the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Alabama – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

There is no state law in Alabama prohibiting any form of employment discrimination. Rather, Alabama defers to federal law for providing its citizens with protections against discrimination based upon age, race, religion, sex, national origin, and disabilities. Only a few unsuccessful attempts have been made to enact legislation to prohibit sexual orientation discrimination, and none to prohibit discrimination on the basis of gender identity or expression. Neither the state nor any locality in Alabama prohibits sexual orientation or gender identity discrimination.

Documented examples of employment discrimination by state and local government employers on the basis of sexual orientation and gender identity Alabama include:

- An employee of the University of Alabama's campus police department did not have his complaint of same-sex sexual harassment against his supervisor taken seriously and was fired for making the complaint; the 11th Circuit rejected a motion to dismiss and allowed his claim to proceed. Downing v. Board of Trustees of the Univ. of Alabama, 321 F.3d 1017 (11th Cir. 2003).

- A receptionist at the Alabama Bureau of Tourism and Travel was the brunt of a sexually oriented joke and then fired based on a false accusation that he had made a homosexual advance (the accusation had been made by one of the coworkers who played the joke); he was later reinstated to his position by an Alabama appellate court. State Pers. Dep't v. Mays, 624 So.2d 194 (Ala. Civ. App. 1993).

- In 2007, a city communication technician reported that she had experienced workplace harassment based on her gender identity when a new supervisor was hired.[1]

- In 2002, a closeted gay teacher in an Alabama school district reported that he was discharged because of his sexual orientation, after two successful years of teaching in the district. A United State District Court judge allowed his claim to

[1] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

proceed under a "John Doe" filing to protect him in from further discrimination in his new job teaching at a public school in Alabama.[2]

Moreover, Alabama has several state laws and polices that would greatly discourage LGBT applicants from even applying for state or local employment. For example, Alabama criminalized same-sex sexual conduct[3] until the United States Supreme Court struck down such laws in 2003.[4] In 1996, Alabama's governor issued an Executive Order that included the statement that "God's law prohibits members of the same sex from having sexual relations with each other." Alabama's education code continues to require that sex education in public schools include "[a]n emphasis…that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state."[5]

Comments by public officials reflect widespread hostility toward LGBT persons in Alabama. In August of 2008, the mayor of Birmingham was sued for discriminating against LGBT city employees by refusing to let them hang Gay Pride Week banners on city property, although no similar prohibitions were enacted to bar banners from other types of employees.[6] The Mayor also refused to sign a parade permit for the annual Gay Pride Celebration Parade and publicly stated that he did not condone the "lifestyle choice" represented by the parade.[7] In early December 2008, a federal judge denied the mayor's motion to dismiss the lawsuit.[8]

In 1998, during a December television broadcast, the chairman of Alabama Gov. Fob James's re-election campaign and longtime Montgomery, Alabama mayor, Emory Folmar, used a disparaging term for gay people. Complaints from the local Parents, Families and Friends of Lesbians and Gays (PFLAG) chapter and Gay and Lesbian Alliance of Alabama found Mayor Folmar unrepentant. 'I used the word 'queer' and I'll use it again. I'm not going to call them gay. I don't approve of their lifestyle one bit,' Folmar reported to the *Montgomery Advisor*. The mayor's remarks came during his response to a caller to "Good Morning, Montgomery" about being harassed outside a downtown nightclub. Folmar also recalled 'I said something to the effect 'If you didn't all hang out together, there wouldn't be a problem.[9]

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[2] Lesbian & Gay L. Notes (June 2002), *available at* http://www.qrd.org/qrd/usa/legal/lgln/2002/06.02.
[3] ALA. CODE §13A-6-63 (2001); §13A-6-64 (2001).
[4] Human Rights Campaign, State Law Listing, Alabama Sodomy Law, www.hrc.org/laws_and_elections/state/713.htm (last visited Sept. 3, 2009).
[5] ALA. CODE §16-40A-2(C)(8) (2008).
[6] *Central Alabama Pride, Inc. v. Langford*. No. 2:2008cv01533 (N.D. Ala. filed Aug 27, 2008).
[7] *See id.* and Plaintiff's Complaint associated therewith.
[8] James Hipps, *Federal Judge Denies Mayor's Request*, GAYAGENDA, Dec. 15, 2008, http://www.gayagenda.com/tag/central-pride-alabama.
[9] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 110 (1998 ed.)

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Alabama has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[10]

B. Attempts to Enact State Legislation

None.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

Alabama state employees are hired through an application process run by the State Personnel Department. The Personnel Department's legal notice provides that all applications are accepted and appointments made "on an equal opportunity, merit basis, without regard to sex, race, age, religion, disability, color, or national origin."[11]

3. Attorney General Opinions

None.

D. Local Legislation

None.

1. City of Birmingham

In May, 2007, the city of Birmingham, Alabama passed a "non binding anti-discrimination resolution that [includes] sexual orientation."[12] City Council member Valerie Abbot initially proposed this resolution in March, 2007, but the resolution failed

[10] Lawyers.com Employment Law in Alabama, http://www.http://research.lawyers.com/Alabama/Employment-Law-in-Alabama.html (last visited Sept. 3, 2009).
[11] Alabama State Personnel Dep't Website Legal Notice, http://www.personnel.state.al.us/Content.aspx?Pg=27 (last visited Sept. 3, 2009).
[12] Lyon, Cody, *Despite Rocky History, Birmingham GLBT Community Making Progress*, EDGE, Jan. 5, 2008.

by a vote of 3-4 with one abstention.[13] Notably, it was reported that one City Council member, Roderick Royal, objected to the resolution because he felt it placed sexual orientation on the same level as civil rights.[14] There was a tremendous outcry following this initial failure, and only a few months later the resolution passed unanimously.[15] The resolution provides, in part, as follows: "[T]he Mayor and Council herein condemn individual and collective acts of racism, bigotry, harassment, or discrimination directed toward any resident or visitor because of age, ancestry, creed, color, gender, income, mental or physical disability, national origin, race, religion, sexual orientation or gender identity, and will support just and prompt resolution to such incidents."[16]

D. **Occupational Licensing Requirements**

Many of Alabama's licensing regulations have "good moral character" requirements, including licenses for dentists, chiropractors, therapists, geologists, and people in the alcohol industry.[17] No specific cases applying these standards to limit LBGT people from receiving licenses were found.

[13] Equality California Get Informed Resolution, http://www.equalityalabama.org/informed/resolution.html (last visited Sept. 3, 2009).
[14] *See Id*.
[15] *Inclusion Resolution Passes Unanimously*, BIRMINGHAM TERMINAL, http://bhamterminal.com/blog/2007/05/15/inclusion-resolution-passes-unanimously/ (last visited Sept. 3, 2009).
[16] Equality California, The Latest on Birmingham's Inclusion Resolution, http://www.equalityalabama.org/informed/resolution.html (last visited Sept. 3, 2009).
[17] *See, e.g.*, Ala. Admin. Code R. 20-X-8-.06 (Alcohol Manuf., Importer, and Wholesaler); Ala. Admin. Code R. 190-X-2-.03 (Chiropractor); Ala. Admin. Code R. 270-X-2-.03 (Dentistry); Ala. Admin. Code R. 364-X-2-.01 (Geologists); Ala. Admin. Code R. 660-5-25-.05 (Day Care); Ala. Admin. Code R. 536-X-2-.02 (Fam. & Marriage Therapists/Counselor).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

State Pers. Dep't v. Mays, 624 So.2d 194 (Ala. Civ. App. 1993).

State Personnel Department v. Mays[18] involved a receptionist, Timothy Mays, with the Bureau of Tourism and Travel who was fired on the grounds that he made "uninvited homosexual advances toward another state employee" while on state premises and that he defaced state property by writing graffiti on the restroom walls. Mays initially appealed his dismissal to the State Personnel Board (as used in this section, the "Board"), which appointed a hearing officer to conduct an evidentiary hearing.[19] The Hearing Officer found that there was insufficient evidence that the incidents occurred as charged and recommended that Mays be reinstated with back pay. After reviewing the Hearing Officer's findings and hearing oral argument from both parties' counsel, the Board rejected the Hearing Officer's determination and upheld the dismissal.[20] According to the Board, the Hearing Officer "had ignored evidence corroborating the account of the incident given by the alleged victim of the alleged unwanted sexual advance."[21] Mays then appealed the Board's decision to the Circuit Court of Montgomery County, which reversed the Board's decision, holding that the rejection of the Hearing Officer's findings was "unreasonable, arbitrary and capricious."[22]

The alleged victim claimed to have been working at a state welcome center, where Mays was also employed, on the night of January 17, 1991, when Mays came to the center while he was off duty. Mays denied the accusations and denied even being at the welcome center on the night of the alleged incident. There were no witnesses present during the incident but "a multitude of character testimony to the effect that the conduct of which Mays was accused was completely contrary to his character."[23] The second charge against Mays involved the claim of another coworker who alleged that Mays had written sexually explicit graffiti written on a toilet paper dispenser. Mays denied this allegation. There was also testimony that Mays and the coworker did not get along and that this coworker and the alleged victim of the homosexual advances had once played a sexually oriented practical joke together upon Mays.[24]

[18] 624 So.2d 194 (Ala. Civ. App. 1993).
[19] *Id*. at 196.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.

In rejecting the decision of the Hearing Officer, "the Board determined that the Hearing Officer 'ignore[d] contemporaneous circumstances corroborating [the alleged victim's] account of the incident.'"[25] The Appeals court, however, disagreed with the Board and held that the Hearing Officer took these circumstances into consideration and, consequently, the Board had no reasonable justification for reversing the credibility determination made by the Hearing Officer.[26]

Downing v. Board of Trustees of the Univ. of Alabama, 321 F.3d 1017 (11th Cir. 2003).

James D. Downing, a former employee in the campus police department of the University of Alabama at Birmingham sought equitable relief and damages against the University's Board of Trustees under Title VII, on the grounds that his immediate supervisor in the department, the Deputy Chief of Police, sexually harassed him in the workplace and that, when he complained of the harassment, the Chief of Police not only failed to take corrective action, but fired him. The Board of Trustees, claiming sovereign immunity under the Eleventh Amendment, moved to dismiss Downing's Title VII claim.

The Court of Appeal for the Eleventh Circuit held that because Title VII's ban on same-sex hostile environment sexual harassment is co-extensive with the ban on sex discrimination found in the Equal Protection Clause of the 14th Amendment, 11th Amendment sovereign immunity will not shield a state university from a Title VII same-sex harassment claim brought by a male employee. Relying on *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) in its equal protection analysis, the Court also found no difference between same-sex and opposite-sex harassment as a practical and theoretical matter, so long as the victim was selected for harassment because of his sex, and, inasmuch as opposite-sex harassment in a public sector workplace has been found to violate the Equal Protection Clause, there would be no reason to treat same-sex harassment any differently. The court rejected the University's motion to dismiss, affirming the district court.[27]

B. **Administrative Complaints**

Alabama does not have any employment discrimination laws, but rather defers to federal law for adjudication of claims of discrimination based upon age, race, religion, sex, national origin, and disabilities. These issues are handled by the Equal Employment Opportunity Commission, whose office is in Birmingham.[28] If an individual believes that he or she has been discriminated against in a manner prohibited by the Workforce

[25] *Id*.
[26] *Id*.
[27] *Downing v. Board of Trustees of the Univ. of Alabama*, 321 F.3d 1017 (11th Cir. 2003).
[28] Ala. Labor Website, Job Termination Laws, http://www.alalabor.state.al.us/job_termination_laws.htm (last visited Sept. 3, 2009).

Investment Act or 29 CFR Part 37, he or she may file a complaint with the Alabama Department of Industrial Relations or the Civil Rights Center.[29]

[29] Alabama Department of Industrial Relations Human Resources FAQ, http://dir.alabama.gov/contacts/Human_Resources.aspx (last visited Sept. 3, 2009).

C. **Other Documented Examples of Discrimination**

City Government Department

In 2007, a city communication technician reported that she had experienced workplace harassment based on her gender identity when a new supervisor was hired. In addition, her new supervisor assigned her to work with co-workers who did not want to work with her because she is transgender, and gave her unfavorable work assignments where the work was more difficult than required of other employees.[30]

Alabama Public School

In 2002, a closeted gay teacher filed a civil rights suit against an Alabama school district, claiming he was discharged because of his sexual orientation, seeking reinstatement and unspecified monetary damages. Intending to remain closeted, the teacher petitioned for permission to proceed as a John Doe plaintiff, which was granted by U.S. District Judge Inge Johnson. At the time of filing, he was teaching in another school district. He alleged that he was told by some school officials that his discharge was solely for being gay, after two successful years of teaching in the district.[31]

[30] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).
[31] Lesbian & Gay L. Notes (June 2002), *available at* http://www.qrd.org/qrd/usa/legal/lgln/2002/06.02.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Alabama's sodomy law was invalidated by the U.S. Supreme Court on June 26, 2003, as a result of the decision in *Lawrence v. Texas*.[32] Previously, Alabama's sodomy law applied to both heterosexual and same-sex partners.[33] Homosexual conduct was also criminalized under the sexual misconduct law.[34] Under the sexual misconduct law, a person was punishable for engaging in "deviate sexual intercourse with another person."[35]

The Alabama sodomy law has been used to deny rights in other situations, as discussed in Parts IV.E and IV.H, *infra.*[36]

B. Housing & Public Accommodations Discrimination

The Alabama Fair Housing Law provides that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or rental of, or otherwise to make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[37] No materially different housing regulations were found.[38]

C. Hate Crimes

Alabama House Bill 829 would have amended the hate crime law by adding "sexual orientation" as a category. It passed the House by a 46-44 vote and passed a Senate committee, but died when legislature adjourned on May 19, 2008.[39]

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[32] Human Rights Campaign, State Law Listings: Alabama Sodomy Law, http://www.hrc.org/laws_and_elections/state/713.htm (last visited Sept. 3, 2009).
[33] ALA. CODE §13A-6-63 (2001); §13A-6-64 (2001).
[34] Human Rights Campaign, *supra* note 32.
[35] ALA. CODE § 13A-6-65(a)(3) (2001).
[36] *See id*.
[37] ALA. CODE §24-8-4(1) (2008).
[38] Municipalities reviewed include Montgomery, Huntsville, Mobile, Gulf Shores, Auburn and Birmingham.
[39] Human Rights Campaign, Alabama HB 829, http://www.hrc.org/your_community/10715.htm (last visited Sept. 3, 2009).

D. **Education**

In the 1996 case of *Gay, Lesbian, Bisexual Alliance v. Sessions*, an Alabama college attempted to use the sodomy law to deny funding to a gay, lesbian, bisexual and transgender student group at a state college. The court held that the law violated the First Amendment.[40]

Section 16-1-28 of the Alabama Code provides that no public funds or public facilities are to be used to promote lifestyle or activities prohibited by sodomy and sexual misconduct laws. Despite this prohibition, the statute provides that it does not apply to any organization or group whose activities are limited solely to the political advocacy of a change in the sodomy and sexual misconduct laws of Alabama. This statute was deemed to be unconstitutional, as violating the constitutional guarantee of free speech in *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F.Supp. 1548 (M.D.Ala. 1996), affirmed 110 F.3d 1543.

Section 16-40A-2 of the Alabama Code provides that, "[a]n emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state,"[41] is one element that should be included in course materials and instruction pertaining to sexual education or sexually transmitted diseases.

The Teen Suicide and Violence Protection Act would have required local school system to adopt a policy prohibiting harassment motivated by "any characteristic," including sexual orientation, or motivated by an association with an individual who falls into a protected category.[42] On February 14, 2008, house Bill 90 passed the House by a 95-0 vote and passed a Senate committee, but died when the legislature adjourned on May 19, 2008.[43]

E. **Parenting**

In the 2002 Alabama Supreme Court case *Ex parte H.H.*, the Alabama sodomy law was used to deny a lesbian mother custody of her children, despite the prior holding that the father abused the children.[44]

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[40] *Gay, Lesbian, Bisexual Alliance v. Sessions*, 917 F.Supp. 1548 (M.D.Ala. 1996), affirmed 110 F.3d 1543.
[41] ALA. CODE §16-40A-2(C)(8) (2008)
[42] Human Rights Campaign, Alabama HB 90/SB 109, http://www.hrc.org/your_community/9377.htm (last visited Sept. 3, 2009).
[43] *Id*.
[44] *Ex parte H.H.*, 830 So. 2d 21 (Ala. 2002).

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Alabama has both a state law and a constitutional amendment prohibiting marriage between same-sex couples and the recognition of married same-sex couples from other states or jurisdictions.[45] The state has no domestic partnership or civil union law extending the rights and obligations of marriage to same-sex couples.

[45] ALA. CODE § 30-1-19 and ALA. CONST. AMEND 774 (2006).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Alaska – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Alaska's anti-discrimination statute provides no protection against employment discrimination based on sexual orientation or gender identity. The state university system has rebuffed repeated attempts to add sexual orientation to the list of protected characteristics in its anti-discrimination policy. In addition, there are currently no municipal laws offering protection for local government workers (a 1993 Anchorage law was enacted and then repealed in the same year). In 2002, the governor issued an administrative order declaring that the "goal" of state officials is to prohibit and prevent job discrimination against state employees based on, inter alia, sexual orientation; gender identity is not included in the administrative order. However, there appear to be no remedies available under the order, beyond the possibility of filing a complaint.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Alaska include:

> At public hearing in Anchorage in June 2009, a letter was submitted by a transgender woman who had been denied multiple state jobs because of her gender identity. She was a former Marine and had been told she was highly qualified for a position at the McLaughlin Youth Center. However, after she transitioned her repeated applications for a position there were rejected. She did get a job as a psychiatric nursing assistant at Alaska Psychiatric Institute, a state-run facility." However she was fired after three weeks when a problem arose because of her social security number. She explained that her name change had caused the issue and then thought everything was fine. However, she was terminated without explanation a few days later with a letter that said her "services were no longer needed." Later, she heard that a co-worker had been going around calling her "he/she." After she was terminated she was unable to find work in any of the fields she had experience in: security, corrections, youth corrections, or mental health counselor. Instead she works as a cabdriver. She has over $100,000 in student loans for degrees she cannot use in her employment."[1]

[1] Letter from Laura E. O'Lacy to Anchorage Assembly, June 2009, *available at* http://www.bentalaska.com/search/label/Testimony%20AO-64 (last visited Sept.16, 2009) (writing in support of Anchorage Ordinance 64).

- An African-American gay male inmate assigned to the Spring Creek Correctional Center worked for a nominal salary as a barber, cutting other inmates' hair. On August 4, 1997, he received a memo from his supervisor which read:

> This memorandum is to inform you that you have been fired as an APS barber/rec worker. You are a lop, lame, sissy, cake-boy, and your girl is a mud-duck. You are in fact a no talented bum…In fact one of the brother's [sic] told me that you were white, and just had a really good tan. Maybe the kitchen is looking for a new pots and pans man![2]

  After reading the memo as "containing racial and sexual slurs and as being intended to terminate his employment,"[3] he stopped reporting for work. Although he did not report the incident, he kept the memo, which was discovered when he was transferred to another facility; a departmental investigation resulted in his supervisor's termination. He subsequently sued the state, alleging intentional infliction of emotional distress and unlawful termination for racial or sexual reasons in violation of the Alaska Human Rights Act. The state made a settlement offer, which he rejected, and the trial jury returned a verdict for him for the unlawful termination.[4]

- The City of Soldotna paid $50,000 in 1995 to settle a sex discrimination claim brought by police officer that the police department discriminated against her because officials thought that she was in a same-sex relationship.[5]

- An applicant for a clerk-typist position with the Alaska State Troopers in 1984 was asked in her interview if she was a lesbian. When she said yes, the interviewer told her that she was well-qualified for the position, and that she would consider her for it, if she agreed to stop going to any of the gay bars in town. When she did not agree, on the grounds that a gay bar was one of the few places where she could publicly socialize with her friends without fear of harassment, she was told she would not be considered further for the position. She said that she did not believe the interviewer would even have thought about placing a similar restriction on a non-gay employee who frequented heterosexual bars.[6]

  In 1984, a gay youth counselor for the State of Alaska, who had worked in his position since early 1981, was told he could not take the youth he counseled out

[2] *Jones v. State Dep't of Corr.*, 125 P.3d 343, 345 (Alaska, 2005). Plaintiff had explained that he understood "sissy" and "cake-boy" to be derogatory terms for homosexual, "mud-duck" as a reference to someone who engaged in anal sex, and that the remainder of the memo's content was racially offensive – an attack on his African-American cultural identity. *See id.* at 345 n.1.
[3] *Id.*
[4] *Id.* at 350.
[5] *State News*, ANCHORAGE DAILY NEWS, Oct. 2, 1995.
[6] MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 53 (Identity Inc., 1989).

on "pass" to go out to movies or to shop, in order to reward them for their good behavior. The counselor learned that he was considered a risk because had been the leader of a "militant homosexual group" in Fairbanks. The only organization he could think of that might have caused that concern was his position as a discussion group leader for a sexual identity support group composed of young gays and lesbians. His facility director told him there was no way he would be granted a pass for his counselees because he was gay. Eventually he learned that the Anchorage Police Department had reported to his facility that he had been seen in gay bars. After his complaints about the unfairness of the restriction were rejected, he ultimately resigned because the incident, and the denial of what he considered "an important treatment tool," had undermined his ability to do his job well."[7]

- After she was seen celebrating following a softball tournament by one of her co-workers, a lesbian was terminated by the Alaska Marine Highway in 1981. She had been at a "non-gay" bar, on the weekend, dancing with her friends in a circle when seen by her co-worker, who stared at her throughout the night to such an extent she eventually left. When she came to work the following Monday, her co-workers would not make eye-contact or talk with her. She felt they behaved as if she had "leprosy." Just after lunch she was given a written note that she had been terminated on the grounds that she was not strong enough for the job. However, her co-workers had given her no previous indication that she was not 'pulling her weight' or that her job performance was less than adequate. She has performed much heavy physical work in subsequent jobs, and has never had any problems with it. When she contacted her union representative he told her that the union could provide her with no protection from discrimination on the basis of her sexual orientation. She was told that she could make a complaint of sex discrimination. Because she felt that she would further "out" herself if she made a complaint, she decided not to take any further action.[8]

- When a women applied to be on the Alaska State Commission on the Status of Women in 1981 (now the Alaska Women's Commission), she became one of two finalists out of 80 applicants. The Commission met and voted that she should get the position, but as they were leaving one of the Commissioners mentioned that the woman was a lesbian. That night another one of the Commissioners called the chairperson at home to say that she had changed her vote to the other candidate. The woman says the Chair had already left a message for her to call on her answering machine; and had she called back immediately, the job would have been hers. As it happened, she did not return the call until after the chair permitted the vote change. She later learned about the vote alteration through another Commissioner. She went to an attorney, who advised her that she had a strong case and could potentially win both the job and money damages, due to the Commission's inappropriate handling of the matter after an official adjournment.

[7] *Id.*
[8] *Id.*

> However, she did not feel up to a court battle. Instead she asked for an apology and a policy statement that the Commission would never again discriminate on the basis of sexual orientation. The Commission agreed to this compromise."[9]

In combination with these specific incidents, a series of lawsuits in which plaintiffs won judgments that the state university's benefits system violated the state's constitutional guarantee of equal protection made animosity towards homosexuals a highly visible factor in state politics in the 1990s. According to one newspaper account, in 1993, the issue pitched Anchorage, "into months of angry debate, threats of physical harm and political retribution, religious invocations, a petition drive, a ruling from the state Supreme Court and an election in 1993 that cost two people their seats on the city Assembly."[10] Since 1993, Alaska's judicial branch has often been at odds with the state's executive and legislative branches.

In January 1995, Alaska's superior court in *Tumeo v. University of Alaska* held that the University of Alaska could not limit spousal benefits to married employees while denying those same benefits to similarly situated employees who had permanent domestic partners.[11] In response to that ruling, in March 1995, the state legislature introduced an amendment to the state's Human Rights Act, which, when enacted in 1996, permitted greater health and retirement benefits to employees who "have a spouse" as opposed to those employees who are single or have same-sex domestic partners.[12] Except for this carve-out for employee benefits, the Human Rights Act prevents an employer from discriminating against a person "based on race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood," but not for sexual orientation or gender identity. [13]

In February 1998, the Alaska superior court held in *Brause v. Bureau of Vital Statistics*[14] that under the equal protection clause of Alaska's constitution, choosing one's life partner was a fundamental right, regardless of whether that partner was of the same or opposite sex, and the state must show a compelling state interest for the prohibition on same-sex marriages. In response to that decision, the legislature and 68% of the voters passed an amendment to the state's constitution to limit marriage to one man and one woman. In the discussion before the vote, one of the bill's supporters, Sen. Jerry Ward, said the amendment was designed to answer the question: "Do you believe that one man

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[9] *Id*.
[10] Steve Rinehart, *Gay Marriage Haunts Campaign; Lindauer Hits Knowles, Then Hedges On Same Sex Issue*, ANCHORAGE DAILY NEWS, Sept. 13, 1998, *available at* http://bit.ly/XPP7G. In a 1988 survey of 191 employers in Anchorage, Alaska, 27% said they would not hire gays or lesbians, 26% said they would not promote gays or lesbians, and 18% said they would fire them.
[11] No. 4 FA-94-43, 1995 WL 238359 (Alaska Super. Ct. Jan. 11, 1995), *aff'd*, *Univ. of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).
[12] ALASKA STAT.. §18.80.220(c) (2008).
[13] ALASKA STAT.. §18.80.220(a) (2008).
[14] 3AN-95-6562 CI, Super. Ct. of Alaska, Feb. 27, 1998. *See also* Part IV.I.1, *infra*.

and one woman should be married, or do you believe a goat and a cow, or two homosexuals should be?"[15]

The Alaska Civil Liberties Union filed suit on behalf of nine same-sex couples (one member of each couple was an employee or retiree of Alaska or the Municipality of Anchorage) because health and other benefits were being denied to partners of employees and retirees of the state and its municipalities. In October 2005, the Alaska Supreme Court ruled in *Alaska Civil Liberties Union ex rel. Carter v. Alaska*[16] that denying benefits to same-sex domestic partners of state and municipal employees and retirees to the same benefits offered to spouses of similarly situated employees and retirees was unconstitutional under Alaska's constitution as it violated the state's equal protection clause. This decision had no effect on the ban on same-sex marriage. Within four months, proposals were introduced in the legislature aimed at trumping the state Supreme Court's decision. The bills, which failed in the committees of the House and Senate, would have amended Alaska's constitution to restrict the benefits and obligations of marriage only to those who were legally married.

Then, as a result of the January 1, 2007 deadline to comply with the *Alaska Civil Liberties Union* decision, the legislature passed two bills in November 2006: (1) HB 4001 would have prohibited the Commissioner of Administration from granting benefits to state employees and retirees and (2) HB 4002 scheduled an advisory vote at a special election in April 2007 to determine whether the legislature should pursue a constitutional amendment to prohibit benefits to partners of same-sex employees and retirees. Governor Palin begrudgingly vetoed HB 4001 because she was advised that HB 4001 was unconstitutional and signing it would have been a violation of her oath of office.[17] However, Governor Palin signed HB 4002 and noted that she disagreed "with the recent court decision because [she felt] as though Alaskans spoke on [the] issue with its overwhelming support for a Constitutional amendment in 1998 which defined marriage as between a man and woman."[18] The ensuing advisory vote resulted in 53% of the voters voting in favor of the legislative pursuit of a constitutional amendment to strip benefits from same-sex partners of employees and retirees.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context. Because the cause and effect relationship between legislation and case holdings is so integral to the understanding of the state's laws that exist today, a timeline summarizing those key legislation and cases is attached to this memorandum as Annex A.

[15] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 65-66 (1999 ed.).
[16] 122 P.3d 781 (Alaska 2005).
[17] Press Release, Alaska Governor's Office, Governor Palin Vetoes HB4001 (Dec. 28, 2006).
[18] Press Release, Alaska Governor's Office, Same Sex (Dec. 20, 2006).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Alaska has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[19]

B. Attempts to Enact State Legislation

None.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

By an administrative order dated March 5, 2002, Governor Tony Knowles declared that "it was the continued goal of the executive branch to…prohibit and prevent discriminatory behavior in the state workplace based on race, sex, color, religion, physical or mental disability, sexual orientation, or economic status."[20] Public employment protections based on gender identity were not specified in the order. The administrative order has not been revoked.[21]

2. State Government Personnel Regulations

(a) Teaching Profession Code of Ethics

[19] ALASKA STAT. § 18.80.220 (xxxx).
[20] Admin. Order No. 195 (Mar. 5, 2002), *available at* http://gov.state.ak.us/admin-orders/195.html.
[21] Administrative orders are issued under the authority of law (and not under the force of law). Examples of administrative orders include:

> "an order issued under AS 26.20.040 to declare a state of emergency or to exercise powers necessary for the protection of the population in time of attack; to dispose of the property of a dissolved city under AS 29.10.546; to assign functions in the executive branch under AS 44.17.060; to create interim advisory boards under AS 44.19.060." Alaska Admin. Order No. 1 (Jan. 23, 1964), *available at* http://www.gov.state.ak.us/admin-orders/001.html.

If the statute from which the governor derives authority is found to be unconstitutional, then the administrative order is void. *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1144 (AK. 1987). By contrast, an executive order has the force of law and is subject to "disapproval" by the legislature. Alaska Admin. Order No. 1 (Jan. 23, 1964). That is, an executive order can change existing law because it is "issued under the authority of Article III, Sec. 23, Constitution of the State of Alaska" and reviewed by the legislature. *Id*. *See also* Alaska Att. Gen. Op 403 (1979); ALASKA CONST. Art. III §23 (stating that the:

> "legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove [the] executive [order]. Unless disapproved by resolution concurred in by a majority of the members in joint session, [the order becomes] effective at a date thereafter to be designated by the governor." *Id*.

The Alaska code of ethical standards governing members of the teaching profession states that educators ""may not, on the basis of race, color, creed, sex…or sexual orientation, deny to a colleague a professional benefit, advantage or participation in any professional organization, and may not discriminate in employment practice, assignment, or personnel evaluation."[22]

(b) University of Alaska

Various requests to insert "sexual orientation" (gender identity has never been proposed) in the University of Alaska Board of Regents' nondiscrimination policy have been proposed since 1992, but none has been successful.[23] Specific proposals, which were not adopted, are described below:

i. University of Alaska-Anchorage

In 1995, the University of Alaska-Anchorage, which is operated by the state,[24] grappled with the issue of whether to add sexual orientation to its nondiscrimination policy. The student union recommended the addition of sexual orientation to the school's existing anti-discrimination policies to the Board of Regents. The Anchorage Municipal Assembly voted 9-1 in a nonbinding resolution to urge the University of Alaska Anchorage to leave its anti-discrimination policies as they were.[25]

ii. University of Alaska-Fairbanks

In 2001, the University of Alaska Fairbanks Staff Council and the Alaska Faculty Senate passed motions to forward a proposal to the University of Alaska Board of Regents to amend its nondiscrimination policy to include sexual orientation as a class protected from employment discrimination.[26] However, for unknown reasons, the motion was not included on the March 2002 Board of Regents agenda. The matter was addressed

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[22] 20 AK. ADMIN. CODE § 10.020(d) (2008).

[23] Section 04.03.01 of the University of Alaska Board of Regents' Policy & University Regulation states:

> "The University of Alaska does not discriminate on the basis of race, color, religion, national origin, citizenship, marital status, changes in marital status, pregnancy, childbirth or related medical conditions, parenthood, sex, age, disability or status as a veteran in employment…" *See* Memorandum from Kate Ripley, Director of Public Affairs of the Board of Regents' Office, Board of Regents' Discussions & Actions: Nondiscrimination Statements to Include Sexual Orientation (on file with Board of Regents' Office).

[24] *Assembly to Take Stand On UAA Gay Policy Assembly News*, ANCHORAGE DAILY NEWS, Mar., 1995.

[25] *Assembly News*, ANCHORAGE DAILY NEWS, Mar. 8, 1995.

[26] Agenda, UAF Governance Coordinating Committee #51 (Nov. 14, 2001), http://bit.ly/Y0Eht (last visited Sept. 5, 2009). Policy 04.01.020, if enacted, would read as follows:

> "In accordance with federal and state laws, illegal discrimination in employment against any individual because of race, color, religion, national origin, age, sex, veteran status, physical or mental disability, marital status or changes in marital status, pregnancy or parenthood, or sexual orientation is prohibited. Decisions affecting an individual's employment will be based on the individual's qualifications, abilities and performance, as appropriate." *Id.* (emphasis added).

with the Board of Regents' president, who stated that revising the policy would "be bad for the budget." The matter was then postponed.[27]

D. Local Legislation

1. City of Anchorage

Anchorage is the only city/municipality that has extensive news records discussing ordinances and other regulatory policies. Accordingly, this section solely addresses the City and Borough of Anchorage.

On January 12, 1993, the Anchorage Municipal Assembly passed an ordinance that prohibited discrimination in public employment and of municipal contractors on the basis of an individual's sexual orientation.[28] The Mayor of Anchorage, Tom Fink, vetoed the ordinance three days later, but the veto was overridden by the Anchorage Municipal Assembly on January 19. Soon thereafter a citizens' group, "Citizens to Repeal the Homosexual Ordinance," formed and collected 20,000 petition signatures within a month for a referendum to repeal the ordinance at the municipal election (a minimum of 5,672 signatures was required). Supporters of the new ordinance sought to block the vote on grounds that state law required the wording on ballot propositions, such as the referendum to appeal the ordinance, be impartial.

In *Faipeas v. Anchorage*,[29] the Alaska Supreme Court held that the municipal referendum circulated by the citizens group had a misleading title: "Referendum Petition to Repeal a "Special Homosexual Ordinance." The court said, "While opponents of the ordinance regard it as giving special rights to homosexuals, proponents view it as merely adding sexual orientation to the list of other important personal characteristics . . . protected from discrimination in public employment."[30] The Alaska Supreme Court said the vote should be postponed until the lower court reconsidered the question of possible bias, because voters would be upset if they voted to repeal the ordinance at the election, but had it later overturned by the court. The Anchorage Municipal Assembly, however, with a few newly elected assemblymen, later repealed the ordinance in 1993, making a revised referendum moot. As a result of their support of the ordinance, two people on the

[27] *Id*. at Section IV ("Old Business").
[28] The ordinance would have banned discrimination based on sexual orientation for 3,300 city employees and workers hired through municipal contractors. Associated Press, *Opinions In Anchorage Divided As Gay-Rights Measure Goes To Voters*, SEATTLE TIMES, Apr. 12, 1993, *available at* http://bit.ly/OQtnT. This ordinance is not new. A similar anti-discrimination ordinance was enacted by the Anchorage Assembly in 1976, but the mayor, George Sullivan, vetoed the ordinance. Megan Holland, *Gay Rights Ordinance Gets 2nd Assembly Hearing Tonight*, ANCHORAGE DAILY NEWS, June 15, 2009, *available at*, http://bit.ly/VQVLQ.
[29] 860 P.2d 1214 (Alaska 1993).
[30] *Id*. at 1216.

Anchorage Municipal Assembly lost their seats in 1993.[31] Soon thereafter, the new session of Anchorage Municipal Assembly repealed the ordinance.[32]

In August 2009, Anchorage Mayor Dan Sullivan vetoed an ordinance that would have banned several forms of discrimination, including employment, on the basis of sexual orientation. The mayor claimed that "the vast majority of those who communicated their position on the ordinance [were] in opposition." The ordinance had been approved by the Anchorage Assembly on a vote of 7-4 the previous week. Eight votes are necessary to override a mayoral veto. When vetoing the ordinance, the mayor pointed to a "lack of quantifiable evidence necessitating the ordinance."[33] In response, one Assembly member expressed disappointment with the mayor's use of "circular logic" in his claim that there was a lack of complaints filed, when no method for filing complaints existed. Mayor Sullivan's father, former-Mayor George Sullivan, vetoed the initial measure prohibiting discrimination on the basis of sexual orientation in 1976. The measure was defeated several more times in the following decades.[34]

Anchorage district employee contracts also contain language prohibiting harassment over sexual orientation.[35]

E. Occupational Licensing Requirements

While there are no specific licensing requirements addressing sexual orientation or gender identity, several state licensing statutes reference "moral turpitude"[36] and "character," terms which may be used to discriminate against a licensee based on sexual orientation or gender identity.

Certified Public Accountant License: An applicant for the license must be of good moral character.[37]

Acupuncture License: The applicant for a license to practice acupuncture must be of a good moral character.[38]

Collection Operator License: The applicant must be of a good moral character.[39]

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[31] Steve Rinehart, *Gay Marriage Haunts Campaign; Lindauer Hits Knowles, Then Hedges On Same Sex Issue*, ANCHORAGE DAILY NEWS, Sept. 13, 1998.
[32] *Id.*
[33] Editorial, *Our View: Gay Rights Veto*, ANCHORAGE DAILY NEWS, Aug. 18, 2009, *available at* http://bit.ly/ZWJsC.
[34] William Yardley, *Anchorage Gay Rights Measure is Set Back by Mayor's Veto*, N.Y. TIMES, Aug. 18, 2009.
[35] *Schools May Add to Harassment Ban; Sexual Orientation: Board to Consider Additions to District's Policy*, ANCHORAGE DAILY NEWS, June 7, 2001.
[36] Note that licenses may not be issued if a person has been indicted or convicted of a crime involving moral turpitude. Because sodomy laws have been repealed by statute, a list of those statutes has not been included in this list.
[37] ALASKA STAT. §§08.04.110; 08.04.195 (2008).
[38] *Id.* at §08.06.010.
[39] *Id.* at §08.24.110.

Pharmacy License: To be licensed as a pharmacist, the applicant must submit attestations to such person's good moral character.[40] Further, the board regulating the practice of pharmacy may impose disciplinary sanctions on a licensee if such licensee engaged in conduct involving moral turpitude or gross immorality.[41]

Clinical Social Work License: The applicant must be of a good moral character.[42]

Postsecondary Educational Institutional License: The chief executive officer, trustees, directors, owners, administrators, supervisors, staff, and instructors of the institution must be of good reputation and character.[43]

Agent of Postsecondary Educational Institution Permit: A person desiring to be an agent of a postsecondary institution must be of good reputation and character.[44]

National Guard or Naval Militia: A person must be of good character to be eligible for enlistment.[45]

Correctional Officer: To receive a correctional officer certificate, the person must attest and subscribe to the municipal correctional officer Code of Ethics, which states that such person will not discriminate on the basis of sexual orientation.[46]

Alcoholic Beverage License: A person may lose their liquor license if the licensee permits a public offense involving moral turpitude to occur on the licensed premises.[47]

Money Transmission Licenses: For a bank or financial institution to hold a license in money transmission, the character and general fitness of the applicant's executive officers, managers, directors, and persons in control of the applicant are considered.[48]

Currency Exchange License: For a bank or financial institution to hold a license in currency exchange, the character and general fitness of the applicant's executive officers, managers, directors, and persons in control of the applicant are considered.[49]

BIDCO License: Formation of a business entity under the State of Alaska's Business and Industrial Development Corporations (BIDCO) Act requires each

[40] *Id*. at §§08.80.110; 08.80.145.
[41] *Id*. at §08.80.261.
[42] *Id*. at §08.95.110.
[43] *Id*. at §14.48.060.
[44] *Id*. at §14.48.080.
[45] *Id*. at §26.05.240.
[46] 13 ALASKA. ADMIN. CODE §85.235 (2008).
[47] *Id*. at § 04.11.370 . In some states, sale of liquor to homosexuals or the act of permitting the congregation of homosexuals at the licensed premises has been grounds for suspension or revocation of liquor license. 27 A.L.R.3d 1254 (2008).
[48] ALASKA STAT. §06.55.105 (2008).
[49] *Id*. at §06.55.203.

director, officer and controlling person of the applicant to be of a good character.[50]

Employment Agency Permit: To operate an employment agency, the applicant must be of a good moral character.[51]

Registration for certain applications: To register as an architect, engineer, land surveyor, or landscape architect, the applicant must be of a good moral character and reputation.[52]

[50] *Id*. at §§10.13.050; 10.13.410; 10.13.420 (2008).
[51] ALASKA STAT. §23.15.410 (2008).
[52] ALASKA STAT. §08.48.171.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE &LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Unpublished Case (1995).[53]

In 1995, the City of Soldotna, Alaska, agreed to pay $50,000 to settle a 1994 sex discrimination lawsuit filed by an ex-police officer who asserted that she had been wrongly discharged. The lawsuit named the city police chief, several officers and a former city manager as defendants. The plaintiff alleged that she was discriminated against because of (a) her gender and (b) her employers' alleged belief she was in a lesbian relationship. The plaintiff had been fired in 1992. [54]

2. Private Employees

None.

B. Administrative Complaints

1. Complaints Other than Executive Branch

Complaints of unlawful discrimination under the Human Rights Act must be sent to the executive director of the Commission for Human Rights.[55] Except when a temporary restraining order is sought or as otherwise required by law, complaints and investigations by the Commission for Human Rights are confidential and are not made available for inspection by the public. As noted, the Human Rights Act does not include prohibitions on discrimination based on sexual orientation or gender identity.[56]

2. Complaints in Executive Branch

Employees of the executive branch of the Alaska state government must go to the director of personnel, who administers the state's equal opportunity program, for complaints based on discrimination.[57] As specified in Alaska Statute 39.28.060(c), records of employment discrimination complaints in the executive branch are not public.

[53] *State News,* ANCHORAGE DAILY NEWS, Oct. 2, 1995.
[54] *Id*.
[55] ALASKA STAT. § 18.80.100 (2008).
[56] ALASKA STAT. § 18.80.220.
[57] ALASKA STAT. § 39.28.010 (2008).

C. **Other Documented Examples of Discrimination**

McLaughlin Youth Center and Alaska Psychiatric Institute

At public hearing in Anchorage in June 2009, a letter was submitted by a transgender woman who had been denied multiple state jobs because of her gender identity. She was a former Marine and had been told she was highly qualified for a position at the McLaughlin Youth Center. However, after she transitioned her repeated applications for a position there were rejected. She did get a job as a psychiatric nursing assistant at Alaska Psychiatric Institute, a state-run facility." However she was fired after three weeks when a problem arose because of her social security number. She explained that her name change had caused the issue and then thought everything was fine. However, she was terminated without explanation a few days later with a letter that said her "services were no longer needed." Later, she heard that a co-worker had been going around calling her "he/she." After she was terminated she was unable to find work in any of the fields she had experience in: security, corrections, youth corrections, or mental health counselor. Instead she works as a cabdriver. She has over $100,000 in student loans for degrees she cannot use in her employment."[58]

Spring Creek Correctional Center

- An African-American gay male inmate assigned to the Spring Creek Correctional Center worked for a nominal salary as a barber, cutting other inmates' hair. On August 4, 1997, he received a memo from his supervisor which read:

> This memorandum is to inform you that you have been fired as an APS barber/rec worker. You are a lop, lame, sissy, cake-boy, and your girl is a mud-duck. You are in fact a no talented bum…In fact one of the brother's [sic] told me that you were white, and just had a really good tan. Maybe the kitchen is looking for a new pots and pans man![59]

After reading the memo as "containing racial and sexual slurs and as being intended to terminate his employment,"[60] he stopped reporting for work. Although he did not report the incident, he kept the memo, which was discovered when he was transferred to another facility; a departmental investigation resulted in his supervisor's termination. He subsequently sued the state, alleging intentional infliction of emotional distress and unlawful termination for racial or sexual reasons in violation of the Alaska Human Rights

[58] Letter from Laura E. O'Lacy to Anchorage Assembly, June 2009, *available at* http://www.bentalaska.com/search/label/Testimony%20AO-64 (last visited Sept.16, 2009) (writing in support of Anchorage Ordinance 64).
[59] *Jones v. State Dep't of Corr.*, 125 P.3d 343, 345 (Alaska, 2005). Plaintiff had explained that he understood "sissy" and "cake-boy" to be derogatory terms for homosexual, "mud-duck" as a reference to someone who engaged in anal sex, and that the remainder of the memo's content was racially offensive – an attack on his African-American cultural identity. *See id.* at 345 n.1.
[60] *Id.*

Act. The state made a settlement offer, which he rejected, and the trial jury returned a verdict for him for the unlawful termination.[61]

Alaska State Troopers

An applicant for a clerk-typist position with the Alaska State Troopers in 1984 was asked in her interview if she was a lesbian. When she said yes, the interviewer told her that she was well-qualified for the position, and that she would consider her for it, if she agreed to stop going to any of the gay bars in town. When she did not agree, on the grounds that a gay bar was one of the few places where she could publicly socialize with her friends without fear of harassment, she was told she would not be considered further for the position. She said that she did not believe the interviewer would even have thought about placing a similar restriction on a non-gay employee who frequented heterosexual bars.[62]

Alaska Youth Counseling Department

In 1984, a gay youth counselor for the State of Alaska, who had worked in his position since early 1981, was told he could not take the youth he counseled out on "pass" to go out to movies or to shop, in order to reward them for their good behavior. The counselor learned that he was considered a risk because had been the leader of a "militant homosexual group" in Fairbanks. The only organization he could think of that might have caused that concern was his position as a discussion group leader for a sexual identity support group composed of young gays and lesbians. His facility director told him there was no way he would be granted a pass for his counselees because he was gay. Eventually he learned that the Anchorage Police Department had reported to his facility that he had been seen in gay bars. After his complaints about the unfairness of the restriction were rejected, he ultimately resigned because the incident, and the denial of what he considered "an important treatment tool," had undermined his ability to do his job well."[63]

Alaska Marine Highway

After she was seen celebrating following a softball tournament by one of her co-workers, a lesbian was terminated by the Alaska Marine Highway in 1981. She had been at a "non-gay" bar, on the weekend, dancing with her friends in a circle when seen by her co-worker, who stared at her throughout the night to such an extent she eventually left. When she came to work the following Monday, her co-workers would not make eye-contact or talk with her. She felt they behaved as if she had "leprosy." Just after lunch she was given a written note that she had been terminated on the grounds that she was not strong enough for the job. However, her co-workers had given her no previous indication that she was not 'pulling her weight' or that her job performance was less than adequate.

[61] *Id.* at 350.
[62] MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 53 (Identity Inc., 1989).
[63] *Id.*

She has performed much heavy physical work in subsequent jobs, and has never had any problems with it. When she contacted her union representative he told her that the union could provide her with no protection from discrimination on the basis of her sexual orientation. She was told that she could make a complaint of sex discrimination. Because she felt that she would further "out" herself if she made a complaint, she decided not to take any further action.[64]

Alaska State Commission on the Status of Women

When a women applied to be on the Alaska State Commission on the Status of Women in 1981 (now the Alaska Women's Commission), she became one of two finalists out of 80 applicants. The Commission met and voted that she should get the position, but as they were leaving one of the Commissioners mentioned that the woman was a lesbian. That night another one of the Commissioners called the chairperson at home to say that she had changed her vote to the other candidate. The woman says the Chair had already left a message for her to call on her answering machine; and had she called back immediately, the job would have been hers. As it happened, she did not return the call until after the chair permitted the vote change. She later learned about the vote alteration through another Commissioner. She went to an attorney, who advised her that she had a strong case and could potentially win both the job and money damages, due to the Commission's inappropriate handling of the matter after an official adjournment. However, she did not feel up to a court battle. Instead she asked for an apology and a policy statement that the Commission would never again discriminate on the basis of sexual orientation. The Commission agreed to this compromise."[65]

[64] *Id.*

[65] *Id.*

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

1. Sodomy laws

Alaska's sodomy laws were repealed through legislative action in 1980.[66]

B. Housing & Public Accommodations Discrimination

Prohibition on Discrimination Based on Marital Status by Landlords:

Alaska Statute 18.80.240[67] prohibits landlords from refusing to rent based on marital status.[68] Sexual orientation and gender identity are not specifically protected classes.[69]

C. Hate Crimes

New Civil Action & Hate Crime: SB 6

Introduced in January 2007, SB 6 would have added a new cause of action for a person to sue another (or the parent or legal guardian of a minor) for discriminatory

[66] Memorandum from ACLU on History of Sodomy Laws and the Strategy that Led Up to Today's Decision [in Lawrence v. Texas] (June 16, 2003), http://bit.ly/wTF4t (last visited Sept. 5, 2009).
[67] ALASKA STAT. §18.80.240 (2008) provides:

> "It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property (1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for 'singles' or 'married couples' only; (2) to discriminate against a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of real property; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for 'singles' or 'married couples' only." *Id.*; *see also* Anchorage Muni. Code §5.20.020 (2008).

[68] In *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 939 (Alaska 2004), *cert. denied*, 544 U.S. 1060 (2005), the supreme court of Alaska reconfirmed that enforcing a provision prohibiting landlords from refusing to rent property to persons because of marital status did not violate such landlord's right to free exercise of religion. *Id.*
[69] *See also* Anchorage Muni. Code § 5.20.020.

harassment that caused physical injury to, or property damage of, that person if the person who caused such injury or property damage acted with the intent to intimidate or harass based on a person's actual or perceived sexual orientation. Any action under that proposed statute, however, may not be against the state, any political subdivision of the state, and any employees and agents of the state.

SB 6 would have also added a new section that would have increased the seriousness of the offense (e.g. from a Class A misdemeanor to a Class C felony) for crimes that were motivated by prejudice, bias or hatred because of a victim's actual or perceived sexual orientation. The bill was referred to, but failed in, the Senate Health, Education and Social Services, Judiciary and Finance Committees.[70]

In 2004, the City of Anchorage unsuccessfully attempted to amend the Municipal Code to add a new section providing for sexual orientation-related hate crimes as an aggravating factor in sentencing.[71]

D. **Education**

The ethics code governing the Education Profession states that members of the teaching profession "may not harass, discriminate against, or grant a discriminatory advantage to a student on the grounds of… sexual orientation; shall make reasonable effort to assure that a student is protected from harassment or discrimination on these grounds; and may not engage in a course of conduct that would encourage a reasonable student to develop a prejudice on these grounds."[72] The educator must also make a reasonable effort to protect students from harassment and discrimination on these grounds. [73]

In 2001, the Anchorage School Board unanimously approved a new policy that banned harassment of students and school employees over their sexual orientation. [74]

E. **Health Care**

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[70] *SB6 Journal Text*, ALASKA SENATE J. 14 (2007), *available at* http://bit.ly/1Buv6j.
[71] The text would have read:

> "It is a factor in aggravation in sentencing if the defendant directed the conduct constituting the offense under this code at a victim because of that person's actual or perceived race, sex, color, religion, sexual orientation, physical or mental disability, national origin or sexual orientation [sic.]" Mun. of Anchorage Cmty. Action Plan, http://bit.ly/siH88 (last visited Sept. 5, 2009).

In 1993, Police in Anchorage have "begun tracking hate crimes, including a Valentine's Day attack on two men who were struck with a baseball bat and pipe as they left a diner holding hands." Associated Press, *Opinions in Anchorage Divided as Gay-Rights Measure Goes to Voters*, SEATTLE TIMES, Apr. 12, 1993, *available at* http://bit.ly/OQtnT.
[72] *Id*. at § 10.020(b).
[73] 20 ALASKA ADMIN. CODE § 10.020.
[74] Associated Press, *Anchorage Schools Ban Harassment Based on Sexual Orientation*, STATE & LOCAL WIRE, June 12, 2001.

In 1996, SB 282 was introduced in the Senate. SB 282 would have prohibited a managed care plan from discriminating against an individual on the basis of sexual orientation. Further, the managed care plan may not discriminate in the selection of members of the provider network or in establishing the terms of membership for that network on the basis of sexual orientation.[75] The bill failed before it made it to any of the Senate committees.[76]

Anti-discrimination provisions referencing sexual orientation exist in particular professional guidelines that are included in a variety of state statutes:

> Chiropractor to Patient: A chiropractic licensee may not engage in lewd or immoral conduct in connection with the delivery of professional services to a patient. Lewd or immoral conduct includes, among other things, demeaning or degrading comments to the patient about the patient's sexual orientation, regardless of whether the patient is homosexual, heterosexual, or bisexual.[77]
>
> Sex Offender Treatment Provider to Sex Offender: An approved provider of treatment to a sex offender may not discriminate on the basis of sexual orientation.[78]
>
> Medical Board Licensees to Patient: Those licensed by the state medical board may not make a demeaning or degrading comment regarding a patient's sexual orientation, regardless of whether the patient is homosexual, heterosexual, or bisexual.[79]
>
> Viatical Settlement Transactions: A person may not commit or participate in an unfair trade practice, which includes discrimination on the basis of sexual orientation, involving a viatical settlement transaction.[80]

F. **Parenting**

Alaska courts generally do not consider a parent's sexual orientation in custody and visitation determinations unless it is shown that it will adversely affect or harm the child(ren).[81] For example, in *S.N.E. v. R.L.B.*, the Alaska Supreme Court held that the

[75] ALASKA S.B. 282 (1996), *available at* http://www.legis.state.ak.us/PDF/19/Bills/SB0282A.PDF.
[76] Archive of Alaska Senate Bill Leg. Histories, S.B. 282 (1996), http://bit.ly/rl0UJ (last visited Sept. 5, 2009).
[77] 12 ALASKA ADMIN. CODE § 16.930 (2008).
[78] 22 ALASKA ADMIN. CODE § 30.200(b)(2) (2008).
[79] 12 ALASKA ADMIN. CODE § 40.990 (2008).
[80] 3 ALASKA ADMIN. CODE § 31.405 (2008).
[81] ALASKA STAT. § 25.20.090 (2008) states:

> "In determining whether to award shared custody of a child the court shall consider (1) the child's preference if the child is of sufficient age and capacity to form a preference; (2) the needs of the child; (3) the stability of the home environment likely to be offered by each parent; (4) the education of the child; (5) the advantages of keeping the child in the community where the child presently resides; (6) the optimal time for the child to spend with each parent…(7) any findings and recommendations of a neutral mediator; (8)

superior court improperly relied on a "real or imagined social stigma attaching to Mother's status as a lesbian."[82] Further, "[c]onsideration of a parent's conduct is appropriate only when the evidence supports a finding that a parent's conduct has or reasonably will have an adverse impact on the child and his best interests."[83] The Alaska Supreme Court reasoned that the record indicated that parental neglect was absent, the child's development was superb, and there was no increased probability that the child would become homosexual. [84]

G. Recognition of Same-Sex Couples

1. Marriage, Civil Union & Domestic Partnership

Same-Sex Marriage Case: *Brause v. Bureau of Vital Statistics*.[85] In August 1994, the plaintiffs, a same-sex couple, applied for marriage under the then gender-neutral marriage statute, but was rejected. The plaintiffs sued the state seeking to have the interpretation of the marriage statute denying same-sex marriage declared unconstitutional, and to have the state permanently enjoined from denying marriage licenses to same-sex couples. The superior court found that under the equal protection clause of Alaska's constitution, choosing one's life partner was a fundamental right, whether that partner was the same or opposite sex, and ordered a trial requiring the state to show a compelling state interest for the ban on same-sex marriages. [86]

Attorney General Opinion: On March 31, 1995, the Attorney General of the State of Alaska issued its informal opinion on whether a bill that would amend the Alaska marriage code to specify that only a man and a woman can marry would change the law that was in place at that time. The opinion stated that the bill would not change the law because the original Alaska marriage code that was enacted in 1963 specifically restricted marriage to a man and a woman.[87]

After voter approval of the state's constitutional amendment to limit marriage to one man and one woman, the legislature moved for the *Brause v. Bureau of Vital Statistics* case to be dismissed as moot. The plaintiff's arguments evolved to challenge the prohibition against same-sex couples from receiving the same legal benefits and protections of married couples. On September 22, 1999, the superior court judge dismissed the case. The case was appealed and the dismissal was affirmed by the Alaska

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any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents; (9) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child; (10) other factors the court considers pertinent." *Id.*

[82] *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985).
[83] *Id*.
[84] *Id*.
[85] 3AN-95-6562 CI (Super. Court of Alaska, Feb. 27, 1998).
[86] *Id*.
[87] Alaska Att. Gen. Op. 663-95-0451 (1995), *available at* http://bit.ly/2Kerco.

Supreme Court for lack of standing (the plaintiffs had not yet sought the benefits for which they claimed they would be denied).[88]

Constitutional Amendment: In response to the *Tumeo v. University of Alaska* and *Brause v. Bureau of Vital Statistics* decisions, the state legislature proposed to change Alaska's constitution regarding marriage. In 1998, Alaska became one of the first states to constitutionally limit the definition of marriage as that between a man and a woman.[89]

Statute: Having realized that the gender-neutral marriage statute could be interpreted to allow same-sex marriage (as suggested by the superior court in *Tumeo*), the legislature changed the marriage statute in 1996 to accomplish two goals: "(1) to clearly provide that for purposes of legal recognition and status, marriage in Alaska could exist only between one man and one woman; and (2) to clearly prevent any same-sex marriage, validly performed in another State, from being recognized in Alaska."[90]

2. **Benefits**

Tumeo v. Univ. of Alaska: The possibility of extending equal benefits to domestic partners of public employees was first raised in early 1995 in *Tumeo v. Univ. of Alaska*.[91] The superior court held that the University of Alaska-Fairbanks could not legally limit spousal benefits to husbands and wives.[92] The Alaska Human Rights Act's bar against marital status discrimination[93] precluded the University of Alaska from giving family

[88] See *Brause v. Dep't of Health & Soc. Servs*, 21 P.3d 357 (Alaska 2001). For their part in decisions favorable to the gay and lesbian community, conservative groups attempted to oust those judges in the *Tumeo* and *Brause* cases. Rachel D'Oro, *Alaskans Cast Votes on Judges in Controversial Campaigns*, THE ASSOCIATED PRESS, Nov. 8, 2000.

[89] ALASKA. CONST. Art. I §25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.")

[90] Kevin Clarkson et. al, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 AK. L. REV. 213 (Dec.1999).

[91] No. 4 FA-94-43, 1995 WL 238359 (AK. Super. Ct. Jan. 11, 1995), *aff'd, Univ. of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

[92] In an email remark, Mark Tumeo wrote:

> "In 1993 I and Kate Wattum applied to the University for benefits for our same-sex domestic partners. We were denied. We went to Superior Court because Alaska has a law against discrimination based on marital status, and the University clearly stated their decision was based on the fact we were not married. We argued that our financial interdependency was the same as marriage and to deny benefits merely because we didn't have a marriage licence [sic.] was illegal. The Superior court agreed. The university then asked for the Superior Court to reconsider. The judge not only denied it, but basically told the university they were out of line to ask." Email from Mark A. Tumeo to The Network (Feb. 18, 1995 09:59:10), http://bit.ly/uwFUl (last visited Sept. 5, 2009).

[93] ALASKA STAT. §18.80.220(a) (1995) (stating that:

> "(a) [i]t is unlawful for (1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable

benefits to married employees while denying those benefits to similarly situated employees who had permanent domestic partners, but were not legally married. Though not central to her decision, the superior court judge's decision suggested that the gender-neutral marriage statute might allow for same-sex marriage.

In response to the superior court's ruling in *Tumeo*, Alaska's legislature began circulating an amendment to the Human Rights Act in 1995 (eventually becoming effective in 1996) that overturned the ruling in *Tumeo*.[94]

Despite the amendment to the Human Rights Act permitting benefit discrimination, the University of Alaska adopted regulations and eligibility requirements to provide benefits to partners of same-sex employees.[95] These regulations were ratified by the court.[96] Other branches of Alaska's government, however, did not follow the regulations adopted by the University of Alaska.

Alaska Civil Liberties Union v. Alaska: In 1999, the Alaska Civil Liberties Union filed suit on behalf of nine same-sex couples (one member of each couple was an employee or retiree of the State of Alaska or the Municipality of Anchorage), claiming that health insurance and other employment benefits programs that were only offered to "spouses" of public employees and retirees violated their right to equal protection under the Alaska constitution.[97] In a unanimous decision in October 2005, the Alaska Supreme Court ruled that it was unconstitutional for the state to continue to deny domestic same-sex partners of state and municipal employees and retirees to the same benefits offered to spouses of state and municipal employees and retirees. [98] Despite Alaska's statutory and constitutional provisions that define marriage as an institution limited to a man and a woman, the Alaska Supreme Court extended the state constitution's equal protection clause to include nondiscrimination of same-sex couples.[99]

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demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood." *Id.*)

[94] ALASKA STAT. §18.80.220 was amended to add, "(c) Notwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a)… (1) an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees." ALASKA STAT. §18.80.220.

[95] Alaska Leg. Comm. Minutes on H.B. No. 4002 (Nov. 15, 2006), http://bit.ly/c3IeW (last visited Sept. 5, 2009).

[96] *Id.*

[97] *Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 122 P.3d 781 (Alaska 2005). In 2001, the superior court ruled in favor of Alaska, finding that the state had not violated the equal protection clause of the Alaska constitution by failing to extend health and retirement benefits to same-sex partners of state employees. See Alaska Leg. Comm. Minutes (Nov. 15, 2006), http://bit.ly/17LyaH (last visited Sept. 5, 2009).

[98] 122 P.3d at 783-84.

[99] The Alaska Legislature began providing state benefits to same sex partners beginning January 1, 2007. Governor Palin stated that "[t]he [Alaska] Supreme Court has ordered adoption of the regulations by the State of Alaska to begin providing benefits January 1. We have no more judicial options. We may disagree with the rationale behind the ruling, but our responsibility is to proceed forward with the law and follow the Constitution." Press Release 06-012, Alaska Governor's Offic, *Same Sex*, Dec 20, 2006.

Some state political leaders were outraged by the ruling. Governor Frank Murkowski called it "shameful," and by February 2006 (less than four months after the Supreme Court's decision), resolutions were filed in Alaska's House and Senate with the aim of trumping the decision.[100]

These legislative attempts to delay resulted in a special election for a non-binding advisory vote that cost the state taxpayers over $1.2 million. Approximately 53% of the voters in that special election voted in favor of a legislative pursuit of a constitutional amendment to prohibit benefits to same-sex public employees and retirees.

Disparate Employment Benefits to Same-Sex Couples: The state of Alaska, however, enacted an exception to its nondiscrimination statute in 1996, which permits employers to provide preferential health and retirement benefits to family members only of legally married employees.[101]

Employment-Related Benefits to Same-Sex Couples: As described in "II.E.1(b)", the Alaska Supreme Court unanimously ruled in *Alaska Civil Liberties Union ex rel. Carter v. Alaska* that denying certain benefits to same-sex couples that were enjoyed by married straight couples was unconstitutional. Because the court ordered the state to comply with the ruling by January 1, 2007,[102] there was a flurry of legislative activity in 2006, the results of which are described in detail below.

Benefits Limited to Marriage: Conservative Alaskan politicians vowed to overturn the ruling in *Alaska Civil Liberties Union ex rel. Carter v. Alaska*. As expected, legislative resolutions targeted health care benefits to same-sex couples. Conservatives proposed a constitutional amendment in February 2006 that would have allowed the voters to overturn the Alaska Supreme Court ruling. The proposed joint resolutions of the House and Senate[103] would have added a sentence to the Alaska constitutional marriage

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[100] Anne Sutton, *Measure Denying Benefits to Gay Couples Sputters in Legislature*, A.P., Apr. 7, 2006.
[101] ALASKA STAT. §18.80.220. Introduced in 1995 as HB 226, ALASKA STAT. §18.80.220 was amended (effective July 18, 1996) to provide that an employer may not:

> "refuse employment… [or] discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion,… [or] marital status… when the reasonable demands of the position do not require distinction on [that] basis… [*except*] an employer may refuse to provide benefits to a person because the person is not legally married to an employee of the employer." ALASKA STAT. §18.80.220.

[102] Alaska Leg. Comm. Minutes (Nov. 15, 2006), http://bit.ly/17LyaH (last visited Sept. 5, 2009).
[103] Senate Joint Resolution Number 20 proposed:

> "Section 25. Marriage and related limitations. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No other union is similarly situated to a marriage between a man and a woman and, therefore, a marriage between a man and a woman is the only union that shall be valid or recognized in this State and to which the rights, benefits, obligations, qualities, or effects of marriage shall be extended or assigned." ALASKA SEN. J.R. (24th Leg.), *available at* http://bit.ly/9mkBM.

amendment to restrict the "rights, benefits, obligations, qualities or effects of marriage" only to married couples.[104]

SJR 20 made it to the Senate Finance Committee but never arrived on the floors of the House and Senate for a vote. A constitutional amendment would have required a two-thirds vote of the legislature to pass. The representative sponsoring the House version said the requirement was too high of a hurdle.[105]

Special 2006 November Session: With the January 1, 2007 deadline looming and no resolution having been passed by the House and Senate on benefits,[106] in November 2006, Governor Frank Murkowski called the legislature back into a special one week session to grant the state Commissioner of Administration the authority to adopt the new benefits plan.[107] The extension of the health benefits to the same-sex partners of public employees and retirees also required legislative approval for additional appropriations.[108]

But instead, in unenforceable resolutions, the legislature declared that the Alaska Supreme Court was improperly exercising judicial power and that the issue would be better resolved if the deadline were postponed so that the next legislative session may thoroughly consider the issues with adequate public participation. The legislature stated that the incoming Senate and House will consider alternatives to remedy the "constitutional defect" that had been identified by the Alaska Supreme Court. Specific alternatives included: (1) withdrawal of spousal benefits for all newly hired married state employees; (2) focusing on granting benefits to dependents instead of same-sex partners; and (3) adoption of legislation that authorizes regulations along the lines proposed by the Department of Administration."[109]

The special November session also resulted in the following bills:

i. Prohibiting Commissioner of Administration from Granting Benefits:

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[104] Anne Sutton, *Measure Denying Benefits to Gay Couples Sputters in Legislature*, A.P.: STATE & LOCAL WIRE, Apr. 7, 2006.

[105] Anne Sutton, *70 Percent of Bills, Even Hot-Button Issues, Die Early Deaths*, A.P.: STATE & LOCAL WIRE, May 10, 2006. In February 2007, Republicans attempted again to enact a proposal that, if approved by two-thirds of the legislature and a majority of voters, would revise Alaska's constitution dealing with marriage. HJR 9 (and the parallel Senate Bill, SJR 9) contained identical language as the 2006 proposals, SJR 20 (and HJR 32). Prior to the House vote, one of the House representatives released an opinion from Legislative Legal Services stating that even if HJR 9 cleared the legislature, the court would likely strike down the law as unconstitutional. HJR 9 failed to receive the two-thirds vote of the House necessary to pass. The vote was 22 for, 14 against, with 4 absent. 27 "yes" votes were needed to pass HJR 9. Reconsideration of this bill was not taken up. See legislative history of HJR 9 at Alaska Leg., Bill History/Action for 25th Leg., HJR 9, http://bit.ly/AX8UJ (last visited Sept. 5, 2009).

[106] The legislature was not in session in June 2006 when the Supreme Court ordered the January 1, 2007 compliance deadline.

[107] Anne Sutton, *Legislature Defies Supreme Court*, A.P.: STATE & LOCAL WIRE, November 21, 2006. See Alaska Leg. Comm. Minutes (Nov. 16, 2006), http://bit.ly/3LNgat (last visited Sept. 5, 2009).

[108] Alaska State Leg., Bill Text 24th Leg. SCR 401, http://bit.ly/3e9cPd (last visited Sept. 5, 2009).

[109] *Id*.

The house proposed House Bill ("HB") 4001, which would have prohibited "the commissioner of administration from adopting, allowing to become law, or implementing regulations that grant or extend employment-related benefits to same-sex partners of state employees and members of the state retirement systems."[110]

The House representative sponsoring the bill explained that HB 4001 was an "attempt to reserve the right of the legislature to make policy decisions regarding the State's retirement and benefit regulations. [There is a] 'disagreement' between the legislative and judicial branches of State government, illustrated by the legislature's passage in 1996 of a statute prohibiting recognition of same-sex relationships as an entitlement to marriage benefits, which the court has effectively "overruled" with the current mandate."[111]

The bill moved swiftly through the House and Senate and by early December, the final version of the bill was transmitted to the governor. On December 28, 2006, Governor Sarah Palin, who had just assumed office on December, 4, 2006, vetoed the bill.[112] In a release from the governor's office, the governor stated that she was advised that the bill would be unconstitutional given the court order mandating compliance on same-sex benefits by January 1, 2007. [113] By signing the bill, she would be in direct violation of her oath of office.[114] The Alaska Attorney General had advised the governor that the bill would have "effectively eliminated the regulatory process as a way to comply with the [Alaska Supreme Court's] order to provide same-sex domestic partner benefits" for state employees and members of the retirement system.[115]

ii. Providing for Same-Sex Partner Survivor and Medical Benefits:

Also in November 2006, Governor Frank Murkowski transmitted a bill to the legislature for consideration. Because the state had a duty to comply with the Supreme Court order in connection with *Alaska Civil Liberties Union ex. re. Carter v. Alaska*, the governor was duty bound to propose the bill despite his opposition to equal benefits for same-sex partners. Specifically, Governor Frank Murkowski wrote, "While Alaskans may differ in their views on the wisdom of the [Alaska Supreme Court] order, the state has a duty to comply with the court's order."[116]

HB 4003 (and the parallel bill, Senate Bill ("SB") 4001) would permit same-sex couples access to employment-related insurance and survivor benefits and would have codified the open enrollment regulations adopted by the Commissioner of Administration.[117] The proposal would have also set out affidavit and documentation

[110] Alaska Leg., Bill Text 24th Leg., http://bit.ly/DMqzq (last visited Sept. 5, 2009).
[111] Alaska Leg. Comm. Minutes (Nov. 15, 2006), http://bit.ly/17LyaH (last visited Sept. 5, 2009).
[112] *Id*.
[113] Press Release 06-016, Alaska Governor's Office, Governor Palin Vetoes HB4001 (Dec 28, 2006).
[114] *Id.*
[115] *Id*.
[116] Alaska Leg. Journal Text for SB4001 in the 24th Leg., http://bit.ly/16Mvlf (last visited Sept. 5, 2009).
[117] ALASKA S.B. 4001 (24th Leg. 2006), *available at* http://bit.ly/m6kZs.

requirements that a state employee or retiree must meet to enroll a same-sex partner. [118] HB 4003 and SB 4001 each failed in the Finance committees of the House and Senate.

iii. Advisory Vote to Prohibit Benefits to Same-Sex Couples:

The legislature proposed and passed HB 4002 in November 2006, which was then signed by Governor Palin that December. HB 4002 provided for an advisory vote at a special election on the subject of employment benefits for same-sex partners of public employees and retirees. The "purpose of the bill was to reassert the constitutional authority of the legislature as the voice of the people… [The] Judiciary had overstepped its bounds in areas that speak to public policy... [There are] changing attitudes in the country regarding the issue and [the special election will advise the legislature] if Alaska was ready to follow this trend or maintain the constitutionally adopted definition of marriage."[119] The advisory election would ask voters at the municipal election in April 2007 whether lawmakers should pursue a constitutional amendment to prohibit benefits from same-sex partners of public employees and retirees. [120] Governor Sarah Palin, signed the bill stating that, "I disagree with the recent court decision because I feel as though Alaskans spoke on [the] issue with its overwhelming support for a Constitutional Amendment in 1998 which defined marriage as between a man and woman. But the Supreme Court has spoken and the state will abide."[121]

As a non-binding initiative, the measure had no influence on Alaska law and because it was the only question on the ballot for the special election, the state spent over $1.2 million just for the advisory initiative.[122] In the resulting advisory election, 53% of those who voted said the legislature should pursue a constitutional amendment to prohibit benefits to same-sex public employees and retirees.[123]

H. Other

1. Veteran & Small Business Loans

[118] *Id.*
[119] Quote from Representative Norman Rokeberg at the special November session. Alaska Leg., *supra* note 87.
[120] The question that appeared on the ballot asked:

> "Shall the legislature adopt a proposed amendment to the state constitution to be considered by voters at the 2008 general election that would prohibit the state, or a municipality or other subdivision of the state, from providing employment benefits to same-sex partners of public employees and to same-sex partners of public employee retirees?" ALASKA H.B. 4002 (2007), *available at* http://bit.ly/m6kZs.

[121] Press release 06-012, Alaska Governor's Office *Same Sex*, Dec 20, 2006.
[122] Bent Alaska, STONEWALL DEMOCRATS RESPOND TO PALIN ACCUSATIONS ON SEXUAL ORIENTATION, http://www.bentalaska.com/2008/10/stonewall-democrats-respond-to-palin.html.
[123] Associated Press, *Lawmaker Questions Use of Electronic Voting Machines*, STATE & LOCAL WIRE, June 15, 2007.

Certain loans are not available to persons not of good character.[124]

2. Right to Privacy

In 2001, the legislature proposed SB 210, which would have provided that the right to privacy does not extend to a right to receive public money, a public benefit, or a public service. This would have included state benefits based on a partnership other than marriage.[125] The bill failed in the Senate Rules Committee.

3. Judges, Court Staff & Others

In the performance of judicial duties, a judge must not manifest, by words or conduct, bias or prejudice based upon, among other characteristics, sexual orientation. Further, a judge must not permit court staff and others subject to the judge's direction and control to deviate from such standards in their duties.[126]

4. Ban on Bus Advertising

In 1995, two members of the Anchorage Municipal Assembly proposed a broad ordinance proscribing advertisement for "any political candidate, political or public issue, religious issue or subject, or any sex or sexual orientation" and defined "sexual orientation" as including "any human or animal sexual orientation including asexual, heterosexual, homosexual and bisexual orientations." [127] When asked for an example of animal sexual orientation, Assemblyman Bob Bell said, "Well, what's the definition of sexual orientation? You can interpret sexual orientation as anything -- sex with animals, sex with children, sex with dead people." [128] No such ordinance is in existence today. Research on the outcome of the proposal does not address whether the ordinance was passed and later repealed or whether the proposal failed by an assembly vote.

5. City of Fairbanks

Intimidation based on a perception as to a person's sexual orientation is considered a "nuisance activity" under the City of Fairbank's local ordinance.[129]

In 1995, Sarah Palin, who was mayor of Wasilla at the time, allegedly tried to remove the book, "Pastor, I Am Gay," from the public library.[130]

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[124] See ALASKA STAT. §§26.15.040; 45.81.260 (2008).
[125] ALASKA S.B. 210 (2001), *available at* http://bit.ly/b4fE6.
[126] ALASKA RULES OF JUD. CONDUCT, CANON 3.
[127] Robert Meyerowitz, *Proposal Strips Sex, Politics from Bus Ads*, ANCHORAGE DAILY NEWS, Mar. 28, 1995.
[128] *Id*. The other Assemblyman who proposed the ordinance stated that he had received various phone calls on homosexual issues, pro and con, which prompted the proposal. Advertisements had been run by EQUAL, a gay and lesbian organization, with messages such as "Gay Pride Week in Alaska… It's 52 weeks a year!" Kerusso Ministries, prompted by the EQUAL advertisements, ran messages stating that homosexuals could change their orientation. *Id*.
[129] See Fairbanks Code of Ordi. §46-211 (2008) (definition of "intimidation"), *available at* http://bit.ly/16xGrq.

In June 2001, the mayor of Anchorage removed a gay pride exhibit, meant to "encourage discussion and dispel myths about gay, lesbian, bisexual and transgendered persons," at the Z.J. Loussac Public Library in Anchorage, Alaska the morning after it was first opened.[131] The exhibit included t-shirts that were tacked to walls above the library elevators to give library patrons the feeling they were walking in and out of closets. There accompanying sign read "closets are for clothes not people."[132] The mayor then personally reviewed the display and refused to allow it back in the library after deciding it was "promotional and church-sponsored, offending the separation of church and state." A federal judge overruled the city's attempt to censor the educational collection. [133]

6. Cancellation of Funding & Prohibition on Advertising on Municipal Buses

In 1993, Out North Contemporary Art House ("Out North Theater"), having invited Pomo Afro Homos[134] to perform "Fierce Love: Stories From Black Gay Life" for two nights at the theater, submitted advertising to Anchorage's Transit Department, which administers an advertising program in conjunction with the bus system.

The Transit Department's advertising policy seeks to "ensure good taste in advertising" and prohibits the display of advertising relating to "tobacco products, alcoholic beverages, any use of obscenities, and any reference to sexual or adults-only material." The Transit Department director requested additional information about the performance from Out North Theater after being alerted to the ads by the advertising agency handling those ads. The ads for "Fierce Love," a series of 13 vignettes about the lives of gay black men, featured only the Pomo Afro Homos' name, the show's title, the theatre's name and phone number, and a picture of a bespectacled man's eyes. [135]

The advertising agency claimed that advertising Pomo Afro Homos' performance may counter the Transit Department's content restrictions. Though three positive reviews of the performance were sent to the Transit Department, the Transit Director rejected the ad, claiming that it promoted "adults-only material," a decision that was publicly supported by the mayor and the Anchorage Municipal Assembly.[136] As a result, the ads

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[130] David Talbot, *The Pastor Who Clashed with Palin*, SALON, http://www.salon.com/news/feature/2008/09/15/bess.

[131] Gay Pride Library Exhibit Archive, http://www.thefileroom.org/html/340.html (last visited Sept. 5, 2009). The exhibit was installed as part of Gay Pride Month and PrideFest activities and was supposed to be open for 30 days. It was sponsored by Metropolitan Community Church and Parents, Families and Friends of Lesbians and Gays.

[132] Gay Pride Library Exhibit Archive, http://www.thefileroom.org/html/340.html (last visited Sept. 5, 2009).

[133] Mary Pemberton, *ACLU Files Lawsuit Challenging Removal of Gay Pride Exhibit*, A.P.: STATE & LOCAL WIRE, June 13, 2001.

[134] Pomo Afro Homos is short for "Postmodern Afro-American Homosexuals."

[135] Encyclopedia, *Tom Fink*, NATION MASTER, http://www.nationmaster.com/encyclopedia.

[136] Gay Pride Library Exhibit Archive, http://bit.ly/Ri0Zr (last visited Sept. 1, 2009).

were banned. Out North Theater sued the city for censorship and the judge ordered the city to run the ads.[137]

Months later, the mayor sent a veto memo to the Anchorage Municipal Assembly proposing to cancel Out North Theater's municipal grant of $19,000. Mayor Fink said, "[I don't] think there's any question that the public does not approve of spending money for a theater which encompasses homosexual themes." [138] The Anchorage Municipal Assembly voted unanimously to reject the mayor's proposal to cut the grant. [139]

[137] Robert Meyerowitz, *Proposal Strips Sex, Politics from Bus Ads*, ANCHORAGE DAILY NEWS, Mar. 28, 1995.
[138] Gay Pride Library Exhibit Archive, http://bit.ly/Ri0Zr (last visited Sept. 1, 2009).
[139] Sara Dover, *Sarah Palin and Gay Rights, The Tom Fink Connection*, VILLAGE VOICE, Oct. 17, 2008, http://bit.ly/OHC6e.

Annex A

Timeline of Certain Key Events in Alaska

1993

January – Anchorage Municipal Assembly passes an ordinance to add sexual orientation to its public employer and municipal contractor nondiscrimination law.

Repeal of Anchorage Ordinance by newly elected Anchorage Municipal Assembly.

1994

August – *Brause v. Bureau of Vital Statistics* filed.

1995

January – *Tumeo v. University of Alaska* decided. The superior court held that the University of Alaska could not limit spousal benefits to husbands and wives.

March

HB 226 introduced (proposal that would permit the provision of different retirement and health benefits to employees to those with a spouse or children); statute enacted as Alaska Stat. 18.80.220(c)(1) in July 1996.

HB 227 introduced (proposal to amend Alaska Stat. 25.05.011 to read that a marriage is between one man and one woman); fails in committee.

1996

February - SB 282 (proposal to prohibit discrimination by managed care plans) is introduced in the Senate; fails before reaching any committee.

March

SB 308 is introduced and contains two important proposals:

(Alaska Stat. 25.05.011 is amended to read that a marriage is between one man and one woman); enacted (Effective May 1996).

(Alaska Stat. 25.05.013 is added, which denies recognition of same-sex marriage if performed in another jurisdiction); enacted (Effective May 1996).

1998

February – *Brause v. Bureau of Vital Statistics* decided. The right to marry was a fundamental right and the state must show a compelling interest why same-sex marriages are prohibited.

March – SJR 42 is introduced (proposal to amend state's constitution to limit marriage to one man and one woman); passed House and Senate (becomes Proposition 2 on the November 1998 ballot).

November – Alaskans vote in favor of Proposition 2 by a margin of 68% to 32%. Alaska's constitution is amended to limit marriage to one man and one woman.

1999

Alaska Civil Liberties Union ex rel. Carter v. Alaska is filed.

September – *Brause v. Bureau of Vital Statistics* was dismissed.

2001

April – SB 210 introduced (proposal stating that right to privacy does not extend to right to receive state benefits based on partnership other than marriage); failed in committee.

2002

March – Governor Tony Knowles executes executive order, making it a goal of the executive branch to prohibit and prevent workplace discrimination by the state based on sexual orientation.

2005

October – Alaska Supreme Court rules in *Alaska Civil Liberties Union ex rel. Carter v. Alaska* that denying benefits to same-sex couples that were enjoyed by married couples was unconstitutional because it violated the equal protection clause of Alaska's constitution.

2006

February – SJR 20 and HJR 32 (proposal to amend Alaska constitution to restrict "rights, benefits, obligations, qualities or effects of marriage" only to straight married couples) are proposed; both fail in committee.

June 1 – Alaska Supreme Court Order requires that the state provide benefits to eligible same-sex couples by January 1, 2007 to the extent required by *Alaska Civil Liberties Union ex rel. Carter v. Alaska.*

November Special Sessions of the House and Senate

HB 4001 (proposal to prohibit the Commissioner of Administration from granting benefits to state employees and retirees) passes House and Senate; vetoed by Governor Palin.

HB 4002 (proposal for an advisory vote at a special election in April 2007 on whether the legislature should pursue a constitutional amendment to prohibit benefits to partners of same-sex employees and retirees); passes House and Senate.

HB 4003/SB 4001 (Governor Murkowski's request to comply with the Supreme Court order in *Alaska Civil Liberties Union ex rel. Carter v. Alaska*); failed.

2007

January – SB 6 (proposal to add new civil action and hate crime sentence enhancements); failed in committee.

February – HJR 9 is introduced (proposal to amend Alaska constitution to restrict "rights, benefits, obligations, qualities or effects of marriage" only to straight married couples); HJR 9 fails to receive 2/3 of House vote.

April –

Advisory vote results in 53% of the voters in favor of the legislature pursuing a constitutional amendment to prohibit benefits to partners of same-sex employees and retirees.

SJR 9 (Senate proposal to amend Alaska constitution to restrict "rights, benefits, obligations, qualities or effects of marriage" only to straight married couples) is introduced; fails in committee.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Arizona – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

There is no state-wide statute in Arizona that protects its LGBT citizens from employment discrimination in either the public or private sectors. Five municipalities have extended such protection through local ordinances. Those ordinances are inconsistent, however, with regard to inclusion of gender identity protection. In recent years there has been considerable debate in Arizona about the extension of partner benefits to public sector employees, but there is currently no such protection for state government employees. Indicia of hostility and animus toward gay people have surfaced during legislative consideration of these proposals. For example, when State Representative Karen Johnson introduced a bill that would have prohibited state municipalities from offering domestic partnership benefits to their employees, she supported her measure with the statement, "homosexuality is at the lower end of the behavioral spectrum" and linked gay people with diseases, including a set of symptoms she labeled "gay bowel disease."[1] Her co-sponsor, Barbara Blewster, stated that homosexuality was a "high sign of the downfall of the nation."[2]

Documented examples of employment discrimination by state and local government employers against LGBT people in Arizona include:

- In 2009, an Arizona crime scene investigator was fired on account of her sexual orientation.[3]

- In 2007, a lesbian employee of the state child support enforcement agency sought counsel after suffering prolonged harassment by co-workers who used epithets in speaking to her and spread false rumors about her, including that she was mentally ill, after she disclosed that she was a lesbian.[4]

[1] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 78-79 (2000 ed.)
[2] *Id*.
[3] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[4] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

- In 2006, a transgender nurse was fired by an Arizona county hospital on account of her gender identity.[5]

- A lesbian police officer for the City of Phoenix alleged that she was discriminated against on the basis of sex and sexual orientation, and that her right to privacy was improperly invaded when the police department investigated her relationship with another woman employed by the department, ordering her not to speak about the investigation with her partner. The Court of Appeals for the Ninth Circuit affirmed summary judgment in favor of the City. Patches v. City of Phoenix, 68 Fed.Appx. 772, 2003 WL 21206120 (Ariz. 2003).

- A male-to-female transsexual, who had legally changed her sex to female, filed suit against a community college claiming the college had violated Title VII's proscription against discrimination because of sex when it required her to use the men's restroom until such time as she provided proof that she did not have male genitalia, and subsequently terminated her upon her refusal to comply with this directive. The District Court allowed Plaintiff's suit to proceed, holding that an individual who fails to conform to sex stereotypes may state a claim for discrimination "because of" sex under 42 U.S.C. §2000(e) *et seq*. The court reasoned that "[t]he presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification." Kastl v. Maricopa County Community College Dist., F.Supp.2d, 2004 WL 2008954 (D. Ariz. 2004).

- An undercover narcotics officer with the Mesa Police Department, who had been awarded the Bronze Star during military service in Vietnam and had a perfect record during his employment with the police department, was fired soon after disclosing to the police chief that he was gay. He was told that, as a homosexual, he was in violation of Arizona's law against sodomy, even though the law applied equally to heterosexuals and homosexuals. The officer filed a lawsuit against the city, but the trial court ruled against him and an Arizona appellate court upheld the decision.[6]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

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[5] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

[6] HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* http://bit.ly/kThbS.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

None. Currently, the state of Arizona has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[7]

B. Attempts to Enact State Legislation

1. Proposed Bill to Modify Arizona's Civil Rights Act

In January 2008, Representatives Campel and Prezelski introduced a bill to modify Arizona's Civil Rights Act to prohibit discrimination on the basis of gender identity or expression and sexual orientation.[8] It does not appear that the House voted on the measure. Arguments against the bill by the Center for Arizona Family included (1) "homosexuals are not a true minority group" because they are not economically deprived, politically powerless and do not have immutable, non-behavioral characteristics; (2) "adding sexual orientation, gender identity, and gender expressions as protected classes is contrary to Arizona's at-will employment practices" and will lead to a heterosexual being fired or laid off before a homosexual; (3) "adding sexual orientation as a protected class opens the door for same-sex marriage;" and (4) "the religious exemption is inadequate to protect religious organizations and individual religious beliefs."[9]

A similar bill was introduced in the State Senate but was held in committee.[10] Similar legislation has been unsuccessfully introduced in Arizona for several years.[11]

Bills prohibiting only the State or political subdivisions of the State from discriminating against their employees on the basis of sexual orientation or gender identity have also been unsuccessfully introduced.[12] In addition, in 1994 Arizona State Representative Rusty Bowers introduced a legislative proposal to amend the Arizona constitution to ban municipalities from adopting sexual orientation discrimination

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[7] In 1965, Arizona passed its Civil Rights Act, which barred discrimination on the basis of race, color, religion, sex, age, disability or national origin. (*as amended*) A.R.S. § 41-1401 *et seq.*

[8] *See* 2008 AZ H.B. 2002.

[9] *See* The Center for Arizona Policy, Family Issue Fact Sheet, HB 2002-Employment Nondiscrimination Act (EDNA) (February 2008); The Center for Arizona Policy, Employment Nondiscrimination Act (January 2008).

[10] *See* 2008 AZ S.B. 146.

[11] *See* 2007 AZ H.B. 2580 (sexual orientation and gender identity or expression); 2006 AZ H.B. 2726 (sexual orientation and gender identity or expression); 2005 AZ H.B. 2704 (sexual orientation and gender identity or expression); 2004 AZ H.B. 2415 (sexual orientation and gender identity); 2003 AZ S.B. 1255 (sexual orientation and gender identity); 2002 AZ H.B. 2308 (sexual orientation and gender identity); 2001 AZ S.B. 1225 (sexual orientation and gender identity); 1996 AZ S.B. (sexual orientation); *see also* 1997 AZ H.B. 2431 (proposing a separate section of the Civil Rights Act to address discrimination based on sexual orientation).

[12] *See* 2001 AZ H.B. 2270 (proposed a separate section of the Civil Rights Act, § 41-1466, to address sexual orientation and gender identity); 2001 AZ S.B. 1240 (same).

ordinances; at the same time, the "Traditional Values Coalition of Arizona" circulated petitions to qualify a similar initiative.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In 2003, by Executive Order, Arizona Governor Janet Napolitano directed that no state agency, board or commission shall discriminate solely on the basis of an individual's sexual orientation.[13] In addition, the Governor directed that acts of sexual harassment or other harassment based upon sexual orientation would be cause for discipline, including dismissal.[14]

On January 20, 2009, Governor Napolitano became Secretary of Homeland Security. Secretary of State Jan Brewer then became Governor. Press reports at the time suggested that Brewer might repeal Governor Napolitano's Order protecting against discrimination on the basis of sexual orientation.[15] As of July 27, 2009, Governor Brewer has taken no action on this matter.

2. State Government Personnel Regulations

Since 1986, Arizona Department of Administration Personnel Administration regulations have directed that that a State agency shall not discriminate against an individual in violation of A.R.S. §§ 41-1461 (definitions), 41-1463 (prohibiting discrimination on the basis of race, color, religion, sex, age, disability or national origin), and 41-1464 (prohibiting retaliation and indication of preference, limitation, specification or discrimination based on race, color, religion, sex, age, disability or national origin).[16] Sexual orientation and gender identity are not listed as protected categories.

The Arizona State Board of Education and several local government departments and municipalities have adopted non-discrimination policies.

(a) Education

Since 2003, Arizona has prohibited teachers and school administrators licensed by the State Board of Education and applicants for licensure from discriminating against or harassing "any pupil or school employee on the basis of race, national origin, religion, sex, including sexual orientation, disability, color or age."[17] Individuals engaging in such unprofessional or immoral conduct may be disciplined by the Board.[18] There is no protection for gender identity.

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[13] Executive Order 2003-22, Confirming Equal Employment Opportunities.
[14] *Id.*
[15] *See e.g.* http://www.politickeraz.com/tags/jan-brewer?page=4 (predicting rollback of Executive Order 2003-22).
[16] Ariz. Admin. Code § R2-5-104.
[17] Ariz. Admin. Code § R7-2-1308(B).
[18] *Id.* § R7-2-1308(C).

Enforcement against a person certified by the State Board of Education who is accused of engaging in unprofessional or immoral conduct begins when a signed and notarized statement of allegations against the certified individual is submitted to the Board.[19] The Board must conduct an investigation of all statements of allegations.[20] After an investigation, the Board may file a complaint.[21] The certified individual against whom the complaint is filed has fifteen days to respond.[22] Decisions of the Board are final unless an appeal is filed in Arizona Superior Court within thirty days of the date of the decision.[23]

Only seven out of approximately 224 school board policies include provision prohibiting discrimination on the basis of sexual orientation.[24] Of the seven, two schools also include gender identity in their nondiscrimination policy statements.[25]

The seven policy statements typically provide that "[t]he Board is committed to a policy of nondiscrimination in relation to race, color, religion, sexual orientation, age, national origin, and disability. This policy will prevail in all matters concerning staff members, students, the public, educational programs, and services, and individuals with whom the Board does business."[26] The Superintendent is designated the compliance officer and charged with investigating and documenting complaints that violate the equal opportunity policy.[27] The Superintendent may hold an administrative hearing or recommend that the matter be brought before the board.[28] If the alleged violator is a teacher or administrator, misconduct may result in suspension or dismissal.[29]

The seven school boards also have reciprocal regulations ensuring equal employment opportunity. In general the equal employment policies prohibit discrimination "against an otherwise qualified individual with a disability or any individual by reason of race, color, religion, sexual orientation, age, or national origin."[30] The policy

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[19] *Id*. § R7-02-1302.
[20] *Id*. § R7-2-1302(H).
[21] *Id*. § R7-2-1303.
[22] *Id*. § R7-2-1304; *see* A.R.S. §§ 15-539 and 15-541 for additional due process requirements.
[23] A.R.S. § 15-543.
[24] An additional two schools located in New Mexico also included sexual orientation in their nondiscrimination policy statements. *See* Hatch Valley Public Schools P.M & A.R. § A-0250 (2005); Tucumcari Public Schools P.M & A.R. § A-0250 (2004).
See Amphitheater Sch. Dist. No. 10 Policy Manual and Administrative Regulations ("P.M & A.R.") § A-0250 (1998); Camp Verde Unified Sch. Dist. No. 28 P.M & A.R. § A-0250 (2007); Catalina Foothills Unified Sch. Dist. No. 16 P.M & A.R. § A-0250 (1997); Flagstaff Unified School District No. 1 Policy Manual § A-0250 (2004); Marana Unified Sch. Dist. No. 6 P.M & A.R. § A-0250 (2005); Pima County Joint Technological Education Dist. No. 11 P.M & A.R. § A-0250 (2008); Sunnyside Unified School Dist. No. 12 P.M & A.R. § A-0250 (2007).
[25] *See* Pima County Joint Technological Education Dist. No. 11 P.M & A.R. § A-0250 (2008); Sunnyside Unified School Dist. No. 12 P.M & A.R. § A-0250 (2007).
[26] *See, e.g.*, Camp Verde Unified Sch. Dist. No. 28 P.M & A.R. § A-0250.
[27] *Id.* § A-0261.
[28] *Id.*
[29] *Id.*
[30] *See e.g.*, Camp Verde Unified Sch. Dist. No. 28 P.M & A.R. §G-0200.

also typically states that "[e]fforts will be made in recruitment and employment to ensure equal opportunity in employment for all qualified persons.[31] The Superintendent is the designated compliance officer charged with investigating and documenting complaints and deciding whether to hold an administrative hearing or bring the matter before the School Board.[32]

(b) **Police and Fire Departments**

The Phoenix Police Department "fully endorses and supports the concept of equal business and employment opportunities for all individuals, regardless of race, color, age, sex, religion, national origin, disability, or sexual orientation."[33] The Police Department Equal Employment Opportunity Policy states that it is illegal to discriminate on the basis of sexual orientation and that all parties will be treated equally without regard to sexual orientation in all employment matters including promotions, transfers, job rotation, training, work assignments, hiring, merit increases, overtime awards, and discipline.[34]

The Phoenix Fire Department Operations Manual ("Manual") defines discrimination as "any act taken because of race, color, religion, gender, age disability, sexual orientation or national origin by a City employee or group of employees that adversely affects another employee or applicant in any aspect of City employment."[35] The Manual states that "discrimination will not be tolerated in any aspect of Department employment" and requires supervisors, managers, and executives to take proactive steps to prevent discrimination and to promptly take corrective action wherever discrimination occurs.[36] In accordance with the Phoenix Code, the Manual also states that the Fire Department shall not deny any City service to any person on the basis of a person's sexual orientation.[37]

The Tempe Fire Department Harassment Policy also prohibits harassment on the basis of sexual preference.[38]

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[31] *Id.*
[32] *Id.* § G -0211; *see also* Catalina Foothills Unified Sch. Dist. No. 16 P.M & A.R. §§ G-0200-211; Marana Unified Sch. Dist. No. 6 P.M & A.R. §§ G-0200-211; Pima County Joint Technological Education Dist. No. 11 P.M & A.R. §§ G-0200-211; Sunnyside Unified School Dist. No. 12 P.M & A.R. §§ G-0200-211; *compare* Amphitheater Sch. Dist. No. 10 P.M & A.R. § G-0200-211.1 (containing more detailed prohibitions and requiring an affirmative action program to "actively promote the full realization of equal employment opportunity" but not setting forth a complaint procedure.)
[33] City of Phoenix, EEO & ADA Standards, Statement of commitment for Police Department Employees at http://phoenix.gov /POLICE /equal_op.html.
[34] Operations Order 3.14(3) (June 2003).
[35] Phoenix Fire Department, Volume 1-Operations Manual, Harassment-Free Environment, MP105.17(A)(III) (defining sexual orientation as heterosexuality, homosexuality, or bisexuality.).
[36] *Id*. at MP 105.17(A)(IV).
[37] *Id.*
[38] Tempe Fire Department Policies and Procedures, Policy Prohibiting Harassment, Including Sexual Harassment 104.12 (2008).

The Sedona Fire District equal employment opportunity policy states that "[t]he District will maintain a policy of nondiscrimination with regard to all personnel and applicants for employment and membership. There shall be no discrimination bias as a result of race, color, religion, sex, sexual orientation, age, national origin, handicap or any basis prohibited by statute."[39] Sedona does not have a city ordinance addressing equal opportunity.

3. Attorney General Opinions

None.

D. Local Legislation

1. City of Phoenix

The City of Phoenix ("Phoenix") bars discrimination on the basis of race, color, religion, sex, national origin or marital status by all employers within the City of Phoenix but does not bar discrimination on the basis of sexual orientation or gender identity.[40] Phoenix also does not include sexual orientation in its ordinances requiring affirmative action efforts by its construction contractors.[41]

The Phoenix Commission on Human Relations, however, is tasked with (1) making periodic surveys of the existence of discrimination in the City of Phoenix because of race, color, religion, national origin, marital status, and sexual orientation in public accommodations and employment and (2) fostering positive inter-group relations and elimination of discrimination based upon race, color, religion, national origin, marital status, and sexual orientation.[42]

In 1991, Phoenix adopted specific regulations barring discrimination by the City on the basis of sexual orientation.[43] Section 18-10.01 of the Phoenix Code provides that Phoenix "shall not refuse to hire any person or to bar or discharge from employment such person, or to discriminate against such person in compensation, conditions or privileges of employment, on the basis of sexual orientation." The City Manager is charged with adopting administrative regulations to enforce the above rights.[44]

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[39] Sedona Fire District Administrative Procedure #143.
[40] *See* Code of the City of Phoenix ("Phoenix Code") §§ 18-1 (declaring "it to be contrary to the policy of the City and unlawful to discriminate against any person because of race, color, religion, sex, national origin, or marital status in places of public accommodation and employment."), 18-4(A)(2)-(4) (barring discrimination in employment), 18-4(B) (barring discrimination in public accommodations).
[41] *See id.* § 18-12 ("It is the policy of the City of Phoenix that any construction contractor ("contractor") who anticipates establishing a business relationship with the City of Phoenix for contracts of ten thousand dollars or more adheres to a policy of equal employment opportunity and demonstrates an affirmative effort to recruit, hire and promote regardless of race, color, religion, gender, or national origin, age or disability; and that all contractors uphold this policy with their subcontractors."); *see also id*. § 18-19 (requiring a similar policy for long-term suppliers of goods and services to the City of Phoenix).
[42] Id. § 18-2(A)(5).
[43] *See* City of Flagstaff Staff Summary Report at 9.
[44] Phoenix Code § 18-10.03. These administrative regulations were not located.

It is also unlawful for employers that are vendors, suppliers or contractors, who do business with Phoenix and employ more than thirty-five persons, to discriminate against any person because of sexual orientation.[45] Specifically, the Phoenix Code prohibits those vendors, suppliers or contractors from (a) failing or refusing to hire or discharging or otherwise discriminating against any individual with respect to compensation, terms, conditions o[r] privileges of employment; (b) limiting, segregating, or classifying employees or applicants for employment in any way that would deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee because of such individual's orientation; (c) coercing, intimidating, threatening or interfering with any person in the excise of or enjoyment of such rights, or on account of his or her having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of such rights; and (d) discriminating against any individual because of such person's sexual orientation in admission to or employment in any apprenticeship or other training or retraining programs, including on-the-job training programs.[46] "Bona fide religious organizations" are exempt from the prohibitions concerning sexual orientation.[47]

2. City of Tucson

The City of Tucson ("Tucson") prohibits discrimination in places of public accommodation, employment, and housing on the basis of, *inter alia*, sexual orientation and gender identity.[48] In addition to prohibiting discrimination on the basis of sexual orientation or gender identity, the Tucson Code provides that such discrimination is a civil infraction with fines ranging from $300 to $2,500.[49]

An employer cannot refuse to hire or employ, bar or discharge from employment, or discriminate in compensation or in terms, conditions or privileges of employment on the basis of sexual orientation or gender identity.[50] Tucson also prohibits "any employer or employment agency to print or circulate, or cause to be printed or circulated, any publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly any limitation, specification or discrimination as to race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status or expresses any intent to make any such limitation, specification, or

[45] Phoenix Code § 18-4(A)(5).
[46] *Id.*
[47] *Id.* § 18-4(A)(8).
[48] City of Tucson Code ("Tucson Code") §§ 17-1 ("It is the policy of the city to eliminate prejudice and discrimination due to race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status, in places of public accommodation, in employment, and in housing."), 17-11(b) ("Discriminate or discrimination means to make, directly or indirectly, any distinction with respect to any person or persons based on race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status.").
[49] *Id.* § 17-14.
[50] *Id.* §§ 17-12(b)-(c).

discrimination."[51] In general the prohibitions do not apply to religious organizations or to certain housing situations where the lessor also resides in the leased housing.[52]

A person discriminated against on the basis of sexual orientation or gender identity in violation of the Tucson Code must file a verified charge with the Office of Equal Opportunity Programs ("OEOP") of the City Manager's office within ninety calendar days of the alleged violation.[53] The OEOP must promptly investigate the charge and notify the person charged. The person charged has twenty days to file a written answer to the charges.[54] The OEOP must issue written findings within 120 calendar days and provide a copy to the parties involved.[55]

If the OEOP issues a finding that there is no reasonable cause to believe the person charged engaged in a discriminatory practice, the aggrieved party may file an appeal with the Tucson Human Relations Commission.[56] If the OEOP finds there is reasonable cause to believe the person charged engaged in a discriminatory practice, OEOP may attempt to eliminate the alleged discriminatory practice by conference, conciliation and persuasion.[57] OEOP may also request the city attorney to file a complaint in city court.[58]

3. City of Scottsdale

In December 2007, the City of Scottsdale amended its equal employment opportunity policy articulated in the Scottsdale Revised Code to include sexual orientation and gender identity. "It is the policy of the [City of Scottsdale] to provide employment opportunities to all persons based solely on ability, regardless of race, color, religion, sex, national origin, age, sexual orientation, gender identity or disability."[59] The policy applies to all human resources related activities.

4. City of Tempe

Although the City of Tempe does not have a general ordinance prohibiting discrimination on the basis of sexual orientation, Tempe does have a nondiscrimination policy with respect to city employees. The hiring process for the city states that Tempe will "assure equal employment opportunity to all qualified person[s]" regardless of "race, color, religion, disability, sex, sexual orientation, age, or national origin."[60]

5. City of Flagstaff

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[51] *Id.* § 17-12(d).
[52] *See id.* §§ 17-13(b), (d).
[53] *Id*. § 17-15(a).
[54] *Id*. § 17-15(a)-(b).
[55] *Id*. § 17-15(c).
[56] *Id*. §17-15(d).
[57] *Id*. § 17-15(e).
[58] *Id*. § 17-15(f).
[59] Scottsdale Rev. Code § 14-2 (2008).
[60] *See* City of Tempe Hiring Process *available at* http://www.tempe.gov/jobs/hiring_process.htm.

The City of Flagstaff also has a nondiscrimination policy to protect city employees from discrimination based on sexual orientation and gender identity.[61] In 2008, the City of Flagstaff considered an ordinance proposed by Equality Arizona that would add sexual orientation and gender identity as a protected class in the City of Flagstaff.[62] The ordinance has not been adopted.

E. Occupational Licensing Requirements

Several state licensure requirements still contain clauses referencing a "misdemeanor involving moral turpitude." Prior to 2001, it was a class 3 misdemeanor to knowingly and without force (1) commit "the infamous crime against nature" with an adult;[63] or (2) commit, "in any unnatural manner, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female adult, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either of such persons."[64] Thus, prior to 2001, Arizona law effectively permitted discrimination against homosexuals by defining sodomy as a misdemeanor. In 2001, Arizona repealed its laws regarding "crimes against nature" and "lewd and lascivious" conduct and thus removed those acts from the realm of misdemeanors involving moral turpitude.

Several applications for licensure, including licenses provided by the Board of Medical Examiners, the Board of Physician Assistants, the Board of Podiatry Examiners, and the Board of Pharmacy, require disclosure of whether the applicant has ever been convicted of a crime involving moral turpitude:[65]

> Board of Chiropractic Examiners: The Board of Chiropractic Examiners may refuse to give an examination or may deny licensure to an applicant if the applicant is under investigation by a regulatory board in Arizona or any other state for an act that constitutes unprofessional conduct.[66] The Board of Chiropractic Examiners may take also disciplinary action for "unprofessional or dishonorable conduct of a character likely to deceive or defraud the public or tending to discredit the profession."[67] Unprofessional or dishonorable conduct includes committing "a misdemeanor involving moral turpitude."[68] In addition, the Board will not approve participation of an extern who "is currently under investigation for a licensing violation, or a felony or misdemeanor involving moral turpitude."[69]

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[61] City of Flagstaff Staff Summary Report at 11.
[62] *Id.*
[63] A.R.S. § 13-411 (1995) (repealed 2001).
[64] A.R.S. § 13-1412 (1995) (repealed 2001).
[65] *See* Ariz. Admin. Code §§ R4-16-201(B)(16) (Board of Medical Examiners); R4-17-203(A) & 204(A) (Board of Physician Assistants); R4-25-301 (Board of Podiatry Examiners); R4-23-301(H)(2)(c), 604(B)(4), 605(B)(1)(e), 606(B)(1)(e), 607(B)(1)(4), 1103(A)(2)(b) (Board of Pharmacy).
[66] A.R.S. § 32-921(C)(3).
[67] A.R.S. § 32-924(5).
[68] Ariz. Admin. Code § R4-7-902(32).
[69] *Id*. § R4-7-1001(C) (addressing the preceptorship training program).

Massage Therapy License: An applicant for a massage therapist license must, among other things, have good moral character and not have, within five years preceding the date of application been convicted of a misdemeanor involving prostitution or solicitation or other similar offense involving moral turpitude that has a reasonable relationship to the practice of massage therapy.[70] Being convicted "of a felony or other offense involving moral turpitude or any conviction for prostitution, solicitation, or similar offense" is also grounds for disciplinary action.[71]

[70] A.R.S. § 32-4222(A)(4) & (7); *see also* Ariz. Admin. Code § R4-15-101(10) (defining an applicant of good moral character as one who "has not, within five years before the date of application, been convicted of a felony or an offense involving moral turpitude or prostitution, solicitation, or other similar offense").
[71] A.R.S. § 32-4253(A)(4).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Patches v. City of Phoenix, 68 Fed.Appx. 772, 2003 WL 21206120 (Ariz. 2003).

In an unpublished opinion, a unanimous three-judge panel of the U.S. Court of Appeals for the 9th Circuit rejected a discrimination and privacy suit brought by a lesbian police officer against the City of Phoenix, Arizona, and several city employees. The court found no constitutional bar to the police department's investigation of Sharon Patches's relationship with another woman employed by the department, and also rejected her claim of unlawful sex discrimination.

It appears that Patches, who was involved in a relationship with another officer, assigned her partner to a special squad, and the assignment was questioned by other subordinates in the department. This led to a departmental investigation, during which Patches was asked about the nature of her relationship. At the conclusion of the investigation, the department imposed a disciplinary sanction on Patches, which was not specified in the opinion.

Patches sued the City of Phoenix and various department officials in the federal district court, claiming that she had been the victim of sex discrimination in violation of the Civil Rights Act of 1964. She also claimed that her constitutional right to privacy was improperly invaded by the investigation, as well as her right to intimate association, and that her equal protection right to be free of sex and sexual orientation discrimination had also been violated. She also claimed that the department discriminated against her by ordering her not to speak with her partner about the investigation while it was ongoing, even though police officers are normally allowed to discuss such matters with their spouses. The District Court granted the defendants' motion for summary judgment.[72]

Kastl v. Maricopa County Community College Dist., F.Supp.2d, 2004 WL 2008954 (D. Ariz. 2004).

Kastl, a male-to-female transsexual, filed suit against a community college claiming the college had violated Title VII's proscription against discrimination because of sex when it required Kastl to use the men's restroom until such time as she provided proof that she did not have male genitalia, and subsequently terminated her upon her refusal to comply with this directive.

[72] *Patches v. City of Phoenix*, 68 Fed.Appx. 772, 2003 WL 21206120 (C.A.9, Ariz. 2003) (Not published in Federal Reporter).

Kastl, an adjunct faculty member and student at Estrella Mountain Community College ("EMCC") alleged that the termination of her employment was the result of unlawful discrimination because of sex, in violation of Title VII. During her employment at EMCC, Kastl had been diagnosed with gender identity disorder. Upon receiving the diagnosis, Kastl began transitioning from male to female and dressed more femininely at work. She legally changed her name and obtained a new driver's license indicating her sex as female. During this time, Kastl's employers received objections from employees about Kastl's use of the female restroom. Consequently, the employer issued a new policy, requiring Kastl and another transsexual employee to use male restrooms until such time as Kastl provided proof that she did not have male genitalia. Kastl offered her new license as proof, but superiors pronounced it "inconclusive and irrelevant." Kastl refused to abide by the new restroom policy, and EMCC swiftly terminated her employment.

The District Court denied Defendant's motion to dismiss, holding that an individual who fails to conform to sex stereotypes may state a claim for discrimination "because of" sex under 42 U.S.C. §2000(e) *et seq*. The court reasoned that:

> "[t]he presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification."

While the defendant argued that its policy segregated people by genitalia—not by sex—the court countered that the defendant mandated the use of the "men's restroom," not the "restroom for individuals with male genitalia." Viewing the evidence in a light most favorable to the Plaintiff, the District Court found that Kastl had successfully stated a claim of sex discrimination against EMCC.[73]

2. Private Employees

None.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

[73] *Kastl v. Maricopa County Community College Dist.*, F.Supp.2d, 2004 WL 2008954 (D.A.Z. 2004). The defendant was later granted summary judgment. 2006 WL 2460636, aff'd 325 Fed Appx 492 (9th Cir. 2009)

Municipal Police Department

In 2009, an Arizona crime scene investigator was fired on account of her sexual orientation.[74]

Arizona Department of Child Support Enforcement

In 2007, an Arizona Department of Child Support Enforcement employee's work environment quickly turned hostile after she disclosed that she was a lesbian to co-workers. Several co-workers began to regularly refer to the employee as "faggot" and "dyke" and told her she smelled of "shit and piss." They circulated a rumor around the office that she had sexually transmitted diseases and was mentally ill. Eventually, the offending co-workers were transferred to a different department, but no disciplinary action was taken, and the harassment did not stop.[75]

County Hospital

In 2006, a transgender nurse was fired by an Arizona county hospital on account of her gender identity.[76]

Mesa Police Department

"R.H." worked as an undercover narcotics officer with the Mesa Police Department. During a tour of duty in Vietnam, he had been awarded the Bronze Star. Since joining the police department, R.H. established a perfect record. In August 1980, R.H. told the police chief that he was gay. The police chief initially assured R.H. that his sexual orientation would not affect his position in the department. Soon after his disclosure, however, R.H. was fired. He was told that, as a homosexual, he was in violation of Arizona's law against sodomy, even though the law applied equally to heterosexuals and homosexuals. R.H. filed a lawsuit against the city, but the trial court ruled against him. An Arizona appellate court upheld the decision in 1984.[77]

[74] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[75] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[76] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[77] HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* http://bit.ly/kThbS.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

In 2001, the State of Arizona repealed its long-standing laws addressing "the infamous crime against nature" and "lewd and lascivious acts." A.R.S. § 13-411 provided that "[a] person who knowingly and without force commits the infamous crime against nature with an adult is guilty of a class 3 misdemeanor."[78] Prior to 1951, the statute expressly precluded "sodomy, or the crime against nature" with mankind or animal.[79]

State law had also provided that:

> A person who knowingly and without force commits, in any unnatural manner, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female adult, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either of such persons, is guilty of a class 3 misdemeanor.[80]

B. Housing & Public Accommodations Discrimination

The Arizona Civil Rights Act prohibits discrimination in public accommodation or housing on the basis of race, color, religion, sex, familial status or national origin.[81]

In 2008, in connection with legislation barring employment discrimination on the basis of sexual orientation, a bill was introduced into the State Senate that also sought to prohibit discrimination on the basis of sexual orientation or gender identity or expression in public accommodation and in housing.[82] The bill did not make it out of committee.

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[78] A.R.S. § 13-411 (1995) (repealed 2001).
[79] *See State v. Potts*, 254 P.2d 1023, 1024 (Ariz. 1953) ("sodomy" and "infamous crime against nature" meant the same thing at common law and were used interchangeably to refer to carnal copulation of human beings in an other than natural manner, that is, against nature and per anum).
[80] A.R.S. § 13-1412 (1995) (repealed 2001).
[81] *See* A.R.S. §§ 41-1442 (discrimination in places of public accommodation); 41-1491.14 (discrimination in sale or rental of a dwelling); *see also* A.R.S. §§ 41-1491.15 (publication of sales or rentals); 41-1491.16 (inspection of dwelling); 41-1491.17 (entry into neighborhood); 41-1491.20 (residential real estate related transactions); 41-1491.21 (brokerage services).
[82] *See* Ariz. S.B. 1416 (2008).

The City of Phoenix prohibits discrimination on the basis of race, color, religion, sex, national origin, or marital status, but not sexual orientation or gender identity, in places of public accommodation and in employment.[83] As noted above, the Phoenix Commission on Human Relations conducts periodic surveys of the existence of discrimination in the City of Phoenix because of sexual orientation in public accommodations and employment and fosters positive inter-group relations and elimination of discrimination based upon sexual orientation.[84]

The city of Tucson prohibits discrimination in places of public accommodation and in housing on the basis of, among other things, sexual orientation and gender identity.[85] In addition to prohibiting discrimination on the basis of sexual orientation or gender identity, the Tucson Code provides that such discrimination is a civil infraction with fines ranging from $300 to $2,500.[86]

Tucson prohibits the owner, operator, lessee, manager, agent or employee of any place of accommodation from discriminating against any person or directly or indirectly displaying, circulating, publicizing or mailing any advertisement, notice or communication which states or implies that any facility or service shall be refused or restricted on the basis of sexual orientation or gender identity or that any person would be unwelcome, objectionable, unacceptable, undesirable or not solicited because of their sexual orientation or gender identity.[87]

Tucson prohibits discrimination on the basis of sexual orientation or gender identity in the sale and rental of housing within the City Limits.[88] The prohibitions concern offers or negotiations for the sale or rental of a dwelling, advertisement, representations regarding availability of a dwelling or the make-up of a neighborhood, real estate loan terms, and membership or participation in listing services or real estate business organizations.[89] Certain single family dwellings, religious organizations, and private clubs are exempt.[90]

C. HIV/AIDS Discrimination

[83] PHOENIX CODE §§ 18-1 (articulating city policy), 18-4(A)(2)-(4) (barring discrimination in employment), and 18-4(B) (barring discrimination in public accommodation).
[84] *Id.* § 18-2(A)(5).
[85] *See* TUCSON CODE §§ 17-1 ("It is the policy of the city to eliminate prejudice and discrimination due to race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status, in places of public accommodation, in employment, and in housing.") and 17-11(b) ("Discriminate or discrimination means to make, directly or indirectly, any distinction with respect to any person or persons based on race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status.")
[86] *Id*. § 17-14.
[87] *Id.* § 17-12(a).
[88] *Id.* § 17-51(a).
[89] *Id*. § 17-52.
[90] *Id*. §§ 17-51(b), 17-53.

Arizona law regarding acquired immune deficiency syndrome ("AIDS") prohibits any instruction which promotes or portrays homosexuality in a positive life style.[91]

D. **Hate Crimes**

Since 1991, the Arizona Highway Department has been obligated to collect information concerning criminal offenses that manifest evidence of prejudice based on race, color, religion, national origin, sexual orientation, gender or disability.[92] In 2008, bills were introduced in the State House and Senate to require tracking of hate crimes based on gender identity or expression.[93] Both bills died when the legislature adjourned June 27, 2008.[94]

E. **Education**

As noted above, teachers and school administrators licensed by the State Board of Education are prohibited from discriminating against or harassing "any pupil or school employee on the basis of race, national origin, religion, sex, including sexual orientation, disability, color or age."[95]

In addition, seven Arizona School Boards have nondiscrimination or equal opportunity clauses that prohibit discrimination on the basis of sexual orientation or gender identity. These same school boards have equal education policies which prohibit discrimination in educational opportunities. The policies typically provide that "[t]he right of a student to participate fully in classroom instruction shall not be abridged or impaired because of race, gender (including sexual harassment . . .), sexual orientation, national origin, religion, creed, age disability or any other reason not related to the student's individual capabilities."[96] The Superintendent is charged with investigating and documenting complaints and determining whether to hold an administrative hearing or bring the matter before the board.[97]

Arizona law prohibits charter schools from limiting admission based on "ethnicity, national origin, gender, income level, disabling condition, proficiency in the English language or athletic ability."[98] Admission discrimination based on gender identity or sexual orientation, however, is not prohibited.[99]

Arizona law protects the rights of students to form gay and lesbian and transgender affinity groups, as well as the right to form clubs opposed to homosexuality:

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[91] A.R.S. § 15-0716 (2009).
[92] A.R.S. § 41-1750(A)(3).
[93] *See* 2008 Ariz. S.B. 1483; 2008 AZ H.B. 2752.
[94] Human Rights Campaign, EQUALITY FROM STATE TO STATE: A REVIEW OF THE STATE LEGISLATION IN 2008 AFFECTING THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITY AND A LOOK AHEAD TO 2009 36 (2008), http://www.hrc.org/documents/HRC_States_Report_08.pdf.
[95] ARIZ. ADMIN. CODE § R7-2-1308(B); *see* Part. I(J)(1) *supra.*
[96] *See, e.g.* CATALINA FOOTHILLS UNIF. SCH. DIST. NO. 16 POLICY MANUAL § J-0150.
[97] *Id.* § J-0161.
[98] A.R.S. § 15-184(B).
[99] *See id.*

> "It is unlawful for any public school that offers instruction in grades seven and eight to deny equal access to pupils, to deny a fair opportunity to pupils or to discriminate against pupils who wish to conduct a meeting within a limited open forum on the basis of religious content, political content, philosophical content or other content of speech at these meetings."[100]

Arizona regulations governing the content of materials teaching sex education do not accommodate homosexuality or gender identity concerns. Rather, the regulations include language that could be construed to prohibit recognition of homosexuality as acceptable behavior. For example, Arizona regulations provide that sex education materials and instruction shall, among other things, "recognize local community standards and sensitivities [and] shall not include the teaching of abnormal, deviant, or unusual sexual acts and practices."[101] Any materials discussing sexual intercourse must, among other things, "promote honor and respect for monogamous heterosexual marriage."[102]

In connection with instruction regarding AIDS, state law reflects a blatant bias against homosexuality. Arizona prohibits a district from including within the AIDS curriculum any instruction which (1) promotes a homosexual life-style; (2) portrays homosexuality as a positive alternative life-style; or (3) suggests that some methods of sex are safe methods of homosexual sex.[103] In 2008, bills were introduced in the State House and Senate to remove these prohibitions, but the measures were unsuccessful.[104]

In 1999, a bill was introduced into a committee at the House of Representatives that would have required a school district to deny the use of school monies, resources, property, and employees to any student organization that (1) encouraged criminal or delinquent conduct; (2) promotes sexual activity of any kind; (3) promotes conduct that contradicts certain abstinence requirements; or (4) promotes a specific sexual orientation.[105] However, the language of the bill was stricken completely in committee and the bill was revised to deal with "spirituous liquor and motor vehicle travel."[106]

In 2003, a bill was introduced that would have granted "all persons regardless of gender, transgender, ethnic group identification, race, national origin, religion, color, mental or physical disability or sexual orientation" equal rights and opportunities in the

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[100] A.R.S. § 15-720.
[101] ARIZ. ADMIN. CODE § R7-2-303(A)(3)(a).
[102] ARIZ. ADMIN. CODE § R7-2-303(A)(3)(b)(v).
[103] A.R.S. § 15-716 (1991).
[104] *See* 2008 Ariz. H.B. 2708; 2008 AZ S.B. 1342.
[105] 1999 Ariz. H.B. 2051.
[106] Amendments to H.B. 2051 (Feb. 19, 2009); *see also Perspective*, TUCSON OBSERVER, Feb. 24, 1999, at 4, *available at* http://bit.ly/FOwhe (noting bill that would ban gay and lesbian support clubs from public school campuses would be "gutted").

education institutions of the State of Arizona.[107] The bill would have prohibited educational institutions that received State financial assistance or that enroll students who receive state financial aid from discriminating against the same class of people.[108] The bill died in committee.

F. Health Care

Residents of a health care institution licensed by the Department of Health Services have the right "[t]o be free from discrimination in regard to race, color, national origin, sex, sexual orientation, and religion and to be assured the same civil and human rights accorded to other individuals."[109] Regulations barring discrimination by nursing care institution administrators, however, do not mention sexual orientation.[110]

A client of a behavioral health service agency that is licensed by the Department of Health Services has the right to "not be discriminated against based on race, national origin, religion, gender, sexual orientation, age disability, marital status, diagnosis, or source of payment."[111] Further, opioid treatment must be provided regardless of race, ethnicity, gender, age or sexual orientation.[112]

Counselors licensed by the Board of Behavioral Health Examiners who obtained degrees by non-accredited programs must take one three-semester credit hour course addressing, among other things, "attitudes and behaviors based on factors such as age, race, religious preference, physical disability, sexual orientation, ethnicity and culture, family patterns, gender, socioeconomic status and intellectual ability."[113] Required courses for accredited programs do not specifically include instruction regarding sexual orientation or gender identity. Instead, required content refers to studies to provide a broad understanding of "the physical, psychological, social and moral development of individuals throughout the lifespan, including normal and abnormal behavior" or "social norms, changes, and trends, human roles, and alternative lifestyles."[114]

G. Parenting

In 2008, a bill was introduced into the House of Representatives that would have set forth the rights of children in foster care. Included in the enumerated rights was the right of a child in foster care to be free from unfair treatment because of the child's sex,

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[107] *See* 2003 Ariz. H.B. 2453.
[108] *Id.*
[109] ARIZ. ADMIN. CODE § R9-10-710(D)(22).
[110] *See id.* at §§ R4-33-208(B)(6) & 407(B)(6) (barring discrimination against a patient or employee on the basis of race, sex, age, religion, disability, or national origin).
[111] *Id.* at § R9-20-203(C)(2); *see also id.* at §§ R9-20-701 (C) (providing similar rights to clients of agencies that treat individuals determined to be sexually violent); R9-20-1202 (providing similar rights to clients of agencies that assist with crisis situations or enhance independent living skills).
[112] *Id.* at § R9-20-1010.
[113] *Id.* at § R4-6-501(K)(1)(g)(i).
[114] *See id.* at §§ R4-6-501(C)(2)(a), (e).

gender identity, sexual orientation, race, ethnicity, religion, national origin, disability, medical status.[115] The bill was held in committee.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Arizona prohibits same-sex marriage by a state constitutional provision and by statute.[116] However, several local jurisdictions have enacted domestic partnership registries.

(a) City of Phoenix – Domestic Partnership Registry

On December 17, 2008 the Phoenix City Council and mayor unanimously voted to enact a domestic partnership registry for city residents. The sole right granted to domestic partners under the ordinance is partner visitation rights in all health care facilities operating within the City of Phoenix, unless no visitors are allowed, or the patient expresses a desire that visitation be restricted. The ordinance goes into effect February 9, 2009. Domestic partnership is not limited to gay or lesbian individuals.[117]

(b) City of Tucson – Domestic Partnership Registry

Tucson's Domestic Partner Registry Ordinance was the first domestic partner registry law in the State of Arizona and has been in effect since December 1, 2003. Couples sign a statement affirming that they (1) are not related by blood closer than would bar marriage in the State of Arizona; (2) are not married to another person in a marriage expressly recognized by the State of Arizona or in any domestic partnership and/or civil union with another person; (3) are both 18 years of age or older; (4) are both competent to enter into a contract; (5) both declare that they are each other's sole domestic partner; and (6) both currently share a primary residence, are in a relationship of mutual support and that they intend to remain in such for the indefinite future.[118]

Domestic partnership registration provides partner visitation rights in a health care facility, as long as the patient consents and extends use of and access to city facilities to a registered domestic partner as if that partner were a spouse.[119]

(c) City of Mesa – Domestic Partnership Registry

Mesa Councilman Dennis Kavanaugh has asked the city attorney to draft an ordinance that would create a domestic partner registry for unmarried couples for the sole

[115] Ariz. H.B. 2775 (Summary, at 1).
[116] Ariz. Const. Art. XXX ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."), *available at* http://bit.ly/DumQA; A.R.S. § 25-101; ("Marriage between persons of the same sex is void and prohibited.")
[117] ORD. AND RES. 26, http://bit.ly/6Vf8n (last visited Sept. 3, 2009).
[118] Tucson, Domestic Partnership Registration Instructions, http://bit.ly/ONNaL (last visited Sept. 5, 2009); TUCSON CODE § 17-72.
[119] TUCSON CODE § 17-76.

purpose of providing visitation rights for people who are in unmarried-partner relationships.[120]

2. Benefits

In 1999, State Representative Karen Johnson introduced a bill that would have prohibited state municipalities from offering domestic partnership benefits to their employees. According to Johnson, gay men and lesbians do not need health or life insurance because "They can afford it," referring to the myth that all gay men and lesbians have high incomes. Defending her attempt to exclude gays from state benefits, she claimed that "Homosexuality is the lower end of the behavioral spectrum." Johnson linked gays to diseases such as AIDS, gonorrhea, anal carcinoma and something she called "gay bowel disease." The bill's co-sponsor, Barbara Blewster, went further. In a letter to a constituent, she compared homosexuality to "bestiality, human sacrifice and cannibalism." Blewster claimed that ancient civilizations that embraced homosexuals also practiced sex acts with animals and human sacrifice. She wrote that homosexuality "is a high sign of the downfall of the nation."[121]

In April 2008, the State granted domestic partnership benefits to state employees, present and retired, by amending its benefits regulations.[122]

I. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

In *Whitmire v. Arizona*,[123] a homosexual partner of state prisoner brought action against the Arizona Department of Corrections (DOC), alleging that DOC regulations prohibiting same-sex kissing and hugging among non-family members during prison visits violated equal protection clause. The plaintiff appealed from the District Court's dismissal of the case.[124]

The Ninth Circuit Court of Appeals held that the dismissal on the pleadings was not warranted because the DOC presented no corroborating evidence of a rational connection between the regulation and the correctional safety interest being asserted. To determine whether or not a statute or regulation violates equal protection rights, the issue is whether there is a valid, rational connection between the prison regulation and the asserted, legitimate governmental interest. The DOC asserted the interest of protecting prisoners against being labeled as homosexuals. The Court of Appeals remanded the case

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[120] Gary Nelson, *Councilman Seeks Mesa Partnership Registry*, ARIZ. REPUB., Jun. 6, 2009, at B1, *available a* http://bit.ly/UlVqP.
[121] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 78-79 (2000 ed.).
[122] *Arizona Extends Domestic Partner Benefits to State Employees*, TUSCAN OBS., Apr. 1, 2008, *available at* http://bit.ly/VAeKb; *see also* ARIZ. ADMIN. CODE §§ R2-5-101, R2-5-416– 419, R2-5-421– 422; *see also* Ariz. Dep't of Admin., Benefits Div., Domestic Partner Enrollment Forms and Instructions, http://bit.ly/12dJNX (last visited Sept. 5, 2009) (listing criteria to qualify for benefits).
[123] 298 F.3d 1134 (Ariz. 2002).
[124] *Id*.

stating that there was no common sense connection between the regulation and the DOC's asserted safety interest for prisoners who were open about their homosexuality.

1. Insurance

Under Arizona law, an insurer shall not cancel or nonrenew a motor vehicle insurance policy because of the named insured's location of residence, age, race, color, religion, sex, sexual orientation, marital status, national origin, ancestry or driving record.[125]

2. Arizona Judicial Code of Conduct

The Arizona Code of Judicial Conduct ("the Code") prohibits a judge from holding "membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."[126] Although the Canon does not mention sexual orientation or gender identity, general provisions within the Canon directing a judge to avoid impropriety and the appearance of impropriety may apply.[127]

The Code mandates that a judge perform judicial duties without bias or prejudice.[128] Specifically, the Code states that:

> "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials, or others subject to the judge's direction and control to do so."[129]

In proceedings before judges, attorneys must adhere to the same standards.[130]

3. Legal Profession

The Arizona State Bar Association has suggested a revision to the Oath of Admission to include language that a lawyer "will not permit considerations of gender, race, religion, age, nationality, sexual orientation, disability or social standing to influence my duty of care." Opponents of the change have argued that the language's vagueness violates due process and free speech guarantees and that its application infringes First Amendment rights by compelling conduct and expression in conflict with

[125] A.R.S. § 20-1632.01 (2001).
[126] ARIZ. CODE OF JUD. CONDUCT, Canon 2.
[127] *See, e.g., id.* at Canon 2(B) ("A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment").
[128] *Id*. at Canon 3(B)(5).
[129] *Id.*
[130] *Id*. at Canon 3(B)(6).

an attorney's philosophical or religious beliefs as well as his other professional responsibilities.[131]

4. Prison Regulations

In 2002, Arizona Department of Correction Regulations permitted kissing and embracing at the beginning and end of each visit but prohibited "same-sex kissing, embracing (with the exception of relatives or immediate family), or petting."[132]

Current orders or procedures by the Department of Corrections no longer contain the restrictions barring same-sex interaction.[133] Yet visitation rules on the Department of Corrections website still contain language barring same-sex kissing.[134]

5. Homeland Security

In 2007, the Arizona Senate considered a bill to create a homeland security committee and a homeland security force. The bill as originally introduced prohibited members of the homeland security force from discussing their sexual orientation with the media as a topic of an interview.[135] This language was removed by amendment by the Committee of the Whole.[136]

6. Franchise Act

In 2000, a proposed bill to regulate business franchises would have prohibited a person from discriminating among prospective franchises on the basis of race, color, sexual orientation, gender, religion, disability, national origin or age.[137] The bill was held in committee.

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[131] *See* Letter to Edward F. Novak, Arizona State Bar President, from Members of the Arizona Bar (Dec. 12, 2008), http://bit.ly/E8nvz (last visited Sept. 5, 2009).
[132] *See Whitmire v. Ariz.*, 298 F.3d 1134, 1135 (9th Cir. 2002).
[133] Ariz. Dep't of Corr. Order 911 (Inmate Visitation).
[134] *See* Ariz. Dep't of Corr. Phoenix Visitation Rules, http://bit.ly/9JK7R (last visited Sept. 5, 2009) (barring same sex kissing or embracing (with the exception of relatives or immediate family members).
[135] Ariz. S.B. 1132 Sec. 1(E) (2007).
[136] *Id.* at Final Amended Fact Sheet, 4.
[137] Ariz. H.B. 2195 §§ 44-7003(A)4), 44-7004(A)(2) (2000).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Arkansas – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Arkansas has no state statutes or local ordinances prohibiting employment discrimination on the basis of sexual orientation or gender identity. The only two attempts to include such protections for public employees were subsequently rescinded. In 1990, one Arkansas county added sexual orientation as a protected class to its personnel policy. That policy was rescinded in 1998 because opponents argued that it was not required under federal law and that it validated "repugnant" and "immoral" sexual behaviors.[1] In 1998, when a city council in Arkansas passed a resolution against sexual orientation discrimination in city employment, that resolution was quickly vetoed by the city's mayor. When the city council overrode the veto, the protection was repealed by voters.[2] No Arkansas counties or cities have since prohibited employment discrimination on the basis of sexual orientation or gender identity.

In addition to this pattern of rescission of even local civil rights protections, documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Arkansas include:

- A counselor and eighth-grade teacher applied for teaching job and was told by the principal and assistant principal that they had heard he was gay. Despite assurances that he would be hired, he was not offered the job.[3]

- When the Supreme Court of Arkansas struck down that state's sodomy law in 2002[4], it noted the impact of the state law on employment. The the opinion discusses the fact that the plaintiffs "fear prosecution for violations of the statute and claim that such prosecution could result in their loss of jobs" and "professional licenses."[5] Three of the plaintiff/appellees brought up employment discrimination as they set forth the harms they had suffered because of the law.[6]

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[1] Michael Rowett, *Orientation on Sex Out as JPs Trim Bias Shield,* ARK. DEMOCRAT GAZETTE, July 12, 1998, at B1.
[2] Laura Kellams, *"Dignity" Policy Hurts Businesses, Opponents Argue*, ARK. DEMOCRAT-GAZETTE, Sept. 26, 1998, at B10.
[3] HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* http://www.hrc.org/documents/documentingdiscrimination.pdf.
[4] *Jegley v. Picado*, 349 Ark. 600, 608 (Supreme Court of Arkansas, 2002).
[5] *Id*. at 609.
[6] Appellee's Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815).

> One plaintiff/appellee had been hired as a school counselor, but when school administrators learned he was gay, they refused to honor his contract[7]; another had to conceal her relationship because her lover was afraid she would be fired from her teaching job if her sexual orientation became known[8]; and a third feared that if his sexual orientation became known, he would be reported to the State Board of Nursing and lose his nursing license.[9]

In 2002, the Arkansas Supreme Court ruled that the state's sodomy law was unconstitutional.[10] In holding that the plaintiffs had standing to challenge the law, the Arkansas Supreme Court held that the statute's mere existence triggered a stigma against homosexuals, and served as a tool for government officials to discriminate against homosexuals in arenas such as employment and parental rights.[11]

In 2008, Arkansas banned by state-wide vote the ability of same-sex couples to adopt children.[12] Arkansas is also one of the few states in the United States that does not have a hate crimes law.[13] When asked on a national television show how he felt about gay rights, former governor Mike Huckabee suggested, "It's a different set of rights," noting that the gay rights movement had not suffered the kind of struggle and violence that confronted the black civil rights movement.[14]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

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[7] Aff. of Brian Manire, *Jegley*, 349 Ark. 600 (No. 01-815).
[8] Aff. of Charlotte Downey, *Jegley*, 349 Ark. 600 (No. 01-815).
[9] Aff. of George Townsend, *Jegley*, 349 Ark. 600 (No. 01-815).
[10] *See* Jeg*ley v. Picado*, 80 S.W.3d 332 (Ark. 2002).
[11] *See id.*; Arthur S. Leonard, *Arkansas Supreme Court Rules Sodomy Law Inapplicable to Private, Consensual Sex*, LESBIAN & GAY L. NOTES 107 (Summer 2002).
[12] On November 4, 2008, Arkansas voters enacted a law that prohibits adoption by an individual "cohabitating with a sexual partner outside a marriage." NAT'L GAY & LESBIAN TASK FORCE, ADOPTION LAWS IN THE U.S. (2008). *See infra*, Section IV.H.
[13] Human Rights Campaign, State Law Listings, State Laws, http://bit.ly/45KeeL (last visited Sept. 5, 2009). *But see infra* Section IV.D (discussing unsuccessful attempts to enact hate crimes bills that include~~s~~ sexual orientation as a protected class).
[14] *See* THE VIEW (ABC Nov. 18, 2008), http://bit.ly/WXt92 (last visited Sept. 5, 2009).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

The state of Arkansas has not enacted laws to protect against sexual orientation and gender identity employment discrimination.[15]

B. Attempts to Enact State Legislation

1. Proposed Bill to Amend Arkansas' Civil Rights Statute

In 2005, House Bill 2751 was introduced to amend the state's civil rights statute to include prohibition of discrimination because of sexual orientation.[16] Gender identity was not included as a protected class. "Sexual orientation" was defined as "heterosexuality, homosexuality, or bisexuality."[17] The bill died in committee. No hearing transcripts are available.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

State law prohibits state employment discrimination on the basis of "race, creed, religion, national origin, age, sex or gender."[18] Sexual orientation and gender identity are not protected characteristics.

3. Attorney General Opinions

None.

D. Local Legislation

1. City of Fayetteville

On April 21, 1998, the City of Fayetteville's council passed the Human Dignity Resolution, which added sexual orientation and familial status as protected categories in the city's nondiscrimination policy for public employees.[19] Then mayor of Fayetteville Fred Hanna subsequently vetoed the resolution, but in an unprecedented action, the city

[15] ARK. CODE ANN. § 16-123-102 (2001).
[16] Ark. HB 2751 (2005).
[17] *Id.*
[18] ARK. CODE ANN. § 21-12-103 (2008).
[19] Press Release, Nat'l Gay & Lesbian Task Force, Election Night Round Up (Nov. 4, 1998) (describing Resolution 51-98).

council overrode the veto. This prompted a group, Citizens Aware, to oppose the resolution and bring the matter to a public vote. The Citizens Aware campaign coordinator argued, "The question is, what is the second, third and fourth step [gay rights supporters] have in mind?"[20] In November 1998, voters repealed the resolution.[21]

2. County of Washington

In 1990, Washington County became the first Arkansas county to add sexual orientation as a protected characteristic in its personnel policy.[22] In 1998, however, the Washington County Quorum Court voted 8-4 to remove sexual orientation as a protected class, citing that such protection was not required under federal law and that it was unrelated to employment. Opponents of such protections believed that the protection validated "repugnant" and "immoral" sexual behaviors.[23] No other Arkansas counties have deemed sexual orientation to be a protected class for purposes of their personnel policies.

E. Occupational Licensing Requirements

A review of all occupational licensing boards[24] reveals that no occupational licensing requirements explicitly relate to sexual orientation or gender identity but that two state licensing requirements reference criteria that have been associated with discrimination against LGBT people, as follows:

> State Board of Architects: An applicant must "be of good moral character, as verified by employers and registered architects."[25]
>
> Real Estate Commission: A licensee is subject to disciplinary action if found to have committed "any act involving moral turpitude …."[26] It is not defined as to who makes this determination.

Additionally, one state licensing board changed its regulations in response to the expulsion of an HIV-positive cosmetology student. In 2005, a cosmetology school in Paragould, Arkansas expelled Alan Dugas after he disclosed that he was HIV positive.[27] The school cited a State Board of Cosmetology regulation that barred individuals with

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[20] Kellams, *supra* note 2, at B10.
[21] Mike Rodman, *Human Dignity Resolution Fails*, NW. ARK. TIMES, Nov. 4, 1998.
[22] Rowette, *supra* note 1, at B1.
[23] *Id.*
[24] The Arkansas occupational boards that issue licenses are the Arkansas Appraisers Licensing & Certification Board, Arkansas State Board of Public Accountancy, Contractors Licensing Board, Arkansas State Board of Cosmetology, Arkansas State Board of Embalmers & Funeral Directors, Arkansas Board of Engineers, Arkansas Mortgage Loan Brokers, Arkansas Notaries Public, Arkansas Real Estate Commission, Arkansas Social Workers, and Arkansas State Board of Architects.
[25] ARK. ARCHITECTURAL ACT RULES AND REG. § III.D(1)(a) (2005), *available at* http://www.arkansas.gov/arch/rulesregs.pdf.
[26] ARK. REAL ESTATE LICENSE LAW § 17-42-311 (7) (2007), *available at* http://www.arkansas.gov/arec/LL%209-07.pdf.
[27] ANNUAL UPDATE (ACLU LGBT Rights Project 2006), http://www.aclu.org/lgbt/gen/index.html (last visited Sept. 5, 2009).

infectious diseases from studying or practicing cosmetology.[28] After the ACLU intervened, however, the Board clarified its regulations by adding, "The term 'infectious or communicable disease' shall not include [HIV] or any other disease that similarly does not pose a significant risk to the health or safety of others during the performance of an act of cosmetology or any of its branches."[29]

[28] *See* ARK. BD. OF COSMETOLOGY, RULES & REG. § 15 (2007), *available at* http://www.arkansas.gov/cos/index.html.
[29] *Id.*

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

2. Private Employees

B. Administrative Complaints

According to the Office of Personnel Management, which is responsible for overseeing the state's personnel system and responsible for establishing policies regarding employment, each state agency must provide a grievance procedure for complaints related to discrimination.[30] The specific requirements of such grievance procedures were not explained and a non-exhaustive search of electronic sources did not provide any examples of specific state agency grievance procedures.

C. Other Documented Examples of Discrimination

Arkansas Public School

"B.M." was a counselor and eighth-grade teacher at a junior high school from 1991-92. He applied for a job at the school where the principal and the assistant principal gave him verbal agreements that he would be hired. Afterward, however, they called B.M. in and said they had heard a rumor he was gay. As a result, B.M. was not hired.[31]

[30] DEP'T OF FINANCE & ADMIN POLICY & PROCEDURES MANUAL § 135.1.0 (Ark. Office of Pers. Mgmt. 2005), http://bit.ly/1UDVUq (last visited Sept. 5, 2009).
[31] HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* http://www.hrc.org/documents/documentingdiscrimination.pdf.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

In July 2002, the Arkansas Supreme Court ruled that the state same-sex sodomy law was unconstitutional as applied to private consensual behavior.[32] The sodomy statute specifically punished same-sex sexual conduct, even if the act was consensual and done in private. The Arkansas Supreme Court invalidated the statute on privacy and equal protection grounds. One deeply contested issue was whether the plaintiffs had standing to seek a declaratory judgment. Plaintiffs were made up of seven gay residents of Arkansas, none of whom had actually been prosecuted under the sodomy law, but who had engaged in the illegal behavior in private with consenting partners and planned to continue to do so. The state argued that since none of them had been prosecuted, and no evidence that they would be prosecuted was provided, that the plaintiffs lacked standing. The Arkansas Supreme Court, however, accepted the plaintiff's arguments that the statute's mere existence triggered a stigma against homosexuals, and served as a tool for government officials to discriminate against homosexuals in other arenas such as employment and parental rights.[33]

B. Housing & Public Accommodations Discrimination

The Arkansas Fair Housing Commission receives, investigates, and resolves complaints related to allegations of discrimination based on "race, color, national origin, religion, sex, familial status and disability."[34] Sexual orientation and gender identity are not protected classes.

C. HIV/AIDS Discrimination

In the area of insurance underwriting, Arkansas Insurance Rule and Regulation 42 establishes standards to prevent unfair discrimination in reference to HIV. Under the regulation, insurance companies may require individuals to undergo mandatory HIV tests only if the testing is provided "on a nondiscriminatory basis for all individuals in the same class" and no proposed insured is denied covered or rated as substandard risk on the basis of such testing, unless an enzyme test returns positive results and a Western Blot test returns results that are not negative.[35]

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[32] *See Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).
[33] *See id.* at 336-37; Arthur S. Leonard, *Arkansas Supreme Court Rules Sodomy Law Inapplicable to Private, Consensual Sex*, LESBIAN &GAY L. NOTES 107 (Summer 2002).
[34] Ark. Fair Housing Comm'n, http://www.arkansasfairhousing.com (last visited Sept. 5, 2009).
[35] ARK. INSURANCE RULE AND REGULATION 42 (2001), *available at* http://bit.ly/1hGmxl.

D. **Hate Crimes**

Despite several attempts to enact such laws, Arkansas is one of the few states in the United States that currently has no hate crimes law.

In 1995, House Bill 1257 was introduced, which would have provided for certain enhanced penalties for crimes committed because of a person's "race, color, ancestry, ethnicity, religion, national origin, gender, or sexual orientation," but the bill died in committee. No hearing transcripts are available.

In 2001, Senate Bill 35 and House Bill 2509 were introduced, this time providing for prison sentences to be 20 percent longer for crimes committed because of a person's actual or perceived race, color, religion, ethnicity, ancestry, national origin, sexual orientation, gender, or disability.[36] The 2001 push for hate crimes legislation was largely backed by then Attorney General Mark Pryor.[37] The bills, however, failed to pass.

In 2003, Senate Bill 765 was proposed, this time prescribing rehabilitation instead of increased prison terms for people convicted of hate crimes.[38] The bill included sexual orientation as a protected class. The bill passed in the Senate, but died in a House committee. No hearing transcripts are available.

E. **Education**

Based on the same-sex marriage ban, discussed *infra* in Part IV.I.1, separate legislation prohibiting any definition of marriage in public school textbooks that is contrary to the ban was passed in the House in 2005, but died in Senate committee.[39]

In 2005, the House passed House Bill 1136, a bill that would have barred all representations of homosexual people in any public school textbooks describing marriage. The bill would have required books to define marriage as only a "union between one man and one woman."[40] The bill passed in the House but failed in a Senate committee. No hearing transcripts are available.

In *Wolfe v. Fayetteville, Arkansas School District*, a federal district court reviewed a motion to dismiss various claims by the parents of Billy Wolfe, an adolescent boy who had allegedly been repeatedly bullied and harassed at school for his perceived sexual orientation.[41] The parents brought actions under 42 U.S.C. § 1983 for sex discrimination, perceived sexual orientation discrimination, discrimination based on the anti-homosexual nature of attacks, violation of First Amendment rights, and denial of due process. Claiming that school officials had failed to act appropriately in response to the bullying, the plaintiffs further brought causes of action under Arkansas state law for outrage, deprivation of the right not to be bullied, negligent supervision, defamation, and

[36] Ark. S.B. 35 (2001); Ark. H.B. 2509 (2001).
[37] Seth Blomeley, *Legislature Passed 20 Bills Touted by Pryor*, ARK. DEMOCRAT-GAZETTE, Apr. 20, 2001, at A5.
[38] Ark. S.B. 765 (2003).
[39] Ark. H.B. 1136 (2005).
[40] *Id.*
[41] *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 600 F.Supp.2d. 1011 (W.D. Ark 2009).

false light. Considering the defendant's motion to dismiss for failure to state a claim, the court found that plaintiffs had properly stated claims under § 1983 for sex discrimination, perceived sexual orientation discrimination, discrimination based on the anti-homosexual nature of attacks and First Amendment retaliation, as well as the state claims for negligent supervision, defamation and false light.[42]

In finding that plaintiffs had properly stated certain claims, the court considered alleged facts such as the continuous nature of the harassment and the inappropriate acts by certain school officials in response to such harassment. Billy Wolfe was allegedly repeatedly taunted and beaten by his classmates while being called "fag" and "homo."[43] The plaintiffs reported the behavior to school officials, who would do nothing in response. The alleged harassment continued for years, with no response by school officials to the plaintiffs' numerous complaints. On one occasion, students had formed a Facebook group called "Everyone that Hates Billy Wolfe," featuring a photo of Billy's face superimposed over Peter Pan, with a description stating, "There is no reason anyone should like Billy he's a little bitch [sic]. And a homosexual that NO ONE LIKES."[44] Comments left by group members were anti-homosexual and threatening in nature, and when plaintiffs reported the group to the vice principal, the vice principal asked, "Well, is he a homosexual?"[45] More harassment followed, ultimately forcing plaintiffs to file the current suit.[46] The plaintiffs' specific causes of action that survived the motion to dismiss have yet to be adjudicated.

F. **Parenting**

In *Taylor v. Taylor*,[47] the Arkansas Supreme Court affirmed a lower court's issuance of a temporary custody order containing a non-cohabitation clause prohibiting a divorced mother's lesbian partner from remaining in the residence or staying overnight when the mother's children were present. The non-cohabitation restriction limits a parent's unmarried cohabitation and is a material factor considered in custody determinations.[48] While the Court emphasized that the non-cohabitation restriction applies to both heterosexual and homosexual relationships,[49] it seems that a divorced parent's subsequent relationship with a member of the same sex could serve as grounds for removing children in custody of that parent since Arkansas bans same-sex marriage, forcing every same-sex relationship to run into the non-cohabitation restriction.

[42] *Id.* (dismissing the state law claims for outrage and deprivation of the right not to be bullied).
[43] *Id.*
[44] Dan Barry, *A Boy the Bullies Love to Beat Up, Repeatedly*, NY TIMES, Mar. 24, 2008, *available at* http://bit.ly/JHbPk.
[45] *Wolfe*, 600 F.Supp.2d at 1017.
[46] *See id.*
[47] 47 S.W.3d 222 (Ark. 2001).
[48] *Id.* at 225.
[49] *Id.*

In 2005, the Arkansas legislature considered House Bill 1119 which would have banned homosexuals from becoming foster or adoptive parents. The bill, however, died in a Senate committee.

In *Department of Human Services v. Howard*, the Arkansas Supreme Court struck down Regulation 200.3.2, which prohibited homosexuals and anyone living in a household with a homosexual adult from being foster parents. The Court found that the regulation did nothing to promote the health, welfare, and safety of the foster children, and simply excluded a group of people based on morality and bias.[50] As such, the Court held that the Child Review Agency Board overstepped its authority and infringed on the Legislature's powers.

In 2007, reacting to the Arkansas Supreme Court's 2006 ruling in *Howard*,[51] the Senate committee passed Senate Bill 959, a bill that would have categorically banned homosexuals from adopting or serving as foster parents. The bill, however, died in a House committee.

In 2008, again in reaction to the 2006 *Howard* ruling, a law prohibiting adoption by an individual "cohabiting with a sexual partner outside of a marriage" was enacted by statewide vote. The law applies to both same-sex and opposite-sex cohabiting couples.[52] The group largely responsible for pushing the measure was the Family Council Action Committee. The group cited several motivations, one of which was "to blunt a homosexual agenda."[53] On December 30, 2008, the ACLU filed a complaint in the Pulaski County Circuit Court in Arkansas seeking to strike down the law as a violation of federal and state constitutional rights to equal protection and due process.[54] The case is still pending as of the date of this memorandum.

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 2004, Arkansas voters approved an amendment to ban same-sex marriage and civil unions.[55] Amendment 83 of the Arkansas Constitution states that, "Marriage consists only of the union of one man and one woman."[56] Any marriage between members of the same sex is void.[57]

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[50] 238 S.W.3d 1 (Ark. 2006).
[51] *Id*.
[52] NAT'L GAY & LESBIAN TASK FORCE, ADOPTION LAWS IN THE U.S. (2008).
[53] Steve Chapman, *Gay Adoption: The Real Agenda*, CHI. TRIB., Nov. 30, 2008, at C30.
[54] Press Release, ACLU of Ark., ACLU Asks Court to Strike Down Arkansas Parenting Ban, ACLU of Arkansas (Dec. 30, 2008) *available at* http://bit.ly/hGZY4; *see also Cole v. Ark.*, No. CV2008-14284 (Ark. Cir. Ct. Pulaski County) (Pl. Complaint), *available at* http://bit.ly/akuxD.
[55] *2004 Ballot Measures Election Results*, CNN, http://bit.ly/JC1E3 (amendment had 75% for it).
[56] ARK. CONST. AMEND. 83, § 1 (2004).
[57] ARK. CODE. ANN. § 9-11-107 (2008).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **California – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

The California Fair Employment Practices and Housing Act ("FEHA") prohibits discrimination based on sexual orientation or gender identity, in both public and private employment as well as housing.

Despite having strong state laws in place, discrimination against LGBT state and local government employees has been well documented. Examples solely from the last 20 years include:

- A captain in the Los Angeles Fire Department with 36 years of experience was retaliated against, and his career prematurely ended, because he reported a sexually inappropriate comments and racial, sexual, and sexual orientation harassment aimed at a firefighter in the Department. A jury awarded the plaintiff damages of $1,730,848 under the California Fair Employment and Housing Act, and the court of appeal affirmed the award. Bressler v. City of Los Angeles, 2009 WL 200242 (Jan. 29, 2009)(unpublished).

- In 2009, a Superior Court jury in Newport Beach ruled in favor of a veteran police officer who claimed he was denied promotions several times because he was incorrectly perceived by the police department as being gay. Despite his outstanding annual evaluations, the sergeant was stereotyped as being gay and denied promotion because he was single and physically fit. The jury ruled for the sergeant on claims of discrimination based on perceived sexual orientation and retaliation, and awarded $8,000 in past lost earnings, $592,000 in future earnings, and $600,000 for noneconomic losses, for a total verdict of $1.2 million.[1]

- A gay police officer for the city of Huntington Beach was subjected to disparaging and harassing comments and conduct regarding his sexuality, but no action was taken against the perpetrators in response to his complaints. In 2008, the city settled a discrimination suit brought by the officer, for a sum that reportedly could eventually reach $2.15 million, including a $150,000 lump sum payment to end the lawsuit, and a lifetime monthly disability entitlement of $4,000.[2]

- A University of California-Davis police officer brought suit against the University

[1] LESBIAN & GAY L. NOTES (May 2009).
[2] LESBIAN & GAY L. NOTES (Summer 2008).

for harassment based on his sexual orientation in 2005, alleging that when other officers discovered he was gay, they subjected him to harassment including homophobic slurs and a death threat, and his supervisor referred to him as a "fucking faggot" and retaliated against him after he lodged complaints in response to the treatment from other officers. The UC Regents settled the case in 2008 for $240,000.[3]

- An employee of the Los Angeles Police Department filed suit alleging that the LAPD discharged her in retaliation for her complaints about mistreatment due to her sexual orientation. In 2008, a superior court judge rejected a motion to dismiss the lawsuit.[4]

- In 2008, a new teacher in the Ravenswood City School District was pressured into quitting his job after revealing to students that he had been gay while instructing the students not to use derogatory language in reference to gay men. He filed a lawsuit and the School District settled the case, agreeing to pay the teacher a year's salary.[5]

- In 2008, two lesbian public school bus drivers reported being subjected to a hostile work environment because of their sexual orientation.[6]

- In 2008, a lesbian corrections officer reported that she was subjected to a hostile work environment because of her sexual orientation.[7]

- In 2008, a deputy fire marshal passed the test for the position of Battalion Chief, but was not promoted. He subsequently learned that the fire chief told another employee that he believed the deputy was not promotable due to his being gay. After the deputy filed an internal complaint, the work environment became progressively more hostile.[8]

- An employee of Atascadero State Hospital who was not hired for the position of Unit Supervisor claimed discrimination on the bases of race (Mexican), sexual orientation (heterosexual), and age (46). The candidate selected was Caucasian, under 40, and it was "common knowledge" that this individual would be selected before interviews were held. The case was closed because the evidence found in the DFEH investigation did not establish a violation of the statute. A right to sue was issued. California Dep't of Mental Health, Atascadero State Hospital. Closed December 26, 2007.

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[3] *Former UC Davis Officer Sues Cops, University*, KCRA 3, http://bit.ly/vwA4u.
[4] LESBIAN & GAY L. NOTES (Mar. 2008).
[5] LESBIAN & GAY L. NOTES (Mar. 2008).
[6] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).
[7] *Id*.
[8] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

- In 2007, a volleyball coach was awarded $5.85 million in damages in her discrimination suit against Fresno State University after the University refused to renew her contract. The coach had alleged that this was a result of her advocacy of gender equity and her perceived sexual orientation.[9]

- A California Highway Patrol Motor Carrier Inspector claimed differential treatment, retaliation and constructive transfer. Upon disclosure of the employee's sexual orientation during an internal investigation, the employee's federally issued computer was taken, Department of Transportation overtime was halted, and the employee was interrogated. A complaint was filed with the Department of Fair Employment and Housing ("DFEH"). The DFEH case was closed because the complainant elected court action. A right to sue letter was issued.[10]

- In 2007, the head women's basketball coach and her domestic partner were unlawfully fired by San Diego Mesa College after the coach repeatedly advocated for equal treatment of female student-athletes and women coaches, and following publication in a local paper of an article identifying the two women as domestic partners.[11]

- In 2007, an African-American lesbian firefighter who sued the Los Angeles Fire Department on charges of racial and sexual orientation harassment was awarded $6.2 million in compensatory damages and $2,500 in punitive damages by a jury. Two other firefighters who filed lawsuits contending they suffered retaliation for supporting her also won a $1.7 million jury verdict, and a $350,000 settlement, respectively.[12]

- In 2007, a police chief decided not to promote an officer to a position she was qualified for, and for which no other qualified person was found, and instead eliminated the position, because the officer was transgender.[13]

- In 2007, the San Jose Public School District fired two openly gay women claiming they violated the dress code, but they believed it was because they were openly gay.[14]

- A police sergeant was transferred to South Lake Tahoe where she allegedly experienced a hostile environment due to her gender (female) and sexual

[9] LESBIAN & GAY L. NOTES (Summer 2007).
[10] Complaint of Discrimination under the Provisions of the California Fair Employment and Housing Act, [Redacted] v. California Highway Patrol, Department of Fair Employment and Housing, Case No. E2000607H0121-00-se (Aug. 10, 2007) [herein after FEHA Complaint, Case No. (date).].
[11] Nat'l Center for Lesbian Rts., Employment Case Docket: *Sulpizio v. San Diego Mesa College*, http://bit.ly/LoLOt (last visited Sept. 5, 2009).
[12] *Id*.
[13] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[14] *Id*.

orientation (homosexual). Allegedly, she was disciplined for conduct that male officers were not, and was forced to transfer to a clerical position in another office. The DFEH case was closed because an immediate right to sue was requested.[15]

- An employee alleged wrongful termination by University of California, Food Stamp Nutrition Education Program, on the bases of sex (male), and sexual orientation (gay). He alleged that he was terminated after complaining about anti-gay material on a computer. The case was close by administrative decision and a right to sue was issued.[16]

- A conservationist in the California Conservation Corps alleged that after her sexual orientation was revealed after she had a friend spend the night with her at a camp, she received numerous reprimands damaging to her career and her ability to supervise was questioned. In addition, she alleged that the next week an investigation was conducted by senior supervisors, who spoke with other conservationists about how they felt about the lesbian conservationist having her "girlfriend" spend the night. A policy was then issued that no overnight guests were to be allowed. Previously, overnight guests had been allowed for heterosexual couples. The case was closed because the DFEH could not conclude there was a violation of the statute. A right to sue was issued.[17]

- A Surgical Clinical Nurse at the University of San Francisco School of Medicine was laid off, allegedly due to not being a good fit for the job. The nurse believed that the decision was motivated by discrimination on the bases of sexual orientation (gay), medical condition (HIV positive), and religion (non-Evangelical Christian). Upon investigation, the DFEH determined the evidence did not show a violation of the statute. The case was closed by administrative decision and the DFEH issued a right to sue.[18]

- An employee of the University of California/CAPS alleged discrimination on the basis of sexual orientation (lesbian) and race (African-American), claiming denial of a promotion and issuance of a notice of intent to dismiss. The employer contended the dismissal arose because the employee falsified her resume (criminal record, including fraud), and there were discrepancies related to dispersals of petty cash for client surveys. The case was closed by administrative decision and a right to sue was issued.[19]

- An employee alleged he was denied a position at the University of California, Irvine/Mental Health because of his homosexuality. The employer contended it was because a background check showed the employee had violated relevant aspects of the professional code of conduct as a licensed psychiatric technician.

[15] FEHA Complaint, Case No. E200708e0853-00-sc (Dec. 18, 2007).
[16] FEHA Complaint, Case No. E200708C014900b (Aug. 28, 2007).
[17] FEHA Complaint, Case No. E200607E0372-00 (Oct. 15, 2007).
[18] FEHA Complaint, Case No. E200506A0797-00-pr (Jan. 12, 2007).
[19] FEHA Complaint, Case No. E200607A0383-00-b (Oct. 27, 2006).

The DFEH closed the case by administrative decision and issued a right to sue.[20]

- A police officer was denied promotion, and an external candidate was selected in one of the few instances in the department's history. The officer alleged racial and sexual orientation discrimination. The DFEH case was closed because an immediate right to sue was requested.[21]

- A Program Technician alleged retaliation and a hostile work environment by the California Department of Health Services based on sexual orientation (lesbian), marital status (domestic partner), and religion (Baptist), after putting up a Lavender Committee (Union) poster, which she was asked to remove because it was controversial. Allegedly, her supervisor made remarks like "God don't like the ugly," or "the Lesbian is here, let's go." The DFEH case was closed by administrative decision and a right to sue was issued.[22]

- A gay man working as a cook for the California Youth Authority was awarded one million dollars in non-economic damages after a jury and court found that he was subjected to severe sexual orientation harassment on a daily basis. Hope v. California Youth Auth., 36 Cal. Rptr. 3d 154 (Cal. Ct. App. 2005).

- In 2005, a department supervisor at the University of California-Davis drew up a dress code specifically targeting one gay male employee, prohibiting him from wearing mid-length pants. The supervisor also forbade him from bringing the Gay and Lesbian Yellow Pages into the office.[23]

- An employee of a veterans' home alleged discrimination on the basis of sexual orientation as the reason for his termination, in violation of FEHA. The veterans' home said the termination was due to the employee performing a non-standard procedure. The employee contended that he was suspended because of his sexual orientation, and that heterosexual employees with the same conduct were not suspended. The DFEH recommended no further action be taken and provided a right to sue.[24]

- In 2004, the City of Los Angeles agreed to pay out $200,000 and $450,000 to settle sexual orientation discrimination claims by two police officers. Both claimed that they were harassed and suffered career setbacks due to homophobia in the police department. According to an Associated Press report on Dec. 27, 2004, these added to other settlements would cumulate to nearly $3 million paid out by the city to settle sexual orientation discrimination claims brought by eight

[20] FEHA Complaint, Case No. E200506-K-0047-00 (Sept. 27, 2006).
[21] FEHA Complaint, Case No. E200607E0174-00-rc (July 28, 2006).
[22] FEHA Complaint Case No. E200506E1408-00-b (Apr. 6, 2006).
[23] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[24] FEHA Complaint, Case No. E200506M0403-00-b (Sept. 21, 2005).

different police officers in recent years.[25]

- In 2004, a lesbian teacher who did not fit traditional gender norms was repeatedly transferred from site to site and once thrown against the wall by a principal. The school district and the union refused to intervene.[26]

- In 2004, a gay man faced harassment and isolation at work in a county department, causing him stress-related health problems. Although he knew California law had sexual orientation protections, he was afraid that the county and union would not enforce the law.[27]

- A municipal worker who had been harassed based on other employees' perception that he was gay was discharged in connection with allegations that he had inappropriately sexually harassed volunteers in the department. He contested the allegations and the court determined that the city had violated his due process rights. Martinez v. Personnel Board of the City of Loma Linda, 2003 WL 429505 (Cal. Ct. App. Feb. 24, 2003).

- A state agency employee reported that he had tried to persuade the agency to provide domestic partner benefits in 2002. This caused conflict with his boss and he was put on administrative leave and eventually terminated.[28]

- A police cadet for the City of Oakland was forced to resign after being harassed by training instructors because of his perceived sexual orientation. A jury returned a verdict in favor of the plaintiff on his discrimination and harassment claims in the amount of $500,000, and the appellate court affirmed the judgment. Hoey-Custock v. City of Oakland, 2002 Cal. App. pub. LEXIS 7692 (2002).

- In 2001, the Beverly Hills School Board paid a gay man formerly employed as the Superintendent of Schools $159,000 to settle his discrimination complaint against the school district. He was discharged as superintendent after allegations surfaced that he had misused a district credit card, but he claimed that story was a pretext for anti-gay discrimination, arguing that all the expenses incurred on the card were legitimate business expenses. After being discharged, he was hired as superintendent of a school district in Long Island, New York.[29]

- A lesbian employed by the San Jose Police Department alleged that when she objected to performing strip searches, she was referred to internal affairs rather than being provided with counseling and training, as would normally be the case. She also said her attempts to transfer to other units where she would not have to perform such searches were thwarted because of her sexual orientation. In 2001,

[25] LESBIAN & GAY L. NOTES (Jan. 2005), *available at* http://bit.ly/vwBVH.
[26] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[27] *Id.*
[28] *Id.*
[29] LESBIAN & GAY L. NOTES (May 2001), *available at* http://bit.ly/41pXwR.

she won a $935,000 jury verdict in her sexual orientation discrimination case against the San Jose Police Department, but the superior court judge found that the verdict was not supported by the evidence and ordered a new trial.[30]

- Parents in the San Leandro Unified School District complained to the school board about the a public high school English teacher who helped establish a Gay-Straight Alliance at the school to provide support and protect students from harassment. After the teacher discussed these events with his class, the school issued the teacher a letter of censure, and the school board adopted a new policy requiring that undefined 'controversial issues' need to be cleared with the principal before they are broached in class. The school district settled with Debro for $1.1 million.[31] *Debro v. San Leandro Unif. Sch. Dist.*, 2001 U.S. Dist. LEXIS 17388 (N.D. Cal. Oct. 11, 2001).

- An award-winning high school teacher experienced severe and continuing harassment and discrimination at Oceanside High School because of her sexual orientation. Administrative officials failed to investigate this harassment or take corrective action, refused to promote her because of disapproval of her lifestyle, and threatened retaliation if she pursued her complaints. After the Court of Appeal rejected the district's attempt to dismiss her discrimination claim, the district reached a settlement with the teacher under which she resigned and the district paid her $140,000 and provided annual sensitivity training to its employees of issues of sexual orientation discrimination. Murray v. Oceanside Unif. Sch. Dist., 79 Cal. App. 4th 1338, 95 Cal. Rptr. 2d 28 (Cal. App. 4th Dist., Div. 1 2000).

- In 2000, a lesbian high school teacher filed a complaint with the California Labor Commission against the Hemet Unified School District charging that administrators had discriminated against her when they removed a female student from her class whose parents objected to their daughter being taught by a lesbian. The teacher had assigned students to talk about an important person in their lives, and she voluntarily discussed her same-sex partner as an example. The California Labor Commission ruled in favor of the teacher and the school board appealed that decision.[32]

- A gay teacher filed a discrimination claim with the California State Labor Department after the Rio Brave-Greeley Union School District granted the requests of parents to remove students from his classes bases solely on their perception that the was gay. The Labor Commissioner ordered the district to stop removing students from the teacher's classes and to cease treating employees differently based on their sexual orientation. A settlement was then reached under which the district agreed to adopt a non-discrimination policy, to reject any

[30] LESBIAN & GAY L. NOTES (Dec. 2001), *available at* http://www.qrd.org/qrd/usa/legal/lgln/2001/12.01.
[31] *Teacher Who Broached Controversial Subjects Gets $1.1 Million Court Settlement*, CURRICULUM REVIEW (Nov. 1, 2002).
[32] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 30 (2000 ed.)(hereinafter "HOSTILE CLIMATE" ([year] ed.)).

parental request to transfer students based on the "ethnicity, race, national origin, age, sex, actual or perceived sexual orientation, disability, or political or religious beliefs of classroom teachers," and to make a public statement in support of the teacher.[33]

- A highway patrol officer was harassed by his co-workers for five years, including finding anti-gay pornographic cartoons taped to his mailbox, urine in his locker, and a ticket for "sex with dead animals" on his windshield. After he complained, the harassment continued and he resigned in 1993. In 1999, a state court jury awarded him $1.5 million in damages and legal fees for the harassment to which he was subjected by his co-workers, under the state statute prohibiting employment discrimination based on sexual orientation.[34]

- An elementary school teacher alleged that the school board failed to renew her contract because of "her relationship with a lesbian teacher at the school." After a closed hearing on the matter, a school board member told a local citizen on the street, "[i]f you knew what I knew, you'd know that we made the right decision." The teacher sued for wrongful discharge and defamation. Songer v. Dake, 1999 WL 603796 (Cal. Ct. App. July 29, 1999).

- A commander in the California National Guard with a record of "outstanding performance" was pressured by his commanding officer "to communicate to members of [his] unit that [he] was not homosexual." As a result, he sent a letter to his commanding officer in which he stated: "I am compelled to inform you that I am gay." His commanding officer instituted proceedings to withdraw his federal recognition as an officer with the United States Army National Guard, and he was terminated from the National Guard. Holmes v. Cal. Nat. Guard, 124 F.3d 1126 (9th Cir. 1997), *reh'g, en banc denied*, 155 F.3d 1049 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999).

- When a teacher notified officials at Center High School that she was going to begin the process for gender reassignment surgery, the district distributed a letter to all district parents. After four parents complained, the school board voted to fire the teacher, citing her "evident unfitness for service." The teacher filed a complaint with the state labor commissioner seeking to be reinstated to her teaching position, and later reached a settlement with the school board in which she agreed to resign.[35]

- A lesbian claimed she was constructively discharged by the West Contra Costa County Unified School District after she told her immediate supervisor that she was a lesbian. In 1997, a jury awarded her a $360,000 award in her sexual

[33] LESBIAN & GAY L. NOTES (Apr. 1999), *available at* http://bit.ly/4EkQci.
[34] HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* http://bit.ly/kThbS.
[35] HOSTILE CLIMATE (2000 ed.), *supra* note 21, at 92.

orientation discrimination suit against the district.[36]

- In the late 1990s, a Bay Area public school teacher was unable to secure a full-time teaching contract in any of the several school districts to which she applied after she had transitioned. She then applied for an entry-level federal job, and after two days and multiple hours of interviews and screening, she was turned down for the position immediately after she disclosed her transgender status on a comprehensive medical questionnaire.[37]

- In 1996, a controversy arose in Los Angeles about personally invasive questions to which a lesbian police officer was subjected when she filed claims about harassment on the job based on her gender and sexual orientation. The ACLU wrote to the city on her behalf, resulting in a City Attorney move to narrow the scope of questions asked "in areas involving personal relationships" and to train lawyers in the workers' compensation division on how to elicit relevant information without invading the privacy rights of claims applicants.[38]

- In 1995, a committee on teacher credentials recommended to the California Teacher Credentialing Commission that two San Francisco high school science teachers have their teaching credentials revoked as a result of a 1992 incident when a classroom speaker from Community United Against Violence, a gay anti-violence group, made sexually explicit comments to a class of eleventh graders during a discussion with the class. Parent complaints to the school administration about the incident were rebuffed on the ground that the teachers themselves had done nothing wrong. But the parents then filed charges with the credentialing commission. A spokesperson for the San Francisco Unified School District cited the good records of the teachers and urged that the commission "let them continue their careers."[39]

- In 1994, two Los Angeles police officers filed suit alleging physical and verbal harassment on the basis of sexual orientation. They alleged that the LAPD had done nothing to implement guidelines for treatment of gays and lesbians on the job that were adopted as part of the settlement of a previous lawsuit. One of the officers had experienced verbal and physical harassment, other officers refusing to speak or work with him, and a supervisor continually greeting him in an effeminate tone with a lisp. The other officer had been advised to conceal her homosexuality because the department was "not yet ready to accept gays" and she would not make it through the academy or probation if her sexual orientation were known. Although she followed this advice, she was subjected to frequent anti-gay harassment that escalated when she participated in an investigation of anti-gay harassment of a fellow officer, and she was later denied a promotion because of her sexual orientation. At a press conference announcing the suit,

[36] LESBIAN & GAY L. NOTES (Summer 1997), *available at* http://bit.ly/ZUFT3.
[37] SHANNON MINTER & CHRISTOPHER DALEY, TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES (Nat'l Center for Lesbian Rts. & Transgender L.Center 2003).
[38] LESBIAN & GAY L. NOTES (Feb. 1996), *available at* http://bit.ly/hVma6.
[39] LESBIAN & GAY L. NOTES (Oct. 1995), *available at* http://bit.ly/1D2Hvo.

another officer alleged that in the past year five gay or lesbian police officers had been forced off the job, out of the department, or to sick leave status, due to anti-gay harassment.[40]

- The first openly gay officer in the Los Angeles Police Department, who had graduated from the Academy at the top of his class, experienced severe harassment and hostility on the basis of sexual orientation, including other officers refusing to back him up in life-threatening situations. After the department refused to investigate, he believed his life was in danger, and he left the department. He filed a sexual orientation employment discrimination lawsuit against the city of Los Angeles. In 1993, he settled the case, leading to his reinstatement to the force, but he then filed a second lawsuit, charging the city and numerous police staff with violating the settlement agreement, as well as his federal and state constitutional and state statutory rights. He also challenged the LAPD's decision to suspend him for "unauthorized recruiting" of lesbians and gay men to join the force, and for allegedly wearing his uniform without permission in a photo in a gay weekly, and at gay pride and AIDS-awareness events. The Court ordered the LAPD to rescind his suspension and pay him for the time lost. This second lawsuit prompted the city to make widespread improvements in its sexual orientation employment policies. Settlement discussions to make further improvements to city and LAPD employment policies continued for years.[41]

- A lesbian who worked in the Los Angeles Police Department experienced ongoing harassment base on her sexual orientation after she was "outed" by her roommate to her classmates at the police academy. For example, it took nearly twice as long for backup to arrive as it should have when she responded to a burglary call. Several of her colleagues made comments about physically harming a gay speaker to her class at the academy, including comments such as placing bombs in bodily orifices and shutting "that fag up." As a result of the harassment she faced, she said that she wouldn't recommend law enforcement as a career. She suffered from ulcers, shingles, and high blood pressure and felt as though she had no other career options.[42]

- A videotape showing Simi Valley police officers ridiculing gays and other groups emerged as a lawsuit alleging discriminatory attitudes and practices was filed against the department. Although the tape's producers claimed it was intended as a joke for a departing officer, other officers say it revealed widespread intolerance. One scene in the video, which takes place in the police chief's office, suggests a male officer wants to return to work so that he can continue an affair with a male police investigator. In it, one officer says "A lot of people don't want

[40] LESBIAN & GAY L. NOTES (Sept. 1994), *available at* http://bit.ly/adQhm.
[41] Lambda Legal, All Cases: *Grobeson v. City of Los Angeles*, http://bit.ly/1mcZ82 (last visited Sept. 5, 2009); HUMAN RIGHTS CAMPAIGN, *supra* note 33.
[42] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 33-38 (Routledge 1996).

to work with a coke freak." Another responds, "Or a [homosexual]." Reportedly, an anti-gay slur was used repeatedly.[43]

- A gay man in a city police department in Southern California reported that instructors in the police academy made comments to his class about gay people, including "Did you did hear that they're actually letting fags on this department now? Isn't that disgusting? That's really sick." During a conversation about hate crimes, the Sergeant raised the example of someone being physically assaulted for being gay and that such an incident would be considered a hate crime. Several of the officers responded with comments such as "That's a matter of opinion" and "Oh, yeah. Cruelty to animals." He brought the comments to the attention of the Sergeant, who responded that he hadn't heard the comments.[44]

- A gay man who was placed with a more experienced teacher when he first began teaching in a public high school in Santa Clara was notified by the supervisor after only one day of teaching that things weren't working. The more experienced teacher stated that he was "uncomfortable with your alternative lifestyle, which he said he picked up from your mannerisms, and he doesn't want you influencing his students."[45]

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A review of Administrative Decisions conducted by the Department of Fair Employment and Housing ("DFEH") shows that they were generally resolved by issuance of a right to sue at the complainant's request when electing court action, or were closed by administrative decision (finding no basis for further action). Sample summaries may be found in Section III.B *infra* regarding administrative investigations for which factual background is available.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[43] HOSTILE CLIMATE (2000 ed.), *supra* note 21, at 113-14.
[44] Buhrke, *supra* note 41, at 58-62.
[45] WARREN J. BLUMENFELD, ONE TEACHER IN 10 58-64 (Kevin Jennings, ed., Alyson 1994).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

The FEHA prohibits public and private discrimination in employment on the bases of race, religion, color, sex, gender identity, sexual orientation, physical or mental disability, medical condition, including genetic characteristics, marital status, age, national origin or ancestry.[46] Discrimination in public works contracts on any of these bases is also prohibited. California law allows employees to dress consistently with their gender identity.[47]

Unless based on a bona fide occupational qualification, it is an unlawful employment practice in California to engage in any of the discriminatory practices outlined above. The law covers businesses regularly employing five or more persons.[48]

2. Enforcement & Remedies

The requirements of FEHA are contained in great specificity in California.[49] Regulations on the administration of FEHA and the DFEH are located in Chapter 3 of Title 8 of the California Code of Regulations.[50]

The Fair Employment and Housing Commission may assess administrative fines against an employer. Together with any actual damages assessed, the amount of this fine may not exceed $150,000 per employee.[51] Administrative fines are available only when the commission finds express or implied guilt, oppression, fraud, or malice. The amount of the fine will take into consideration willful, intentional, or purposeful conduct, refusal to prevent or eliminate discrimination, harassment, conduct without just cause or excuse, and multiple FEHA violations.[52] Public entities are not subject to administrative fines.[53]

The Fair Employment and Housing Commission may also assess civil penalties up to $25,000 against an employer to be awarded to a person denied freedom from violence or intimidation under Section 51.7 of the Unruh Civil Rights Act.[54]

Complaints must be brought through the Fair Employment and Housing Commission. The commission will investigate any complaints and take the actions it deems appropriate. Once the commission closes the case, it provides a Notice of Case

[46] CAL. GOV. CODE §§ 12900 *et seq.* (2003).
[47] CAL GOV. CODE §§ 12926, 12949; *see also* AB 14, Civil Rights Act of 2007.
[48] CAL. GOV. CODE § 12926.
[49] CAL. GOV. CODE 12900 *et. seq*.
[50] CAL. CODE REG. (online ed. 2009), http://bit.ly/S5DzJ (last visited Sept. 5, 2009).
[51] CAL. GOV. CODE § 12970 (1999).
[52] CAL. GOV. CODE § 1297.
[53] CAL. GOV. CODE § 12970.
[54] CAL. GOV. CODE § 12970.

Closure, which also creates a right to sue for the aggrieved party.[55] After filing a complaint, the complainant may elect court action, and request that the commission immediately close the case. This will terminate the investigation unless the FEHC continues it on its own initiative.

B. Attempts to Enact State Legislation

In 1984, Governor George Deukmejian vetoed Assembly Bill 1, the first bill in California that would have banned job discrimination on the basis of sexual orientation.[56]

In 1991, Governor Pete Wilson vetoed Assembly Bill 101, which would have prohibited discrimination based on sexual orientation as part of the FEHA.[57] In 1992, Governor Wilson signed a different bill that added sexual orientation to the Labor Code rather than to the FEHA.[58] The next day he vetoed the Civil Rights Restoration Act of 1992 (substantially the same as the 1991 bill).[59] By amending FEHA, the vetoed bill would have given a state agency jurisdiction to impose criminal penalties for violations, whereas the bill signed the day before provided more limited enforcement remedies. Assembly Speaker Willie Brown said the veto "shows a callous disregard for the basic rights of many Californians who have felt the sting and humiliation of discrimination."[60]

In 1998, Governor Wilson again characterized as "unnecessary" a bill that would have moved sexual orientation protection from the California Labor Code to FEHA. The governor returned the bill, unsigned, to the legislature. State Senator Dick Mountjoy denounced the bill for giving "special rights" to gays and lesbians and threatened to promote a public referendum to overturn the law if the governor failed to veto the legislation.[61]

In 1999, Assembly Speaker Antonio Villaraigosa submitted Assembly Bill 1001, adding sexual orientation to the anti-discrimination provisions of the State Fair Employment and Housing Act, which became law.[62] During the legislature's consideration of the bill, Assembly member Pat Bates argued that the bill granted "special rights" to gay men and lesbians and state Sen. Richard Mountjoy claimed that being gay "is a sickness…an uncontrolled passion similar to that which would cause someone to rape."[63]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

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[55] CAL. GOV. CODE §§ 12965, 12962.
[56] *California Gay Rights Timeline*, PINK NEWS, http://www.pinknews.co.uk/aroundtheworld/tag/vetoes.
[57] Nancy Gibbs, *Civil Rights: Test Case for Gay Cause*, TIME, Oct. 14, 1991, *available at* http://bit.ly/1cwTcH.
[58] *California Gay Rights Timeline*, *supra* note 55.
[59] Associated Press, *California Governor Vetoes Civil Rights Bill*, N.Y. TIMES, Sept. 28, 1992, *available at* http://bit.ly/NZtGM.
[60] *Id*.
[61] HOSTILE CLIMATE (1998 ed.), *supra* note 21.
[62] *California Gay Rights Timeline*, *supra* note 55.
[63] HOSTILE CLIMATE (2000 ed.), *supra* note 21.

1. Executive Orders

Executive Order B-54-79, effective April 4, 1979, prohibited discrimination in state employment on the basis of sexual orientation.

2. State Government Personnel Regulations

By statute through the FEHA and Unruh Civil Rights Act, Executive Order, and Attorney General Opinion, all branches of state and local governments are prohibited from discriminating on the same bases as private employers within the state.

3. Attorney General Opinions

California Attorney General's Opinion number 83-707 (December 27, 1983) prohibited public agencies from discriminating in their employment practices on the basis of sexual orientation.

D. Local Legislation

The following California municipalities prohibit employment discrimination based on sexual orientation or gender identity: City of Berkeley, Cathedral City, City of Costa Mesa, City of Davis, City of Laguna Beach, City of Long Beach, City of Los Angeles, City of Oakland, City of Sacramento, City of San Diego, City of San Francisco, City of San Jose, City of Santa Cruz, City of Santa Monica, City of West Hollywood, Los Angeles County, San Mateo County, and Santa Cruz County.

E. Occupational Licensing Requirements

A review of professional licensing requirements in California revealed no policies that could serve as pretext for discrimination against LGBT individuals. The requirements for individual licenses are available in Title 16 of the California Code of Regulations.[64]

[64] CAL. CODE REG., *supra* note 49.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Bressler v. City of Los Angeles, 2009 WL 200242 (Jan. 29, 2009).

In *Bressler v. City of Los Angeles*, the California 2nd District Court of Appeal affirmed (in an unpublished decision) a jury finding that the plaintiff, a captain in the LA Fire Department, suffered unlawful retaliatory conduct by those in authority in the Department, prematurely ending his career, because he reported a sexually inappropriate comment made by a superior to a subordinate and because he reported racial, sexual and sexual orientation harassment aimed at a lesbian firefighter in the Department. The jury verdict affirmed by the court of appeal awarded Bressler damages of $1,730,848 under the state's Fair Employment and Housing Code.

Bressler served as a Fire Captain with the LAFD for 26 years. Prior to his employment with the LAFD, he had been a firefighter and a fire captain with another city for 10 years. From 1983 through July 2004, Bressler was assigned to LAFD Fire Station 96 in Chatsworth. With the exception of his first performance evaluation, and his last performance evaluation, Bressler always received a "satisfactory" or "satisfactory plus" rating from his supervisors at the LAFD. Bressler's claims against the city were based on Bressler's allegations that the city and several of its employees retaliated against Bressler after he (1) reported a sexually inappropriate comment made by Captain II Wesley Elder; and (2) made verbal and written reports about discrimination and harassment directed at Firefighter Brenda Lee, an African-American lesbian.[65]

Hope v. California Youth Auth., 36 Cal. Rptr. 3d 154 (Cal. Ct. App. 2005).

In *Hope v. California Youth Authority*, the plaintiff, Bruce Hope, a gay man, worked as a cook for the California Youth Authority, and sued for sexual orientation harassment in violation of FEHA. The appellate court upheld the jury verdict in Hope's favor, stating that the harassment that Hope suffered was sufficiently severe and pervasive. The employer argued that the jury verdict was not supported by evidence. The court disagreed, finding that Hope was subjected to sufficiently severe sexual orientation harassment, his superiors either knew or should have known of the harassment, and the youth correctional facility that employed Hope did not take corrective action. The court found hostile environment evidence, including evidence that Hope's supervisor and others called Hope derogatory names on a daily basis, that a non-supervisory worker instructed wards not to assist the employee, forcing Hope to complete work alone (while others had assistance), that another employee endangered Hope by telling the wards that Hope was not protected by the system, and that Hope's promotion

[65] *Bressler v. City of Los Angeles*, 2009 WL 200242 (Jan. 29, 2009) (unpublished).

was revoked in violation of the employer's policy. In support of economic damages, the court found that the employer's mitigation argument failed because the employer offered no evidence of the amount that the employee might have earned through reasonable effort. The court also concluded that a non-economic damages award of $ 1 million did not shock the conscience.

Martinez v. Personnel Board of the City of Loma Linda, 2003 WL 429505 (Cal. Ct. App. Feb. 24, 2003).

The California Court of Appeal, 4th District, affirmed a ruling by a San Bernardino County Superior Court that the City of Loma Linda violated the due process rights of a municipal worker whose employment was terminated in a proceeding where he was not afforded the opportunity to review all the evidence against him. Jaime Martinez was widely regarded by other employees as being gay, and claimed he was being subjected to harassment. When the city clerk's teenage sons volunteered for summer work in the city department where Martinez was employed, other employees warned them that Martinez was gay and might try to put the moves on them. The boys later reported that Martinez had done so, and he was discharged. When he grieved his discharge, the personnel department conducted an investigation, but refused to share with Martinez all of the statements that it had collected, and upheld the discharge, which he appealed to the courts. The trial court determined that Martinez was entitled to see the evidence against him, and was affirmed on this count by the court of appeal.[66]

Hoey-Custock v. City of Oakland, 2002 Cal. App. pub. LEXIS 7692 (2002).

In *Hoey-Custock*, a police cadet employed by the City of Oakland, California, became the victim of harassment because of his perceived sexual orientation. Hoey-Custock opted to resign and filed a complaint against the City alleging discrimination under the Fair Employment and Housing Act ("FEHA") based upon his sexual orientation. A jury returned a verdict in favor of Hoey-Custock on his discrimination and harassment claims in the amount of $500,000, and the city appealed. On appeal, the court issued an unpublished decision affirming the judgment in favor of Hoey-Custock.

At the police academy, a training instructor stepped on Hoey-Custock during an exercise, remarking: "[Y]ou can't be that weak." The instructor then asked Hoey-Custock "whether he lived in San Francisco" in a manner which Hoey-Custock understood to be asking him if he was gay. A second instructor made "disparaging and demeaning remarks ridiculing gay men." During a class, the second instructor asked if trainees knew what a "queen" was, explaining that "a queen is a man who puts on a lady's dress and sells his body." The instructor then stated: "Wait until you have to search one of these ladies, as opposed to searching a woman prostitute." A fellow recruit complained that Hoey-Custock was being harassed during training, and superiors questioned Hoey-Custock about the harassment. Hoey-Custock confirmed the allegations against recruits, but was afraid to accuse his instructors. As a result of Hoey-Custock's

[66] *Martinez v. Pers. Bd. of Loma Linda*, 2003 WL 429505 (Cal. App. Feb. 24, 2003).

complaints, officers placed the accused recruits on leave and Hoey-Custock was escorted from the building. Later, Hoey-Custock overhead someone asking, "Who is the fucking faggot who had the trainees removed?" and saw officers mocking homosexuals in the locker room. Thereafter, Hoey-Custock was ostracized from participation in paired training exercises by fellow recruits, and he failed two final defense tests. As a result of failing his final tests, Hoey-Custock was given a highly subjective remedial examination; he was the only recruit given the remedial exam to be terminated from the academy.[67]

Debro v. San Leandro Unif. Sch. Dist., 2001 U.S. Dist. LEXIS 17388 (N.D. Cal. Oct. 11, 2001).

Karl Debro, a heterosexual public high school English teacher, expressed support for LGBT students in the classroom and helped establish the Gay-Straight Alliance at the school to provide support and protect students from harassment. In reaction, parents of two students formed a group in order "to attempt to stop the discussion of social issues in the classroom and particularly to combat what they saw as the 'promotion' of homosexuality." At a school board meeting, the parents spoke out against Debro and other teachers who discussed social issues in the classroom. Shortly thereafter, Debro discussed the events of the school board meeting with his class. Formal complaints were filed against Debro by students' parents and Debro was ultimately issued letters of "disciplinary warning" by the school. In May, a hearing was held before the school board. All seven board members voted to keep the censure in Debro's files. In addition, a new policy was devised that states that undefined "controversial issues" need to be cleared with the principal before they are broached in class.

Debro brought suit against the San Leandro Unified School District alleging that the warnings were imposed as retaliation for his exercise of First Amendment rights. In deciding whether Debro's actions were protected by the First Amendment, the Court stated that "it is certainly possible to speak about racial diversity and tolerance for gays and lesbians as part of classroom instruction, perhaps particularly in an English class." Nevertheless, the court held that Debro's discussion of the school board meeting was unprotected, even though the meeting was a matter of public interest, because he departed from classroom instruction.

After the trial court ruled against Debro, the ACLU of Northern California helped his appeal with a friend-of-the-court brief, arguing that Debro's speech was constitutionally protected. Before the federal appeals court heard the case, the case settled favorably for Debro,[68] for approximately $1.1 million.[69]

Murray v. Oceanside Unif. Sch. Dist., 79 Cal. App. 4th 1338, 95 Cal. Rptr. 2d 28 (Cal. App. 4th Dist., Div. 1 2000).

[67] *Hoey-Custock v. City of Oakland*, 2002 Cal. App. pub. LEXIS 7692 (Cal. Ct. App. 2002).
[68] *Debro v. San Leandro Unif. Sch. Dist.*, 2001 U.S. Dist. LEXIS 17388 (N.D. Cal. Oct. 11, 2001).
[69] *Teacher Who Broached Controversial Subjects Gets $1.1 Million Court Settlement*, CURRICULUM REVIEW (Nov. 1, 2002).

Dawn Murray, an award-winning high school teacher, brought a claim against the Oceanside Unified School District for harassment and discrimination based on her sexual orientation. Murray experienced severe and continuing discrimination while employed as a teacher at Oceanside High School because of her sexual orientation. For years she endured various insults, criticism, suggestive remarks concerning sexual activity, and rumor mongering by fellow employees and a consequent failure to investigate or take corrective action by administrative officials. The school failed to promote her to Student Activities Director, though she was the top candidate, because it disapproved of her lifestyle. Murray was told that if she pursued her complaints, she would suffer adverse job consequences. On several occasions, obscene and harassing graffiti was painted outside of her classroom and no investigation was conducted by Oceanside administrators. She was verbally harassed during an after-school meeting when the principal mentioned Murray's sexual orientation to the audience. On three occasions, she had her class cancelled based on complaints from a parent and a fellow teacher with improper motives based on her sexual orientation.

On appeal, the Court of Appeal rejected the district's attempt to dismiss the discrimination claim, thereby reinstating Murray's claim with a unanimous appellate ruling. The school district then settled with Murray. Under the settlement agreement, Murray resigned her position and the School District agreed to pay her $140,000 and to provide annual sensitivity training to its employees of issues of sexual orientation discrimination.[70]

Songer v. Dake, 1999 WL 603796 (Cal. Ct. App. July 29, 1999).

Jane Songer's contract as an elementary school teacher in St. Helena Unified School District in California was not renewed in 1993. She asked for a closed hearing before the Board, convinced that she was discharged because of "her relationship with a lesbian teacher at the school," but after the hearing the Board found she was discharged for proper work-related reasons. According to Songer, shortly after the Board decision, one of her friends encountered a Board member in the street, who asked why the Board had discharged Songer. This Board member allegedly said, "If you knew what I knew, you'd know that we made the right decision." Songer subsequently sued in federal court for wrongful discharge, appending a state defamation claim. Her federal charges were dismissed, and she brought a defamation action in state court, which the trial judge dismissed on motion, finding that the alleged statement by the Board member was a statement of opinion protected by the 1st Amendment. The California First District Court of Appeal reversed the lower court in an unpublished decision, finding that it was not dispositive that the defendant's alleged statement was in the form of an opinion. Noting the U.S. Supreme Court's recent weakening of the traditional opinion/fact distinction in defamation cases, the court found that the statement, if made, could be found to imply a factual assertion about Songer's fitness and qualifications as a teacher, which if untrue might be *per se* defamatory.[71]

[70] *Murray v. Oceanside Unif. Sch. Dist.*, 79 Cal. App. 4th 1338, 95 Cal. Rptr. 2d 28 (Cal. Ct. App. 2000).
[71] *Songer v. Dake*, 1999 WL 603796 (Cal. Ct. App. July 29, 1999).

Holmes v. Cal. Nat. Guard, 124 F.3d 1126 (9th Cir. 1997), *reh'g, en banc, denied*, 155 F.3d 1049 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999).

In Holmes, a commander in the California National Guard with a record of "outstanding performance" received "pressure" from his commanding officer "to communicate to members of [his] unit that [he] was not homosexual." As a result, Holmes sent a letter to his commanding officer in which he stated: "I am compelled to inform you that I am gay." Based on such letter, Holmes' commanding officer instituted proceedings to withdraw Holmes' federal recognition as an officer with the United States Army National Guard. A national withdrawal board finalized the withdrawal, and Holmes received a termination notification from the U.S. Army National Guard of California based upon the withdrawal of his federal recognition. Upon his withdrawal, Holmes remained an officer of the State Reserve.

Holmes filed suit in a California district court against the California National Guard and the United States Army National Guard alleging he was discharged for violating the "Don't Ask, Don't Tell" policy (the "Policy"); a violation of his federal and state constitutional rights to equal protection and free speech. The District Court granted summary judgment in favor of Holmes' federal equal protection and free speech claims but dismissed all other claims.

On appeal, the Ninth Circuit reversed the lower court's judgment in favor of Holmes. Upon considering Holmes' equal protection challenge to the constitutionality of the Policy, the Circuit Court subjected the Policy to rational basis review. The court held that the government's proffered explanation for excluding gay men – that they expose troops to combat liabilities and present risks to "unit cohesion" – was a legitimate interest.[72]

Yancey v. State Pers. Bd., 167 Cal.App.3d 478, 213 Cal.Rptr. 634 (Cal. Ct. App. 1985).

Plaintiff, a correctional officer at the California Medical Facility, was fired after he was found wearing women's clothing while off-duty. Relying upon testimony from Plaintiff and medical doctors that Plaintiff was not homosexual, and that his behavior was "medical" in nature, "stress related," and "transitory in nature," the court held that no "substantial relationship" existed between Plaintiff's behavior and his ability to perform his job functions: "On the basis of the record before us, we conclude that no substantial evidence exists that appellant is unfit for his employment, and that if any discipline is warranted, the penalty imposed was grossly excessive."

After Plaintiff was discovered near his home by police officers wearing women's clothing (he was not charged with any criminal conduct), he was dismissed from his job as a correctional officer pursuant to Government Code section 19572 subdivision

[72] *Holmes v. Cal. Nat. Guard*, 124 F.3d 1126 (9th Cir. 1997), *reh'g, en banc, denied*, 155 F.3d 1049 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999).

(t),which permits discipline of an employee for "failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment." The matter was heard before a Board hearing officer, who made the following pertinent findings: "[Appellant] was considered a good Officer and had no blemishes on his prior seven-year employment record. However, it must be found that the dismissal action was warranted. [par.] [Appellant] has attributed his wearing of female clothing to job-related stress which he now feels he can handle. But it must be recognized that this incident is widely known at the institution and would as a practical matter cause [Appellant] to have great difficulty in working with other Correctional Officers and inmates. This in itself would create a difficult if not impossible situation and in addition would place [Appellant] in an atmosphere far more stressful than the normal job circumstances which existed at the time of the ... episode. [par.] The Department [of Corrections] just cannot be required to run the risk of employing [Appellant] in a stressful security position when his reaction to stress is so unusual." The Board adopted the hearing officer's findings and decision.

Yancey filed a petition under Code of Civil Procedure section 1094.5, seeking a writ of mandate restoring his job. The trial court applied the substantial evidence test in reviewing the Board's decision; it found the evidence supported the Board's decision and denied relief. The court of appeal reversed, finding that no substantial evidence exists that appellant is unfit for his employment. The court observed: "When measuring appellant's conduct under the statute in light of existing precedent, one is struck by certain obvious distinguishing characteristics between the instant case and others where discipline was imposed. Appellant did not commit a criminal act, he was not wilfully [sic] disobedient, he did not violate any rule or regulation of the department, he was not dishonest, everyone agreed he was cooperative and completely candid in his disclosures, he was not insubordinate, and his prior work record was exemplary. None of this is disputed. Furthermore, although the record is not altogether clear on this point, the sole reason for appellant's behavior appears to be medical, and may have been caused in some degree by the job itself. It also appears to be transitory in nature."[73]

Gay Law Students Assoc. v. Pacific Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979).

Plaintiffs, a student group and individuals, challenged a public utility company's policy of discriminating against homosexuals *per se* in employment decisions, alleging violation of the Equal Protection clause. The Fair Employment Commission refused to hear Plaintiffs' claims, stating that homosexuals were not a protected class. The lower court upheld the Commission's refusal. The California Supreme Court reversed the lower court, holding that the public utility's actions constituted state action, and that all groups of individuals were protected from "arbitrary employment discrimination" under the Equal Protection clause. The court held that discrimination against homosexuals without an individualized determination that the applicant/employee's homosexuality "renders [him] unfit" for the employment function is a violation of the Equal Protection clause.[74]

[73] *Yancey v. State Pers. Bd.*, 167 Cal.App.3d 478, 213 Cal.Rptr. 634 (Cal. Ct. App. 1985).
[74] *Gay Law Students Assoc. v. Pacific Tel. &Tel. Co.*, 595 P.2d 592 (Cal. 1979).

McLaughlin v. Bd. of Med. Exam'rs, 35 Cal. App. 3d 1010 (Cal. Ct. App. 1973).

Plaintiff, a medical doctor, had his medical license revoked for "moral turpitude" after he was charged with the solicitation of a homosexual act from another adult (an out-of-uniform police officer) in a public restroom. Plaintiff denied the charges. The court upheld the revocation, reasoning that Plaintiff's homosexual proclivities could cause him to be a danger to his patients if he was unable to control his sexual urges.[75]

Bd. of Educ. v. Calderon, 35 Cal. App. 3d 490 (Cal. Ct. App. 1973).

Plaintiff, a public school teacher, was discharged by the school board of a public school after he was arrested on a college campus for the crime of engaging in oral copulation, despite the fact that he was acquitted from the criminal charges. Plaintiff did not directly challenge factual findings that he committed oral copulation. The lower court and the appellate court upheld the school board's decision on the basis that Plaintiff's conduct was "immoral."[76]

Morrison v. State Bd. of Educ., 461 P.2d 375 (Cal. 1969).

The California State Board of Education revoked the teaching license of Plaintiff, a teacher at a state public school, on the basis of homosexuality *per se*. Plaintiff was alleged to have engaged in private, adult, consensual "non-criminal" homosexual conduct (i.e. did not involve sodomy, oral copulation, or other similar acts) with another teacher; Plaintiff admitted to the behavior, but denied being a practicing homosexual. The State Board of Education found that this conduct constituted "immoral conduct," "unprofessional conduct," and involved "moral turpitude," and therefore determined that it had cause to revoke his license pursuant to applicable regulations. The lower court agreed. The California Supreme Court reversed the lower court's decision, holding that dismissal for "immoral conduct," "unprofessional conduct," or "moral turpitude" must be related to fitness for the occupation in question, and that no such nexus had been shown in this case.

Morrison, a secondary school teacher, held two teaching diplomas issued by the California State Board of Education. An accusation was filed with the State Board of Education charging that the diplomas should be revoked for cause because Morrison had engaged in private sexual activity with another man. A hearing examiner made recommendations, later adopted by the Board, to revoke the diplomas finding that the sexual relationship constituted "immoral and unprofessional conduct and acts involving moral turpitude" -- grounds for revocation under section 13202 of the Education Code. As a result of the action, Morrison was unable to teach at any public school in the state. The trial court, exercising independent judgment on the weight of the evidence, reached the same conclusion as the hearing examiner.

[75] *McLaughlin v. Bd. of Med. Exam'rs*, 35 Cal. App. 3d 1010 (Cal. Ct. App. 1973).
[76] *Bd. of Educ. v. Calderon*, 35 Cal. App. 3d 490 (Cal. Ct. App. 1973).

A California Court of Appeal affirmed the trial court's determination of immoral and unprofessional conduct and acts involving moral turpitude that justified revocation of the teaching diplomas. Despite the trial court's finding of no direct evidence that the acts complained of or Morrison's sexual orientation in any manner affected his ability and willingness to perform as a teacher or had any effect at any time on any pupils taught by him, the court was persuaded that the acts themselves, and that they became known publicly, established the requisite "immorality" and "moral turpitude."

The Supreme Court of California disagreed with the Court of Appeal, stating that the extramarital sexual relationship against a background of years of satisfactory teaching would not justify revocation of the diplomas without any showing of an adverse effect on fitness to teach. Though the homosexual nature of the sexual activity itself was not enough to justify revocation according to the Supreme Court of California, the ultimate inquiry of whether a teacher's homosexuality had an adverse effect on fitness to teach was left with the Board, subject to review by the Superior Court. The case was remanded to the Superior Court for application of the proper standard to the evidence.[77]

Sarac v. State Bd. of Educ., 249 Cal. App. 2d 58 (Cal. Ct. App. 1967).

The California State Board of Education revoked the teaching license of Plaintiff, a public school teacher, after he was criminally charged for engaging in public homosexual acts at a public beach, for the reason that such conduct was "immoral" and "unprofessional" pursuant to the applicable regulation. Plaintiff was alleged to have "rubbed, touched and fondled the private sexual parts" of another man. Both the lower court and the appellate court upheld the license revocation. Rather than focusing on the public nature of the act, the appellate court reasoned that homosexual behavior "has long been contrary and abhorrent to the social mores and moral standards" of California and is "clearly, therefore, immoral conduct" under the regulation.[78]

2. Private Employers

Collins v. Shell Oil Co., 1991 Cal. App. LEXIS 783 (Cal. Super. Ct. App. Dep't. 1991).

In *Collins v. Shell Oil Co.*, the court found that preparing a memo on "house rules" for safe sex at a gay party was protected political activity in light of increasing awareness in the gay community of the need for safe sexual practices.

Soroka v. Dayton Hudson Corp., 18 Cal. App. 4th 1200 (Cal. Ct. App. 1991)

In *Soroka v. Dayton Hudson Corp.*, 18 Cal. App. 4th 1200 (Cal. Ct. App. 1991), the court held that FEHA and the Labor Code were violated by pre-employment psychological screening tests that contained questions concerning sexual orientation.

B. Administrative Complaints

[77] *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969).
[78] *Sarac v. State Bd. of Educ.*, 249 Cal. App. 2d 58 (Cal. Ct. App. 1967).

Many of the DFEH complaints contain no information related to the underlying action, and merely provide notice of the right to sue. This section summarizes the administrative investigations for which factual information was available.

E200506M0403-00-b. Closed September 21, 2005. An employee of a veterans' home alleged discrimination on the basis of sexual orientation as the reason for termination in violation of FEHA. The veterans' home said the termination was due to the employee performing a non-standard procedure. The employee contended that he was suspended because of his sexual orientation, and that heterosexual employees with the same conduct were not suspended. The case was closed by administrative decision. The DFEH recommended no further action be taken and provided a right to sue.

E200506M1386-00. Closed November 8, 2006. A custodian at the University of California-Berkeley alleged sexual harassment on the basis of perceived sexual orientation. Allegedly, the supervisor sent messages of a sexual nature, the conduct was verbally reported to the Human Resources Department, and no response was given. The supervisor contended that he never engaged in this conduct, and the allegations arose in retaliation to his write-up of the employee for insubordination. The DFEH closed the case because it was unable to conclude that the investigative findings established a statutory violation, and found that the employer took prompt action (the investigation was coordinated by Labor Relations Advocate at UC Berkeley). The case closure provided the right to sue.

E200506-K-0047-00. Closed September 27, 2006. An employee alleged he was denied a position at the University of California-Irvine/Mental Health because of his homosexuality. The employer contended it was because a background check showed the employee had violated relevant aspects of the professional code of conduct as a licensed psychiatric technician. The DFEH closed the case by administrative decision and issued a right to sue.

E200607E0174-00-rc. *Chang v. Regents of the University of California*. Closed July 28, 2006. A police officer was denied promotion, and an external candidate was selected in one of the few instances in the department's history. The officer alleged racial and sexual orientation discrimination. The DFEH case was closed because an immediate right to sue was requested.

E200506A0797-00-pr. Closed January 12, 2007. A Surgical Clinical Nurse at University of San Francisco School of Medicine as was laid off, allegedly due to not being a good fit for the job. The nurse believed that the decision was motivated by discrimination on the bases of sexual orientation (gay), medical condition (HIV positive), and religion (non-Evangelical Christian). Upon investigation, the DFEH determined the evidence did not show a violation of the statute. The case was closed by administrative decision and the DFEH issued a right to sue.

E200506E1408-00-b. Closed April 6, 2006. The DFEH case against the California Department of Health Services was closed by administrative decision and a right to sue was issued. A Program Technician alleged retaliation and a hostile work environment based on sexual orientation (lesbian), marital status (domestic partner), and religion (Baptist), after putting up a Lavender Committee (Union) poster, which she was asked to remove because it was controversial. Allegedly, her supervisor made remarks like "God don't like the ugly," and "the Lesbian is here, let's go." No direct retaliation could be identified.

E200708C014900b. Closed August 28, 2007. An employee alleged wrongful termination by University of California, Food Stamp Nutrition Education Program, on the bases of sex (male), and sexual orientation (gay). He alleged that he was terminated after complaining about anti-gay material on a computer. The case was close by administrative decision and a right to sue was issued.

E2000405C118800rse. The Complaint was executed June 5, 2005. A women's volleyball coach was terminated, allegedly due to her sex (female), marital status (single), and sexual orientation (homosexual). California State University, Fresno, through the Athletic Director, said she was terminated because her position was not renewed. The volleyball coach believed the termination was in retaliation for complaining about disparate gender treatment and the failure to provide equal resources and opportunities to female athletics. She alleged that her position was filled by a less qualified, married male. The file did not contain information about the outcome of this matter.

E200607E0372-00. Closed October 15, 2007. A conservationist initiated an investigation of the California Conservation Corps. The conservationist alleged that her sexual orientation was revealed after she had a friend spend the night with her at a camp. She claimed she received numerous reprimands damaging to her career on this account and her ability to supervise was questioned. In addition, she alleged that the next week an investigation was conducted by senior supervisors, who spoke with other conservationists about how they felt about the lesbian conservationist having her "girlfriend" spend the night. A policy was then issued that no overnight guests were to be allowed. Previously, overnight guests had been allowed for heterosexual couples. The employer contended that the change in policy was due to a sponsor's request. A review of the employee's case file showed verbal reprimands and write-ups before this event. The case was closed because the DFEH could not conclude there was a violation of the statute. A right to sue was issued.

E200708e0853-00-sc. Closed December 18, 2007. A police sergeant was transferred to South Lake Tahoe where she allegedly experienced a hostile environment due to her gender (female) and sexual orientation (homosexual). Allegedly, she was disciplined for conduct that male officers were not, and was forced to transfer to a clerical position in another office. The DFEH case was closed because an immediate right to sue was requested.

E200607A0383-00-b. Closed October 27, 2006. The case against the University of California/CAPS was closed by administrative decision and a right to sue was issued. The employee alleged discrimination on the basis of sexual orientation (lesbian), and race (African-American), claiming denial of a promotion and issuance of a notice of intent to dismiss. The employer contended the dismissal arose because the employee falsified her resume (criminal record, including fraud), and there were discrepancies related to dispersals of petty cash for client surveys.

E2000607H0121-00-se. Closed August 10, 2007. A California Highway Patrol Motor Carrier Inspector claimed differential treatment, retaliation and constructive transfer. Based on a citizen's complaint that the inspector was abusing the position, an internal investigation was initiated. Upon disclosure of the employee's sexual orientation, the employee's federally issued computer was taken, Department of Transportation overtime was halted, and the employee was interrogated. The case was closed because the complainant elected court action. A right to sue was issued.

California Dep't of Mental Health, Atascadero State Hospital. Closed December 26, 2007. The employee claimed discrimination when not hired for the position of Unit Supervisor. The employee claimed discrimination on the bases of race (Mexican), sexual orientation (heterosexual), and age (46). The candidate selected was Caucasian, under 40, and it was "common knowledge" that this individual would be selected before interviews were held. The case was closed because the evidence found in the DFEH investigation did not establish a violation of the statute. A right to sue was issued.

C. **Other Documented Examples of Discrimination**

Newport Beach Police Department

In 2009, a Superior Court jury in Newport Beach ruled in favor of a veteran police officer who claimed he was denied promotions several times because he was incorrectly perceived by the police department as being gay. Sergeant Neil Harvey claimed that despite his outstanding annual evaluations, he was stereotyped as being gay and denied promotion because he was single and physically fit. The jury awarded $8,000 in past lost earnings, $592,000 in future earnings, and $600,000 for noneconomic losses, for a total verdict of $1.2 million. The jury ruled for Harvey on claims of discrimination based on perceived sexual orientation, retaliation, and failure of the city to prevent discrimination, but rejected his hostile work environment claim. The City Council voted on March 24, 2009 to authorize counsel to file motions challenging the verdict.[79]

San Diego Mesa College

[79] LESBIAN & GAY L. NOTES (May 2009).

In 2007, Lorri Sulpizio and her domestic partner, Cathy Bass, were unlawfully fired by San Diego Mesa College (Mesa) after Sulpizio repeatedly advocated for equal treatment of female student-athletes and women coaches, and following publication in a local newspaper of an article identifying Sulpizio and Bass as domestic partners. Sulpizio was the Head Women's Basketball Coach at Mesa and Bass assisted the team and served as the team's Director of Basketball Operations for over eight years. On September 8, 2008, the Office of Civil Rights (OCR) of the U.S. Department of Education found "disparities with respect to the scheduling of games, the provision of locker rooms, practice and competitive facilities, and the provision of medical and training facilities." The OCR concluded that those disparities had "a disparate, negative impact on female athletes" and "collectively established a violation of Title IX." A jury trial on Sulpizio and Bass's discrimination, harassment, and retaliation claims is scheduled to begin in San Diego Superior Court in September 2009.[80]

City of Huntington Beach Police Department

In 2008, the City of Huntington Beach settled a discrimination suit brought by Adam Bereki, a gay police officer, for a sum that reportedly could eventually reach $2.15 million, including a $150,000 lump sum payment to end the lawsuit, and a lifetime monthly disability entitlement of $4,000. Bereki is 29. According to a news report on July 1 in the *Orange County Register*, Bereki joined the police force in 2001 and began to be subjected to "disparaging and harassing comments and conduct regarding his sexuality" a year later when rumors spread among the police officers that he was gay. Bereki claims he complained to supervisors three times about the treatment he was receiving, but no action was ever taken against the perpetrators. The city did eventually undertake an internal affairs investigation, but has never revealed the result, citing confidentiality laws.[81]

University of California- Davis Police Department

In 2008, the UC Regents settled a harassment claim brought by Calvin Chang for $240,000. Calvin Chang, a UC-Davis police officer, brought suit against the University for harassment based on his sexual orientation in 2005. When other officers discovered that Chang was gay, they subjected him to harassment including homophobic slurs and a death threat. His supervisor referred to him as a "fucking faggot" and retaliated against him after he lodged complaints in response to the treatment from other officers.[82]

Los Angeles Police Department

In 2008, a superior court judge rejected a motion to dismiss Shelby Feldmeier's lawsuit alleging that the Los Angeles Police Department had discharged her because she complained about mistreatment due to her sexual orientation. Feldmeier has alleged that

[80] Nat'l Center for Lesbian Rts., Employment Case Docket: *Sulpizio v. San Diego Mesa College*, http://bit.ly/LoLOt (last visited Sept. 5, 2009).
[81] LESBIAN & GAY L. NOTES (Summer 2008).
[82] *Former UC Davis Officer Sues Cops, University*, KCRA 3, http://bit.ly/vwA4u.

male officers made frequent offensive comments about homosexuality and asked about her sexual orientation while she was assigned to Wilshire Station as a probationary employee. She claims that her complaints to superiors were not taken seriously. The suit alleges wrongful termination and retaliation in violation of state law.[83]

Ravenswood City School District

In 2008, *The Palo Alto Daily News* (Feb. 7, 2008) reported that the Ravenswood City School District had settled a sexual orientation discrimination claim by paying the plaintiff, Emmit Hancock, a year's salary. Hancock, then a new teacher, said that on the first day of school in 2004 he overheard boys on the playground calling each other derogatory names used to describe gay men. He told them not use such language, and when they asked why he told them he had been gay for five years but was now married. The word spread, parents contacted the school with protests, and Hancock claims that the school administration pressured him to quit his job, which he did in February 2005, filing suit in October of that year.[84]

California Public School

In 2008, two lesbian public school bus drivers reported being subjected to a hostile work environment because of their sexual orientation.[85]

Correctional Facility

In 2008, a lesbian corrections officer reported that she was subjected to a hostile work environment because of her sexual orientation.[86]

Municipal Fire Department

In 2008, a deputy fire marshal passed the test for the position of Battalion Chief, but was not promoted. He subsequently learned that the fire chief told another employee that he believed the deputy was not promotable due to his being gay. After the deputy filed an internal complaint, the work environment became progressively more hostile.[87]

Fresno State University

In 2007, a Fresno County Superior Court jury awarded $5.85 million in damages to Lindy Vivas in her discrimination suit against Fresno State University, accepting her claim that the school refused to renew her contract as the volleyball coach because of her

[83] LESBIAN & GAY L. NOTES (Mar. 2008).
[84] LESBIAN & GAY L. NOTES (Mar. 2008).
[85] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).
[86] *Id.*
[87] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

advocacy of gender equity and her perceived sexual orientation. The gender equity claim was brought under Title IX of the federal Higher Education Act, and the sexual orientation claim was based on state anti-discrimination law. The verdict was almost $2 million more than Vivas had sought in her complaint, and counsel for the university announced their belief that the jury must have been confused.[88]

Los Angeles Police Department

In 2007, a Los Angeles County jury awarded $6.2 million in compensatory damages and $2,500 in punitive damages to Brenda Lee, an African-American lesbian firefighter who had sued the Los Angeles Fire Department on charges or racial and sexual orientation harassment in violation of state law. Two other firefighters who filed lawsuits contending they suffered retaliation for supporting Lee, Lewis Bressler and Gary Mellinger, were also vindicated in earlier proceedings. Bressler won a $1.7 million jury verdict in April, and Mellinger settled his case last year for $350.000.[89]

Municipal Police Department

In 2007, a police chief decided not to promote an officer to a position she was qualified for, and for which no other qualified person was found, and instead eliminated the position, because the officer was transgender.[90]

San Jose Public School District

In 2007, the San Jose Public School District fired two openly gay women claiming they violated the dress code, but they believed it was because they were openly gay.[91]

University of California-Davis

In 2005, a department supervisor at the University of California-Davis drew up a dress code specifically targeting one gay male employee, prohibiting him from wearing mid-length pants. The supervisor also forbade him from bringing the Gay and Lesbian Yellow Pages into the office.[92]

Los Angeles Police Department

In 2004, the City of Los Angeles agreed to pay out $200,000 to settle a sexual orientation discrimination claim by Police Sgt. Robert Duncan and $450,000 to settle a

[88] LESBIAN & GAY L. NOTES (Summer 2007).
[89] LESBIAN & GAY L. NOTES (Summer 2007).
[90] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[91] *Id.*
[92] *Id.*

claim by Officer Alan Weiner. Both claimed that they were harassed and suffered career setbacks due to homophobia in the police department. According to an Associated Press report on Dec. 27, 2004, these added to other settlements would cumulate to nearly $3 million paid out by the city to settle sexual orientation discrimination claims brought by eight different police officers in recent years.[93]

Contra Costa County Public School

In 2004, a lesbian teacher who did not fit traditional gender norms was repeatedly transferred from site to site and once thrown against the wall by a principal. The school district and the union refused to intervene.[94]

California State Agency

In 2004, a state agency employee reported that he had tried to persuade the agency to provide domestic partner benefits in 2002. This caused conflict with his boss and he was put on administrative leave and eventually terminated.[95]

El Dorado County Department

In 2004, a gay man faced harassment and isolation at work in a county department, causing him stress-related health problems. Although he knew California law had sexual orientation protections, he was afraid that the county and union would not enforce the law.[96]

Beverly Hills School District

In 2001, the Beverly Hills School Board paid Robert Pellicone, a gay man formerly employed as the Superintendent of Schools, $159,000 to settle his discrimination complaint against the school district. Pellicone was discharged as superintendent after allegations surfaced that he had misused a district credit card, but Pellicone claimed that story was a pretext for anti-gay discrimination, arguing that all of the expenses incurred on the card were legitimate business expenses. After being discharged, Pellicone was hired as superintendent of the Shoreham-Wading River School District on Long Island, New York.[97]

San Jose Police Department

In 2001, Dawn Goodman won a $935,000 jury verdict in her sexual orientation discrimination dispute with the San Jose Police Department—$435,000 in compensatory

[93] LESBIAN & GAY L. NOTES (Jan. 2005), *available at* http://bit.ly/vwBVH.
[94] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[95] *Id.*
[96] *Id.*
[97] LESBIAN & GAY L. NOTES (May 2001), *available at* http://bit.ly/41pXwR.

damages and $500,000 in punitive damages. However, a Santa Clara County superior court judge found that the verdict was not supported by the evidence and ordered a new trial. Goodman, who is a lesbian, alleged that when she objected to performing strip searches she was referred to internal affairs rather than being provided with counseling and training, as would normally be the case. She also said her attempts to transfer to other units where she would not have to perform such searches were thwarted because of her sexual orientation.[98]

Hemet Unified Public School

In 2000, Alta Kavanaugh, a lesbian high school teacher, filed a complaint with the California Labor Commission against the Hemet Unified School District charging that administrators had discriminated against her when they removed a female student from her class. The student's parents objected to their daughter being taught by a lesbian. The student's mother, Janiece Betrand, said she requested that her child be removed because homosexuality is against her religious beliefs. "I believe she was teaching tolerance in the classroom, and she was being sneaky about it," Betrand said. Kavanaugh had assigned students to talk about an important person in their lives, and she voluntarily discussed her same-sex partner as an example. The California Labor Commission ruled in favor of Kavanaugh. The school board appealed that decision.[99]

Rio Brave-Greeley Public School

In 1999, James Merrick, a gay school teacher who filed a discrimination claim with the California State Labor Department after the Rio Brave-Greeley Union School District granted the requests of parents to remove students from his classes, reached a settlement prompted by a Labor Commissioner's ruling in favor of his complaint. Merrick filed discrimination complaints with both the state Labor Commission and the school district. Although the school board voted unanimously to dismiss Merrick's complaint, the state Labor Commission found that "by granting requests for the removal of students when such requests were based solely on [Merrick's] perceived sexual orientation, the school district fostered 'different treatment in an aspect of employment' based upon [Merrick's] perceived sexual orientation." The agency ordered the district to stop removing students from Merrick's classes and to cease treating employees differently based on their sexual orientation.

Under the settlement, which has been approved by the Bakersfield Board of Education, the school district will adopt a non-discrimination policy and will specifically agree to reject any parental request to transfer students based on the "ethnicity, race, national origin, age, sex, actual or perceived sexual orientation, disability, or political or religious beliefs of classroom teachers." The Board will also make a public statement of support for Merrick. Merrick was a recent recipient of the Teacher of the Year Award from the Bakersfield Chamber of Commerce.[100]

[98] LESBIAN & GAY L. NOTES (Dec. 2001), *available at* http://www.qrd.org/qrd/usa/legal/lgln/2001/12.01.
[99] HOSTILE CLIMATE (2000 ed.), *supra* note 21.
[100] LESBIAN & GAY L. NOTES (Apr. 1999), *available at* http://bit.ly/4EkQci.

California Highway Patrol

In 1999, a state court jury awarded Thomas Figenshu $1.5 million in damages and legal fees for the anti-gay harassment to which he was subjected by his co-workers, ruling that it was illegal under the state statute prohibiting employment discrimination based on sexual orientation. Figenshu worked as an officer with the California Highway Patrol from 1983 to 1993. After he was promoted to sergeant and transferred to west Los Angeles in 1988, co-workers began to harass him. Anti-gay pornographic cartoons were taped to his mailbox. A ticket for "sex with dead animals" was left on his windshield. He found urine on his clothes in his locker. Figenshu was commonly the object of anti-gay slurs. After Figenshu complained, an officer was reprimanded and another suspended, but the harassment continued. To remove himself from the hostile work environment, Figenshu resigned in 1993.[101]

Center High School

Before the summer 1999 recess, teacher David Warfield began a process for gender reassignment surgery to become Dana Rivers and drew the ire of parents and officials at Center High School and the local school board. Soon after Rivers notified officials of her intention, the board distributed a letter about her decision to all of the district's parents, four of whom wrote back to complain. Citing what it said was her "evident unfitness for service," the school board voted 3-2 in June to fire Rivers, withholding its official announcement to her until September. After she was notified, Rivers filed a complaint with the state labor commissioner seeking to be reinstated to her teaching position. Rivers later dropped the complaint she made to the state labor commissioner as part of a settlement with the school board in which she also agreed to resign.[102]

West Contra Costa County Public School

In 1997, Jan Overholtzer won a $360,000 jury award in her sexual orientation discrimination suit against the West Contra Costa County Unified School District. Overholtzer claimed she was constructively discharged after she told her immediate boss that she was a lesbian, as a result of harassment and demeaning treatment. $15,000 of the award was designated as punitive damages.[103]

Bay Area California Public School

In the late 1990s, a transgender Bay Area public school teacher was unable to secure a full-time teaching contract in any of the several school districts to which she applied after she had transitioned. Needing work, she then applied to an entry-level federal job. After two days and multiple hours of interviews and screening, she was

[101] HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* http://bit.ly/kThbS.
[102] HOSTILE CLIMATE (2000 ed.), *supra* note 21, at 92.
[103] LESBIAN & GAY L. NOTES (Summer 1997), *available at* http://bit.ly/ZUFT3.

turned down for the position immediately after she disclosed her transgender status on a comprehensive medical questionnaire.[104]

Los Angeles Police Department

In 1996, a controversy arose in Los Angeles about personally invasive questions to which a lesbian police officer was subjected when she filed claims about harassment on the job based on her gender and sexual orientation. The ACLU wrote to the city on her behalf, resulting in a City Attorney move to narrow the scope of questions asked "in areas involving personal relationships" and to train lawyers in the worker's compensation division on how to elicit relevant information without invading the privacy rights of claims applicants.[105]

San Francisco Public School

In 1995, a committee on teacher credentials recommended to the California Teacher Credentialing Commission that two San Francisco high school science teachers have their teaching credentials revoked as a result of a 1992 incident when a classroom speaker from Community United Against Violence, a gay anti-violence group, made sexually explicit comments to a class of eleventh graders. According to news reports, the teachers had combined their classes to hear the speakers, who engaged in discussion with the students that led to some sexual comments by one of the speakers. When students told their parents what had happened, parents confronted the school administration. Parent complaints to the school administration were rebuffed on the ground that the teachers themselves had done nothing wrong. The parents then filed charges with the credentialing commission. A spokesperson for the teachers' union expressed shock at the committee's recommendation, and a spokesperson for the San Francisco Unified School District cited the good records of the teachers and urged that the commission "let them continue their careers."[106]

Los Angeles Police Department

In 1994, Los Angeles police officers Lance LaPay and Natasha Benavides filed suit in Los Angeles County Superior Court against the City of Los Angeles, the Police Department, Chief Willie Williams, seven individual officers and up to one hundred "John Does," alleging physical and verbal harassment on the basis of sexual orientation in violation of state and local law. They alleged that the Police Department had done nothing to implement guidelines for treatment of gays and lesbians on the job that were adopted by the city council as part of the settlement of a lawsuit brought by Sergeant Mitchell Grobeson. At a press conference announcing the suit, Grobeson alleged that in the past year five gay or lesbian police officers had been forced off the job, out of the department or to sick leave status due to anti-gay harassment.

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[104] SHANNON MINTER & CHRISTOPHER DALEY, TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES (Nat'l Center for Lesbian Rts. & Transgender L.Center 2003).
[105] LESBIAN & GAY L. NOTES (Feb. 1996), *available at* http://bit.ly/hVma6.
[106] LESBIAN & GAY L. NOTES (Oct. 1995), *available at* http://bit.ly/1D2Hvo.

Lance Lapay worked for the Los Angeles Police Department from 1988 to 1993. During his training in the police academy and while on the force, Lapay was subjected to continuous anti-gay harassment and forced to work in a hostile environment sanctioned and encouraged by department supervisors. While Lapay was working in the internal affairs section, one sergeant continually greeted him in an effeminate tone with a lisp. Some officers verbally and physically harassed him. Others refused to speak with him, even when serving as his partner. And others told supervisors they would not work with him because he was gay. Although a few officers complained to superiors about the harassment Lapay received — one filed a formal complaint — the department failed to investigate or take any action. In August 1993, Lapay filed a claim for workers' compensation for stress, anxiety and related symptoms associated with harassment and discrimination. The claim was denied.

When Natasha Benavides applied to work with the police department in 1987, she revealed during a background investigation that she was a lesbian. The officer assigned to her case advised her to conceal her homosexuality because the department was "not yet ready to accept gays" and that she would not make it through the academy or probation if her sexual orientation were known. Although Benavides followed his advice, she was subjected to frequent anti-gay harassment that only escalated when she participated in an investigation of anti-gay harassment of a fellow officer. When Benavides complained publicly about the situation, the harassment against her escalated again. In 1993, she lost a promotion because of her sexual orientation. In December 1993, Benavides filed a workers' compensation claim for stress and anxiety.[107]

Los Angeles Police Department: Mitchell Grobeson

Mitchell Grobeson was the first openly gay officer in the Los Angeles Police Department. Grobeson graduated from the Los Angeles Police Department Academy at the top of his class and began to rise quickly in the department as an officer. Rumors began to circulate in 1984 that he was gay after a county sheriff stopped him with another man in a predominantly gay neighborhood. After the incident, Grobeson's fellow officers harassed him regularly. Further, he was placed in danger when they refused to back him up in life-threatening situations. Nonetheless, Grobeson was promoted to sergeant more quickly than any of his peers. As the harassment increased, however, the department refused to investigate. Believing his life was in danger, Grobeson left the department and filed a sexual orientation employment discrimination lawsuit with two other officers against the City of Los Angeles.

In 1993, Grobeson settled the case. The settlement led to his reinstatement to the force, but Grobeson then filed a second lawsuit, charging the city and numerous police staff with violating the settlement agreement, as well as his federal and state constitutional and state statutory rights. Grobeson also challenged the LAPD's decision to suspend him for his "unauthorized recruiting" of lesbians and gay men to join the force, and for allegedly wearing his uniform without permission in a photo in a gay weekly, and at gay pride and AIDS-awareness events. The Court ordered the LAPD to

[107] LESBIAN & GAY L. NOTES (Sept. 1994), *available at* http://bit.ly/adQhm.

rescind Grobeson's suspension and pay him for the time lost. This second lawsuit prompted the city to make widespread improvements in its sexual orientation employment policies. Settlement discussions to make further improvements to city and LAPD employment policies continued for years.[108]

1. Declarations in Support of Grobeson

(a) 8-year LAPD officer

> "The Department requires that police officers adopt a 'macho' attitude, and an essential part of that 'macho' attitude is the hatred of homosexuals. The Department's extreme bias against homosexuals is bred into every new generation of officers. No other attitude toward homosexuals is tolerated. Even those officers who have no prejudices against homosexuals when they join the force soon come to realize that they must at least pretend to despise homosexuals or risk being ostracized.
>
> The Department has many ways to pressure its officers to accept its prejudice against homosexuals. I sat through countless roll calls in which the sergeant or lieutenant in charge would hold up a bulletin describing a homosexual suspect and tell us to 'get this fruit.' All sorts of offensive comments would then be made about the suspect's sexual orientation and suspected lifestyle. I remember one particularly disturbing incident in which we were told to look out for a suspect who was believed to have AIDS. The officers at roll call had an absolute field day with this information, making fun of the individual and his suffering, stating that they did not want to be the one to make the arrest."[109]

(b) LAPD officer

> "During the five years that I have served as a police officer, I have heard countless insults directed at gays and lesbians…and witnessed numerous instances of officers

[108] Lambda Legal, All Cases: *Grobeson v. City of Los Angeles*, http://bit.ly/1mcZ82 (last visited Sept. 5, 2009); Human Rights Campaign, *supra* note 23.
[109] Declaration of John Roe-1 (Nov. 21, 1989), *Grobeson v. City of Los Angeles*, LASC Case No. C 700134, 70-71.

making rude and offensive comments to anyone in custody who 'appears' to be homosexual.

When I was at the Police Academy, I heard derogatory comments made about gays and lesbians on a daily basis. It was common to hear officers talking about 'faggots' and 'bull dykes.' These offensive remarks were made by both the cadets and the training officers, and other supervisory personnel responsible for instructing the cadets in proper police conduct.

I remember one particularly disturbing incident in which my fellow cadets publicly humiliated a member of the gay community, who had been invited to address our class as part of our cultural awareness training. When it was announced that a gay man was going to be talking to us, many of the cadets sitting near me began to make such comments as, 'Oh shit, there's a faggot coming.' When he got up in front of us, many cadets laughed and nudged each other. Throughout his presentation, cadets made offensive remarks in my presence about the 'queen,' the 'fairy princess,' the 'faggot' who addressed us. After this speech, the level of hostility directed at homosexuals increased at the Academy. Many of my fellow cadets expressed outrage that a 'fruit' had been allowed to come and talk to us.

The hostility toward homosexuals was just as great when I left the Academy and joined the force as an officer. The general attitude toward homosexuals at Harbor Division, where I was first assigned as a probationary officer, was negative. I continually heard my fellow officers and watch commanders make anti-gay comments. The attitude toward homosexuals was worse at Pacific Division and Hollywood Division, my two assignments after I left Harbor. At both of those Divisions, the hostility toward...the gay community was extreme.

It has been my experience that officers within the Department who are suspected of being homosexual are subjected to continual harassment by other members of the Department. Some of the harassment is overt. For example, when I was at the Pacific Division, I witnessed my fellow officers engage in numerous acts of retaliation against a sergeant who was believed to be gay. The officers refused to treat the sergeant with respect, and instead subjected him to such humiliating treatment as turning their back on him when he talked or walking away

> whenever he approached. They repeatedly refused to follow direct orders that he gave them. They made offensive comments about his sexual orientation and private sexual life behind his back, further undermining his authority. On at least one occasion, I heard fellow officers discuss how they had 'set up' the sergeant because he was gay. Finally, the officers refused to respond to any of the sergeant's calls for back-up, placing him in possible jeopardy and seriously interfering with his ability to do an effective job as an officer."[110]

(c) **14-year LAPD officer**

> "I can attest to the fact that the Department condones and indeed fosters hatred of homosexuals.
>
> The general attitude in the Department towards homosexuals is that of disgust. Officers make anti-gay remarks frequently. Supervisors reinforce the idea that officers must be 'macho' by making jokes about 'fruits and faggots'...This kind of conduct has been going on in the Department basically unchecked, since I joined the force as an officer in 1972.
>
> I hear homophobic comments on a nearly daily basis. At roll call, it is not uncommon for some officer to make some joke about 'faggots' and 'fruits.' At one roll call within the past several months, one of my sergeants stated to the assembled officers that 'all goddamn faggots should be fired.' I have heard these types of anti-gay comments ever since I joined the Department. They are made by supervisors and officers alike."[111]

Los Angeles Police Department: Sue Herold

Sue Herold, a lesbian, worked in the Los Angeles Police Department. Before a speaker arrived to present to her class in the academy, several of her colleagues made comments about physically harming the speaker, who was gay. Comments such as placing bombs in bodily orifices and shutting "that fag up" terrified Herold. After Herold was outed by her roommate to her classmates at the police academy, Herold was harassed and was not supported by her colleagues. For example, Herold responded to a burglary call, and it took nearly twice as long for backup to arrive as it should have. In response to the harassment she faced, Herold said that she wouldn't recommend law enforcement as a

[110] Declaration of John Doe-2 (Nov. 21, 1989), *Grobeson v. City of Los Angeles*, *supra*, ¶¶ 2,6-8.
[111] Declaration of John Doe-1, *supra* note 61, at ¶¶ 2, 5, and 7.

career. She suffered from ulcers, shingles, and high blood pressure and felt as though she had no other career options.[112]

Simi Valley Police Department

A videotape showing Simi Valley police officers ridiculing gays and other groups emerged as a lawsuit alleging discriminatory attitudes and practices was filed against the department. In the suit, two white officers claimed the department had harassed them after they filed worker's compensation claims, and a black officer alleged that he was racially harassed. Although the tape's producers claimed it was intended as a joke for a departing officer, other officers say it revealed widespread intolerance. Former police chief and current City Council member Paul Miller, who was amongst those featured in the video, had no comment. One scene in the video, which takes place in Miller's former office, suggests a male officer wants to return to work so that he can continue an affair with a male police investigator. In it one officer says "A lot of people don't want to work with a coke freak." Another responds, "Or a homosexual." Reportedly, an anti-gay slur was used repeatedly.[113]

Municipal Police Department

"B," a gay man, who asked that his real name not be used, transferred from a university police department in Massachusetts to a city police department in Southern California. Instructors in the police academy made comments to B's class about gay people, including "Did you did hear that they're actually letting fags on this department now? Isn't that disgusting? That's really sick." During a conversation about hate crimes, the Sergeant raised the example of someone being physically assaulted for being gay and that such an incident would be considered a hate crime. Several of B's colleagues responded with comments, such as "That's a matter of opinion" and "Oh, yeah. Cruelty to animals." B brought the comments to the attention of the Sergeant, who responded that he hadn't heard the comments. B then told the Sergeant that he expected respect from his co-workers and that if he heard any derogatory comments, he would sue the department. From that point forward, B felt that his colleagues kept their distance and were careful about what they said.[114]

Bookser High School

Warren Blumenfeld, a gay man, worked in a public high school in Santa Clara, California. When he first began teaching, Blumenfeld was placed with a more experienced teacher. After one day of working with this teacher, Blumenfeld was notified by the supervisor that things weren't working. The more experienced teacher stated that he was "uncomfortable with your alternative lifestyle, which he said he picked

[112] Buhrke, *supra* note 41, at 33-38.
[113] HOSTILE CLIMATE (2000 ed.), *supra* note 21, at 113-14.
[114] Buhrke, *supra* note 31, at 58-62.

up from your mannerisms, and he doesn't want you influencing his students." Blumenfeld was then placed with another teacher who gave him a glowing review.[115]

[115] WARREN J. BLUMENFELD, ONE TEACHER IN 10 58-64 (Kevin Jennings, ed., Alyson 1994).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

E. **Education**

Kern County

In 1999, prompted by a group of gay citizens who offered to lead an effort to combat local hate crimes, Pastor Douglas Hearn, a Kern County Human Relations commissioner said, "I [am] opposed to having homosexuals lead in the community. Because any man who wants to have sex with another man has a problem. He's really sick and doesn't know it." In an interview, he elaborated, saying he believed "Gays have a right to live, shop and be human beings," but that he also felt that "if they were teaching our youth, I'd be scared they might rape them or something."[116]

Fremont School District

In 1997, the president of the Fremont school board wrote a blatantly homophobic letter to the local daily newspaper. In his letter, he stated that "anyone practicing homosexuality reduces their life expectancy from about 75 to around 44 years of age, the obvious conclusion should occur: This is not something to celebrate or promote, especially when horrible health problems...are brought to light." He also stated that issues of health and harassment should not be "mix[ed]," and concluded his letter: "Protect all from harassment, but do not celebrate or promote unhealthy lifestyles."[117]

[116] HOSTILE CLIMATE (1999 ed.), *supra* note 21, at 80.
[117] HOSTILE CLIMATE (1997 ed.), *supra* note 21, at 40.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Colorado – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

In 1992, Colorado voters passed Amendment 2 to the Colorado Constitution,[1] prohibiting enactment or enforcement of anti-discrimination protections for gay, lesbian and bisexual Coloradans. The Amendment provided:

> "Neither the state of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing."[2]

Amendment 2 would have rendered unconstitutional municipal ordinances already adopted in Aspen, Boulder and Denver prohibiting such discrimination, but it was enjoined pending the outcome of a litigation challenge. In *Romer v. Evans*,[3] the U.S. Supreme Court held Amendment 2 unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment. Writing for the Court, Justice Kennedy observed that, "the resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."[4]

Shortly after the *Romer* decision, El Paso County Commissioner Betty Beedy claimed on ABC's "The View" that since you cannot "see" sexual orientation, gays cannot be discriminated against and therefore do not need legal protections against discrimination.[5]

In conjunction with Amendment 2 and the other legislative ballot proposals of that year, the state prepared "The Report on Ballot Proposals of the Legislative Council of Colorado General Assembly, An Analysis of 1992 Ballot Proposals"[6] ("Report") to

[1] Colo. Const., Art. II, § 30b (1993).
[2] *Id*.
[3] 517 U.S. 620 (1996).
[4] *Id*.
[5] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 98 (1999 ed.).
[6] RESEARCH PUBL. NO. 369, 9-12 (1992).

provide a survey of the law on sexual orientation discrimination and policies existing as of 1992. While the Report did not take any positions, its findings were not supportive of Amendment 2.

According to the Report:

> "Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the No Protected Status complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation."[7]

The Report went on to note that the state of the law in Colorado and the United States in 1992 was a "patchwork of federal, state, and local laws, regulations, and policies."[8] Specific to Colorado were local ordinances in Aspen, Boulder and Denver, which protected "individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation."[9] The Report concluded that none of these ordinances afforded affirmative action or minority status, but rather that "these cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations."[10]

As of 1992, the only statewide antidiscrimination policy stemmed from an executive order and from the state insurance code. The Governor's Executive Order in 1990 prohibited "discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees."[11] This order broadly covered state agencies, including education and university education as well as other public agencies. According to the Report, the "only Colorado statute offering protection based on sexual

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

orientation prohibits health insurance companies from determining insurability based on an individual's sexual orientation."[12]

The Report also mentioned that, "legislation was defeated in 1991 which would have expanded Colorado's ethnic intimidation law to include the right of every person, regardless of age, handicapping condition or disability, or sexual orientation, to be protected from harassment."[13] Similar legislation would be defeated through 1999. There were several laws on hate crimes, civil rights and same sex marriage proposed during the period 1993-1999 as well, all of which were not passed or enacted.[14]

Recently, Colorado adopted the Colorado Antidiscrimination Act (2007), the current state law banning discrimination in employment, housing, public accommodations, and advertising, including on the bases of sexual orientation and gender identity. Formerly, discrimination on the basis of sexual orientation could only be claimed by alleging discrimination for engaging in any lawful activity off the employer's premises outside of working hours.

Documented examples of employment discrimination by state and local government employers against LGBT people in Colorado include:

- A professor at a Colorado state university who in 2007 reported being harassed on the job, denied promotion, and stripped of his courses because he was gay. The professor had been teaching for more than two decades and had long been open about being gay. He began to experience problems when the former provost of the university retired. Thereafter, the dean began making derogatory comments about him in meetings, including referring to him as a girl. He was then passed over as chair of his department in favor of a heterosexual woman with much less tenure, even though he previously had been the chair of a related department. The professor was also stripped of graduate courses that he taught for years and was given only undergraduate courses to teach, based on a false claim that he did not turn his lesson plans on time.[15]

- An employee of the Colorado Division of Youth Services who was harassed by co-workers based on his perceived sexual orientation. Doerr's co-workers subjected him to derogatory comments and gestures because they believed him to be a gay man. An internal investigation uncovered a pattern of inappropriate conduct towards Doerr that precipitated a directive to cease all conversations regarding an employee's sexual orientation in the workplace.[16] Doerr v. Colorado Division of Youth Services, 2004 WL 838197 (10th Cir. Apr. 20, 2004) The court dismissed his constitutional and Title VII claims after he was later terminated

[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

because he failed to exhaust administrative remedies on time and because the court found that his allegations that defendants had not adequately investigated and addressed his complaints was not supported by the record.[17]

- A female nurse employed by the County of Elbert, Colorado who alleged that she was discharged from her employment based upon her sexual orientation, age, race, sex and handicapped status, thereby violating her constitutionally protected rights of due process and equal protection. At trial, a jury returned a verdict for the nurse on her claim that the County had violated her due process rights by failing to provide her with an adequate opportunity to be heard, but not on any of her other counts and awarded attorneys fees to the county. Langseth v. County of Elbert, 916 P.2d 655 (Colo. App. 1996). On appeal, the court reversed the judgment awarding attorney's fees to the defendants but affirmed in all other respects.[18]

- A librarian at the University of Colorado Law School who was forced out of her job after publishing an article about Amendment 2 in the newsletter of the American Association of Law Libraries. In 1994, the ACLU of Colorado announced that it settled the case. Under the settlement, the librarian received $25,000, the reprimand was removed from her file, and she received a favorable recommendation letter for use in her job search.[19]

- An employee of the Denver Department of Health and Hospitals who was denied sick leave to care for his same-sex domestic partner. The Colorado Court of Appeals held that the denial of "family sick leave" did not violate the State Career Service Authority Rule 19-10(c) forbidding discrimination in state employment. Ross v. Denver Dept. of Health and Hospitals, 883 P.2d 516, 18 Empl. Benefits Cases (BNA), 1434 (Colo. Ct. App. 1994); *reh'g denied*, May 12, 1994.

- A gay public high school teacher who, in 2000, testified during a school board meeting that he was subjected to anti-gay taunts while teaching at Denver's high schools.[20]

- A lesbian police officer, with a long and distinguished record of reliable service with the Denver Police Department, who for more than four years struggled to keep her job and withstand insults and constant surveillance. As a member of the department's school resource program, the officer taught public safety to local public school students. She was consistently praised by the schools where she taught and was promoted. One day in 1986, she bought a few books in a lesbian bookstore, and soon afterward, her supervisors transferred her to street patrol.

[17] *Doerr v. Colo. Div. of Youth Serv.*, 2004 WL 838197 (10th Cir. Apr. 20, 2004).
[18] 916 P.2d 655 (Colo. App. 1996).
[19] Lesbian & Gay L. Notes (July/August 1994), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1994/07.and.08.94.
[20] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 123 (2000 ed.).

They told her that they had "damaging information" about her that could impair her integrity on the job. During roll call, other police officers began to make disparaging comments about lesbians. While on street patrol, her calls for backup often went unanswered, leaving her in serious danger. When she reported these incidents to her supervisors, they responded by stationing unmarked police cars at her home and the homes of friends she visited. When she consulted outside agencies, she was told that the law gave little protection against harassment based on sexual orientation and the local American Civil Liberties Union would not take her case. Finally, Denver enacted an anti-discrimination ordinance, and the police department approved new anti-discrimination and anti-harassment guidelines in 1990.[21]

[21] Human Rights Campaign, *Documenting Discrimination: A special report from the Human Rights Campaign featuring cases of discrimination based on sexual orientation in America's workplaces* (2001), *available at* http://www.hrc.org/documents/documentingdiscrimination.pdf.

II. SEXUAL ORIENTATION &GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

The Colorado Antidiscrimination Act[22] prohibits employment discrimination in the state, on many bases, including "sexual orientation," which is defined to include "transgender status." The statute covers discrimination based on actual or perceived sexual orientation. It applies to anyone employing persons within the state, the state itself, and any of its political subdivisions, commissions, departments, institutions or school districts, as well as those religious organizations or associations which are supported in whole or in part by taxes or public borrowing.

The relevant language of the statute provides, "it is unlawful to refuse to hire, discharge, promote or demote, to harass during the course of employment, or to discriminate in matters of compensation against any person otherwise qualified because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry."

Under the statute, it is a discriminatory or unfair employment practice for an employer to terminate an employee for engaging in any lawful activity off the employer's premises outside of working hours, unless the restriction relates to a bona fide occupational requirement, or is reasonably and rationally related to the employment.[23]

It is also unlawful under the statute to:

(a) classify any job, have separate lines of progression or maintain seniority lists on the basis of sexual orientation;[24]

(b) conduct any pre-employment inquiry related to sexual orientation, or any wage schedule or wages based on sexual orientation[25]; and

(c) advertise indicating a preference, limitation, specification, or discrimination based on sexual orientation, unless it is a bona fide occupational qualification.[26]

In order for the challenged conduct to be actionable, the employee must file a complaint at the workplace, and the employer must fail to initiate a reasonable investigation and take prompt remedial action.[27]

[22] COLO. REV. STAT. §§ 24-34- 401-06 (2008).
[23] COLO. REV. STAT. § 24-34-402.5(1) (2008).
[24] 3 COLO. CODE REG. §708-1, Rule 81.3 (2007).
[25] 3 COLO. CODE REG. §708-1, Rule 81.5 (2007).
[26] 3 COLO. CODE REG. §708-1, Rule 81.10 (2007).
[27] COLO. REV. STAT. § 24-34-402 (2007); 3 COLO. CODE REG. §708-1, Rule 85.0 (2007).

Religious organizations or associations not supported by public funds are not covered.[28] There are also exceptions for bona fide occupational qualifications, among others. Employees may be required to conform to reasonable dress codes, so long as the policy is consistently applied,[29] but if there is a gender-specific dress code, then the employer must allow the employees to follow it in a manner consistent with their gender identity.[30]

2. Enforcement and Remedies

The complainant (or through an attorney) must make a written charge with the Division of Civil Rights (DORA) and notify the respondent.[31] Charges must be filed within 6 months of the alleged violation.[32] The DORA will investigate to determine probable cause. If probable cause is found, then the DORA will attempt to resolve the matter. After the administrative remedies are exhausted, including when probable cause is not found, the complainant may file a civil action.

The DORA may order the employer to cease and desist and take any other action it deems appropriate, including ordering back pay, hiring, reinstatement or upgrading of employees, restoration of membership in a labor organization, admission into an apprentice program, etc.[33]

Evidence of discrimination against individuals because of their sexual orientation helps to justify the need for and passage of the Colorado Antidiscrimination Act. The GLBT Community Center of Colorado reports that, as of the date of the publication of their annual report, 43 cases of anti-LGBT discrimination in employment have been filed since the law became effective as of August, 2007.[34]

The prior version of the statute[35] prohibited employment decisions based on lawful activities outside of work place and hours, and did not expressly cover sexual orientation discrimination.[36]

B. Attempts to Enact State Legislation

None.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

[28] COLO. REV. STAT. § 24-34-402 (2007).
[29] *Id.*
[30] See *infra* Section III.A.2.
[31] COLO. REV. STAT. § 24-34-306(1) (2007).
[32] COLO. REV. STAT. § 24-34-403 (1989).
[33] COLO. REV. STAT. § 24-34-403.
[34] GLBT CMTY. CENTER OF COLO. ANNUAL REPORT 6 (2008).
[35] COLO. REV. STAT. § 24-34-401.5(1) (Supp. 1996).
[36] See *infra* Section III.A.2.

1. Executive Orders

A 1990 Executive Order[37] prohibited employment discrimination for all state employees on the basis of sexual orientation. Amendment 2 would have prohibited this policy, had it been implemented.

2. State Government Personnel Regulations

None.

3. Attorney General Opinions

From 1984 to 2008, there were no Colorado Attorney General Opinions dealing with sexual orientation, HIV/AIDS, or discrimination other than age discrimination and discrimination against out of state students.

D. Local Legislation

1. City of Denver

Denver's Municipal Code prohibits sexual orientation discrimination, providing: "it shall be a discriminatory practice to do any of the following acts based upon the race, color, religion, national origin, gender, age, sexual orientation, gender variance, marital status, military status or physical or mental disability."[38]

2. City of Aspen

The Aspen Municipal Code[39] prohibits discrimination in employment, housing and public accommodations on the basis of sexual orientation.

3. City of Boulder

The Boulder Code[40] prohibits discrimination in employment, housing and public accommodations on the basis of sexual orientation.

E. Occupational Licensing Requirements

None.

[37] Executive Order No. D0035 (Dec. 10, 1990).
[38] DENVER MUN. CODE Art. IV, §28-93-(a)(1) (1991).
[39] ASPEN MUN. CODE §13-98 (1977).
[40] BOULDER REV. CODE §§12-1-2 -4 (1987).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Doerr v. Colorado Division of Youth Services, 2004 WL 838197 (10th Cir. Apr. 20, 2004).

Doerr brought suit against his state agency employer and individual defendants under Title VII, the Equal Protection Clause, the Due Process Clause, and the First Amendment because of harassment he endured based on his perceived sexual orientation. Doerr's co-workers subjected him to derogatory comments and gestures because they believed him to be a gay man. An internal investigation uncovered a pattern of inappropriate conduct towards Doerr that precipitated a directive to cease all conversations regarding an employee's sexual orientation in the workplace. After the CDYS terminated Doerr, he filed suit but his claims were dismissed, in part because he failed to exhaust his administrative remedies as required by Title VII. The Tenth Circuit panel upheld the dismissal.[41]

Romer v. Evans, 517 U.S. 620 (1996).

This landmark case was brought in response to Amendment 2 to the Colorado Constitution.[42] A temporary injunction was granted on January 15, 1993, preventing Amendment 2 from becoming part of the Colorado Constitution because of its possible unconstitutionality. Before trial, the state appealed the injunction to the Colorado Supreme Court, which sustained the original injunction on July 19, 1993, finding that Amendment 2 violated the equal protection clause of the Fourteenth Amendment of the United States Constitution by denying equal rights in the normal political process because, if Amendment 2 were in force, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. The court applied strict scrutiny to the Amendment because it impeded access to the political process.

The Supreme Court of the United States ruled that Amendment 2 was unconstitutional. Justice Kennedy wrote the majority opinion, joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer.[43] The Court rejected the argument that Amendment 2 merely prevented special rights, and found that it imposed "a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy and may seek without constraint," and the Court concluded that antidiscrimination laws are not special rights because they relate to fundamental rights enjoyed by all citizens. The Court did not apply strict scrutiny but rather held that

[41] *Doerr v. Colorado Division of Youth Services*, 2004 WL 838197 (10th Cir. Apr. 20, 2004).
[42] *Romer*, 517 U.S. at 620.
[43] *Id*.

Amendment 2 "lacks a rational relationship to legitimate state interests." The Court continued that Amendment 2 "is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." However, Justice Kennedy did not extensively analyze the claims put forward that were rejected, asserting that "it is not within our constitutional tradition to enact laws of this sort."

Langseth v. County of Elbert, 916 P.2d 655 (Colo. App. 1996).

In *Langseth*, a female nurse employed by the county filed suit in a Colorado court against the County of Elbert, Colorado, alleging that she was discharged from her employment based upon her sexual orientation, age, race, sex and handicapped status, thereby violating her constitutionally protected rights of due process and equal protection.

At trial, a jury returned a verdict against Langseth on all counts except her 42 U.S.C. § 1983 claim that the County had violated her due process right by failing to provide her with an adequate opportunity to be heard. However, the court awarded attorney's fees to the defendants.

On appeal, the court considered the issue of whether Langseth, by virtue of her favorable due process judgment, could claim "prevailing party" status for the purpose of recovering attorney's fees on civil rights claims. The court reversed the judgment awarding attorney's fees to the defendants but affirmed in all other respects.[44]

Ross v. Denver Dept. of Health and Hospitals, 883 P.2d 516, 18 Empl. Benefits Cases (BNA), 1434 (Colo. Ct. App. 1994); *reh'g denied*, May 12, 1994.

In *Ross v. Denver Dept. of Health and Hospitals*,[45] the Colorado Court of Appeals held that the denial of "family sick leave" to an employee to care for his same-sex domestic partner did not violate the State Career Service Authority Rule 19-10(c) forbidding discrimination in state employment.

2. **Private Employers**

James Miller v. AIMCO (2006).

In *Richard James Miller v. AIMCO*, a gay employee of AIMCO, an apartment landlord, claimed sexual orientation discrimination based on a work environment hostile to gay employees. When he complained to management, he had his hours cut, pay reduced, and the rent on his apartment increased, forcing him to vacate. The outcome of this case could not be ascertained.

In re Dower v. King Soopers, Inc. (2005).

[44] 916 P.2d 655 (Colo. App. 1996).
[45] 883 P.2d 516, 18 Empl. Benefits Cases (BNA), 1434 (Colo. Ct. App. 1994); *reh'g denied*, May 12, 1994.

In *In re Dower v. King Soopers, Inc.*, a long-time pharmacist employee of King Soopers decided to change his gender, but was informed that he would be required to comply with the male dress code and would not be permitted into the pharmacy if he appeared in female dress. Dower interpreted this to mean that he would be fired, and so did not do so. This prevented him from proceeding with the one year period of publicly living as a woman that is required before sexual reassignment surgery. In finding probable cause, the Denver Anti-Discrimination Office of the Agency for Human Rights and Community Relations found that this constituted unlawful employment discrimination. John C. Hummel of The Center identified this as the first time an employer was subjected to an unlawful discrimination violation related to transsexual employees.[46]

Bryce v. Episcopal Church of Colo., 289 F.3d 648 (10th Cir. 2002).

In this Colorado employment case, Bryce, a lesbian church employee, and Reverend Sara Smith, her partner, asserted a sexual harassment claim against the church.[47] The Court dismissed the action on the basis of the church autonomy doctrine, that is, courts have "essentially no role in determining ecclesiastical questions, or religious doctrine and practice."[48] The court found that the selection of youth minister was "rooted in religious belief."[49]

Ozer v. Borquez, 940 P.2d 371 (Colo. 1997).

This Colorado employment case involved the termination of Robert Borquez, a gay associate in the Ozer & Mullen, P.C. law firm.[50] Borquez had kept his sexual orientation confidential until his partner was diagnosed with AIDS, at which point he informed Ozer because he did not believe he was in a mental state that day to handle the matters on which he was working, asking Ozer to keep his disclosure in confidence. Ozer informed the other partners, and Borquez was terminated only days after receiving his third merit-based salary increase. Ozer contended that the decision to fire Borquez had been made due to the law firm's poor financial circumstances.[51]

Borquez claimed wrongful discharge and invasion of privacy. Borquez also alleged violation of the Denver Revised Municipal Code making it unlawful for a private employer in Denver County to discharge an employee because of homosexuality.[52] The jury awarded compensatory damages for the wrongful discharge, and compensatory and punitive damages on the invasion of privacy claim. The court of appeals affirmed.[53] The Colorado Supreme Court held that the jury verdict did not support the finding because the

[46] GLBT Cmty. Center, Legal Initiatives Project, http://bit.ly/2QTfGl (last visited Sept. 5, 2009).
[47] *Bryce v. Episcopal Church of Colo*., 289 F.3d 648 (10th Cir. 2002).
[48] *Id*. (*citing Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116-17 (1952)).
[49] *Id*.
[50] *Ozer v. Borquez*, 940 P.2d 371 (Colo. 1997).
[51] *Id*.
[52] *Id*.
[53] *Id*.

jury instructions on both the wrongful discharge and the invasion of property claims were improper, and remanded the case. [54]

Phelps v. Field Real Estate Co., 991 F.2d 645 (10th Cir. 1993).

An HIV positive employee without symptoms was discharged allegedly due to poor work performance and company reorganization. Phelps was the head of a division of a real estate company. His division had not performed well since he came into that role, at least partly due to market conditions**.** Two years before his firing, staff members had written a note saying that they were uncomfortable with Phelps' condition, which was discussed at a 1988 board meeting. Phelps filed suit claiming ERISA violations and handicap bias under the Colorado Antidiscrimination Act. Both claims were dismissed because the trial court found that there had been a business judgment-based reason for his firing. The Court of Appeal affirmed.

B. **Administrative Complaints**

All complaints in the Colorado agencies are confidential.

C. **Other Documented Examples of Discrimination**

Colorado State University

In 2007, a professor at state university for more than two decades, who had long been open about his being gay, began to experience problems when the former provost of the university retired. The dean thereafter began making derogatory comments about the professor in meetings, including referring to him as a girl. The professor was then passed over as chair of his department in favor of a heterosexual woman with much less tenure, even though he previously had been the chair of a related department. The professor was also been stripped of graduate courses that he taught for years and was given only undergraduate courses to teach, based on a false claim that he did not turn his lesson plans on time.[55]

University of Colorado Law School

In 1994, the ACLU of Colorado announced that it settled a case where a librarian at the University of Colorado Law School was forced out of her job after publishing an article about Amendment 2 in the newsletter of the American Association of Law Libraries. Stacy Dorian, a lesbian, had permission from her supervisor to do the article, but allegedly not to publish her e-mail address at the university for those interested in responding to the article. Under the settlement, Dorian receives $25,000, the reprimand

[54] *Id.*
[55] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

is removed from her file, and she gets a favorable recommendation letter for use in her job search.[56]

Denver Public School

During a school board meeting on the proposal to amend the Denver Public School's non-discrimination and anti-harassment codes, which cover both students & teachers, to include sexual orientation and gender identity as protected categories a gay teacher testified to the anti-gay taunts he received in Denver's high schools.[57]

Denver Police Department

Angela Romero, a lesbian police officer, had a long and distinguished record of reliable service with the Denver Police Department. As a member of the department's school resource program, she taught public safety to local public school students. Romero was consistently praised by the schools where she taught and was promoted. She never discussed her sexual orientation with any other police officers. One day in 1986, Romero bought a few books in a lesbian bookstore, and soon afterward, her supervisors transferred her to street patrol. They told her that they had "damaging information" about her that could impair her integrity on the job. During roll call, other police officers began to make disparaging comments about lesbians. While on street patrol, Romero's calls for backup often went unanswered, leaving her in serious danger. When Romero reported these incidents to her supervisors, they responded by stationing unmarked police cars at her home and the homes of friends she visited. When Romero consulted outside agencies, she was told that the law gave little protection against harassment based on sexual orientation. The local American Civil Liberties Union would not take her case. Romero spent more than four years struggling to keep her job and withstand the insults and constant surveillance. Finally, in 1990, Denver enacted an anti-discrimination ordinance, and the police department approved new anti-discrimination and anti-harassment guidelines.[58]

[56] Lesbian & Gay L. Notes (July/August 1994), *available at*http://www.qrd.org/qrd/usa/legal/lgln/1994/07.and.08.94.

[57] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 123 (2000 ed.).

[58] Human Rights Campaign, *Documenting Discrimination: A special report from the Human Rights Campaign featuring cases of discrimination based on sexual orientation in America's workplaces* (2001), *available at* http://www.hrc.org/documents/documentingdiscrimination.pdf.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Housing & Public Accommodations Discrimination

The Colorado Antidiscrimination Act, in addition to employment discrimination, prohibits discrimination in housing,[59] public accommodation,[60] and advertising,[61] as do the local ordinances in Aspen, Boulder, and Denver, to the extent they are still in effect.

B. Health Care

Provisions in the Colorado Insurance Code[62] prohibit health insurance providers from determining insurability and/or premiums based on the sexual orientation of the applicant, insured or beneficiary.

C. Parenting

The Parent Adoption Bill (2007) allows gay couples to adopt children together. Previously, gay individuals could adopt children, but not same-sex couples, whereas married couples could adopt each other's children as stepparents.

D. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Amendment 43 (2006) amended Article II of the Colorado Constitution to define "marriage" as between one man and one woman in Colorado.[63]

[59] COLO. REV. STAT. § 24-34-501.
[60] COLO. REV. STAT. § 24-34-601–605.
[61] COLO. REV. STAT. § 24-34-701– 707.
[62] COLO. REV. STAT. § 10-3-1104(1)(f)(VI)(A & B) (2008).
[63] Colo. Const. Art. II, Amend. 43 (2006), *available at* http://bit.ly/1bI09h.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Connecticut – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

A Connecticut statute bans employment discrimination on the basis of sexual orientation. No Connecticut statutes prohibit discrimination on the basis of gender identity or expression. In November 2000, the Connecticut Commission on Human Rights and Opportunities – the agency responsible for administering the anti-discrimination statutes and for processing discrimination complaints – ruled that statutes prohibiting sex discrimination also banned discrimination on the basis of gender identity. Efforts to reinforce this ruling by adopting a statute covering gender identity discriminaton have so far been unsuccessful.

When a rainbow flag was flown over the state Capitol in 2000 to commemorate a week of lobbying for gay and lesbian rights, several state legislators objected. "Many state residents have strong moral objections to the homosexual lifestyle, and these citizens have a right to expect that the Capitol flagpole will not be used to further the gay agenda," State Representative T.R. Rowe said, while also comparing gay and lesbian rights groups to the Ku Klux Klan.[1]

Documented examples of sexual orientation and gender identity discrimination by state and local employers in Connecticut include:

- In 2009, a Connecticut public school teacher with excellent evaluations was dismissed shortly after mentioning in class when Connecticut began to allow same-sex couples to marry that Spain also allowed this. Although the school said the dismissal was based on poor performance, the teacher felt it was sexual orientation discrimination. The teacher filed a complaint with the Connecticut Commission of Human Rights & Opportunities.[2]

- In 2008, a gay man, working in the Connecticut State Maintenance Department, reported that he had been harassed by his coworkers for being gay. He was tied by his hands and feet and locked in a closet. He filed a complaint, and the

[1] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 129 (2000 ed.).

[2] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

department is investigating this incident as a possible hate crime. His assaulters were placed on administrative leave.[3]

- In 2008, a gay man reported that he had endured harassment and discrimination based on his sexual orientation while working for sixteen years in the State of Connecticut Department of Developmental Disabilities. In 1996, he was given a promotion. Upon telling his new Program Supervisor that he was gay, he was immediately notified that the promotion was going to be given to another staff person instead. Additionally, on the same day he put a rainbow sticker on his car, the employee overheard many inappropriate comments about his sexual orientation, such as "[t]hey put those on their cars so they can spot each other to have sex." In 2007, the employee was promoted and moved to new group home. As part of his job responsibilities, the employee was asked to shave a total care client. However, he was told that it was inappropriate for him to shave another male client because he was gay, and that if were to do that, he would be turned in for abuse. Other staff members, who are heterosexual, were not prohibited from shaving clients of a different-sex. The employee felt "totally isolated and helpless" and had trouble sleeping as a result of this work environment. His attempts to work with supervisors and human resource personnel have resulted in no difference in climate, and he was told to "keep my personal business to myself."[4]

- In 2008, an employee who had worked for the State of Connecticut for just over one year, reported that he had experienced discrimination and harassment based on his sexual orientation. The employee filed a complaint, and based upon the investigation, the State of Connecticut Department of Developmental Services Equal Employment Opportunity Division found sufficient evidence of harassment and discrimination to move forward.[5]

- In 2008, a gay teacher in a Connecticut public school reported that she was one of three gay teachers to be "treated badly" by her coworkers. She was singled out through selective enforcement of rules, such as taking down decorations in her classroom. The principal of the school told the teacher that she would only provide her with a letter of recommendation if she resigned.[6]

- In 2008, a transgender woman working for a Connecticut Police Training Academy reported that her supervisor harassed her based on her gender identity. He called her into a dorm room, lay down on a bed, and asked her personal questions about her family, their approval, and what she does in her free time. This lasted for more than two hours. After the incident, her supervisor cited her for taking too long to change ceiling tiles and stripping the floors, despite her having accomplished the task and receiving praise from others for doing a good

[3] GLAD Intake Form (Sept. 10, 2008).
[4] GLAD Intake Form (Feb. 12, 2009).
[5] GLAD Intake Form (Sept. 29, 2008).
[6] GLAD Intake Form (May 22, 2008).

job. She was also instructed to use the men's restroom. She filed a complaint, in which she disclosed her status as transgender. She noted that she felt afraid to be alone with her supervisor. After submitting this complaint, she was fired.[7]

- In 2005, a teacher brought federal and state claims against his former employer, the Norwalk Board of Education, accusing it of sexual orientation discrimination. The plaintiff taught math and science at one of the defendant's middle schools, and was also the program facilitator for the Connecticut Pre-Engineering Program. The principal told the plaintiff that the Program was primarily aimed at African-American students and that those students should be given preference for admission. When the plaintiff refused to give such preferences, he was subject to various retaliatory actions. The principal gave him a negative job evaluation and insinuated that he had HIV/AIDS when he became ill as a result of the hostile environment he was encountering. When the teacher returned from medical leave, he was terminated. After receiving a release from the Connecticut Commission on Human Rights and Opportunities and a right to sue letter from the EEOC, he brought a lawsuit. His claims survived a motion to dismiss. DeMoss v. City of Norwalk Bd. of Educ., 2007 WL 3432986, at *1-3 (D. Conn. Nov. 14, 2007).

- In 2005, a City of New Haven employee brought a lawsuit against the City of New Haven accusing her supervisor of denying her equal terms and conditions of employment and harassing her based on her sexual orientation. The City moved to dismiss, which the Court denied, finding that the plaintiff had sufficiently alleged facts supporting her discrimination claim.[8] The parties filed a joint stipulation of dismissal on September 10, 2007, but our research was not able to ascertain the substantive terms of the stipulation. Marcisz v. City of New Haven, at *1-2 (D. Conn. June 22, 2005).

- In 2003, a police department applicant filed a complaint with the Connecticut Commission on Human Rights and Opportunities accusing the town and several police department personnel of refusing to hire her because of her sexual orientation. The parties entered into settlement discussions and reached an agreement. Before the plaintiff signed the agreement, the defendants demanded that she sign a statement saying that she was not hired for legitimate non-discriminatory reasons. When the plaintiff refused to sign, the defendants filed suit seeking to enforce the settlement agreement. The Superior Court found that the plaintiff had never agreed to sign the statement and denied the motion to enforce. The Court added that "[i]t has not been demonstrated that plaintiff's sexual orientation is a relevant factor that the defendants could consider in her employment and [to do so] would be contrary to the public policy of the state." Skorzewski v. Town of Guilford, 2007 WL 901822, at *1-2 (Conn. Super. Ct. Mar. 8, 2007).

[7] GLAD Intake Form (Aug. 27, 2008).
[8] *Marcisz v. City of New Haven*, 2005 WL 1475329, at *1-2 (D. Conn. June 22, 2005).

- In 2003, a transgender woman, working as a police officer in Hartford, reported that she suffered harassment as a result of her gender identity. She was denied career advancement, despite being qualified. She approached her chief regarding the situation, but was "brushed off."[9]

- In 2001, a teacher brought a lawsuit against the New Britain Board of Education alleging, among other things, sexual orientation discrimination. The plaintiff, a lesbian, was employed as a special education teacher at a New Britain public school and accused the superintendent of transferring her to a lesser position based on her sexual orientation.[10] The Court eventually dismissed a number of counts arising out of the plaintiff's allegations that she was harassed by several of the defendants.[11] The end result of the litigation is unclear based on our search of several Westlaw databases, including Connecticut state court dockets. Kavy v. New Britain Bd. of Educ., 2001 WL 688622, at *1 (Conn. Super. Ct. May 21, 2001).

- In 1995, an employee of the City of Hartford brought sex and sexual orientation discrimination claims against the city, which had fired him after nine years of employment. Two years prior to his termination, the plaintiff had undergone a sex change operation. Following his termination, he filed a complaint with the Connecticut Commission on Human Rights and Opportunities, and then a lawsuit in state court after receiving a release from the Connecticut Commission on Human Rights and Opportunities. Based on the plaintiff's failure to comply with discovery requests, the trial court entered a judgment of non-suit against the plaintiff, which the appellate court affirmed. Conway v. City of Hartford, 760 A.2d 974, 975-77 (Conn. App. Ct. 2000).

- In 1995, after a police department applicant was denied a job, she filed a right to privacy action against a police official. She alleged that during her application for a job as a police officer, she was questioned about her "marital status and fidelity" and was asked the question, "What exactly are your sexual practices and preferences?" She argued that such inquiries were designed to "elicit information about her sexual orientation," and as such, they violated her right to privacy. The District Court held that such inquiries had, indeed, violated her right to privacy. However, the court held that the police official was entitled to qualified immunity. On appeal to the Second Circuit, the court affirmed, reasoning that public officials are not liable under section 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Since the conduct at issue had occurred in 1995, a reasonable official would not have known the conduct was constitutionally proscribed. Eglise v. Culpin, 2000 WL 232798, at *1 (2d Cir. Feb. 28, 2000).

[9] GLAD Intake Form (June 2, 2003).
[10] *Kavy v. New Britain Bd. of Educ.*, 2001 WL 688622, at *1 (Conn. Super. Ct. May 21, 2001).
[11] *Kavy v. New Britain Bd. of Educ.*, 2003 WL 721565, at *1 (Conn. Super. Ct. Jan. 22, 2003).

- An applicant to police department was denied employment, despite his exceptional test results. His background investigation was said to reveal issues regarding his "integrity" because the applicant was gay.[12]

- In October 1994, John Doe of North Haven took the Hamden Police Department qualifying exam and scored higher than any other applicant. He was in good physical condition and maintained a 3.5 average in a graduate-level criminal justice program. Based on his outstanding record, Doe was offered "conditional employment" as a police officer in March 1995 — subject to the completion of psychological, medical and polygraph examinations. During the polygraph test, Doe was directly asked his sexual orientation. He responded that he was gay. After the revelation, the Hamden police chief told Doe that he was not the "best candidate for the job." "Let's get one thing straight. I'm not going to enter a dialogue with you," the police chief told Doe when he pressed the issue. "The interview process is over and you didn't get the job." Doe asked for a copy of his polygraph report through the state's freedom of information commission. The very first paragraph included the statement, "He is gay."[13]

- In a book published in 1996, one of the only openly lesbian state troopers in Connecticut recounted the harassment and discrimination she faced in her division. During her admittance exam, she was required to take a polygraph exam. Several of the questions asked about sexual practices, including whether she had ever had sex with someone of the same-sex. She approached her department about wearing her uniform in a gay rights parade. She was told that she could not wear her uniform, despite the fact that other officers had worn their uniforms in other parades - a Jamaican/West Indies parade and the St. Patrick's Day parade. In response to writing an article about her experiences as an openly gay state trooper, she was reprimanded and a negative review was placed in her file. She contacted a legal rights organization, whose challenge brought about the removal of the negative review. However, several weeks later, she was transferred to another division.[14]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments

[12] H.R. Hrg. 104-87, pp. 163–165, Prepared Testimony of Michael Proto, Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act, Wed., Jul. 17, 1996, 104th Congress, 2nd Session, Referenced at 142 Cong. Rec. D 755, D 760. *See In the News*, FED. NEWS SERV., Jul. 17, 1996.

[13] HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* http://bit.ly/kThbS.

[14] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 117-24 (Routledge 1996).

against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

In 1991, Connecticut passed "An Act Concerning Discrimination on the Basis of Sexual Orientation," known colloquially as the "Gay Rights Law," which prohibits discrimination based on sexual orientation in public and private employment, housing, public accommodations, associations of licensed persons, credit practices, and by state agencies in their provision of services.[15] With respect to private employment, the law forbids employers from refusing to hire a person, discharging them, or discriminating against them "in compensation, or in terms, conditions or privileges of employment" due to sexual orientation or civil union status.

In addition to its general prohibition against sexual orientation employment discrimination, Connecticut's Gay Rights Law provides that employment agencies may not refuse to properly classify or refer their customers for employment or otherwise discriminate based on sexual orientation or civil union status. Labor organizations, such as unions, may not deny or exclude membership in the union or otherwise discriminate against its members because of sexual orientation or civil union status. The law also forbids all of these entities from advertising employment opportunities in such a way as to restrict employment based on sexual orientation or civil union status.[16]

With respect to public employment, state agencies must guarantee equal employment opportunities at all levels of state government without regard to sexual orientation. State agencies must promulgate written directives to carry out this policy and conduct training programs emphasizing non-discriminatory employment practices.[17] The law also requires state agencies – including educational institutions – that provide employment referrals or placement services to public or private employers to accept job orders on a non-discriminatory basis and to reject job requests that indicate an intention to discriminate based on sexual orientation.[18]

There are, however, several exceptions to the Gay Rights Law. For example, an employer (including the state) must employ three or more persons in order to be subject to the law.[19] Religious organizations are exempt as far as (1) employment of persons who perform work or carry out the activities of the organization and (2) matters of discipline, faith, or internal organization, or rules established by the organization.[20] Finally, the Reserve Officers' Training Corp ("ROTC") program may continue to

[15] 1991 Conn. Legis. Serv. P.A. 91-58 (West) (codified at CONN. GEN. STAT. §§ 46a-81a–81r (2007 & Supp. 2008)).
[16] CONN. GEN. STAT. § 46a-81c (2007 & Supp. 2008).
[17] *Id.* § 46a-81h.
[18] *Id.* § 46a-81j.
[19] *Id.* § 46a-51(10).
[20] *Id.* § 46a-81p.

discriminate on the basis of sexual orientation in its "conduct and administration" at colleges and universities.[21]

On November 15, 2000, the CHRO issued a Declaratory Ruling finding that the Gay Rights Law provision prohibiting employment discrimination based on sexual orientation applied to the Boy Scouts of America's policy of excluding openly gay males from employment. However, the CHRO found that it could not render a decision as to whether the Boy Scouts' policy actually violated the statute on the factual record before it. The CHRO's Ruling also stated that, based on the U.S. Supreme Court's decision in *Boy Scouts of America v. Dale*, the provision of the Gay Rights Law prohibiting public accommodations discrimination based on sexual orientation could not be applied to the Boy Scouts' policy of excluding openly gay adult volunteers.[22]

Subsequently, on February 8, 2001, the CHRO issued another Declaratory Ruling pertaining to the Boy Scouts' policy of discriminating on the basis of sexual orientation. This Ruling was requested by the State Employees' Campaign Committee (the "Committee"), an annual campaign designed to raise funds from state employees for charitable and public health, welfare, environmental, conservation, and service purposes. The funds are administered in part through charitable federations, which are composed of member agencies, some of which include the Boy Scouts. The CHRO concluded that the Committee's inclusion of Boy Scouts member agencies violated various provisions of the Gay Rights Law prohibiting sexual orientation discrimination by state agencies.[23] The Boy Scouts later filed a lawsuit against the Committee to enjoin it from excluding the Boy Scouts from the 2000 campaign and future campaigns. The federal district court granted summary judgment in favor of the Committee, and the Second Circuit affirmed.[24]

Neither the Gay Rights Law, nor any other Connecticut anti-discrimination statute, explicitly prohibits discrimination based on gender identity or expression. On November 9, 2000, the Commission on Human Rights and Opportunities ("CHRO") ruled that discrimination against transgender persons was a form of sex discrimination and that such persons could pursue claims of gender identity discrimination under the sex discrimination statutes.[25] These statutes, including those forbidding sex discrimination in both private and public employment, are similar in scope and coverage to the Gay Rights Law.[26]

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[21] *Id.* § 46a-81q.
[22] Declaratory Ruling on behalf of John/Jane Doe, Nov. 9, 2000 [hereinafter Declaratory Ruling 2000].
[23] CHRO Declaratory Ruling on the Petition Filed by the State Employees' Campaign Committee, Feb. 8, 2001.
[24] *Boy Scouts of America v. Wyman*, 213 F. Supp. 2d 159 (D. Conn. 2002), *aff'd*, 335 F.3d 80 (2d Cir. 2003).
[25] Declaratory Ruling 2000, *supra* note 23. The Ruling permits transgender persons to bring sex discrimination claims grounded in accusations of discrimination based on their gender identity or expression. Some state legislators felt that the ruling provided inadequate protection, and have proposed amending the anti-discrimination statutes to specifically include gender identity discrimination.
[26] *See* CONN. GEN. STAT. §§ 46a-59–78 (2007 & Supp. 2008). Importantly, the CHRO Declaratory Ruling applies to "all statutes outlawing sex discrimination under the CHRO's jurisdiction," not just those barring discrimination in employment. Declaratory Ruling 2000, *supra* note 23, at n.13.

2. Enforcement and Remedies

Any person who believes he or she has suffered unlawful discrimination on the basis of sexual orientation or gender identity may file a complaint with the CHRO within 180 days of the alleged discriminatory act.[27] The respondent must file a written answer within 30 days of receiving the complaint, and the CHRO then has 90 days to review the complaint to determine whether it merits further investigation. If the CHRO decides further investigation is warranted, it has 190 days from the end of its initial review to conduct a factual investigation to determine whether there is "reasonable cause" to believe that the alleged discrimination occurred. Upon a finding of reasonable cause, the CHRO has an additional 50 days to attempt to eliminate the discriminatory practice.[28] If the complaint cannot be resolved through this process, the CHRO will appoint a hearing officer or human rights referee to adjudicate the complaint in a trial-type hearing.[29] Certain decisions, such as the CHRO's decision to dismiss a complaint for lack of reasonable cause or a hearing officer's final order, can be appealed to the superior courts.[30]

Any person who believes they have suffered unlawful discrimination at the hands of a state actor may bypass the CHRO process and file a complaint directly in state court.[31] All others must first file with the CHRO, but can bring an action in superior court if they ask for and receive the appropriate release from the CHRO.[32] Lawsuits brought after obtaining the appropriate release must be filed within two years of the date the complaint was filed with the CHRO.[33]

B. Attempts to Enact State Legislation

Efforts to amend state law to prohibit discrimination based on gender identity have failed. According to a staff attorney for the Gay & Lesbian Advocates & Defenders, some state employers have questioned the validity of the CHRO's decision, and the ruling itself does not require state agencies to address gender identity discrimination in their training or employee manuals.[34] Thus, in January 2007, the Joint Committee on the Judiciary introduced Raised Senate Bill No. 1044, entitled "An Act Concerning Discrimination," which prohibited discrimination on the basis of gender identity or expression in a variety of areas, including public and private employment.[35] State Senator David Cappiello based his opposition to the bill on the fact that he had "a difficult time asking people to try and explain to their seven-year-old son or daughter what is happening with their teacher because they're going through gender identity crisis

[27] CONN. GEN. STAT. § 46a-82 (2007 & Supp. 2008). The CHRO is also empowered to file a complaint whenever it has reason to believe that a person has been or is engaged in discrimination. *Id.*
[28] *Id.* § 46a-83.
[29] *Id.* §§ 46a-84, 46a-86.
[30] *Id.* § 46a-94a. With respect to hearing officer orders, the appeal can be made not only by the aggrieved party, but by the CHRO itself.
[31] *Id.*§ 46a-99.
[32] *Id.* §§ 46a-83a, 46a-100, 46a-101.
[33] *Id.*§ 46a-102.
[34] Brian Lockhart, *A Drive For 'Workplace Equity'*, ADVOCATE, Aug. 30, 2007, at 2.
[35] 2007 Conn. S.B. 1044 (State Net).

or a sex change, or they choose, because of what other reason or ailment, they dress like the opposite sex."[36] State Senator Sam Caligiuri voiced similar concerns, arguing that the law should not be extended to protect teachers.[37] Despite this opposition, the bill passed the State Senate by a vote of thirty to four.[38]

During the debate in the House, State Representative Kevin Witkos objected to the bill on the ground that it did not allow school boards to take protective measures to ensure that teachers did not wear clothing typically worn by the opposite sex.[39] State Representative Richard Belden voiced his reservations about the bill by stating: "[W]hat people do on their private time in their private lives is one thing. But when we get to the norm, and what we do collectively in society, be it employment, I think it's slightly different . . . ."[40] The bill died in the State House of Representatives.[41]

On February 27, 2008, the Joint Committee on the Judiciary introduced a similar bill, Raised House Bill No. 5723, in a second attempt to codify the prohibition of gender identity discrimination.[42] The Joint Committee voted in favor of the bill by a thirty-seven to six margin.[43] However, the bill ultimately failed. The Joint Committee on the Judiciary introduced a nearly identical bill – Raised House Bill No. 6452 – at the beginning of the January 2009 legislative session.[44] That bill is still pending.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

None.

3. Attorney General Opinions

None.

D. Local Legislation

1. City of Hartford

[36] CT S. Tran., May 23, 2007 (statement of State Sen. David Cappiello).
[37] *See* CT S. Tran., May 23, 2007 (statement of State Sen. Sam Caligiuri).
[38] Vote for SB-1044, May 23, 2007, *available at* http://bit.ly/1JlCa5.
[39] CT H.R. Tran., June 4, 2007 (statement of State Rep. Kevin Witkos).
[40] CT H.R. Tran., June 4, 2007 (statement of State Rep. Richard Belden).
[41] *See* Daniela Altimari, *Connecticut to Consider Transgender Anti-Discrimination Proposal*, HARTFORD COURANT, Jan. 6, 2009, at A1.
[42] 2008 Conn. H.B. 5723 (State Net).
[43] Raised H.B. No. 5723, Jud. Comm. Vote Tally Sheet, Mar. 24, 2008, *available at* http://bit.ly/zwA1h.
[44] 2009 Conn. H.B. 6452 (State Net).

The City of Hartford bans sexual orientation discrimination in the recruitment and employment of city employees.[45] In addition, the City has established the "Hartford Commission on Lesbian, Gay, Bisexual and Transgender Issues," the purpose of which is to assist in the elimination of bigotry against these groups and to make recommendations regarding city policies and services that impact lesbian, gay, bisexual, and transgender persons.[46]

2. City of Stamford

The City of Stamford also bans discrimination against city employees based on their sexual orientation.[47]

3. City of New Haven

The City of New Haven prohibits the denial of equal opportunities to any person on the basis of sexual orientation.[48]

4. Town of Greenwich

In 2007, the town of Greenwich adopted a written resolution forbidding discrimination on the basis of sexual orientation.[49]

E. Occupational Licensing Requirements

The Gay Rights Law prohibits state agencies from granting, denying, or revoking a license or charter on the grounds of sexual orientation. Additionally, state agencies may not permit such discrimination by associations of licensed persons.[50] Based on the CHRO's Declaratory Ruling of November 9, 2000, laws (1) prohibiting sex discrimination in state licensing and charter procedures and (2) forbidding state agencies from permitting sex discrimination in professional or occupational associations also ban gender identity discrimination in those areas.[51]

[45] HARTFORD MUN. CODE §§ 2-696(a), 2-232.
[46] *Id.* §§ 2-286-87.
[47] STAMFORD CHARTER AND CODE § 47-23.
[48] NEW HAVEN CODE OF ORD. §§ 12 1/2-2(b).
[49] Martin B. Cassidy, GREENWICH TIME, Sept. 22, 2007, at A1.
[50] CONN. GEN. STAT. §§ 46a-81k, 46a-81*l* (2007 & Supp. 2008).
[51] *Id.* §§ 46a-73, 46a-74; Declaratory Ruling 2000, *supra* note 23.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

DeMoss v. City of Norwalk Bd. of Educ., 2007 WL 3432986, at *1-3 (D. Conn. Nov. 14, 2007).

In *DeMoss v. City of Norwalk Board of Education*, the plaintiff, a gay man, brought federal and state claims against his former employer, the Norwalk Board of Education, accusing it of sexual orientation discrimination. The plaintiff taught math and science at one of the defendant's middle schools, and was also the program facilitator for the Connecticut Pre-Engineering Program. The principal told the plaintiff that the Program was primarily aimed at African-American students and that those students should be given preference for admission. When the plaintiff refused to give such preferences, he was subject to various retaliatory actions. The principal gave him a negative job evaluation and insinuated that he had HIV/AIDS when he became ill as a result of the hostile environment he was encountering. When DeMoss returned from medical leave, he was terminated. After receiving a release from the CHRO and a right to sue letter from the EEOC, he brought this lawsuit. His claims survived a motion to dismiss.[52]

Skorzewski v. Town of Guilford, 2007 WL 901822, at *1-2 (Conn. Super. Ct. Mar. 8, 2007).

In *Skorzewski v. Town of Guilford*, the plaintiff filed a complaint with the CHRO accusing the town and several police department personnel of refusing to hire her because of her sexual orientation. The parties entered into settlement discussions and reached an agreement. Before the plaintiff signed the agreement, the defendants demanded that she sign a statement saying that she was not hired for legitimate non-discriminatory reasons. When the plaintiff refused to sign, the defendants filed suit seeking to enforce the settlement agreement. The Superior Court found that the plaintiff had never agreed to sign the statement and denied the motion to enforce. The Court added that "[i]t has not been demonstrated that plaintiff's sexual orientation is a relevant factor that the defendants could consider in her employment and [to do so] would be contrary to the public policy of the state."[53]

Marcisz v. City of New Haven, 2005 WL 1475329, at *1-2 (D. Conn. June 22, 2005).

In *Marcisz v. City of New Haven*, the plaintiff brought a lawsuit against the City of New Haven accusing her supervisor of denying her equal terms and conditions of employment and harassing her based on her sexual orientation. The City moved to

[52] *DeMoss v. City of Norwalk Bd. of Educ.*, 2007 WL 3432986, at *1-3 (D. Conn. Nov. 14, 2007).
[53] *Skorzewski v. Town of Guilford*, 2007 WL 901822, at *1-2 (Conn. Super. Ct. Mar. 8, 2007).

dismiss, which the Court denied, finding that the plaintiff had sufficiently alleged facts supporting her discrimination claim.[54] The parties filed a joint stipulation of dismissal on September 10, 2007, but our research was not able to ascertain the substantive terms of the stipulation.[55]

Kavy v. New Britain Bd. of Educ., 2001 WL 688622, at *1 (Conn. Super. Ct. May 21, 2001).

In *Kavy v. New Britain Board of Education*, the plaintiff brought a lawsuit against the New Britain Board of Education alleging, among other things, sexual orientation discrimination. The plaintiff, a lesbian, was employed as a special education teacher at a New Britain public school and accused the superintendent of transferring her to a lesser position based on her sexual orientation.[56] The Court eventually dismissed a number of counts arising out of the plaintiff's allegations that she was harassed by several of the defendants.[57] The end result of the litigation is unclear based on our search of several Westlaw databases, including Connecticut state court dockets.

Conway v. City of Hartford, 760 A.2d 974, 975-77 (Conn. App. Ct. 2000).

In *Conway v. City of Hartford*, the plaintiff brought sex and sexual orientation discrimination claims against the City of Hartford, which had fired him after nine years of employment. Two years prior to his termination, the plaintiff had undergone a sex change operation. Following his termination, he filed a complaint with the CHRO, and then a lawsuit in state court after receiving a release from the CHRO. Based on the plaintiff's failure to comply with discovery requests, the trial court entered a judgment of non-suit against the plaintiff, which the appellate court affirmed.[58]

Eglise v. Culpin, 2000 WL 232798, at *1 (2d Cir. Feb. 28, 2000).

Diana Eglise filed a right to privacy action against police official John R. Culpin. Eglise alleged that during her application for a job as a police officer, she was questioned about her "marital status and fidelity" and was asked the question, "What exactly are your sexual practices and preferences?" Eglise argued that such inquiries were designed to "elicit information about Eglise's sexual orientation," and as such, they violated her right to privacy. The District Court held that such inquiries had, indeed, violated Eglise's right to privacy. However, the court held that Culpin was entitled to qualified immunity. On appeal to the Second Circuit, the court affirmed, reasoning that public officials are not liable under section 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Since the conduct at issue had occurred in 1995, a reasonable official would not have known the conduct was constitutionally proscribed.[59]

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[54] *Marcisz v. City of New Haven*, 2005 WL 1475329, at *1-2 (D. Conn. June 22, 2005).
[55] *Marcisz v. City of New Haven*, 2007 WL 4448442 (D. Conn. Sept. 10, 2007).
[56] *Kavy v. New Britain Bd. of Educ.*, 2001 WL 688622, at *1 (Conn. Super. Ct. May 21, 2001).
[57] *Kavy v. New Britain Bd. of Educ.*, 2003 WL 721565, at *1 (Conn. Super. Ct. Jan. 22, 2003).
[58] *Conway v. City of Hartford*, 760 A.2d 974, 975-77 (Conn. App. Ct. 2000).
[59] *Eglise v. Culpin*, 2000 WL 232798, at *1 (2d Cir. Feb. 28, 2000).

Gay and Lesbian Law Students Association v. Board of Trustees, 673 A.2d 484 (Conn. 1996).

In *Gay and Lesbian Law Students Association v. Board of Trustees*, the Connecticut Supreme Court found that the Gay Rights Law prohibited the military from recruiting on the campus of the University of Connecticut School of Law due to the military's policy of discriminating on the basis of sexual orientation.[60]

2. **Private Employers**

None.

B. **Administrative Complaints**

Erin Dwyer v. Yale Univ., CHRO Nos. 0130315 & 0230323 (Nov. 29, 2005).

In *Erin Dwyer v. Yale University*, Dwyer filed two complaints with the CHRO accusing Yale University of employment discrimination based on her sexual orientation, transsexual status, and gender dysphoria. Dwyer's complaint was based on derogatory comments and conduct by co-workers and management while working at various Yale dining halls, as well as Yale's decision to suspend and terminate her employment.[61] The human rights referee concluded that Dwyer did not present sufficient evidence to prove most of her allegations. However, the referee did find that the harassment Dwyer was subject to at one of the dining halls created a hostile work environment based on her sexual orientation and that Dwyer was entitled to back pay.[62]

Sandra J. Schoen v. Grace Christian Sch., CHRO No. 0120163 (Dec. 2, 2002).

In *Sandra J. Schoen v. Grace Christian School*, Schoen filed a complaint with the CHRO accusing Grace Christian School of employment discrimination based on her sex and sexual orientation. Schoen alleged that she was fired from her job with Grace Christian because of her opposition to the school's anti-homosexual policies. This opposition consisted of Schoen's refusal to ask her minister, who was not an employee of the school, whether he was a homosexual. The respondent moved to dismiss. The human rights referee found that Schoen's sexual orientation claim failed on three grounds: (1) it failed to allege an employment relationship between her minister and the respondent; (2) the Gay Rights Law did not have a provision against retaliation for

[60] 673 A.2d 484 (Conn. 1996). Whether this decision is still viable after the U.S. Supreme Court's decision in *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47 (2006), which upheld the Solomon Amendment, has yet to be litigated.
[61] *Erin Dwyer v. Yale Univ.*, CHRO Nos. 0130315 & 0230323 (Nov. 29, 2005), *available at* http://www.ct.gov/chro. Pursuant to the CHRO's Declaratory Ruling of November 9, 2000, Dwyer's claim of discrimination based on her transsexual status was brought as a sex discrimination claim. *See* Declaratory Ruling 2000, *supra* note 23.
[62] *Id.*

opposing a discriminatory employment practice; and (3) the Gay Rights Law provision exempting religious organizations defeated any claim of discrimination.[63]

C. **Other Documented Examples of Discrimination**

A Connecticut Public School

In 2009, a Connecticut public school teacher with excellent evalutations was dismissed shortly after mentioning in class when Connecticut began to allow same-sex couples to marry that Spain also allowed this. Although the school said the dismissal was based on poor performance, the teacher felt it was sexual orientation discrimination. The teacher filed a complaint with the Connecticut Commission of Human Rights & Opportunities.[64]

Connecticut State Maintenance Department

In 2008, a gay man, working in the Connecticut State Maintenance Department, reported that he had been harassed by his coworkers for being gay. He was tied by his hands and feet and locked in a closet. He filed a complaint, and the department is investigating this incident as a possible hate crime. His assaulters were placed on administrative leave.[65]

Connecticut State Department of Developmental Disabilities

In 2008, a gay man reported that he had endured harassment and discrimination based on his sexual orientation while working for sixteen years in the State of Connecticut Department of Developmental Disabilities. In 1996, he was given a promotion. Upon telling his new Program Supervisor that he was gay, he was immediately notified that the promotion was going to be given to another staff person instead. Additionally, on the same day he put a rainbow sticker on his car, the employee overheard many inappropriate comments about his sexual orientation, such as "[t]hey put those on their cars so they can spot each other to have sex." In 2007, the employee was promoted and moved to new group home. As part of his job responsibilities, the employee was asked to shave a total care client. However, he was told that it was inappropriate for him to shave another male client because he was gay, and that if were to do that, he would be turned in for abuse. Other staff members, who are heterosexual, were not prohibitteed from shaving clients of a different-sex. The employee felt "totally isolated and helpless" and had trouble sleeping as a result of this work enviroment. His

[63] *Sandra J. Schoen v. Grace Christian Sch.*, CHRO No. 0120163 (Dec. 2, 2002), *available at* http://www.ct.gov/chro.
[64] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).
[65] GLAD Intake Form.

attempts to work with supervisors and human resource personnel have resulted in no difference in climate, and he was told to "keep my personal business to myself."[66]

Connecticut State Department

In 2008, an employee who had worked for the State of Connecticut for just over one year, reported that he had experienced discrimination and harassment based on his sexual orientation. The employee filed a complaint, and based upon the investigation, the State of Connecticut Department of Developmental Services Equal Employment Opportunity Division found sufficient evidence of harassment and discrimination to move forward.[67]

Connecticut Public School

In 2008, a gay teacher in a Connecticut public school reported that she was one of three gay teachers to be "treated badly" by her coworkers. She was singled out through selective enforcement of rules, such as taking down decorations in her classroom. The principal of the school told the teacher that she would only provide her with a letter of recommendation if she resigned.[68]

Police Training Academy

In 2008, a transgender woman working for a Connecticut Police Training Academy reported that her supervisor harassed her based on her gender identity. He called her into a dorm room, lay down on a bed, and asked her personal questions about her family, their approval, and what she does in her free time. This lasted for more than two hours. At a later date, her supervisor cited her for taking too long to change ceiling tiles and stripping the floors, despite have accomplished the task and receiving praise from others for doing a good job. She was also instructed to use the men's restroom. She filed a complaint, in which she disclosed her status as transgender. She noted that she felt afraid to be alone with her supervisor. After submitting this complaint, she was fired.[69]

Hartford Police Department

In 2003, a transgender woman, working as a police officer in Hartford, reported that she suffered harassment as a result of her gender identity. She was denied career advancement, despite being qualified. She approached her chief regarding the situation, but was "brushed off."[70]

Municipal Police Department

[66] GLAD Intake Form (Feb. 12, 2009).
[67] GLAD Intake Form (Sept. 29, 2008).
[68] GLAD Intake Form (May 22, 2008).
[69] GLAD Intake Form (Aug. 27, 2008).
[70] GLAD Intake Form (June 2, 2003).

An applicant to police department was denied employment, despite his exceptional test results. His background investigation was said to reveal issues regarding his "integrity" because the applicant was gay.[71]

Hamden Police Department

In October 1994, John Doe of North Haven took the Hamden Police Department qualifying exam and scored higher than any other applicant. He was in good physical condition and maintained a 3.5 average in a graduate-level criminal justice program. Based on his outstanding record, Doe was offered "conditional employment" as a police officer in March 1995 — subject to the completion of psychological, medical and polygraph examinations. During the polygraph test, Doe was directly asked his sexual orientation. He responded that he was gay. After the revelation, the Hamden police chief told Doe that he was not the "best candidate for the job." "Let's get one thing straight. I'm not going to enter a dialogue with you," the police chief told Doe when he pressed the issue. "The interview process is over and you didn't get the job." Doe asked for a copy of his polygraph report through the state's freedom of information commission. The very first paragraph included the statement, "He is gay."[72]

Connecticut State Police

Stacey Simmons, a lesbian, was considered one of the only open gay state troopers in Connecticut. During her admittance exam, Simmons was required to take a polygraph exam. Several of the questions asked about sexual practices, including whether she had ever had sex with someone of the same-sex. Simmons approached her department about wearing her uniform in a gay rights parade. She was told that she could not wear her uniform, despite the fact that other officers had worn their uniforms in other parades - a Jamaican/West Indies parade and the St. Patrick's Day parade. In response to writing an article about her experiences as an openly gay state trooper, Simmons was reprimanded and a negative review was placed in her file. Simmons contacted a legal rights organization, whose challenge brought about the removal of the negative review. However, several weeks later, Simmons was transferred to another division.[73]

[71] H.R. Hrg. 104-87, pp. 163–165, Prepared Testimony of Michael Proto, Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act, Wed., Jul. 17, 1996, 104th Congress, 2nd Session, Referenced at 142 Cong. Rec. D 755, D 760. *See In the News*, FED. NEWS SERV., Jul. 17, 1996.
[72] HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* http://bit.ly/kThbS.
[73] BUHRKE, *supra* note 14, at 117-24.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Connecticut's sodomy law was repealed when Connecticut rewrote its Penal Code in 1971.[74]

B. Housing & Public Accommodations Discrimination

The Gay Rights Law prohibits discrimination based on sexual orientation in a variety of conduct related to the sale or rent of a dwelling.[75] Based on the CHRO's Declaratory Ruling of November 9, 2000, laws prohibiting sex discrimination in housing also ban gender identity discrimination in this area.[76] The CHRO must investigate complaints alleging housing discrimination based on sexual orientation or gender identity within 100 days of the complaint's filing, and a final administrative disposition must be made within one year of filing unless it would be impracticable to do so.[77] Moreover, no state department, board, or agency may permit housing discrimination.[78]

The Gay Rights Law makes it unlawful to deny any person within Connecticut full and equal accommodations in any place of public accommodation, resort, or amusement based on sexual orientation, or to discriminate, segregate, or separate on account of sexual orientation.[79] Based on the CHRO's Declaratory Ruling of November 9, 2000, laws prohibiting sex discrimination in public accommodations also ban gender identity discrimination in this area.[80] Moreover, no state department, board, or agency may permit public accommodations discrimination.[81]

The Gay Rights Law requires that every state agency perform its services without discrimination based on sexual orientation, and no state facility may be used in furtherance of any discrimination.[82] Based on the CHRO's Declaratory Ruling of

[74] *See* Memorandum, Getting Rid of Sodomy Laws: History and Strategythat Led to the Lawrence Decision (ACLU Lesbian & Gay Rts. Project June 26, 2003), *available at* http://bit.ly/nIDtY.
[75] *Id.* § 46a-81e.
[76] *Id.* § 46a-64c; Declaratory Ruling 2000, *supra* note 13.
[77] CONN. GEN. STAT. §§ 46a-64c(f), 46a-81e(e) (2007 & Supp. 2008).
[78] *Id.* §§ 46a-74, 46a-81*l*.
[79] *Id.* § 46a-81d.
[80] *Id.* § 46a-64(a)(1)-(2); Declaratory Ruling 2000, *supra* note 13.
[81] CONN. GEN. STAT. §§ 46a-74, 46a-81*l* (2007 & Supp. 2008).
[82] CONN. GEN. STAT. § 46a-81i (2007 & Supp. 2008).

November 9, 2000, laws prohibiting sex discrimination by state agencies ban gender identity discrimination by those agencies as well.[83]

Connecticut Department of Economic and Community Development regulations state that any recipient of department funds, including sponsors of housing, technical assistance organizations, and subcontractors must adopt a fair housing statement that indicates the recipient's commitment to promoting fair housing choice and not to discriminate on the basis of, amongst other things, sexual orientation.[84]

Several local jurisdictions also prohibit sexual orientation discrimination in housing and public accommodations. The City of Hartford prohibits housing and employment discrimination by city contractors based on sexual orientation.[85] It also prohibits city departments and agencies from denying housing accommodations to any person based on their sexual orientation.[86] In addition to prohibiting the denial of equal opportunities on the basis of sexual orientation, the City of New Haven also specifically prohibits housing discrimination and discrimination by city contractors on the basis of sexual orientation.[87] New Britain, Connecticut, also prohibits housing discrimination on the basis of sexual orientation.[88] Finally, in 2007, the town of Greenwich adopted a written resolution forbidding discrimination on the basis of sexual orientation.[89] The town had previously adopted a policy providing that all town ordinances, regulations, policies, and rules regarding the town's park facilities, beaches, and recreation areas would be applied consistently without regard to sexual orientation.[90]

The Department of Consumer Protection's regulations governing real estate brokers and salesmen include sexual orientation in its definitions of "blockbusting" and "steering."[91] These regulations also prohibit brokers and salesmen from denying services to someone based on their sexual orientation.[92] Home inspectors are also prohibited from discriminating on the basis of sexual orientation.[93]

Department of Human Resources regulations state that shelters may not discriminate in the acceptance of clients based on, among other things, their sexual orientation.[94]

[83] *Id.* § 46a-71; Declaratory Ruling 2000, *supra* note 13.
[84] CONN. AGENCIES REGS. § 8-37ee-311 (2007).
[85] HARTFORD MUN. CODE § 2-558(a).
[86] *Id.* § 2-697(a).
[87] *Id.* §§ 2 1/2-43, 12-1(d).
[88] NEW BRITAIN CODE OF ORD. § 2-199.
[89] Cassidy, *supra* note 40.
[90] *Text of Anti-Discrimination Policy*, GREENWICH TIME, Mar. 3, 2006, at A1.
[91] *Id.* (§ 20-328-1a).
[92] *Id.* (§ 20-328-4a).
[93] *Id.* (§ 20-491-14).
[94] *Id.* (§ 17-590-4).

Alan Couture v. Waterbury Republican, CHRO No. 0630390, at 18-20 (June 12, 2008).

In *Alan Couture v. Waterbury Republican,* Couture filed a complaint with the CHRO accusing the Waterbury Republican, a newspaper, of public accommodations discrimination based on his sexual orientation and civil union status for refusing to print a picture of him and his civil union partner with those of married couples. The newspaper filed a motion to dismiss. The human rights referee granted the motion on the ground that there was no authority in Connecticut to support a finding that the laws against public accommodations discrimination extended to a private newspaper in the gathering and publication of unpaid announcements.[95]

Judy Hartling v. Jeffrey Carfi, CHRO No. 0550116, at 3, 9 (Oct. 26, 2006).

In *Judy Hartling v. Jeffrey Carfi, et al.*, Hartling filed a complaint with the CHRO accusing Carfi, his girlfriend, and his company of retaliating against her for filing a housing discrimination claim against them. Hartling further alleged that the retaliation was motivated in part by her sexual orientation. In an earlier decision, a human rights referee entered a default judgment in favor of Hartling, imposing liability for housing discrimination based on her sexual orientation.[96] The issue before the referee in the instant decision was damages. The referee awarded Hartling $25,000 for the emotional distress she suffered as a result of the respondents' retaliation, as well as other costs.[97]

C. **Hate Crimes**

Connecticut has made it a felony to "maliciously, and with specific intent to intimidate or harass another person because of the actual or perceived race, religion, ethnicity, disability, sexual orientation or gender identity or expression of such other person," cause serious physical injury to that person or a third person.[98] This prohibition was enacted in 2000 without the disability and gender identity categories, which were later added in a 2004 amendment.[99]

Connecticut has also made it a crime to "subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or the United States" on account of sex or sexual orientation.[100] If the person who violates this law damages property as a consequence of their violation, they will be guilty of a class D felony.[101]

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[95] *Alan Couture v. Waterbury Republican*, CHRO No. 0630390, at 18-20 (June 12, 2008), *available at* http://www.ct.gov/chro. Couture's civil union partner, Robert McDonald, filed the same complaint simultaneously. The referee issued an identical ruling in that case. *Id.*
[96] *Judy Hartling v. Jeffrey Carfi*, CHRO No. 0550116 at 3, 9 (Oct. 26, 2006), *available at* http://www.ct.gov/chro.
[97] *Id.*
[98] CONN. GEN. STAT. § 53a-181j (2007, Supp. 2008).
[99] 2000 Conn. Legis. Serv. P.A. 00-72 (West); 2004 Conn. Legis. Serv. P.A. 04-135 (West).
[100] *Id.* § 46a-58(a).
[101] *Id.* § 46a-58(d).

D. **Education**

Connecticut prohibits sexual orientation discrimination in the public schools, providing children with an equal opportunity to participate in the activities, programs, and courses of study offered in the public schools.[102]

The State Board of Education Codes of Professional Responsibility for Teachers and for School Administrators state that teachers and school administrators shall "[n]urture in students lifelong respect and compassion for themselves and other human beings regardless of . . . sexual orientation."[103]

E. **Health Care**

DCF regulations governing the licensure of outpatient psychiatric clinics for children require clinics to consider for admission all referrals regardless of sexual orientation.[104]

To maintain enrollment in the Connecticut Medical Assistance Program, a provider must abstain from discriminating or permitting discrimination based on sexual orientation.[105] However, the Department of Social Services will not pay for physicians' services or nurse practitioner services for sex reassignment surgery, and will not pay for psychiatric services performed in the process of preparing an individual for transsexual surgery.[106]

F. **Gender Identity**

Connecticut law permits transsexuals who have undergone sex-reassignment surgery to be issued new birth certificates.[107] For more issues related to birth certificates, *see infra* Part IV.G.

Based on the CHRO's Declaratory Ruling of November 9, 2000, laws prohibiting sex discrimination by state agencies ban gender identity discrimination by those agencies as well.[108]

G. **Parenting**

The Gay Rights Law allows the Commissioner of Children and Families or a child-placing agency to consider the sexual orientation of the prospective adoptive or foster parent(s) when placing a child for adoption or in foster care, and "nothing . . . shall be deemed to require . . . place[ment] [of] a child . . . with a prospective adoptive or

[102] CONN. GEN. STAT. § 10-15c(a) (2007, Supp. 2008).
[103] *Id.* §§ 10-145d-400a, -400b.
[104] *Id.* § 17a-20-40.
[105] *Id.* § 17b-262-526.
[106] *Id.* §§ 17b-262-342, -456, -612.
[107] *Id.* § 19a-42.
[108] Declaratory Ruling 2000, *supra* note 13.

foster parent or parents who are homosexual or bisexual."[109] However, it is unlawful for any state agency to discriminate on the basis of sexual orientation,[110] and under the CHRO's November 9, 2000 Declaratory Ruling, laws prohibiting sex discrimination by state agencies also prohibit discrimination based on gender identity.[111] For more on the Department of Children and Families' ("DCF") internal policies regarding adoption by gay, lesbian, bisexual, or transgender individuals.

In 2000, the state legislature enacted "An Act Concerning the Best Interests of Children in Adoption Matters" in response to the Connecticut Supreme Court's decision in *In re Adoption of Baby Z.* In that case, the biological mother submitted an adoption application to the Probate Court to have her same-sex partner declared the adoptive parent of their child. The Court found that, under the adoption laws, only the state, a parent married to the prospective adoptive parent, or a blood relative were allowed to access the probate process.[112] The 2000 law allows the parent of a child to enter into an adoption agreement with one other person who "shares parental responsibility for the child."[113] This permits a parent's unmarried partner – whether same-sex or opposite-sex – to adopt their partner's child.

Beginning October 1, 2008, Connecticut law governing the filing of a birth certificate unambiguously states that gestational surrogacy agreements are enforceable. As a result of this law, couples – including same-sex couples – who enter into a gestational surrogacy agreement where one or both members of the couple are "intentional" parents rather than biological parents, can petition to have a court order the Department of Health to put both parents' names on the birth certificate.[114]

Oleski v. Hynes involved the question of whether a person who was not the biological parent of a child and who had no legal relationship with the biological parent was entitled to have his name placed on the child's birth certificate based on the terms of a gestational surrogacy contract. Here, a same-sex male couple had contracted with a woman to serve as the surrogate mother to a set of twins. The agreement listed one of the men as the biological parent, the other as the "adopting" parent, and the surrogate mother as the "carrier."[115] The identity of the egg donor was not revealed. The Court held, based on Connecticut statutory and case law, that the "adopting" parent would have to go through the regular adoption procedures, after the child's birth, in order to become the child's parent.[116]

In three other cases decided in 2008, however, courts facing the same question reached a different conclusion. In *Griffiths v. Taylor* and *Cassidy v. Williams*, both courts found that Connecticut General Statutes § 7-48a, even prior to the amendment that took

[109] *Id.* § 45a-726a.
[110] *Id.* § 46a-81i(a).
[111] *Id.* § 46a-71(a); Declaratory Ruling 2000, *supra* note 13.
[112] *In re Adoption of Baby Z.*, 724 A.2d 1035, 1038, 1055-56 (Conn. 1999).
[113] 2000 Conn. Legis. Serv. P.A. 00-228 (West) (codified as CONN. GEN. STAT. § 45a-724(a)(3) (2007)).
[114] 2008 Conn. Legis. Serv. P.A. 08-184 (West) (to be codified at CONN. GEN. STAT. § 7-48a).
[115] *Oleski v. Hynes*, 2008 WL 2930518, at *1-2 (Conn. Super. Ct. July 10, 2008).
[116] *Id.* at *11-12.

effect on October 1, 2008, "create[d] yet another statutory manner in which parentage can be established: by being named as an intended parent in a gestational carrier agreement."[117] *Cunningham v. Tardiff* reached a similar conclusion in an opinion that was issued after the amended version of § 7-48a took effect.[118] All three cases involved same-sex male couples.

Generally, Connecticut courts have been willing to award joint or sole legal custody of a child to a gay or lesbian parent.[119] Moreover, courts will allow a former same-sex partner with no legal or biological relationship to the child to petition for visitation. *Lavoie v. MacIntyre* involved a same-sex couple that had been together for nearly a decade and had raised two children together, both of which were the biological children of the defendant, and neither of which had any legal relationship with the plaintiff. After the couple separated and the defendant prevented the plaintiff from seeing the children, the plaintiff sought visitation rights pursuant to Connecticut General Statutes § 46b-59.[120] The court granted visitation, finding that the plaintiff had a "parent-like relationship" with each of the two children and that the denial of visitation would cause the children harm.[121]

In *M. v. M., U v. U.*, the defendant, a male-to-female transsexual father of two children, sought joint custody of her children and requested that they reside primarily with her and her current husband. The plaintiff mother wanted the children to continue living primarily with her. Although the Court expressed some concerns about the father's request to keep her sex change a secret, as well as the children's adjustment to puberty in light of their father's sex change, it nevertheless found that the father was the more organized parent and that the children should live with her. The mother was awarded unrestricted visitation.[122]

In *Zavatsky v. Anderson*, the plaintiff brought a lawsuit against numerous employees of the DCF alleging violations of the plaintiff's rights to family integrity, family association, and equal protection. The plaintiff, who was a lesbian, had a partner who had given birth to a son that suffered from psychological disturbances. When the child was eight years old, the defendants submitted a petition to the juvenile court contending that he was physically and emotionally neglected, and the child was ultimately placed in foster care. The plaintiff contended that the defendants, throughout their handling of the child's case, "refused to acknowledge the existence of the family unit" consisting of the plaintiff, her partner, and the child, thereby depriving the plaintiff

[117] *Griffiths v. Taylor*, 2008 WL 2745130, at *6 (Conn. Super. Ct. June 13, 2008); *Cassidy v. Williams*, 2008 WL 2930591, at *2 (Conn. Super. Ct. July 9, 2008).
[118] 2008 WL 4779641, at *4 (Conn. Super. Ct. Oct. 14, 2008).
[119] *See, e.g., Isch v. Isch*, 2006 WL 1230270, at *2 (Conn. Super. Ct. Apr. 20, 2006) (granting joint legal custody to a gay father); *Zienka v. Zienka*, 2004 WL 1557951, at *7 (Conn. Super. Ct. June 1, 2004) (granting sole legal custody to a lesbian mother); *Campbell v. Campbell*, 2003 WL 23028336, at *5 (Conn. Super. Ct. Dec. 5, 2003) (granting joint legal custody to a lesbian mother).
[120] *Lavoie v. MacIntyre*, 2002 WL 31829964, at *2-3 (Conn. Super. Ct. Nov. 26, 2002). In an earlier and similar case, *Laspina-Williams v. Laspina-Williams*, the Court found that a plaintiff in the *Lavoie* plaintiff's position had standing to seek visitation rights. 742 A.2d 840, 844 (Conn. Super. Ct. 1999).
[121] *Lavoie*, 2002 WL 31829964, at *7-8.
[122] *M v. M, U. v. U.*, 1996 WL 434302, at *23 (Conn. Super. Ct. July 11, 1996).

of various rights.[123] The court dismissed the family integrity claim, finding that the plaintiff's relationship to the child and her partner did not have a legal basis and therefore did not trigger the right to family integrity.[124] The court did not dismiss the plaintiff's equal protection claim, which was based on the allegation that the defendants had treated her differently based on her sexual orientation, finding that "there appears to have been no rational basis" for their consideration of the plaintiff's sexual orientation.[125] However, a few years later, the court granted summary judgment to the defendants, finding that the plaintiff could not show that the defendants were motivated by animus towards her because of her sexual orientation.[126]

In *In re Jacob R.*, the DCF brought petitions to terminate the parental rights of the parents of Jacob R, alleging abandonment, failure to rehabilitate, and no ongoing parent-child relationship. At the time of the petitions, DCF had possessed custody of Jacob R. for nearly four years. In agreeing to terminate parental rights, the Court praised Jacob R.'s current foster parents, a same-sex couple, as "a very good placement" that offered him "the specialized attention and psychological management" that best served his needs.[127]

In *Davis v. Kania*, a same-sex male couple had been domestic partners for thirteen years and had established a paternal relationship with a child under the law of California. Both men were listed on the child's birth certificate. The couple then moved to Connecticut where the relationship ended in 2002. In 2003, the plaintiff filed an application to enjoin the defendant from taking the child out of the country for three months, as well as an application for custody. The defendant then filed a motion to dismiss the plaintiff's application for custody, claiming that the plaintiff was not a "parent" of the minor child.[128] The Court rejected this motion, finding that both men had been listed as parents on the child's birth certificate by a California court, and that the California judgment was enforceable in Connecticut because it did not contravene Connecticut state law or policy.[129]

Chapter 30-9 of the Policy Manual for the DCF deals with discrimination on the basis of sexual orientation and gender identity. The purpose of the policy is twofold: (1) to ensure that gay, lesbian, bisexual, and transgender children under the guardianship of the DCF receive "non-discriminatory, safe, affirming and non-detrimental services"; and (2) to facilitate "recruitment and retention of affirming foster or adoptive parent(s) and mentors" and to ensure that LGBT individuals "are given consideration equal to all other individuals."[130] It further prohibits a child's removal from their biological, foster, or

[123] *Zavatsky v. Anderson*, 130 F. Supp. 2d 349, 351-52 (D. Conn. 2001).
[124] *Id.* at 355.
[125] *Id.* at 356-58.
[126] *Zavatsky v. Anderson*, 2004 WL 936170, at *9 (D. Conn. Mar. 9, 2004).
[127] *In re Jacob R.*, 2001 WL 1231673, at *1, 15 (Conn. Super. Ct. Sep. 21, 2001).
[128] *Davis v. Kania*, 836 A.2d 480, 481-82 (Conn. Super. Ct. 2003).
[129] *Id.* at 483-84.
[130] CONNECTICUT DEPARTMENT OF CHILDREN & FAMILIES POLICY MANUAL, Chptr. 30, at 9, *available at* http://bit.ly/1JMFCh.

adoptive family based solely on the parent(s) gender identity or expression, marital partner or cohabitation status, or actual or perceived sexual orientation.[131]

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In October 2008, the Connecticut Supreme Court decided *Kerrigan v. Commissioner of Public Health*, resolving a lawsuit filed by eight same-sex couples who had applied for and been denied marriage licenses. The Court found that the state statutory scheme permitting opposite-sex couples to marry but forbidding same-sex couples from doing so discriminated on the basis of sexual orientation and violated the state constitutional provisions guaranteeing equal protection of the laws.[132] A key component of the Court's decision was its finding that sexual orientation was a quasi-suspect class under the Connecticut Constitution.[133] With this decision, Connecticut became the third state to permit same-sex marriage.

I. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

1. Child Care

Department of Social Services regulations state that parents and providers in the Child Care Assistance Program have the right to be treated fairly without regard to sexual orientation.[134]

2. Veterans' Affairs/National Guard

If the Connecticut National Guard wants to lease an armory, it cannot engage in or permit discrimination based on sexual orientation, including employment discrimination.[135]

The Connecticut Department of Veterans' Affairs cannot discriminate against any employee, applicant, veteran, program participant, or visitor because of sexual orientation.[136] In addition, Connecticut veterans discharged from the military due to their admitted homosexuality, absent any homosexual activities during their service, are eligible for the veterans' bonus.[137]

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[131] *Id.*
[132] *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 482 (Conn. 2008).
[133] *Id.* at 475-76.
[134] *Id.* (§ 17b-749-02).
[135] *Id.* (§ 27-39-7).
[136] *Id.* (§ 27-102l(d)-72).
[137] *Id.* (§ 27-140c-6).

3. Department of Social Services

The Department of Social Services prohibits any public or private entity receiving funds under the Older Americans Act from discriminating on the basis of sexual orientation.[138] The Department also prohibits sexual orientation discrimination related to loans given as part of the Assistive Technology Revolving Fund.[139]

4. Insurance

Finally, under regulations governing viatical settlements, a viatical settlement agent, broker, or provider may not discriminate in the creation or solicitation of a viatical settlement contract on the basis of sexual orientation.[140]

[138] *Id.* (§ 17b-423-3).
[139] *Id.* (§ 17b-606a-6).
[140] *Id.* (§ 38a-465-7).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Delaware – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

On July 2, 2009, Delaware added the term "sexual orientation" to the already-existing list of protected categories; the statute now prohibits discrimination against a person on the basis of sexual orientation in housing, employment, public works contracting, public accommodations, and insurance. It does not include gender identity, although an executive order does. Prior to 2009, the Delaware legislature repeatedly attempted and failed to enact legislation aimed at ending discrimination against gays in employment, public housing, public accommodation, insurance and public contracts. Despite the fact that the Delaware Division of Industrial Affairs had received more than 500 complaints of employment discrimination based on sexual orientation or association with an individual based on sexual orientation by 1999,[1] bills to prevent such discrimination failed each year between 1998 and 2009.

Unsurprisingly, some politicians who opposed this protective legislation have evidenced their animosity towards gays. For example, the Senate Pro Tem, repeatedly sabotaged such legislation by sending the proposed bills to committees where he knew they would fail.[2] According to one gay rights activist, Representative Charles West told a group of citizens lobbying in support of adding sexual orientation to the state anti-discrimination statute, "I'm not going to vote for it because I don't like the way you [gay people] recruit children to your lifestyle….It was one thing when you people were quiet, but now that you're coming forward, wanting your rights, that's hard to take."[3] Still others have remained in the political arena in part to oppose such legislation. As late as November 2008, for example, Senator Colin R.M.J. Bonini, an incumbent candidate seeking re-election to the Delaware General Assembly, said that one of his reasons for running was to uphold traditional values, telling newspapers: "I believe in traditional values and I am willing to defend those values. I oppose gay marriage, and I oppose granting special rights to individuals based on sexual preference."[4]

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[1] Letter from Karen E. Peterson, Director, State of Delaware Dep't of Labor, Division of Industrial Affairs (Feb. 8, 1999), *available at* http://bit.ly/4t9d2L htm (last visited Sept. 6, 2009).
[2] *See infra* Section II.A.2.
[3] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 133 (2000 ed.) [hereinafter HOSTILE CLIMATE].
[4] *Candidates Profiles for Delaware State General Assembly*, DOVER POST, Oct. 22, 2008, *available at* http://bit.ly/4kB5Pu (last visited Sept. 6, 2009).

Documented examples of discrimination based on sexual orientation by state and local employers include two cases almost 25 years apart, both involving public education, illustrate the continuing nature of the proble:[5]

- In 1977, the University of Delaware refused to renew the contract of an openly gay instructor.[6] A month after an article was published in the campus newspaper quoting him on gay issues, Richard Aumiller was told that his lectureship contact would not be renewed because "Aumiller had placed himself in a position of advocacy of the homosexual lifestyle for the undergraduate."[7] Aumiller sued the University and won. Aumiller v. University of Delaware, 434 F.Supp. 1273 (D. Del. 1977).

- In 2001, a Delaware public high school teacher alleged that the school principal forced her to remove a "Safe Space" rainbow triangle sticker from her classroom door.[8] Although the school permitted the display of stickers of other clubs and organizations, the school district did not want to appear as an advocate of "Safe Space" associated with gay people.[9] A similar pattern appears in the private sector.

Beyond the context of employment, but illustrating the problems encountered by LGBT citizens in dealing with public officials, a judge hearing a domestic abuse case involving a lesbian couple told them "get out of here" and "don't bring it back – the next time you come back, I'll put somebody in jail."

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[5] See *infra* Section III.A.1.
[6] *Aumiller v. University of Delaware*, 434 F.Supp. 1273, 1276 (D. Del. 1977).
[7] *Id.* at 1285.
[8] "EMcG," *Tell Your Story*, TOWARD EQUALITY, http://bit.ly/zqBIU.
[9] *Id.*

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Delaware added "sexual orientation" to the list of protected categories in its discrimination statute, the Discrimination in Employment Act ("DEA"), on July 2, 2009.[10] The statute now forbids employers, including state and local governments, from discriminating against an employee based on his or her sexual orientation.[11] The DEA defines "sexual orientation" as "heterosexuality, homosexuality, and bisexuality."[12] The DEA does not explicitly prohibit discrimination on the basis of perceived sexual orientation. In fact, DEA states that sexual orientation "*exclusively* means heterosexuality, homosexuality, or bisexuality"[13] The statute does not prohibit discrimination on the basis of gender identity, but there is a gubernatorial executive order that prohibits the state, as an employer, from discriminating on the basis of gender identity.[14]

The DEA applies to employers of four or more employees and exempts religious organizations including those that are "supported, in whole or in part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization's unrelated taxable income."[15]

1. Scope of Statute

Under the DEA, an aggrieved employee must exhaust administrative remedies before filing a civil action.[16] The administrative complaint must be filed within 120 days of the alleged unlawful practice.[17]

Upon a preliminary review of the complaint, the Department of Labor ("the Department") may dismiss the charge unless it receives additional information that warrants further investigation, refer the case for mediation, or refer the case for investigation.[18] If the Department makes a determination of "no reasonable cause" after an investigation or the case is dismissed before an investigation is conducted, the complainant receives a Right to Sue notice.[19] If the Department makes a determination of "reasonable cause," the parties are required to appear for conciliation.[20] If conciliation

[10] 6 DEL. CODE ANN. § 4501 (2009).
[11] *Id*.; § 4502(13).
[12] § 4502(13) (emphasis added).
[13] *Id*.
[14] *See infra* notes 16, 18 and accompanying text. DO YOU MEAN TO USE INFRA FOR CONTENT THAT CAN BE FOUND TWO SENTENCES LATER?
[15] 19 DEL. CODE ANN. § 710(6).
[16] § 712(c)(1).
[17] *Id*.
[18] § 712(c)(2).
[19] § 712(c)(3).
[20] *Id*.

efforts fail, the Department is to issue a Right to Sue notice.[21] The complainant may file a civil action at any time within 90 days after it receives the Right to Sue notice.[22]

2. Enforcement & Remedies

The Department of Labor is not entitled to award damages or injunctive relief, and may only force the employer to engage in reconciliation.[23] If the aggrieved employee files a civil action, the court may award compensatory damages and punitive damages (subject to the same graduated caps imposed on an employee filing a claim under Title VII) as well as injunctive relief and attorneys fees.[24]

B. Attempts to Enact State Legislation

Though Delaware added "sexual orientation" to the list of protected categories in its discrimination statute in July 2009, there were many failed attempts to add sexual orientation to the statute over the last decade. Proponents in the Delaware State Legislature attempted but failed to enact protective legislation over a number of years.[25] The proposed legislation had been identical over the years, with one exception (discussed below). The repeatedly introduced bill would have required the addition of "sexual orientation" to non-discrimination laws already in existence in the areas of employment, housing, public accommodations, insurance and public works contracting.[26] The bills defined sexual orientation as "heterosexual, bisexual or homosexual orientation, *whether real or perceived*."[27] The legislation made clear that it did not apply to religious organizations.[28] The legislation also made clear that it related only to non-discrimination and was not intended to require additional benefits for same sex domestic partners.[29]

In 2005, House Bill 36 in the 143rd General Assembly explicitly addressed several opponents' concerns in the summary of the bill's purpose (the bill's text remained unchanged).[30] First, the summary clarified the legislative intent to recognize the

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[21] § 712(c)(5).
[22] § 714.
[23] § 712(c)(3).
[24] § 715.
[25] *See, e.g.*, H.B. 99, 141st Gen. Assem., Reg. Sess. (Del. 2001); H.B. 99, 142nd Gen. Ass., Reg. Sess. (Del. 2003); H.B. 36, 143rd Gen. Ass., Reg. Sess. (Del. 2005); S.B. 141, 144th Gen. Ass., Reg. Sess. (Del. 2007).
[26] *See, e.g.*, H.B. 99, 141st Gen. Assem., Reg. Sess. (Del. 2001).
[27] *Id*. (emphasis added).
[28] *Id*. (stating that:

> [t]he term 'employer' with respect to discriminatory practices based upon sexual orientation does not include religious corporations, associations or societies supported, in whole or in part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization that generate unrelated business taxable income subject to 46 taxation under § 511(a) of the 47 Internal Revenue Code of 1986. *Id*.

[29] *Id*. (stating that "[n]othing in this subchapter shall be interpreted to require employers to offer health, welfare, pension or other benefits to persons associated with employers on the basis as such benefits are afforded to the spouses of married employees.").
[30] H.B. 36, 143rd Gen. Ass., Reg. Sess. (Del. 2005).

continued validity of the Delaware Defense of Marriage Act. [31] Second, the summary clarified that the bill did require employers to establish hiring goals, targets or plans for hiring based on sexual orientation.[32] Third, the summary clarified that the bill does not require employers to establish a dress code.[33] Finally, the summary clarified the legislative intent to exclude from the bill's reach employment situations involving minors or the advocacy of sexual orientation.[34]

Despite these accommodations, these bills and all of their predecessors and successors failed prior to 2009. Over the years, each bill passed the House only to be blocked in the Senate.[35]

Prior to 2003, it does not appear that these protective bills ever reached a full Senate vote.[36] Since 2003, Senator Thurman Adams Jr., the Senate President Pro Tem, has consistently assigned the bill to committees chaired by legislators who he knew opposed it. [37] In 2007, he said of the bill, "I hope its reception isn't very good. … I'm sure there will be some discussion about it. But I don't like it."[38] In part because of this animosity, from 2003 through 2009, the legislation failed in the Senate Committees through "desk drawer vetoes" (meaning that the bills have been allowed to expire in committee without reaching the Senate floor for a vote).[39] In 2007, under the 144th General Assembly, Senator Adams assigned Senate Bill 141, the only bill of this kind to be initiated in the Senate, to the Senate Insurance and Elections Committee, where for the first time the bill did reach a hearing.[40] However, the bill appears to have expired at the end of the General Assembly without reaching a full Senate vote.[41]

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[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] In general, once a bill passes the Delaware House, it is sent to the Senate Pro Tem for assignment to a Senate committee. *See* State of Delaware, Legislative Process: How a Bill Becomes Law, *available at* http://bit.ly/4tGKhb (last visited Sept. 6, 2009). The committee discusses the bill and votes to send it to the full Senate for debate. *Id*. Once the bill reaches the Senate agenda, the Senate debates and amends the bill, after which it is either passed, defeated or delayed by either postponement or return to committee. *Id.*
[36] *See supra* note 28 and accompanying text. But, note that the legislative history prior to 2001 is unavailable on-line.
[37] *Antidiscrimination Bill Fails Again in Delaware State Senate*, ADVOCATE, June 22, 2007, *available at* http://bit.ly/xSfyx; J.L. Miller & Patrick Jackson, *Sex-Discrimination Bill Again Dies in Committee*, NEWS J., June 21, 2007, at 1A (reporting Senator John C. Still's statement, in reference to Senate President Pro Tem Thurman Adams, Jr., that "[t]his bill has now shown up in three different committees, some of which I haven't served on, and it's never gotten out. I'd say that shows the pro tem knows how to pick committees"); Patrick Jackson, *Gay Rights Bill to Get Committee Hearing*, NEWS J., June 15, 2007, at 1B; J.L. Miller, *Bill to Ban Discrimination Against Gays in Del. in Limbo*, NEWS J., Jan. 3, 2005, at 1A (stating that "[i]n past sessions, House Bill 99 has been assigned to committees chaired by senators who oppose it: Sens. Robert L. Venables Sr. and James T. Vaughn. Each man let the bill die without a vote by the full Senate").
[38] James Merriweather, *Gay-Rights Advocates Have Fresh Optimism*, DEL. ONLINE, Apr. 22, 2007, *available at* http://bit.ly/HdsAo (last visited Sept. 6, 2009).
[39] *See supra* note 28 and accompanying text. NOT SURE THIS CORRELATES
[40] *See* Jackson, *supra* note 28. NOT SURE WHO JACKSON IS. DOUBLE CHECK SUPRA
[41] *See* S.B. 141, 144th Gen. Ass., Reg. Sess. (Del. 2007) (legislative history).

Critics of the bill argued that these protections were unnecessary and overreaching. Some citizens of Delaware argued that LGBT individuals do not need these protections because they are not, in fact, victims of discrimination.[42] Others, including the 2007 Senate minority leader, argued that the bill would burden small businesses with crushing legal fees.[43] Still others claimed that the bill was merely a veiled attack on Delaware's own Defense of Marriage Act or its ban on same-sex marriage.[44] Public opinion of the bills was also mixed. For example, three downstate legislative candidates who backed House Bill 99 in 2003, Brian J. Bushweller in Dover, Tom Savage in Lewes, and Brian L. Dolan in Milton all lost their election bids in what some comments suggested was a rejection of their position on this bill.[45] Dolan's support of the measure led to more than 75 of his campaign signs being defaced with "No fags" graffiti."[46]

In addition to introducing a discrimination statute, Senator Margaret Rose Henry, with the support of (then) Governor Minner, also introduced Senate Bill 10 in the 144th General Assembly in 2007. This bill would have required state employers to extend benefits to domestic partners, including same sex domestic partners.[47] The bill was assigned to the Senate Finance Committee, but this bill also died without a vote at the close of the session.[48]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In 2009, Governor Markell issued Executive Order Number 8, which prohibits state employers from engaging in discrimination on the basis of gender identity.[49]

In 2000, Governor Thomas Carper approved Executive Order Number 10, which proscribed employment discrimination based on sexual orientation within his own offices.[50] His successor, Governor Ruth Minner issued three successive Executive Orders prohibiting sexual orientation discrimination against employees of cabinet departments and executive agencies.[51]

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[42] *See* Miller & Jackson, *supra* note 43. THIS IS NOTE 43.
[43] *See* Jackson, *supra* note 26. PLEASE CHECK THIS SUPRA. NOTE 26 DOESN'T REFERENCE JACKSON
[44] *See id*.
[45] *See* J.L. Miller, *Bill to Ban Discrimination Against Gays in Del. in Limbo*, NEWS J., Jan. 3, 2005, at 1A (reporting Senator Adams' statement, "I think in the last election, you saw how the people felt about it …. The people down here that did not support that bill won by the biggest majority they ever had.'").
[46] Ron Williams, *H.B. 99 Hurt Candidates Yet Does Little*, NEWS J., Nov. 12, 2004, at 14A.
[47] S.B. 10, 144th Gen. Ass., Reg. Sess. (Del. 2007).
[48] *See id*. (legislative history).
[49] Del. Exec. Order No. 8 (2009).
[50] Young et. al, *Governor Carper Signs Order Protecting Gays from Discrimination*, 6 DEL. EMPL. L. LETTER 2 (Feb. 2001).
[51] Del. Exec. Order No. 10 (2001); Del. Exec. Order No. 81 (2006); Del. Exec. Order No. 86 (2006).

2. State Government Personnel Regulations

A few state and local agencies have enacted non-discrimination policies that include sexual orientation. In 2001, in response to Governor Minner's Executive Order Number 10, the Delaware Office of Management and Budget (the "OMB") revised the state Merit System's non-discrimination policy, Merit Rule 2.1, to include sexual orientation.[52] The Merit System, managed by the OMB, governs state employment and directs the promulgation of Merit Rules governing state employment.[53] Therefore, as of 2001, although not mandated by any statute, state government offices have had a non-discrimination policy that includes sexual orientation. [54]

Under the Merit System, employees are encouraged to resolve complaints about discrimination first through informal meetings with their supervisors.[55] If the complaint still remains unresolved, the employee is then permitted to log a grievance with the Merit Employee Relations Board ("MERB") within 14 calendar days of the grievance matter.[56] The employee should then meet again with her immediate supervisor, and the supervisor will issue a written reply.[57] If the employee is still not satisfied, she can file an appeal with the top agency personnel official or representative within 7 calendar days of the supervisor's reply.[58] The employee then meets with the designated management official who in turn issues another written reply.[59] If she is still not satisfied, the employee can again appeal to the State Personnel Director within 14 calendar days of that reply.[60] The employee will then meet with the Director who will issue a binding decision on the agency management within 45 calendar days of the meeting.[61] If the employee is still not satisfied, she has one final appeal to the MERB for a final disposition.[62] The Director and the MERB have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of the Merit Rules.[63] MERB decisions and rulings are available for public inspection, but only in person during business

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[52] DEL. MERIT RULES (2009), *available at* http://bit.ly/1Okzvs I AM NOTICING THESE LINKS YOU USE ARE ALL TO PDFs AS OPPOSED TO WEBSTES. NOT QUITE SURE HOWTO HANDLE THIS BUT IT SEEMS STRANGE. (last visited Sept. 5, 2009) (stating that "2.0 Non-Discrimination 2.1 Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, *sexual orientation*, or other non-merit factors is prohibited." *Id*. (emphasis added)); *see* Del. Att'y Gen. Op. 03-IB27 (2003) (discussing history of revised Merit Rule 2.1).
[53] 29 DEL. CODE ANN. §5914 (2008).
[54] Robert D. Martz, *Equal Benefits Work in Corporate America*, NEWS J., Jan. 5, 2007, at 9A.
[55] 19 DEL. ADMIN. CODE 3000 §19.0 (2003) (Grievance Procedure), *available at* http://bit.ly/16cLtf.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] 29 DEL CODE. ANN. § 5931.

hours.[64] Because of that limitation, we were unable to review the rulings. There is no private right of action.[65]

Aside from the Merit Rules, other state agencies also have non-discrimination polices that explicitly include sexual orientation as a protected class, including: (i) the Delaware Department of Services for Children, Youth and their Families,[66] (ii) the Delaware Department of Education[67] and (iii) the University of Delaware.[68]

3. Attorney General Opinions

None.

D. Local Legislation

A few Delaware cities have implemented legislation protecting gays in various areas, including the employment context.

1. City of Rehoboth Beach

In 2003, the city of Rehoboth Beach, Delaware implemented a law prohibiting private employers from discriminating based on sexual orientation.[69]

2. City of Wilmington

The city of Wilmington, Delaware prohibits discrimination based on sexual orientation in the employment context, in the issuance of business licenses and in the public housing arena. [70]

3. City of Dover

The city of Dover, Delaware prohibits employment discrimination on the basis of sexual orientation in hiring and recruitment.[71]

4. County of New Castle

Only one of Delaware's three counties, New Castle County, has an employment policy that includes sexual orientation in its list of protected classifications. [72]

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[64] RULES GOVERNING PRACTICE AND PROC. BEFORE MERIT EMPL. REL. BD. OF DEL. (2004), *available at* http://bit.ly/NqyF2 (last visited Sept. 5, 2009).
[65] 19 DEL. ADMIN. CODE 3000 §19.0 (2003) (Grievance Procedure), *available at* http://bit.ly/16cLtf.
[66] *See* AFFIRMATIVE ACTION/MANAGING DIVERSITY PLAN 7 (Department of Services for Children, Youth and Their Families 2008-09), *available at* http://bit.ly/d9PtB (last visited Sept. 6, 2009).
[67] *See* Del. Dep't of Empl., *available at* http://www.doe.k12.de.us/job/default.shtml (last visited Sept. 5, 2009).
[68] ANNUAL REPORT 6 (Univ. of Del. 2006), *available at* http://bit.ly/1vQJkY.
[69] N. Peter Lareau, 1 LABOR AND EMPLOYMENT LAW § 127.12 (2008).
[70] WILMINGTON CODE §35-111, §5-31, §35-77 (2008), *available at* http://bit.ly/34OY6y.
[71] *See* DOVER EMPLOYEE HANDBOOK, at13-14 (J2004), *available at* http://bit.ly/uYsD0.

E. **Occupational Licensing Requirements**

The application for teacher licensure in the State of Delaware states that a teacher must not have engaged in any immoral acts. [73] It is unknown whether this requirement has ever been used in a discriminatory manner against LGBT persons.

[72] *See* New Castle County Govn't. Application (2007), *available at* http://bit.ly/V5YBM (last visited Sept. 6, 2009); *see also* Kent County Non-Discrimination Notices, *available at* http://bit.ly/CFvzC (last visited Sept. 6, 2009) (omitting sexual orientation); Sussex County Council Employ. Application, *available at* http://bit.ly/17uh4Y (last visited Sept. 6, 2009).
[73] 14 DEL. ADMIN. CODE § 1510 (2009), *available at* http://bit.ly/2s1lCq.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Aumiller v. University of Delaware, 434 F.Supp. 1273 (D. Del. 1977).

Richard Aumiller was a non-tenured "Lecturer" at the University of Delaware during the 1974-75 and 1975-76 academic terms.[74] He brought a civil rights action under 42 U.S.C. section 1983 against the University of Delaware, the Board of Trustees of the University, and a number of University officials and administrators.[75] Aumiller, a gay man and a member of an organization at the University called *The Gay Community*, alleged that the defendants violated his First Amendment rights of free expression and association by refusing to renew his contract for the 1976-77 academic term based on his statements on the subject of homosexuality appearing in three newspaper articles.[76]

The first newspaper article quoted two statements by Aumiller and excerpted a portion of a letter written by Aumiller in his capacity as faculty advisor to the Gay Community. A month after the first article was published, Aumiller was rehired for the 1975-76 academic term. In the second and third articles published in October and November, 1975, Aumiller was quoted regarding a variety of issues related to the Gay Community.

A month after the last article was published, the president of the university told others that he would not sign a contract for Aumiller for the 1976-77 term if one were presented to him because "Aumiller had placed himself in a position of advocacy of the homosexual lifestyle for the undergraduate."[77] The president also said that the issue was not Aumiller's job performance, but rather that he had placed himself in a position of advocating "a homosexual lifestyle for the undergraduate and that he had used his position as a faculty member to expound this particular point of view and that this was not appropriate for him to do so."[78] Aumiller was later told that his contract would not be renewed for the following academic year.[79]

Aumiller filed a three-part grievance to the University of Delaware and sought to have his contract reinstated.[80] It was appealed all the way up to the University's President, who made the final decision.[81] The University's President denied the three

[74] *Aumiller v. University of Delaware*, 434 F.Supp. 1273, 1277 (D. Del. 1977)
[75] *Id.*
[76] *Id.* at 1278.
[77] *Id.* at 1285.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1286.
[81] *Id.* at 1287.

grievances, explaining that he believed that Aumiller improperly used his position at the University to promote a homosexual lifestyle.[82]

Aumiller prevailed on his First Amendment claim.[83] The court held that although homosexuality is controversial and emotional topic, and that Aumiller's position likely represents a minority view, its unpopularity "can not justify the limitation of Aumiller's First Amendment rights by the University of Delaware."[84] Thus, the decision not to renew Aumiller's contract contravened the primary purpose of the First Amendment and violated Aumiller's right of freedom of expression.[85] The court awarded Aumiller with the following remedies: (1) reinstatement for the 1976-77 academic term (because the term was at its end, Aumiller received his salary for the year); (2) that all reference to this incident in Aumiller's employment records be expunged, (3) $10,000 in compensatory damages for the emotional distress, embarrassment and humiliation Aumiller suffered as a result of defendants' actions, and (4) $5,000 in punitive damages.[86]

2. Private Employers

None.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

None.

[82] *Id,*

[83] *Id.*

[84] *Id.* at 1301.

[85] *Id.* at 1301-02.

[86] *Id. at 1312-1313.*

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Until 1972, Delaware had a sodomy statute that criminalized consensual sexual acts between same sex persons.[87] The police used this statute vigorously to arrest and harass same sex couples.[88] In 1972, the legislature redefined sodomy to exclude consensual sexual acts between same sex persons.[89] In 1987, House Representative B. Bradford Barnes attempted to reinstate the sodomy law, but his fellow House members rebuffed this proposal.[90]

B. Housing & Public Accommodations Discrimination

In 1997, a complaint was filed against a judge who dismissed a domestic abuse case involving two lesbians, whom the judge threatened to send to jail because he wanted nothing to do with "funny relationships." The entire courtroom erupted into laughter after hearing the judge state, "You all have these funny relationships – that's fine – I have nothing to do with it, but don't bring it in here for me to try to decide, I don't know how to handle it. Now take this stuff out of here, I'm dismissing the case, you all control your business another way, get out of here. It's too much for me. Don't bring it back – the next time you come back, I'll put somebody in jail."[91]

The City of Wilmington prohibits discrimination based on sexual orientation not only in employment, but also in the issuance of business licenses and public housing. [92]

C. HIV/AIDS Discrimination

Miller v. Spicer, 822 F. Supp. 158 (D. Del. 1993).

In *Miller v. Spicer*,[93] an emergency room physician at a private hospital refused to treat a critically injured patient because of the patient's perceived homosexuality and HIV status. The doctor specifically instructed the nurse to label plaintiff's chart with the words "known admitted homosexual," despite the fact that plaintiff had never revealed

[87] George Painter, THE SENSIBILITIES OF OUR FOREFATHERS: THE HISTORY OF SODOMY LAWS IN THE UNITED STATES: DELAWARE (1991), *available at* http://bit.ly/Uho7f.
[88] *Id*. at 5.
[89] *Id*. at 6.
[90] *Id*. at 7.
[91] HOSTILE CLIMATE, *supra* note 3 at 48-49 (1997 ed.).
[92] WILMINGTON CODE § 35-111, § 5-31, § 35-77 (2008), *available at* http://bit.ly/34OY6y.
[93] *Miller v. Spicer*, 822 F. Supp. 158 (D. Del. 1993).

his sexual orientation to the hospital.[94] The doctor also falsely claimed that he did not perform the type of procedure plaintiff needed and consequently transferred plaintiff to a hospital in Washington D.C. that he believed "[took] care of gay people."[95] As a result of the doctor's refusal to treat him, the patient suffered a permanent disability. Plaintiff brought suit against the doctor and the hospital claiming discrimination based on his perceived HIV status, intentional infliction of emotional distress and breach of contract.[96]

On defendants' motion for summary judgment, the court held that a genuine issue of material fact existed as to whether the hospital discriminated against plaintiff because of his perceived HIV status. The court noted that the fact that the doctor lied about his ability to perform plaintiff's procedure and labeled the plaintiff a "known admitted homosexual," a highly unusual practice, supported an inference that hospital employees knew plaintiff was being transferred for discriminatory reasons.[97] The court also held that a genuine issue of material fact existed as to whether the doctor and the hospital acted so outrageously as to give rise to a claim for intentional infliction of emotional distress.[98] With respect to the doctor, the court noted that a jury could find outrageous:

> (i) the manner in which Dr. Spicer refused to render medical treatment; (ii) the fact that he refused to treat plaintiff, not for some legitimate medical reason, but for unacceptable discriminatory reasons; (iii) the fact that he formulated his discriminatory treatment plan primarily on the basis of subjective information such as derogatory comments made by [hospital] staff members that the patient was homosexual and his leap to the conclusion that [plaintiff] might therefore be infected with the AIDS virus; and (iv) the fact that Spicer knew his refusal to treat the plaintiff could cause serious permanent injury.[99]

With respect to the hospital, the court held that a jury could have found the staff's labeling of plaintiff as a homosexual outrageous, and that the staff's failure to follow procedures for the transfer of patients evidenced a discriminatory purpose.[100] The court dismissed all other claims, and no other subsequent appellate history is available online.

D. **Hate Crimes**

The Delaware Hate Crime Bill criminalizes hate crimes committed because of the victim's sexual orientation, but the statute does not cover gender identity.[101]

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[94] *Id*. at 161.
[95] *Id*.
[96] *Id*. at 160.
[97] *Id*. at 164.
[98] *Id*. at 169-171.
[99] *Id*. at 170.
[100] *Id*.
[101] 11 DEL. CODE ANN. §1304 (a)(2) (2008).

The City of Wilmington also criminalizes bias crimes that were committed on the basis of sexual orientation.[102]

E. Parenting

Delaware provides several protections for same sex parents. For example, Delaware recognizes second-parent adoptions by same sex partners.[103] Delaware also recognizes the parental rights of a same sex parent with no biological or adoptive relationship to the child of an ex-partner.[104]

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 1996, the Delaware Constitution was amended to prohibit marriage between same-sex couples.[105] Moreover, Delaware does not recognize marriages of same sex couples performed outside of the State.[106] Delaware courts, however, have permitted same-sex partners to legally change their surnames.[107]

G. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

New Castle Parade Permits

The City of New Castle, Delaware expressly prevents the City Administrator from denying applications for parades or public assemblies based on sexual orientation.[108]

> [a]ny person who commits, or attempts to commit, any crime as defined by the laws of this State, and who intentionally: … selects the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry, shall be guilty of a hate crime. For purposes of this section, the term 'sexual orientation' means heterosexuality, bisexuality, or homosexuality. *Id*.). WHAT'S GOING ON HERE? WAS THIS SUPPOSED TO BE INTRODUCED BY THE CITATION IN FN 102.

[102] WILMINGTON CODE §35-1 (2008).
[103] *See, e.g., In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001).
[104] *See, e.g., L.M.S. v. C.M.G.*, 2006 Del. Fam. Ct. Lexis 298 (Del. Fam. Ct. 2006) (recognizing *de facto* parental rights for a child that plaintiff and defendant, her ex-partner, jointly decided to adopt, even though only defendant's name appeared on the adoption papers); *Chambers v. Chambers*, 2002 Del. Fam. Ct. Lexis 39 (Del. Fam. Ct. 2002) (recognizing *de facto* parental rights in child who plaintiff and ex-partner jointly decided to conceive through in-vitro fertilization, despite defendant's lack of biological relation to child); *S.A.S. v. E.M.S.*, 2004 Del. Fam. Ct. Lexis 188 (Del. Fam. Ct. 2004).
[105] 13 DEL. CODE ANN. § 101 (2008) (otherwise known as the "Delaware Defense of Marriage Act").
[106] *Id.*
[107] *See, e.g., In re Marley*, 1996 Del. Super. Lexis 192 (Del. Super. Ct. 1996) (overturning lower court's decision to deny name change because court should not undertake a pseudo-marriage ceremony).
[108] New Castle Code § 171-8 (2008), *available at* http://bit.ly/g9QHt.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Florida – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Florida's anti-discrimination law, the Florida Civil Rights Act, does not cover employment discrimination on the basis of sexual orientation or gender identity. In addition, there has never been an executive order to prohibit these forms of discrimination against state employees. Recent efforts to enact statutory protection have all failed.[1] Florida Representative D. Alan Hays has been quoted as saying that he believes gays and lesbians "need psychological treatment" and on a different occasion stated: "I had a cousin who died of AIDS; he was queer as a three-dollar bill. He had that homosexual lifestyle and deserved what he got."[2]

In 1994, a state-wide ballot measure was proposed that would have banned enactment of gay rights laws and repealed protective local ordinances that existed at the time. The Attorney General petitioned the Supreme Court of Florida for an advisory opinion on the validity of the proposed amendment. The Supreme Court held that the measure should be stricken from the ballot because it encompassed more than one subject and matter, in violation of the Florida Constitution.[3]

Despite these attitudes, some progress has been made on a local level (primarily in larger cities) with twenty municipalities adopting statutes prohibiting discrimination in employment, housing and public accommodations based on sexual orientation and/or gender identity.[4]

Because Florida has no statute prohibiting employment discrimination based on sexual orientation or gender identity, state courts rarely have addressed the issue, except to reiterate the lack of legal protection.

Nonetheless, documented examples of employment discrimination by state and local governments based on sexual orientation or gender identity include:

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[1] See *infra* Section II.B.

[2] Michael Emanuel Rajner, *Florida Lawmaker's Latest Round of Bigoted Statements on Gays and AIDS* , BLOG TO END AIDS, June 15, 2007, http://bit.ly/3t26r8.

[3] The amendment violated the single-subject requirement because it enumerated ten classifications of people that would be entitled to protection (excluding sexual orientation and gender identity), and it covered both civil rights and the powers of the state and local governments. The court also found that the amendment was ambiguously worded and confusing to voters. *In re Advisory Op. to the Att'y Gen.: Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020-21 (Fla. 1994).

[4] *See infra* Part II.D.

- In 2009, two years after she started working at a college, a transgender woman was forced to resign because of her gender identity. She received praise for her work and was given a letter stating that she was dependable, able to work independently, and a skilled technician. Approximately two months before she was fired, she notified her boss that she would be transitioning from male to female. In March 2009, she was called in on her day off to attend a staff meeting. She did not have a clean uniform to wear and told her boss that she would wear women's clothes, which she wore in her day-to-day life but not on the job, and he said it was fine. When she arrived on campus, members of the faculty and staff gave her hostile looks and she felt unsafe. She called a co-worker friend to ask for support, but he hung up on her. Her boss then accused her of harassing her co-worker because she had called him after he hung up and moved her to an unfavorable shift that her friend did not work. The new shift interfered with her medical appointments, which were crucial to her transition, and she was forced to resign.[5]

- In 2007, after she notified her supervisors that she planned to transition, a city manager in Largo was fired because of her gender identity. News of her decision to transition leaked to the local media shortly after she discussed it with her supervisors. When the City Commission heard the news, it voted 5-2 to suspend her. During the suspension meeting, one of the Commissioners who voted in favor of the suspension stated: "His [sic] brain is the same today as it was last week. He [sic] may be even able to be a better city manager. But I sense that he's [sic] lost his [sic] standing as a leader among the employees of the city."[6] She declined to sue the city after she was terminated, saying that bringing suit against it would be "like suing my mother".[7]

- In 2007, a sheriff's department applicant was offered positions at two sheriff's offices which were then rescinded because they found out he was living with a man whom they assumed was his partner.[8]

- In 2007, a lesbian social worker at a county agency suddenly had problems at work upon disclosing her sexual orientation following ten years of employment without issue. When she disclosed her sexual orientation, her supervisor started giving her bad reviews, and stood in the bathroom with her while she urinated for a drug test which was not standard procedure at the agency.[9]

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[5] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[6] Lorri Helfand, *Commission Moves to Fire Stanton*, ST. PETERSBURG TIMES, Feb. 27, 2007.
[7] *Id*.; *see also* Jillian Todd Weiss, *The Law Covering Steve (Susan) Stanton, City Manager Dismissed In Largo, Florida*, GENDERTREE.COM, Mar. , 2007, *available at* http://bit.ly/186I3m.
[8] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[9] *Id*.

- An employee of the Escambia County Utilities Authority brought a claim under Title VII for the workplace harassment he endured because co-workers presumed him to be gay. The court granted summary judgment to the defendant because none of the scenarios established in *Oncale v. Sundowner Offshore Services, Inc.*[10]were present. In rejecting the claim, the court stated that "[the employee's] characteristics [that were targeted in the harassment] may reflect stereotypes associated with a homosexual lifestyle, but they are not stereotypes associated with a feminine gender." Mowery v. Escambia County Util. Auth., 2006 U.S. Dist. LEXIS 5304 (N.D. Fla. Feb. 10, 2006).

- In 2006, an employee of the Department of Children and Family Services was terminated after she was seen hugging a female on the premises. Her supervisor stated before she was terminated that there was a "rumor" that the two women were in a relationship.[11]

- In 2006, an applicant to the police department was accused of being "dishonest" when she informed them of her transgender status after completing her application.[12]

- In 2005, eight years after he had been hired by the Hillsborough County School District, a teacher protested the dismantling of a gay pride book on display at the local public library. He was quoted in the local paper for saying that, as a gay man and a school librarian, he was upset that the book display had been taken down prematurely. The school superintendent saw that he was quoted in the paper and proceeded to have his behavior reviewed by the school district's Professional Standards Office. Though the teacher was not disciplined for discussing the book display with the paper, he was told that he was not to bring "the issue" into the workplace. This censorship has caused him a great deal of distress and he worries that his professionalism will be called into question repeatedly because he is gay.[13]

- In 2005, a gay employee of the Pinellas County Water Quality Department reported that he was terminated after the employee's neighbor disclosed his sexual orientation to his supervisor.[14]

- In 2004, an administrative hearing officer held that a post-operative transsexual had no claim based on sex or disability, but, on appeal, the Commission reversed as to the claim of sex discrimination. The administrative law judge concluded that transsexuality was not a disability

[10] 523 U.S. 75 (1998) (claim of same-sex sexual harassment actionable under Title VII).
[11] *Sampson v. Dep't of Children and Family Servs.*, 2006 Fla. Div. Adm. Hear. Lexis 466 (Sept. 29, 2006).
[12] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[13] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[14] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

under the Florida Civil Rights Act because it is not within the purview of the ADA or the Rehabilitation Act. The judge limited the holding in *Smith v. Jacksonville Correctional Institution*,[15] defining "disability" according to whether or not the employee had undergone sex reassignment surgery (Smith had not, while Fishbaugh had). As to the sex discrimination claim, the administrative law judge found that she was unable to claim sex discrimination because the employee had been discriminated against because she was transsexual, not because she was a woman, and that gender identity receives no protection under the Florida Civil Rights Act. On appeal, the Commission panel held that the employee could bring a claim for sex discrimination because she was "perceived not to conform to sex stereotypes or because [she] has changed sex".[16]

- In 2004, a gay officer with the Tampa Police Department experienced harassment and was terminated when he disclosed his sexual orientation to his supervisors. He was also arrested for lewd and lascivious conduct for informing street youth about "safer sex."[17]

- In 2004, a Sarasota public school teacher who had agreed to let students use her classroom for "Gay-Straight Alliance" meetings was harassed by other teachers to such an extent that she felt she had to leave. After she resigned, the school refused to give her a positive recommendation.[18]

- In 2004, a Department of Corrections employee was compelled to resign by his supervisors when they discovered that he occasionally wore women's clothes outside the office.[19]

- In 2003, a transgender employee of the Pasco County Sheriff's Department reported instances of harassment to her supervisors, who allegedly forced her to resign. Co-workers intentionally used the "wrong" pronoun when she was out on patrol, hence outing her to officers on the receiving end of police calls. She complained to superiors, but the conduct continued. When co-workers started a rumor that she had posed topless online, she resigned.[20]

- In 2002, an applicant for a Florida nursing license was denied because of his sexual orientation. The applicant had already procured a nursing license in Indiana.[21]

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[15] *See Smith v. City of Jacksonville Corr. Inst.*,1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991) (described *infra*).
[16] *Fishbaugh v. Brevard County Sheriff's Dep't*, Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).
[17] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.

- In 2002, a transgender public school employee experienced harassment by co-workers and superiors; she was called a "thing," and was taunted about which bathroom she should be permitted to use.[22]

- In 2002, an openly lesbian firefighter was repeated passed over for promotion in favor of less-qualified employees. She was eventually fired for "low test scores," even though her scores were consistently superior to those of other officers.[23]

- In 2002, a gay firefighter reported that he had been harassed when colleagues found his personal ad online and circulated it around the office. The firefighter's supervisor "wrote him up" for infractions which he later admitted were frivolous.[24]

- In 2002, a gay firefighter reported that he was discriminated against after disclosing his sexual orientation at work. Before he had disclosed his sexual orientation, the firefighter received excellent assessments and was, in fact, promoted. After he revealed his sexual orientation, however, he was told to either resign or accept a demotion. The firefighter accepted the demotion in an effort to retain his retirement benefits.[25]

- In 2001, an employee of the Florida Department of Agriculture reported that he had been the target of virulently anti-gay comments from a colleague. When he complained, he was reprimanded and told to drop the complaint. The employee refused and was terminated shortly thereafter.[26]

- In 2001, a supervisor at the Florida Department of Health said he would try to "rid" the department of gays. When an employee complained, the employee was reprimanded and eventually terminated after enduring an extended period of workplace harassment.[27]

- In 2001, employees in two separate state agencies – the Department of Agriculture and the Department of Health – were fired after complaining of anti-gay harassment.[28]

- In 2001, a transgender city public works department supervisor was fired on account of her gender identity.[29]

[22] *Id*.
[23] *Id.*
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id.*
[29] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

- In 2001, a city government employee was forced to resign when superiors learned the employee enjoyed dressing in women's clothes outside the office and threatened to publicly disclose such discovery.[30]

- In 2000, a lesbian firefighter was subjected to a hostile work environment on account of her sexual orientation.[31]

- In 1996, an employee of a county clerk's office was fired because of his sexual orientation.[32]

- In a book published in 1996, Pete Zecchini, a gay man, described his experience as a Miami Beach police officer as "miserable." When Zecchini inquired as to why his cases had been reassigned and his work schedule had been rearranged, his supervisor told Zecchini it was because of his homosexuality. When Zecchini complained to his chief about this supervisor, the supervisor flatly denied saying any such thing. At shooting practice, Zecchini overheard his coworkers saying, "faggot this," "faggot that," and "Miami Beach is turning into a bunch of faggots." Zecchini alleged that he was the only officer on the force denied a pay raise for using too many sick days.[33]

- In 1994, a U.S. District Court jury in Florida decided that the Sunrise, Florida, Police Department unlawfully discriminated against Darren Lupo, an unmarried lesbian patrolwoman, by requiring that she work a Christmas shift in place of a married policeman with children, but rejected her broader claim of a pattern of discrimination based on her sex and sexual orientation. The jury awarded $56,250 in compensatory damages.[34]

- In 1992, an administrative hearing officer ordered reinstatement and back pay for a second grade teacher who had been fired because he had allegedly committed a crime involving moral turpitude. The teacher had been charged with battery for touching an undercover officer's clothing while flirting with the officer. The school became aware of the incident when an account of the arrest was published in the newspaper. The Hearing Officer noted that "for the most part, the negative comments about Mr. Madison involved not the criminal charge, but the homosexual nature of the event" and concluded that

[30] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[31] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[32] *Id.*
[33] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 102-106 (Routledge 1996).
[34] Lesbian and Gay L. Notes (Oct. 1994) (citing FT. LAUDERDALE SUN-SENTINEL, Sept. 5 1994).

the school had impermissibly discriminated against him based on his lifestyle.[35]

- A deputy sheriff brought suit in 1992 after he was constructively terminated because of his sexual orientation. In the first portion of a bifurcated trial, the jury found that the sheriff was constructively terminated because he was gay. The court then found that the termination violated his constitutional right to privacy and, applying heightened scrutiny because of the plaintiff's sexual orientation, the Equal Protection Clause. Woodard v. Gallagher, 59 Emp. Prac. Dec. (CCH) ¶ 41, 652, 1992 WL 252279 (Fla. Cir. Ct. 1992).

- In 1991, an administrative judge held that a pre-operative female transsexual, who had been fired from her job as a corrections officer, could bring a claim against her employer, the City of Jacksonville, based on disability discrimination. The plaintiff had found it necessary to conceal her gender identity in order to keep her job and suffered from severe physical reactions as a result. One night, while dressed in women's clothes, she was assisted by a passing patrolman when she stopped to change a tire on the side of the road. The patrolman ran a report on her driver's license and discovered that she was classified as a male. Thereafter, when the incident was relayed to her supervisors, she approached her supervisors to tell them that she planned to transition. When she refused to resign at their insistence, they terminated her. At the administrative hearing, the city asserted a BFOQ defense with the stated qualification being "absence of transsexuality." In rejecting the argument, the hearing officer stated, "Simply put, prejudice cannot be a basis for a BFOQ." Smith v. City of Jacksonville Corr. Inst., 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991).

- A deputy sheriff was fired after her boss learned that she was lesbian. She lost her case challenging the dismissal when the court ruled that "in the context of law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end." Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988).

- A lawyer was denied admission to the Florida Bar after he disclosed that the Military Selective Service assigned him to a classification indicating "physical problem or homosexuality." The Bar pressed the lawyer for details about his past sexual conduct, and though he said he preferred men, he declined to provide more detail. The Florida Supreme Court held that the Florida Board of Bar Examiners should be limited to inquiries which bear a rational relationship to an applicant's fitness to practice law, stating that "private noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law." Fla Bd. of Bar Exam'rs Re N.R.S., 403 So.2d 1315 (Fla. 1981).

[35] *Sch. Bd. of Escambia County v. Madison*, 1992 Fla. Div. Adm. Hear. LEXIS 6879 (1992).

- In 1978, three years before *N.R.S.*, the Florida Bar sought guidance from the Supreme Court as to whether an applicant should be denied admission for "lack of good moral character" because of his "admitted" sexual orientation. The court held that mere self-identification as gay was not rationally connected to one's fitness to practice law, but stated that this holding did not extend to individuals who were evidenced to engage in physical homosexual activity (i.e. who were practicing homosexuals). Fla. Bd. of Bar Exam'rs v. Eimers, 358 So. 2d 7 (Fla. 1978).

- In 1957, a plaintiff attorney was disbarred after being convicted of homosexual sodomy, which the Florida Bar stated was "contrary to the good morals and law of this state." State v. Kimball, 96 So.2d 825 (Fla. 1957).

- A public school teacher who had previously received positive evaluations later received negative evaluations after officials discovered that the teacher had a same-sex domestic partner.[36]

Outside the context of employment, animus and hostility toward LGBT people in Florida has surfaced in the law that has prohibited gay people from adopting since 1977; Florida is one of only two states to do so.[37] In addition, students in Florida public high schools have successfully used federal law to challenge school policies that barred expression of support for gay rights. One state court judge was found to be unqualified to adjudicate a case involving a lesbian mother because of prejudice, and several other trial court judges had their decisions in custody cases reversed because they found that a parent's homosexuality was grounds for denial of custody.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[36] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[37] *See infra* Part IV.G.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

The state of Florida has not enacted laws to protect sexual orientation and gender identity from employment discrimination. [38]

The Florida Commission on Human Relations (the "Commission") states that it

> exists to enforce human and civil rights laws in Florida by investigating and resolving discrimination complaints in areas of employment, housing and certain public accommodations. Such discrimination is based on national origin, color, religion, sex, race, age, disability, marital status and familial status.[39]

The Florida Human Rights Act of 1977 expanded the authority of the Commission from a community relations-based agency to that of an enforcement agency.[40] But because the Commission's mission is to enforce the Florida Civil Rights Act, sexual orientation and gender identity discrimination are beyond the scope of the Commission's authority. The Commission has acted in three trans-related instances when a claim was brought as either sex- or disability-based discrimination.

B. Attempts to Enact State Legislation

1. Proposed bills to add sexual orientation to Florida Civil Rights Act

In 2007, State Senator Ted Deutch and State Representative Kelly Skidmore introduced bills during the legislative session to add sexual orientation to the Florida Civil Rights Act and the Florida Fair Housing Act.[41] Although the bills were assigned to committees and were co-sponsored by numerous legislators, neither bill was received at a public hearing.[42]

SB 572, introduced in the Florida Senate on March 4, 2008, would have effectively amended the Florida Civil Rights Act to include "sexual orientation" as an additional protected class in the employment, public accommodations and real estate

[38] Florida Civil Rights Act, FLA. STAT § 760 *et seq.*
[39] Florida Comm'n on Human Rel., *Governance Policy*, http://fchr.state.fl.us/fchr/resources/fchr.governance_policy (last visited Sept. 6, 2009).
[40] FLA. STAT. 760.06 (1977).
[41] David Schwartz, *Activist Pushes Anti-Discrimination Bill*, BOCA RATON TIMES, Feb. 14, 2007.
[42] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).

contexts.[43] The bill passed the Senate Commerce Committee, but died in the Committee on Community Affairs on May 5, 2008.

2. Proposed Bill to add sexual orientation and gender identity to Florida Civil Rights Act

HB 191, introduced in the Florida House on March 4, 2008, would have amended the Florida Civil Rights Act to include "sexual orientation" and "gender identity and expression" as impermissible grounds for discrimination.[44] The bill died in the Committee on Constitution and Civil Law on May 2, 2008.

In the 2009 regular session of the Florida Legislature, State Senator Deutch and State Representative Skidmore both introduced bills that would have prohibited discrimination on the basis of sexual orientation and gender identity and expression in employment and housing.[45] No hearings were heard on the bills, but 40 legislators signed on as co-sponsors of the two bills.[46]

Florida Representative D. Alan Hays has been quoted as saying that he believes gays and lesbians "need psychological treatment" and on a different occasion stated: "I had a cousin who died of AIDS; he was queer as a three-dollar bill. He had that homosexual lifestyle and deserved what he got."[47]

3. Proposed Bill to add sexual orientation and gender identity to Florida Educational Equality Act

In 2007, State Senator Ted Deutch and State Representative Shelley Vana introduced bills to add sexual orientation as a protected class in the Florida Educational Equity Act during the legislative session.[48] The amendment would have prohibited discrimination based on sexual orientation against public school employees.[49] While

[43] S.B. 572, 2008 Leg., Reg. Sess (Fla. 2008). A similar bill was introduced in 2007 but also died in committee. *See* S.B. 2628, 2007 Leg., Reg. Sess. (Fla. 2007). On February 23, 2009, a similar bill was re-introduced in the Senate. Such bill included gender identity/expression as a protected class, in addition to sexual orientation. *See* S.B. 2012, 2009 Leg., Reg. Sess. (Fla. 2009).

[44] H.B. 191, 2008 Leg., Reg. Sess. (Fla. 2008). The proposed bill defined "sexual orientation" as "an individual's actual or perceived heterosexuality, homosexuality, or bisexuality." *Id*. The bill defined "gender identity and expression" as "a gender-related identity, appearance, or expression of an individual, regardless of the individual's assigned sex at birth." *Id*. A similar bill was introduced in 2007 that would have banned discrimination based on sexual orientation only, however, that bill also died. *See* H.B. 639, 2007 Leg., Reg. Sess. (Fla. 2007). On January 15, 2009, a bill similar to H.B. 191 was re-introduced in the House. *See* H.B. 397, 2009 Leg., Reg. Sess. (Fla. 2009).

[45] *LGBT Rights Bills Filed in Florida*, 365 GAY NEWS, Jan. 22, 2009.

[46] Dmitry Rashnitsov, *State GLBT Bill Fails*, SOUTH FLORIDA BLADE, Apr. 30, 2009; *Record Number Sponsor Florida Gay Rights Legislation*, OUT IN AMERICA, May 24, 2009.

[47] Michael Emanuel Rajner, *Florida Lawmaker's Latest Round of Bigoted Statements on Gays and AIDS* , BLOG TO END AIDS, June 15, 2007, http://bit.ly/3t26r8.

[48] Paul Harris, *An End to Discrimination? Two Bills Submitted to Prohibit Discrimination in Public Schools*, THE INDEPENDENT, Feb. 8, 2007.

[49] *See* FL. STAT. ANN. § 1000.05 (2009).

there was no hearing in the Senate, a House subcommittee discussed the bill. However, no action was taken.[50]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

Florida does not have any executive orders related to sexual orientation or gender identity discrimination in the context of employment.[51] In 2007, the Palm Beach County Human Rights Council urged Governor Crist to issue an executive order prohibiting discrimination based on sexual orientation in state employment.[52] Governor Crist declined to issue such order.

2. State Government Personnel Regulations

The University of Florida, Florida International University, the University of South Florida and Florida State University all have policies prohibiting discrimination with respect to sexual orientation.[53]

The proposal to add sexual orientation protection to the employment anti-discrimination policy at the University of Florida encountered strong opposition. In 1999, during a faculty meeting debate described as "hostile" by the chair of the UF Committee for Gay, Lesbian, and Bisexual Concerns, "some of the speakers associated gay people with pedophiles."[54]

3. Attorney General Opinions

In response to an inquiry from the Broward County Legislative Delegation, the Florida Attorney General released an opinion which concluded that a county "has the authority to adopt an ordinance prohibiting discrimination, including discrimination on the basis of sexual orientation" so long as the county does not amend or alter the provisions of any acts passed by the Florida Legislature.[55] The Attorney General also concluded that the county may award damages and nonmonetary relief for violations of the ordinance. Broward County has since adopted an ordinance prohibiting

[50] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[51] *See* Fla. Archive of Exec. Orders, http://www.flgov.com/orders_search (last visited Sept. 6, 2009); Fla. Archive of Exec. Orders in PDF version, http://bit.ly/CHBqJ (last visited Sept. 5, 2009).
[52] *Governor Crist Does Not Issue Executive Order Requested by Homosexual Group,* FLA. FAMILY ASSOC. NEWS, (Florda Family Assoc., Florida), Feb. 2007, at 1, *available at* http://bit.ly/Chvrj.
[53] FLA. ASSOC. OF COLL. POLICY §§ 6C-1.006, 6C8-1.009, 6C4-10.100.
[54] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 109-110 (1999 ed.).
[55] Fla. Att'y Gen. Op. No. 1993 Fla. AG LEXIS 5 (1993).

discrimination based on sexual orientation and gender identity/expression in the areas of employment, housing, and public accommodations.[56]

D. Local Legislation

According to the National Center for Lesbian Rights, fourteen cities and six counties in Florida offer various kinds of protection from discrimination on the basis of sexual orientation.[57] According to the survey, twelve of these municipalities also offer protection from gender identity discrimination.[58] Eight cities and counties in Florida have separate human rights agencies authorized to investigate and resolve discrimination complaints.[59]

1. City of Orlando

In recommending an amendment of Chapter 57 of the Code of the City of Orlando, the City of Orlando's Human Relations Board undertook a review of the issue of whether "sexual orientation" should be added as a protected class.[60] The Orlando Human Relations Board, in collaboration with the Orlando City Council, produced a report documenting discrimination by Orlando-area businesses. The report showed that homosexual and bisexual individuals had, indeed, been the victims of discrimination.[61]

2. Miami-Dade County

In January 1998, the Miami Shores City Council rejected Vice-Mayor Mike Broyle's proposal to urge Miami-Dade County to add sexual orientation to the county's Human Rights Ordinance. Cesar Sastre, who voted against the measure, compared homosexuality to alcoholism and said, "Why should gay people be treated different than me? What is sexual orientation? Where do we draw the line?" Sastre defended his comments by claiming that he is a recovering alcoholic who wants gay men and lesbians to "recover" from their sexual orientation.[62]

3. Palm Beach County

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[56] Fla. L. § 83-380 (Broward County Human Rights Act).
[57] NAT'L CENTER FOR LESBIAN RTS., HUMAN RIGHTS ORDINANCES IN FLORIDA MUNICIPALITIES (2008), http://bit.ly/PKRmQ (last visited Sept. 5, 2009). The municipalities with such legislation are Broward County, Gulfport County, Gainesville, Juno Beach, Key West, Lake Worth, Leon County, City of Miami, Miami Beach, Miami-Dade County, Monroe County, Orange County, Orlando, Oakland Park, Palm Beach County, Sarasota, St. Petersburg, Tampa, Tequestra, West Palm Beach and Wilton Manors. *Id*.
[58] *Id*. The municipalities with such legislation are Broward County, Gulfport County, Gainesville, Key West, Lake Worth, City of Miami, Monroe County, Oakland Park, Palm Beach County, Tequestra, West Palm Beach and Wilton Manors. *Id*.
[59] Broward County Civil Rts. Div., Orlando Office of Hum. Rel., St. Petersburg Cmty. Aff. Dep't, Tampa Office of Hum. Rts., Miami-Dade County Equal Opp. Bd., Hillsborough County Equal Opp. Admin., Jacksonville Hum. Rts. Comm'n, Lee County Office of Equal Opp., Palm Beach County Office of Equal Opp., Pinellas County Office of Hum. Rts. and Greater Palm Beaches Fair Housing Center. *Id*.
[60] Orlando City Council Minutes (2007) (discussing an ordinance amending Ch. 57, 2002).
[61] *Id.*
[62] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 116 (1999 ed.).

In 1990, the Palm Beach County Board of Commissioners became Florida's first public employer to prohibit workplace discrimination based on sexual orientation by unanimously voting to amend the county's Affirmative Action Plan to include sexual orientation.[63]

In 1995, Palm Beach county commissioners voted 4-3 against including sexual orientation in a proposed countywide anti-discrimination ordinance, but then voted 5-2 to pass the proposed ordinance covering the other categories already contained in federal law.[64]

In 2002, the Palm Beach County Board of County Commissioners adopted an amendment including sexual orientation in its Equal Employment ordinance by unanimous consent.[65]

In 2007, the Palm Beach County Board of County Commissioners amended both the Fair Housing and Equal Opportunity ordinances to prohibit discrimination based on gender identity or expression.[66]

Cities in Palm Beach County not specifically named below that have enacted policies prohibiting discrimination based on sexual orientation for city employees include: Atlantis, Belle Glade, Boynton Beach, Greenacres, Haverhill, Lake Park, Manalapan, Pahokee, Palm Beach, Palm Beach Shores, and South Bay.[67]

4. Alachua County

In 2006, a bill was introduced in the House during a session in which it was codifying laws relating to the Gainesville-Alachua County Regional Airport Authority. The bill's original draft included a discrimination provision that would have prohibited the Gainesville-Alachua County Regional Airport Authority from discriminating against a person on the basis of sexual orientation in the employment context. However, when the bill was ultimately codified, it omitted any mention of sexual orientation. [68]

In 1995, a complaint was filed in Alachua County challenging the constitutionality of Amendment 1, a charter amendment passed by voter initiative that prohibited the board of county commissioners from adopting "any ordinance that creates classifications based upon sexual orientation or sexual preference except as necessary to

[63] Meg James, *County First in State to Protect Gay Employees*, PALM BEACH POST, Feb. 7, 1990.
[64] Lesbian & Gay L. Notes (Sept. 1995), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1995/09.95.
[65] J. Christopher Hain, *County Quietly OK'd Law against Gay Bias on Job*, PALM BEACH POST, Dec. 4, 2002.
[66] Jennifer Sorentrue, *Palm Beach County Prohibits Gender Identity Discrimination*, PALM BEACH POST, Nov. 20, 2007.
[67] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[68] 2006 FL H.B.1629 (2006).

conform to county ordinances, federal or state law."[69] A Circuit Court in Gainesville held that Amendment 1 was unconstitutional and "indistinguishable from the Amendment struck down in [*Romer v. Evans*[70]]."[71]

5. City of West Palm Beach

In 1991, the West Palm Beach City Commission enacted a resolution adding sexual orientation to the city's equal opportunity policy and affirmative action plan.[72]

In 1994, the City of West Palm Beach enacted an Equal Opportunity Ordinance prohibiting discrimination based on sexual orientation in employment, housing, and public accommodation. The ordinance also ensured that gay men and lesbians would be represented on city boards and commissions. Shortly after the ordinance went into effect, a referendum was introduced seeking to repeal the ordinance by citywide vote. In January, 1995, 56% of voters refused to repeal the ordinance.[73]

In 2007, West Palm Beach amended the Equal Opportunity Ordinance to prohibit discrimination based on gender identity or expression.[74]

6. City of Lake Worth

In 2003, the Lake Worth City Commission amended the city's Civil Rights Act to prohibit discrimination based on sexual orientation. In 2007, the city commission unanimously voted to amend the act to include gender identity and expression.[75]

7. City of Delray Beach

In 2006, the Delray Beach City Commission voted 3-2 to ban discrimination based on sexual orientation in city government and to provide domestic partner benefits.[76]

8. Town of Juno Beach

In 2007, the Town of Juno Beach revised its non-discrimination and harassment awareness policies to include sexual orientation.[77]

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[69] Lambda Legal, *Lambda Defeats Antigay Amendment in Florida County* (Nov. 25, 1996), http://www.lambdalegal.org/news/pr/lambda-defeats-anti-gay.html.
[70] 517 U.S. 620 (1996).
[71] Lambda Legal, *Lambda Defeats Antigay Amendment in Florida County* (Nov. 25, 1996), http://www.lambdalegal.org/news/pr/lambda-defeats-anti-gay.html.
[72] Angela Bradbery, *West Palm's Gay Workers Added to Equal Opportunity Policy*, PALM BEACH POST, May 20, 1991.
[73] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[74] *West Palm Enacts Transgender Protections*, THE WATERMARK, May 9, 2007.
[75] Nicole Janok, *Lake Worth Opts to Expand Civil Rights Laws*, PALM BEACH POST, July 6, 2007.
[76] Erica Life, *Group Lobbies Delray Commission Approves Gay Rights Measures*, SOUTH FLORIDA SUN-SENTINEL, July 19, 2006.

9. Town of Hypoluxo

In 2007, the town of Hypoluxo amended its non-discrimination policy to include sexual orientation.[78]

10. Town of Jupiter

In 2007, the town of Jupiter voted to amend its non-discrimination policies include sexual orientation and to provide domestic partner benefits.[79]

11. Village of Tequesta

In 2007, the village of Tequesta's city council voted to amend four policies to protect Tequesta employees from discrimination and harassment based on sexual orientation and gender identity and expression.[80]

12. Royal Palm Beach

In 2007, the Village of Royal Palm Beach amended its Equal Employment Opportunity policy and its Anti-Harassment and Anti-Discrimination Policy to prohibit discrimination based on sexual orientation.[81]

13. Palm Beach Gardens

In 2007, Palm Beach Gardens City Council amended its Equal Employment Opportunity Policy to prohibit discrimination based on sexual orientation.[82]

14. Palm Beach County School District

In 1991, the Palm Beach County School district considered amending its policies to prohibit discrimination on the basis of sexual orientation. However, when the amendment came up for a vote, the school board declined to add sexual orientation as a protected group and instead adopted a generic policy prohibiting discrimination that did not enumerate any protected classes.[83]

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[77] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[78] *Hypoluxo to Prohibit Discrimination*, OUT IN AMERICA, Feb. 24, 2007.
[79] *Jupiter Implements Domestic Partner Policy*, WEEKDAY, Mar. 16-22, 2007.
[80] *Village Updates Policy*, NORTHERN PALM BEACH COUNTY HOMETOWN NEWS, May 18, 2007.
[81] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[82] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[83] Lynette Holloway, *Schools Consider Homosexual Rights*, PALM BEACH POST, Aug. 19, 1991; Susan Bellido and Jeffrey Kleinman, *Gay Rights: Board Skirts Issue*, PALM BEACH POST, Aug. 22, 1991.

In 2002, the school board again considered amending its anti-discrimination and anti-harassment policies to include sexual orientation, but ultimately declined to do so.[84]

On May 30, 2006, the School Board of Palm Beach County unanimously adopted a Commercial Nondiscrimination Policy, which prohibits the School Board from accepting bids or proposals from, or engaging business with, "any business firm that has discriminated on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, disability, or any other form of unlawful discrimination in its solicitation, selection, hiring, or treatment of another business."[85] In July, 2009, the policy was amended to prohibit discrimination on the basis of gender identity or expression.[86]

E. Occupational Licensing Requirements

There are several state licensing requirements mandating that one must retain "good moral character" and forebear from committing crimes involving acts of "moral turpitude."[87] "Good moral character" and "moral turpitude" are not defined by Florida statute.

[84] Scott Travis, *Gay Rights Activists Push for Final Vote*, SOUTH FLORIDA SUN-SENTINEL, Jan. 30, 2003; Kimberly Mitchell, *School Board Postpones Gay Anti-Discrimination Vote*, PALM BEACH POST, Dec. 3, 2002.
[85] Donald Cavanaugh, *Nondiscrimination Policy Adopted by School Board*, THE INDEPENDENT, June 8, 2006.
[86] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[87] Examples include license requirements for home health agency personnel, criminal justice officers, health care professionals, day care personnel, home contractors and teachers.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Mowery v. Escambia County Util. Auth., 2006 U.S. Dist. LEXIS 5304 (N.D. Fla. Feb. 10, 2006).

In *Mowery v. Escambia County Utilities Authority*,[88] a white heterosexual male who was harassed by co-workers suggesting that he was gay, brought an action under Title VII of the Civil Rights Act of 1964 (hereinafter, "Title VII") against his employer, the Escambia County Utilities Authority (the "Authority"). Mowery, the plaintiff, did not assert any claims under Florida law. The court granted the Authority's Motion for Summary Judgment on the ground that none of the scenarios established by *Oncale v. Sundowner Offshore Services, Inc.*[89] had been established. The court found that the stereotypes experienced by Mowery were not based on his failure to conform to his expected gender role. The court stated that "being forty years old, owning a home and truck, living alone, and not discussing one's sexual partners are not feminine gender traits. These characteristics may reflect stereotypes associated with a homosexual lifestyle, but they are not stereotypes associated with a feminine gender."[90]

Woodard v. Gallagher, 59 Emp. Prac. Dec. (CCH) ¶. 41, 652, 1992 WL 252279 (Fla.Cir.Ct. 1992).

Thomas Woodard, a deputy sheriff, filed a seven count complaint against Walt Gallagher, as Sheriff of Orange County, alleging a violation of his constitutional rights to privacy, Equal Protection, free speech, free association and a denial of Due Process under the Florida Constitution. The Court found that the constructive termination violated Woodard's constitutional rights to privacy and Equal Protection. The Free Speech and Free Association counts remained in the case, but were not specifically argued as being applicable to the facts.

The Plaintiff alleged the Defendant violated his constitutional rights by forcing him to resign his position as deputy sheriff because he was homosexual. The Sheriff claimed his leaving was voluntary and not unduly forced and therefore the homosexual issue was not relevant. The Court bifurcated the trial to allow a jury to determine the factual issues of whether or not Plaintiff was constructively fired by the Sheriff and if so whether or not the discharge was based on Plaintiff's homosexual orientation and conduct. The jury found the Plaintiff was constructively fired and such firing was based on Plaintiff's homosexual orientation and conduct.

[88] 2006 U.S. Dist. LEXIS 5304 (N.D. Fla. Feb. 10, 2006).
[89] 523 U.S. 75 (1998) (claim of same-sex sexual harassment actionable under Title VII).
[90] *Mowery*, 2006 U.S. Dist. LEXIS 5304 at *19.

The second portion of the trial was conducted before the Court to allow the presentation of further evidence and argument on the constitutional issues. The Court found that the action of the Sheriff in constructively firing the Plaintiff was unconstitutional as applied to the Plaintiff.

> [the homosexual conduct] occurred away from and unrelated to his job and was within his personal private life. There was no evidence that his job or public life was affected in any respect by such conduct. Such conduct was not unlawful and there was no public rumor as to his involvement in any sexual conduct. Also, he stated that he had not been involved in any homosexual conduct since he became a deputy and would even abstain from any personal homosexual relationships if that was required to keep his job. He was not being an advocate for homosexual rights which could have embarrassed the Sheriff or make it appear that the Sheriff was giving tacit approval to homosexual activity.[91]

The Court held that the Sheriff's use of plaintiff's sexual conduct and preference as a basis to discharge him violated his right to privacy. The Court also held that gay people are entitled to heightened scrutiny under equal protection analysis, stating:

> After extensive review of case law in the equal protection area, it is the conclusion of this Court that known homosexual persons are included in a class of persons who are inherently treated with prejudice by a large number of people in our society. *Jantz v. Muci*, [56 EPD ¶ 40,766] 759 F.Supp. 1543 (D.Kan.1991). It appears that the only reason they have not been granted heightened equal protection rights is because the difference in them touches most peoples' deeply ingrained heterosexual orientation both personally and culturally. The majority's heterosexual orientation is biologically, psychologically and morally ingrained in our culture to the extent that most persons don't want to even try and understand, much less accept, the homosexuals [sic] outlook. Even though they recognize that most of a person's life and relationships do take place outside the sexual sphere, their uncomfortableness and aversion to being confronted with the intimacies of persons who are attracted to the same sex

[91] *Woodard v. Gallagher*, 59 Emp. Prac. Dec. (CCH) ¶. 41, 652, 1992 WL 252279 at *1 (Fla. Cir. Ct. 1992).

> often results in depreciating jokes, put downs, derisions, and prejudice.[92]

Smith v. City of Jacksonville Corr. Inst.,1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991).

In *Smith*, a hearing officer held that an individual with gender dysphoria is within the disability coverage of the Florida Human Rights Act, as well as the portions of the Act prohibiting discrimination based on perceived disability. Smith had been employed as a correctional officer but was terminated upon discovery that Smith was transsexual, and the hearing officer recommended that the Human Relations Commission enter a Final Order reinstating Petitioner, awarding back pay and attorneys' fees and costs and reserving jurisdiction should the parties fail to agree on appropriate reinstatement, back pay and attorney's fees and costs.

Smith was biologically male and during the entire time she was employed at the Institution (1972-1985), she functioned as a male and was known as William H. Smith. Smith had previously been diagnosed as transsexual (male-to-female) while serving in the Navy.

While serving as a corrections officer, Smith advanced rapidly. Smith was a floor officer at a time floor officers had broad responsibilities, and then became the youngest officer ever to be put in charge of road crews. Smith was made a provisional sergeant by administrative appointment six months prior to being able to take the sergeants exam. Upon passing the sergeants exam, Smith was made a permanent sergeant. While a sergeant, she was promoted to relief watch commander at the City Jail. Smith was the only sergeant permitted to function as a relief watch commander. Eventually, Smith was made a provisional lieutenant by administrative appointment. Again, the appointment was prior to taking the requisite examination. When she took the examination, she had the highest score of those tested and was promoted to permanent lieutenant. She regularly received excellent performance evaluations. These evaluations included outstanding ratings for interactions with other people due to her knack for relating well with both coemployees and inmates.

However, with the passage of years and the enforced male living, Smith found it increasingly difficult to deny her femaleness. She developed a severe bleeding ulcer. She fell into a major depression and even began to consider suicide. The court found that the impairment was directly due to her handicap of transsexuality. On July 8, 1985 while on vacation, she went out in the middle of the night to a very private, unpopulated, nearby beach wearing women's clothing. While out, Smith had a flat tire. A passing patrolman stopped to help with the tire. Initially, Smith identified herself as Barbara Joe Smith. The officer who stopped to assist Smith ran Smith's tag and discovered that Smith's true name was William, not Barbara Joe. The officer filed a general offense report of the encounter with the City. Once the report was filed, copies of this report

[92] *Id.* at *3.

were immediately circulated throughout the jail in sufficient quantity to "paper the walls."

On July 12, 1985, Smith reported to the Directors' office to discuss the July 8 incident. Smith explained that she was transsexual and that the event had been a manifestation of her transsexuality. The Directors asked Smith if she would be willing to accept counseling, but Smith explained to them that counseling would not "cure" her and that the only effective treatment would be sex reassignment. Smith told her superior that she was going to go ahead and pursue a sex change operation and would live as a female. The Directors thereupon decided that Smith could not be retained and the City's course of action would be to terminate her. They tried to persuade Smith to resign. The City's testimony was that Smith in fact agreed to resign because of concerns about the way other people would react to her. Smith denied agreeing to resign. Smith was then terminated.

The hearing officer found that,

> [i]mportantly, at the time of Smith's termination in 1985, nothing had changed in Smith's abilities to perform her job. This was the same transsexual person who had rendered exemplary service for the past 14 years. No reasonable accommodation of Petitioner's handicap was explored or attempted by the City. Given, the Sheriff's testimony regarding his ability to accept Petitioner, the screening undergone by correctional officers, the fact that co-employees stepped forward on behalf of Smith and Smith's experience in other jobs after her termination demonstrate that the City's apprehensions were unjustified and were not concerns which could not be reasonably accommodated as was done with female correctional officers and black correctional officers when those groups entered the correctional work force.[93]

The City's main line of defense for terminating Smith was that an absence of transsexuality was a bona fide occupational qualification (BFOQ) for her position. The hearing officer rejected this argument, finding that "the City provided virtually no evidence to discharge its burden of proving a BFOQ. Its entire case consisted of the opinions of the Sheriff and his surmise and assumption about the responses of Petitioner's coemployees and inmates."[94] The hearing officer continued,

> Simply put, prejudice cannot be a basis for a BFOQ. Permitting negative third party reactions - whether malignant bigotry or unthinking narrowmindedness and ignorance - to be elevated to a BFOQ would be to turn the

[93] *Smith v. City of Jacksonville Corr. Inst.*,1991 WL 833882, at *8 (Fla. Div. Admin. Hrgs. 1991).
[94] *Id.* at *13.

> Human Rights Act inside out and upside down. Not every adverse reaction can be honored, regardless of merit or worth. Third party reactions must be deserving of deference to receive it. Otherwise, bigotry and prejudice would need only to be entrenched to be upheld. Obviously that cannot be the law. In order for an handicap to be considered a BFOQ some amount of evidence beyond mere speculation must be ascertained by the employer which would justify its conclusion of unemployability and that the handicap cannot be reasonably accommodated . . . .
>
> In this case, the City has failed to show, either directly or indirectly, the existence of sufficient loss of respect to constitute a BFOQ defense. The evidence, to the contrary, tends to negate a BFOQ. Further, the City has not shown any attempts to accommodate Smith and has made no showing that she could not have been accommodated. Perhaps most important, the City's asserted BFOQ would contravene the purposes of the Human Rights Act and even if proved could not on this record be recognized as a legitimate BFOQ. Therefore, Respondent committed an unlawful employment practice against Petitioner when it fired her because of her handicap of transsexualism and Petitioner is entitled to reinstatement to a position similar in nature to the one she was terminated from or to a position employees in positions similar to Petitioners in 1985 were transferred to when the institution reorganized its employment classes, back pay through the date of reinstatement and attorney's fees and costs.[95]

Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988).

Plaintiff, a deputy for the sheriff's department, was fired after the sheriff's department discovered she was a lesbian when two of her former lovers (also employees of the sheriff's department) told the sheriff's department about Plaintiff's sexual orientation. Plaintiff alleged she was terminated because of her sexual orientation; the sheriff's department claimed she was terminated because of excessive absenteeism, failure to perform, and alleged instances of misconduct involving Plaintiff's former lovers. The court granted the sheriff's department's motion for summary judgment, assuming for its analysis that Plaintiff was terminated based on her sexual orientation, and holding that "[i]n the context of both military and law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end."[96]

Florida Bd. of Bar Exam'rs Re N.R.S., 403 So.2d 1315 (Fla. 1981).

[95] *Id.* at *14 (internal citations omitted).
[96] *Todd v. Navarro*, 698 F. Supp. 871, 875 (S.D. Fla. 1988).

In a lawyer's application to the Florida Bar, he disclosed that the Military Selective Service classified him in Class 4-F, which was due to a physical problem or homosexuality. The lawyer refused to answer questions about his sexual conduct and the board refused to certify him for admission to practice. In an informal hearing the Board inquired into lawyer's sexual conduct. Lawyer admitted a continued preference for men but refused to answer questions about his past sexual conduct. The Board requested that he return to answer additional questions and he declined. He petitioned the Court to order the Board to certify him for admission to practice.

The Florida Supreme Court held that the investigation performed by the Florida Board of Bar Examiners should be limited to inquiries which bear a rational relationship to an applicant's fitness to practice law. "

> Private noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law. This might not be true of commercial or nonconsensual sex or sex involving minors . . . . In the instant case the board may ask the petitioner to respond to further questioning if, in good faith, it finds a need to assure itself that the petitioner's sexual conduct is other than noncommercial, private, and between consenting adults. Otherwise, the board shall certify his admission.[97]

Fla. Bd. of Bar Exam'rs v. Eimers, 358 So.2d 7 (Fla. 1978).

In 1978, the Florida State Bar sought guidance from Florida Supreme Court as to whether applicant should be denied admission for lack of "good moral character" because of his admitted orientation as homosexual per se. The court held that a "rational connection" to fitness was required to deny bar admission, and held that mere self-identification as homosexual was not adequate to meet this rational connection. However, the court severely limited its holding, specifying that it did not extend to individuals who were evidenced to engage in physical homosexual activity (i.e. who were practicing homosexuals).[98]

State v. Kimball, 96 So.2d 825 (Fla. 1957).

In *State v. Kimball*, the plaintiff attorney was disbarred after being convicted of homosexual sodomy, which the Florida Bar stated was "contrary to the good morals and law of this state." The Florida Supreme Court upheld Plaintiff's disbarment with minimal discussion.[99]

2. **Private Employees**

Cox v. Denny's, Inc., 1999 U.S. Dist. LEXIS 23333 (M.D. Fla. Dec. 22, 1999).

[97] *Fla. Bd. of Bar Exam'rs Re N.R.S.*, 403 So.2d 1315 (Fla. 1981).
[98] *Fla. Bd. of Bar Exam'rs v. Eimers*, 358 So.2d 7 (Fla. 1978).
[99] *State v. Kimball*, 96 So.2d 825 (Fla. 1957).

In *Cox v. Denny's, Inc.*,[100] a male pre-operative transsexual, claimed he was harassed by a fellow cook at a Denny's restaurant. In a lawsuit filed in the U.S. District Court for the Middle District of Florida, Mark Cox alleged that the male co-worker made sexual advances towards him, groped Cox, stated "I [*sic*] gonna get me some of that," and called him derogatory names such as "fag," "whore bitch," and "freak mother fucker."[101] Cox alleged that he notified management; no action was taken. After exhausting his administrative remedies, Cox filed a *pro se* lawsuit against Denny's, contending that he was verbally and physically assaulted "because of" sex, in violation of Title VII. The court acknowledged that a transsexual may establish an actionable Title VII claim so long as the harassment occurred "because of" the individual's sex "under the traditional meaning of that term."[102] However, the court held that the harassment was not severe enough to give rise to an actionable hostile work environment claim because the co-worker had only groped Cox *once* in a seven month period. Notably, in so holding, the court explained that the co-worker's offensive utterances and derogatory names "were related to Cox's transsexual status and sexual orientation, which [could] support a hostile work environment claim based on sex."[103]

De La Campa v. Grifols America, Inc., 819 So.2d 940 (Fla. Dist. Ct. App. 2002).

In *De La Campa v. Grifols America, Inc.*,[104] a lesbian filed a charge of discrimination with the Miami-Dade County Equal Opportunity Board against Grifols America, Inc. alleging employment discrimination on the basis of sexual orientation in violation of Chapter 11A of the Code of Miami-Dade County (the "Code"), which prohibits employment discrimination on the basis of sexual orientation.[105] In her charge, Aindry De La Campa alleged that her supervisors repeatedly advised her that she would be terminated because of her sexual orientation and that she was intentionally excluded from corporate-sponsored social functions because of her sexual orientation. The trial court found that the Code does not create a private cause of action for alleged violations. On appeal, the appellate court affirmed the trial court's ruling that the Code does not provide a private cause of action but instead provides for an administrative relief scheme.

B. **Administrative Complaints**

[100] 1999 U.S. Dist. LEXIS 23333 (M.D. Fla. Dec. 22, 1999).
[101] *Id.* at *2.
[102] *Id*. at *5-*6.
[103] *Id.* at *10.
[104] 819 So.2d 940 (Fla. Dist. Ct. App. 2002).
[105] See 1 FLA. CODE Chptr. 11A § 11A-1, which states:

> [i]t is hereby declared to be the policy of Dade County, in the exercise of its police power for the public safety, health and general welfare, to eliminate and prevent discrimination in employment… because of race, color, religion, ancestry, national origin, sex, pregnancy, age, disability, marital status, familial status or sexual orientation… All violations shall be prosecuted in the court of appropriate jurisdiction of Dade County, Florida.

Id.

Sampson v. Dep't of Children and Family Serv., 2006 Fla. Div. Adm. Hear. Lexis 466 (F.D.A.H. Sept. 29, 2006).

In *Sampson v. Department of Children and Family Services*,[106] Sampson filed a discrimination claim with the Commission alleging that the Department of Children and Family Services (the "Department") discriminated against her on the basis of race and sex in violation of the Florida Civil Rights Act. Sampson is an African-American lesbian who worked for the Department for two years before she was terminated, allegedly for poor performance. Sampson's claim of sex discrimination was based on the allegation that after she was seen hugging another female employee in her office in a "romantic way," her supervisor informed Sampson that "there was a rumor that Sampson was having a relationship with another female employee, that her conduct needed to be professional, and that she should keep her door open when that employee was in her office."[107] The administrative law judge ruled that Sampson's sex discrimination allegations were not actionable under Florida law and that discrimination on account of sexual orientation is not actionable. The court found that Sampson was terminated because of documented poor performance rather than race or sex. The Commission adopted the recommended order of the administrative law judge and dismissed the complaint.

Fishbaugh v. Brevard County Sheriff's Dep't, Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).

In *Fishbaugh v. Brevard County Sheriff's Department*,[108] Connie Fishbaugh, a post-operative transsexual, filed a complaint of discrimination with the Commission after being terminated allegedly based on disability because of her transsexuality and sex in violation of the Florida Civil Rights Act. (The Final Order from the Commission does not provide any details regarding the circumstances of Fishbaugh's termination.) The administrative law judge concluded that transsexuality is not a disability under the Florida Civil Rights Act because the Americans with Disabilities Act and the Rehabilitation Act exclude transsexuality as a disability. The administrative law judge also limited the application of the *Smith*[109] case because it involved a pre-operative transsexual with medical disabilities, as opposed to Fishbaugh, who was a post-operative transsexual, and because the *Smith* case occurred prior to the American Disabilities Act and the amendments to the Rehabilitation Act. As to the sex discrimination claim, the administrative law judge concluded that Fishbaugh was discriminated against because she is a transsexual and not because she is a woman, and transsexuals are not a protected class under the Florida Civil Rights Act. The Commission panel agreed with the administrative law judge's findings on the disability claim noting that, in this case, Fishbaugh was not disabled because Fishbaugh was not currently suffering from a

[106] 2006 Fla. Div. Adm. Hear. Lexis 466 (F.D.A.H. Sept. 29, 2006).
[107] *Id.* at 21.
[108] Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).
[109] *Smith v. City of Jacksonville Corr. Inst.*,1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991) (discussed *supra*).

disability, since Fishbaugh had completed sex-reassignment.[110] Based on the U.S. Supreme Court's holding in *Price Waterhouse v. Hopkins*,[111] the Commission held that Fishbaugh may bring a claim of sex discrimination as a woman "where the complainant is perceived not to conform to sex stereotypes or because the complainant has changed sex."[112]

Sch. Bd. of Escambia County v. Madison, 1992 Fla. Div. Adm. Hear. LEXIS 6879 (F.D.A.H. 1992).

In *School Board of Escambia County v. Madison*,[113] David Madison received a letter from the Superintendent for the Escambia County School Board (the "School Board") stating that his employment as a second grade teacher was terminated because Madison had allegedly committed a crime involving moral turpitude. Madison was arrested after attempting to interact with the undercover police officer in an area that is allegedly known for illegal sexual transactions, mostly involving gay males. According to the police report, Madison ceased his sexual advances as soon as the undercover officer's consent was withdrawn. Nevertheless, he was arrested for simple battery for touching the officer's clothing. Parents at Madison's school became aware of the situation when the arrest was picked up by the newspapers. Some parents were supportive, while others made statements such as "we don't want those type of people teaching our children" and "homosexuals are child molesters."[114] Madison was fired and sought administrative review. The Hearing Officer of the Division of Administrative Hearings noted that "for the most part, the negative comments about Mr. Madison involved not the criminal charge, but the homosexual nature of the event."[115] The Hearing Officer ruled that Madison was entitled to reinstatement with back pay because there was "no credible evidence to suggest that Mr. Madison's ability to teach had been impaired or that the students in Mr. Madison's class had in any way had their academic potential affected. . . . Additionally, discipline based on a person's lifestyle is clearly prohibited by the master contract."[116] The master contract between the School Board and the Escambia Education Association stated that the "School Board shall not discriminate against any member because of . . . lifestyle."[117]

C. **Other Documented Examples of Discrimination**

Broward College

[110] *See* Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004). The Panel distinguished this case from the *Smith* case because *Smith* involved a pre-operative transsexual with significant medical disabilities, and the *Smith* case occurred prior to the enactment of Americans with Disabilities Act and the Florida Civil Rights Act of 1992.
[111] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a "claim of discrimination could be found where a perception that a person failed to conform to stereotyped expectations of how a "woman" should look and behave").
[112] Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).
[113] 1992 Fla. Div. Adm. Hear. LEXIS 6879 (F.D.A.H. 1992).
[114] *Id.* at *12.
[115] *Id.*
[116] *Id.* at *14.
[117] *Id.*

In 2009, two years after she started working at the college, a transgender woman was forced to resign because of her gender identity. She received praise for her work and was given a letter stating that she was dependable, able to work independently, and a skilled technician. Approximately two months before she was fired, she notified her boss that she would be transitioning from male to female. In March 2009, she was called in on her day off to attend a staff meeting. She did not have a clean uniform to wear and told her boss that she would wear women's clothes, which she wore in her day-to-day life but not on the job, and he said it was fine. When she arrived to campus, faculty and staff gave her hostile looks and she felt unsafe. She called a co-worker friend to ask for support, but he hung up on her. Her boss then accused her of harassing her co-worker because she had called him after he hung up and moved her to an unfavorable shift that her friend did not work. The new shift interfered with her medical appointments which were crucial to her transition and she was forced to resign.[118]

City of Largo Management

Susan (Steve) Stanton worked for the City of Largo as an assistant city manager and city manager for a combined 17 years.[119] In early 2007, Stanton informed her superiors that she planned to begin living as a woman in preparation for sex reassignment surgery. News of Stanton's decision was leaked to the local media, leading the City Commissioners to vote 5-2 to suspend Stanton pending their final vote. During the suspension meeting, one of the Commissioners who voted in favor of the suspension stated: "His [sic] brain is the same today as it was last week. He [sic] may be even able to be a better city manager. But I sense that he's [sic] lost his [sic] standing as a leader among the employees of the city."[120] The Mayor, who voted against the suspension stated: "I'm going to be embarrassed if we throw this man [sic] out on the trash heap after he's [sic] worked so hard for the city. We have a choice to make: We can go back to intolerance, or we can be the city of progress." During the suspension meeting a citizen expressed her sentiments stating: "I don't want that man [sic] in office. I don't think we should be paying him $150,000 a year when he's [sic] not been truthful. We have to speak up. Of course, we don't believe in sex changes or lesbianism. They have their rights, but we do, too." Ultimately, Stanton was fired, but said that she would not sue the city, stating that a potential suit against the city would be "like suing my mother."[121]

Municipal Sheriff's Department

[118] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[119] Jillian Todd Weiss, *The Law Covering Steve (Susan) Stanton, City Manager Dismissed In Largo, Florida*, GENDERTREE.COM, Mar. 1, 2007, http://bit.ly/186I3m.
[120] Lorri Helfand, *Commission Moves to Fire Stanton*, ST. PETERSBURG TIMES, Feb. 27, 2007.
[121] *Id.*

In 2007, a sheriff's department applicant was offered positions at two sheriff's offices which were then rescinded because they found out he was living with a man whom they assumed was his partner.[122]

Miami-Dade County Agency

In 2007, a lesbian social worker at a county agency suddenly had problems at work upon disclosing her sexual orientation following ten years of employment without issue. When she disclosed her sexual orientation, her supervisor started giving her bad reviews, and stood in the bathroom with her while she urinated for a drug test which was not standard procedure at the agency.[123]

Municipal Police Department

In 2006, an applicant to the police department was accused of being "dishonest" and when she informed them of her transgender status after completing her application.[124]

Hillsborough County School District

In 2005, eight years after he had been hired by the Hillsborough County School District, a teacher protested the dismantling of a gay pride book on display at the local public library. He was quoted in the local paper for saying that, as a gay man and a school librarian, he was upset that the book display had been taken down prematurely. The school superintendent saw that he was quoted in the paper and proceeded to have his behavior reviewed by the school district's Professional Standards Office. Though the teacher was not disciplined for discussing the book display with the paper, he was told that he was not to bring "the issue" into the workplace. This censorship has caused him a great deal of distress and he worries that his professionalism will be called into question repeatedly because he is gay.[125]

Pinellas County Water Quality Department

In 2005, a gay employee of the Pinellas County Water Quality Department reported that he was terminated after the employee's neighbor disclosed his sexual orientation to his supervisor.[126]

Tampa Police Department

[122] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[123] *Id*.
[124] *Id*.
[125] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[126] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

In 2004, a gay officer with the Tampa Police Department experienced harassment and was terminated when he disclosed his sexual orientation to supervisors. He was also arrested for lewd and lascivious conduct for informing street youth about "safer sex."[127]

Sarasota Public School

In 2004, a Sarasota public school teacher who had agreed to let students use her classroom for "Gay-Straight Alliance" meetings was harassed by other teachers to such an extent that she felt she had to leave. After she resigned, the school refused to give her a positive recommendation.[128]

Department of Corrections

In 2004, a Department of Corrections employee was compelled to resign by superiors when his supervisors discovered that he occasionally wore women's clothes outside the office.[129]

Pasco County Sheriff's Department

In 2003, a transgender employee of the Pasco County Sheriff's Department reported instances of harassment to her supervisors, who allegedly forced her to resign. Co-workers intentionally used the inappropriate gender pronoun when she was out on patrol, thus outing her to officers on the receiving end of police calls. She complained to superiors, but the conduct continued. When co-workers started a rumor that she had posed topless online, she resigned.[130]

Florida State Board of Nursing

In 2002, an applicant for a Florida nursing license was denied because of his sexual orientation. The applicant had already procured a nursing license in Indiana.[131]

Tampa Public School

In 2002, a transgender public school employee experienced harassment by co-workers and superiors; she was called a "thing," and was taunted about which bathroom she should be permitted to use.[132]

Jacksonville Fire Department

In 2002, an openly lesbian firefighter was repeated passed over for promotion in favor of less-qualified employees. She was eventually fired for "low test scores," even though her scores were consistently superior to those of other employees.[133]

[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.

Newton Fire Department

In 2002, a gay firefighter reported that he had been harassed when colleagues found his personal ad online and circulated it around the office. The firefighter's supervisor "wrote him up" for infractions which the supervisor later admitted were frivolous.[134]

Fort Lauderdale Fire Department

In 2002, a gay firefighter reported that he was discriminated against after disclosing his sexual orientation at work. Before he had disclosed his sexual orientation, the firefighter received excellent assessments and was, in fact, promoted. After he revealed his sexual orientation, however, he was told to either resign or accept a demotion. The firefighter accepted the demotion in an effort to retain his retirement benefits.[135]

Florida State Department of Agriculture

In 2001, an employee of the Florida Department of Agriculture reported that he had been the target of virulently anti-gay comments from a colleague. When he complained, he was reprimanded and told to drop the complaint. The employee refused and was terminated shortly thereafter.[136]

Florida State Department of Health

In 2001, a supervisor at the Florida Department of Health said he would try to "rid" the department of gays. When an employee complained, the employee was reprimanded and eventually terminated after enduring an extended period of workplace harassment.[137]

City Public Works Department

In 2001, a transgender city public works department supervisor was fired on account of her gender identity.[138]

Florida Public School

A public school teacher who had previously received positive evaluations later received negative evaluations after officials discovered that the teacher had a same-sex domestic partner.[139]

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[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

City Government Department

In 2001, a city government employee was forced to resign when superiors learned that the employee enjoyed dressing in women's clothes outside the office and threatened to publicly disclose the discovery.[140]

Municipal Fire Department

In 2000, a lesbian firefighter was subjected to a hostile work environment on account of her sexual orientation.[141]

County Clerk's Office

In 1996, an employee of a county clerk's office was fired because of his sexual orientation.[142]

Miami Beach Police Department

In a book published in 1996, Pete Zecchini, a gay man, described his experience as a Miami Beach police officer as "miserable." When Zecchini inquired as to why his cases had been reassigned and his work schedule rearranged, his supervisor told Zecchini that it was because of his homosexuality. When Zecchini complained to his chief about this supervisor, the supervisor flatly denied saying any such thing. At shooting practice, Zecchini overheard his coworkers saying, "faggot this," "faggot that," and "Miami Beach is turning into a bunch of faggots." Zecchini alleged that he was the only officer on the force denied a pay raise for using too many sick days.[143]

Sunrise Police Department

In 1994, a U.S. District Court jury in Florida decided that the Sunrise, Florida, Police Department unlawfully discriminated against Darren Lupo, an unmarried lesbian patrolwoman, by requiring that she work a Christmas shift in place of a married policeman with children, but rejected her broader claim of a pattern of discrimination based on her sex and sexual orientation. The jury awarded $56,250 in compensatory damages.[144]

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[139] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[140] *Id*.
[141] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[142] *Id.*
[143] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 102-106 (Routledge 1996).
[144] Lesbian and Gay L. Notes (Oct. 1994) (citing FT. LAUDERDALE SUN-SENTINEL, Sept. 5 1994).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Florida's "unnatural and lascivious acts" law[145] was rendered unenforceable by the U.S. Supreme Court's ruling in *Lawrence v. Texas*.[146] The Legislature has not repealed the statute.

B. HIV/AIDS Discrimination

In 1997, a state transportation official responded to a request for a donation to the Florida AIDS ride by expressing the view that AIDS "was created as a punishment to the gay and lesbian communities across the world." The official, a planner in the Department of Transportation's state safety office, wrote that she was sorry that "innocent [heterosexual] people have also had to suffer." But, she added, "[a]s far as the gay[s] and lesbians of this world . . . let them suffer their consequences!" The letter was composed on official state stationery.[147]

C. Education

The Florida Department of Education has issued a Code of Ethics that prohibits teachers from harassing and discriminating against any student on the basis of their sexual orientation.[148]

On June 10, 2008, Florida enacted the "Jeffrey Johnston Stand Up for All Students Act," which prohibits bullying or harassment in public schools.[149] The bill defines bullying as "sexual, religious or racial harassment" but does not specifically use the terms "sexual orientation" or "gender identity." However, according to the bill's sponsor, Representative Nick Thompson, there was no need for inclusion of specific protections for LGBT students because the bill is broad enough to cover all forms of harassment.[150] One attempt to amend the bill sought to include an enumerated list of

[145] FLA. STAT. § 800.02 (2001).
[146] 539 U.S. 558 (2003).
[147] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 52 (1997 ed.).
[148] FLA. ADMIN. CODE § 6B-1.006 (2008).
[149] FLA. STAT. § 1006.147 (2008).
[150] Kevin Jennings, *What the Hays? Florida Legislator Proves Need for a Real Safe Schools Bill*, HUFFINGTON POST, Jan. 15, 2009, http://bit.ly/31czGR.

categories, including sexual orientation. Similar bills introduced in the House, in 2005 and 2007, failed.[151]

In *Gonzalez v. School Board of Okeechobee County*,[152] the U.S. District Court for the Southern District of Florida ruled that the Equal Access Act[153] obligated a school board to officially recognize the Gay-Straight Alliance of Okeechobee High School (the "GSA") and to grant the GSA the benefits afforded to other student groups, including permission to meet on campus. The school board had argued that it denied access to GSA because it was a "sex-based" club that would be harmful to the students and would violate the school's abstinence-only education policy. The court ruled that the GSA did not interfere with abstinence-only education[154] and that the school board was "obligated to take into account the well-being of its non-heterosexual students."[155]

In *Gillman v. Holmes County School District*,[156] a student claimed that school officials violated her First Amendment rights to free expression by barring students from wearing clothes with slogans or symbols advocating acceptance of homosexuality and that such prohibition also constituted viewpoint-based discrimination, in violation of her First and Fourth Amendment rights. The high school had banned all students from wearing t-shirts, armbands, stickers or buttons containing slogans and symbols which advocate the acceptance of gays and lesbians (including rainbows, pink triangles and a list of slogans). This triggered a series of events which led the principal to inquire as to the sexual orientation of eleven students, who were later suspended for their expressive activities. The District Court held that the school had violated Gillman's First Amendment rights. The court ruled that "it was not the students who imposed their views about homosexuality on [the principal] or other students; rather, it was [the principal] who [had] silenced and suspended students for expressing their views."[157]

E. **Health Care**

The State of Florida requires that Hospice Programs be available to all terminally ill persons and their families without regard to, *inter alia*, sexual orientation.[158]

F. **Gender Identity**

In 2005, the Florida House attempted to amend the definition of disability to specifically exclude "homosexuality, bisexuality, transvestism, transsexualism, [and]

[151] H.B. 1303, 2005 Leg., Reg. Sess. (Fla. 2005) (legislative history); H.B. 575, 2007 Leg., Reg. Sess. (Fla. 2007) (legislative history).
[152] 571 F.Supp. 2d 1257 (S.D. Fla. 2008)
[153] 20 U.S.C. § 4071.
[154] The judge stated that the Supreme Court has ruled that "non-curricular student groups do not constitute an act of the school, which is the primary reason why religious non-curricular student groups do not run afoul of the Establishment Clause." *Gonzalez*, 571 F. Supp. 2d at 1267.
[155] *Id.* at 1267.
[156] 567 F.Supp 2d 1359 (N.D. Fla. July 24, 2008).
[157] *Id*. at 1377.
[158] FLA. ADMIN. CODE § 59c-1.0355(f).

gender-identity disorder." However, the final language of the bill did not specifically exclude these categories.[159]

G. **Parenting**

Florida is the only state with a law specifically barring homosexuals from adopting.[160] Florida Statute Chapter 63.042(3), states that "no person eligible to adopt under this statute may adopt if that person is a homosexual."[161] In November 2008, a Florida judge declared the law unconstitutional stating that the state law has "no rational basis" in the case of *In re Adoption of Doe*.[162] The court found that moral preference against homosexuality has no bearing on whether gay or lesbian individuals can adopt because in Florida many LGBT individuals serve as foster parents to abused children. The court stated: "Based on the evidence presented from experts from all over this country and abroad, it is clear that sexual orientation is not a predictor of a person's ability to parent."[163] Florida appealed the decision, and that appeal is now pending before Florida's Third District Court of Appeal.[164] In 2005, the Eleventh Circuit upheld the adoption ban in *Lofton v. Sec. of the Dep't of Children and Family Serv.* [165]

Similar bills were introduced in the House and the Senate on March 4, 2008 that would have provided that a "homosexual is eligible to adopt a child under certain enumerated circumstances."[166] The bills died in committee. The Senate also tried to pass a similar bill in 2006, which also died in committee.[167]

In the custody context, Florida's appellate courts have reversed several lower court decisions in which judges considered a parent's sexual orientation in evaluating fitness to parent.

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[159] H.B. 153, 2005 Leg., Reg. Sess. (Fla. 2005); FLA. STAT. 4.13.08 states:

> "Individual with a disability" means a person who is deaf, hard of hearing, blind, visually impaired, or otherwise physically disabled. As used in this paragraph, the term: 'Hard of hearing' means an individual who has suffered a permanent hearing impairment that is severe enough to necessitate the use of amplification devices to discriminate speech sounds in verbal communication. 'Physically disabled' means any person who has a physical impairment that substantially limits one or more major life activities.

[160] Yolanne Almanza, *Florida Gay Adoption Ban is Ruled Unconstitutional*, N.Y. TIMES, Nov. 26, 2008. See *infra* Section IV.H. At least one other state (Arkansas) has passed a law that would have a similar effect. In November 2008, Arkansas voters passed a law that prohibits adoption by an individual "cohabitating with a sexual partner outside of marriage." NAT'L GAY & LESBIAN TASK FORCE, ADOPTION LAWS IN THE U.S. (2008).
[161] FLA. STAT. § 63.042(3) (1977).
[162] *In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008).
[163] *Id.* at *20.
[164] *Florida Dep't of Children & Families v. In re Matter of Adoption of X.X.G. & N.R.G.*, Appellate Case No. 3d08-3044.
[165] *Lofton v. Sec. of the Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 869 (2005).
[166] H.B. 45, 2008 Leg., Reg. Sess. (Fla. 2008); S.B. 200, 2008 Leg., Reg. Sess. (Fla. 2008).
[167] S.B. 172, 2008 Leg., Reg. Sess. (Fla. 2008).

In *Jacoby v. Jacoby,*[168] the Court of Appeal reversed a trial court ruling granting sole custody of children to their father, writing that the trial court had inappropriately "succumbed to the father's attacks on the mother's sexual orientation."[169] The Court of Appeal found that the decision to grant custody to the father "penalized the mother for her sexual orientation without evidence that it harmed the children."[170]

In *Maradie v. Maradie,*[171] Valerie Maradie sought review of the decision from a Florida trial court awarding primary residential custody of her daughter to her ex-husband (the father of the child). Mrs. Maradie, a lesbian, argued that the lower court erred in awarding custody to the father based on the lower court's taking judicial notice that "a homosexual environment is not a traditional home environment, and can adversely affect a child."[172] The court continued, "To say that this cannot be considered until there is actual proof that it has occurred is asking the Court to abdicate its common sense and responsible decision-making endeavors."[173] The Court of Appeal reversed the trial court, stating that "a connection between the actions of the parent and harm to the child requires an evidentiary basis and cannot be assumed. In addition, the mere possibility of negative impact on the child is not enough."[174] Notably, however, the court left open the door for the trial court to make findings that Mrs. Maradie's sexual orientation could provide a basis for awarding the child to her ex-husband: "By reversing here, we do not mean to suggest that trial courts may not consider the parent's sexual conduct in judging that parent's moral fitness under section 61.13(3)(f) or that trial courts are required to have expert evidence of actual harm to the child."[175]

In *Packard v. Packard,*[176] a lesbian mother challenged a final judgment of dissolution of marriage proceeding in which the trial court granted primary residential custody of the parties' two daughters to the father because "the Petitioner/Husband [would] provide a more traditional family environment for the children."[177] At the time of the trial court proceeding, the mother was living with her same-sex partner. The Court of Appeals reversed the trial court decision, holding that the trial court had not defined "traditional family environment" and, thus, it was not at liberty to speculate as to its meaning.

Courts in Florida have refused to grant custody or visitation rights to the non-biological parent of a child:

In *Wakeman v. Dixon,*[178] two women involved in a relationship conceived two children through artificial insemination. The two women entered into carefully crafted

[168] 763 So.2d 410 (Fla. Dist. Ct. App. 2000).
[169] *Id*. at 413.
[170] *Id.* at 415.
[171] 680 So.2d 538 (Fla. Dist. Ct. App. 1996).
[172] *Id.* at 541.
[173] *Id*.
[174] *Id*. at 543.
[175] *Id.* at 542.
[176] 697 So.2d 1292 (Fla. Dist. Ct. App. 1997).
[177] *Id*. at 1293.
[178] 921 So.2d 669 (Fla. Dist. Ct. App. 2006).

co-parenting agreements regarding the children that provided the non-biological parent parental rights and obligations with respect to the children. After the relationship ended, the biological mother denied visitation rights to the non-biological mother. The court ruled that co-parenting agreements providing visitation by a non-parent are unenforceable and dismissed the action.

In *D.E. v. R.D.B.,*[179] a biological mother and "D.E." (also a female) had a relationship and lived together for over eleven years. The biological mother conceived a child by artificial insemination during their relationship. The couple separated, and the biological mother denied visitation rights to D.E. D.E. sought visitation rights through a dependency action, arguing that the denial of contact between the child and D.E. constituted the level of abuse needed to support a finding of dependency. The Court rejected the petition.

In *Kazmierazak v. Query*,[180] two women involved in a relationship had a child using artificial insemination. The non-biological mother was the child's primary caregiver. The couple later separated, and the biological mother refused visitation rights to the non-biological mother, who then filed a petition for custody and visitation. The appellate court held that a non-biological mother does not have the right to seek visitation or custody once a couple has ended their relationship.

In *Music v. Rachford*,[181] two women in a domestic partnership fostered a child via artificial insemination. The couple later separated, and the biological mother refused visitation rights to the non-biological mother, who then filed a petition for custody and visitation. The appellate court held that a non-biological mother does not have the right to seek visitation or custody once a couple has ended their relationship.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The Florida Defense of Marriage Act states that marriage is a "union between one man and one woman."[182] On November 4, 2008, Florida voters passed an amendment to

[179] 929 So. 2d 1164 (Fla. Dist. Ct. App. 2006)
[180] 736 So.2d 106 (Fla. Dist. Ct. App. 1999).
[181] 654 So.2d 1234 (Fla. Dist. Ct. App. 1995).
[182] FLA. STAT. § 741.212 (1997). The statute reads as follows:

> (1) Marriages between persons of the same sex entered into in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.
>
> (2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or

the state constitution that provides: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."[183]

The Florida Companion Registry Act, introduced in both the House and the Senate on March 4, 2008, would have allowed same-sex and opposite sex couples to register with the state as companions, and equalized the benefits inuring to married couples and companions (such as permitting unmarried partners to make health decisions).[184] The bill died in committee.

I. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Judicial Conduct

Florida Code of Judicial Conduct provides that a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . sexual orientation . . ."[185]

In *Rucks v. State of Florida*,[186] the Court of Appeal of Florida (Second District) found that Robbyn Rucks, who was charged with misdemeanor battery while on probation for dealing in stolen property, was able to demonstrate that she would not be able to receive a fair trial at the hands of the respondent judge based on his prejudicial comments. Rucks argued that she feared that the judge presiding over her matter was prejudiced against her because she was a lesbian who lived with her female partner and her partner's 17 year-old daughter. According to the transcript of the probation violation proceeding, the trial judge stated: "This is a sick situation. I've seen a lot of sick situations since I've been in this court. I've been in this profession for 27 years and this ranks at the top."[187] The trial judge repeated this comment again and also stated "[i]f this is the family of 1997, heaven help us."[188] Following testimony at the contested hearing, the court found Rucks to be in violation of her probation, revoked her probation, and sentenced her to confinement in the county jail. The Court of Appeal granted the petition for writ of prohibition but withheld issuing the writ on the assumption that the trial judge would voluntarily remove himself.[189]

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location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.
(3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

Id.

[183] FLA. CONST., Art. 1, §27.
[184] H.B. 361, 2008 Leg., Reg. Sess. (Fla. 2008); S.B. 2550, 2008 Leg., Reg. Sess. (Fla. 2008).
[185] FLA. CODE OF JUD. CONDUCT Canon 3 (2008).
[186] 692 So. 2d 976 (Fla. Dist. Ct. App. 1997).
[187] *Id.* at 977.
[188] *Id.*
[189] *Id.* at 978.

Attorney Conduct

The Florida Bar's Rules of Professional Conduct provide that

> a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of . . . sexual orientation.[190]

In *The Florida Bar Re: Amendments to Rules Regulating the Florida Bar*,[191] the Florida State Bar and sixty individual members petitioned the Florida Supreme Court to amend the Rules Regulating the Florida Bar to (i) amend the rule regarding conduct that is prejudicial to the administration of justice to prohibit attorneys from "engag[ing] in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic" and (ii) create a rule addressing discriminatory employment practices, which rule would have prohibited lawyers from discriminating "in employment, partnership, or compensation decisions on the basis of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation or age."[192] While the court adopted the amendment to the administration of justice rule, it declined to adopt the new rule regarding employment discrimination on the ground that its "constitutional authority over the courts of Florida and attorney admission and discipline does not extend to the employment practices of lawyers."[193]

Law Enforcement

The Florida Department of Law Enforcement sets forth ethical standards of conduct that a law enforcement officer must abide by whether on duty or off duty. "Principle 3" of the ethical standards provides that officers "shall perform their duties and apply the law impartially and without prejudice or discrimination" and that "[p]olice officers must refrain from fostering disharmony in their communities based upon diversity, and perform their duties without regard to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, *sexual orientation* or age."[194]

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[190] FLA. BAR REG. Rule 4-8.4(2008).
[191] 624 So.2d 720 (Fla. 1993).
[192] *Id.* at 722.
[193] *Id*.
[194] Fla. Dep't of L. Enf., Crim. Just. Prof'l Program, http://bit.ly/20khLp (last visited Sept. 6, 2009) (emphasis added).

The Department of Juvenile Justice mandates that employee screeners those who determine whether juvenile detention is warranted may not discriminate based upon sexual orientation.[195]

[195] 32 FLA. ADMIN. WKLY. 5593.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Georgia – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Based on research conducted as of January 1, 2009, Georgia has no state statute prohibiting public or private discrimination based on sexual orientation or gender expression. Furthermore, Georgia courts have issued no judicial rulings that prohibit discrimination on the basis of sexual orientation or gender expression in either the public or private contexts. A few municipalities such as Atlanta and Doraville have created their own statutes protecting either sexual orientation or gender expression, and Georgia courts have left these laws undisturbed.[1] At least one municipality has introduced an "anti-gay" measure. In 1993, Cobb County incumbent Commissioner, Gordon Wysong, attempted to hold onto his seat by emphasizing his support of the "Cobb County Commission Anti-Gay Lifestyle Resolution."[2]

Documented examples of employment discrimination by state and local government employers against LGBT people in Georgia include:

- A Legislative Editor for the Georgia General Assembly's Office of Legislative Counsel who was fired after she was diagnosed with Gender Identity Disorder and began appearing (upon a doctor's orders) at work as a woman prior to undergoing gender reassignment surgery. Since 2005, she had been responsible for editing proposed legislation and resolutions for the Georgia Assembly. In 2009, in rejecting the state's motion to dismiss, a U.S. District Court ruled that the editor's complaint "clearly states a claim for denial of equal protection" under the 14th Amendment on alternative theories of discrimination on the basis of sex and a medical condition. The court summarized the grounds for termination as, "In the view of Glenn's employers, gender transition surgery and presentation as a woman in the workplace would be seen as immoral… and would make other employees uncomfortable." The court the held that "Unequal treatment fails even the most deferential equal protection review when the disadvantage imposed is born of animosity toward the class of persons affected," quoting the Supreme

[1] *See City of Atlanta v. McKinney et. al.*, 454 S.E.2d 517 (Ga. 1995); *City of Atlanta v. Morgan*, 268 Ga. 586 (1997).
[2] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 121 (1999 ed.).

Court's opinion in *Romer v. Evans*[3]. Glenn v. Brumby, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009).

- An openly gay University of Georgia, Athens Professor who in February of 2009 was accused by two Georgia state representatives of recruiting "young teenage gays" to accompany him on international trips, despite the fact that he is not involved with study abroad programs and teaches graduate level classes. The professor was cleared of any misconduct after an investigation. The state representatives also said they would pressure the University of Georgia in Athens, Georgia State University, and Kennesaw State University to terminate any professors who teach "queer theory" courses. The University of Georgia defended its course offerings and the professors. The legislators also called three other professors into the State Senate to defend their research on sexuality and the outbreak of HIV and AIDS. [4]

- A Georgia Division of Family and Child Services (DFCS) employee who reported in 2006 that after other employees complained about working with her because she was a lesbian, she was subjected to a humiliating and invasive four-hour interrogation during which she was asked if she was a lesbian, who looked after her children, who she lived with and who her friends were. She was then told not to tell anybody else about what happened during the interview. Two weeks later DFCS suspended her for "alleged misconduct."[5]

- The first openly transgender city council member in the Georgia who lost-re-election after two terms after two other candidates for city council filed petitions, during the election, to contest it on grounds she was committing fraud on the voters, drawing attention and national publicity to the fact that she had transitioned. In 2008, the Georgia Supreme Court ruled in favor of the transgender politician, finding that none of the alleged irregularities was specific enough to cast doubt on the results of the election.[6]

- In 2006, five years after a bus driver was hired by public school district in McDonough, Georgia, a co-worker found a personal ad he had posted six years earlier on a gay dating site. The co-worker printed the ad and distributed it at one of the high schools in the district. Immediately after the posting was passed around, he was fired. When he asked for a reason, school officials told him it was "in the best interests of the school system" and that he already "knew the answer."

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[3] *Romer v. Evans*, 517 U.S. 620 (1996).
[4] *Pulpit Power: Does the Religious Right Still Control Georgia?*, SOUTHERN VOICE, Mar. 13, 2009; *Georgia Lawmakers Clash Over Queer Theory, Academic Freedom*, SOUTHERN VOICE, Feb. 11, 2009; *Sex Research Puts University of Georgia Professors in Hot Seat*, DIGITAL J., Febr. 23, 2009; *Professor cleared of allegations*, RED & BLACK, Feb. 17, 2009.
[5] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[6] *Fuller v. Thomas*, 284 Ga. 397 (GA 2008).

He made a complaint to the Board of Education, but received no response. He has not been able to get another job at a school in the area since.[7]

- In 2005, a woman applied for a job as a Disease Investigator with the Fulton County Health Department. When she applied for the job, she was using a male name, but by the time they called her back, she had transitioned and had legally changed her name. The first month went well, but the supervisor at the department was showing increasing discomfort with her transition. He began to make her work life miserable and he forbade her from using the female restroom. Belcher complained to Human Resources, but they did nothing except repeat her complaint to the supervisor without her consent. In February 2006, she was fired without cause and replaced by an untrained and under-qualified employee. Without her job, she was unable to take care of herself and her children financially.[8]

- An attorney who, prior to the Supreme Court's decision in Lawrence v. Texas, had her offer of employment withdrawn from the Georgia Attorney General's Office after she had participated in a wedding ceremony, recognized by her congregation, with her same-sex partner. The Attorney General withdrew the employment offer after concluding that the Plaintiff's participation in the ceremony would interfere with the Department's ability to enforce Georgia's sodomy law, and in general, create difficulties maintaining a supportive working relationship among the office lawyers. In 1997, the Eleventh Circuit upheld a district court decision allowing the Georgia Attorney General to withdraw the offer of employment with three judges dissenting from the majority en banc decision.[9] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).

There is also little anti-discrimination protection in non-employment contexts. The state has had no hate crimes law since 2004, when the Georgia Supreme Court ruled its former law unconstitutionally vague. Georgia law does not address school issues relating to sexual orientation or gender identity. Courts in Georgia typically have not restricted custody and visitation of a gay or lesbian parent as long as there is no evidence of harm to the child. However, there have been no cases dealing with transgender parents or same-sex co-parents.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments

[7] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[8] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[9] *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Georgia has not enacted laws to protect sexual orientation and gender identity from employment discrimination.

B. Attempts to Enact State Legislation

None.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

Fulton County's personnel regulations contain an equal employment opportunity policy, which states: "Equal opportunities for employment, promotion and other personnel transactions shall be offered on a non-discriminatory basis without regard to race, color, religion, national origin, gender, age, disability, or sexual orientation."[10]

3. Attorney General Opinions

None.

D. Local Legislation

1. City of Atlanta

The Atlanta City Code of Ordinances protects against discrimination on the basis of sexual status or domestic relationship status as well as gender identity. Under the Code, anyone who employs 10 or more people may not discriminate on the basis of race, color, creed, religion, sex, domestic relationship status, parental status, familial status, sexual orientation, national origin, gender identity, age, or disability.[11]

Atlanta's Human Rights Commission has issued the following policy statement:

> In the city, with its great cosmopolitan population consisting of large numbers of people of every race, color, creed, religion, sex, marital status, parental status, familial

[10] Fulton County PR1700-1, "Equal Employment Opportunity," *in* Fulton County Personnel Regulations at 121 (rev'd 2000), *available at* http://www.co.fulton.ga.us/images/stories//Personnel/personnelregs20001.pdf.
[11] ATLANTA CODE OF ORD. Ch. 94, art. V §94-112(a).

> status, sexual orientation, national origin, gender identity, and age, many of them with physical and mental disabilities, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of differences of race, color, creed, religion, sex, marital status, parental status, familial status, sexual orientation, national origin, gender identity, age, and disability. The council finds and declares that prejudice, intolerance, bigotry and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the very institutions, foundations and bedrock of a free democratic society.[12]

Atlanta's Charter also includes a Bill of Rights providing non discrimination protection on the basis of sexual orientation and gender identity.[13]

In *City of Atlanta v. McKinney*, the Court upheld city ordinances that prohibit discrimination on the basis of sexual orientation and that establish a domestic partnership registry for jail visitation.

2. City of Doraville

In 2008, the city of Doraville added gender identity to its municipal anti-discrimination policy, providing protection for transgender workers, along the lines previously adopted in Atlanta. City officials said they were not aware of any transgender employees, but responded to a request to adopt the policy in the wake of a federal lawsuit by a transgender woman who asserted that she was fired from a staff position in the state legislature after announcing her decision to transition from male to female gender.[14]

3. City of Tybee

Tybee Island prohibits discrimination against applicants for employment and employees of the city on the basis of "political affiliation, race, color, national origin, sexual orientation, age, religion or handicapped status."[15]

4. County of DeKalb

DeKalb County prohibits county discrimination on the basis of sexual orientation.[16]

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[12] ATLANTA CODE OF ORDINANCES, Ch. 94, Art. 11, § 94-11.
[13] ATLANTA CODE OF ORDINANCES, Subpart A, Bill of Rights, § 4.
[14] City of Doraville, 2008 & 2009 ORDINANCES, 2008-24, *available at* http://www.doravillega.us/FAQs/Government/Find-recent-ordinances.html.
[15] TYBEE CODE §2-4-1.
[16] DEKALB CODE Art. I §20-16 & Art. IX§20-194.

5. Athens-Clarke County

The Athens-Clarke County Code prohibits discrimination based on sexual orientation or gender identity in government employment.[17]

6. City of Clarkson

The City of Clarkson prohibits discrimination in city employment based on sexual orientation or gender identity.[18]

7. City of Doraville

The city of Doraville prohibits discrimination in city employment based on sexual orientation or gender identity.[19]

8. City of East Point

The city of East Point prohibits discrimination based on sexual orientation.[20]

E. Occupational Licensing Requirements

The following licensing regulations require a determination of moral character. No case law was found involving the use of these moral character requirements in denying the license on the basis of sexual orientation or gender identity.

Certified public accountants[21]
Industrial loan applicants[22]
Industrial loan agents[23]
Criminal justice agency employees[24]
Firefighters[25]
Embalmers[26]
Funeral directors[27]
Emergency rescue specialists[28]
Physicians[29]
Physician's assistants[30]

[17] ATHENS-CLARKE COUNTY CODE, Part III, Tit. 1, Ch. 1-17, §. 1-17-1.
[18] CITY OF CLARKSTON CODE, Art. 1, Sec. 14-3 and Art. 9, §14-90.
[19] CITY OF DORAVILLE CODE, Ch. 2, Art. IX, § 2-244 (enacted by Ordinance 2008-24).
[20] CITY OF EAST POINT CODE, Div. 1, Bill of Rights, § 6.
[21] GA. COMP. R. & REGS. § 20-3-.08
[22] GA. COMP. R. & REGS. § 120-1-1-.02
[23] GA. COMP. R. & REGS. § 120-2-1-.02
[24] GA. COMP. R. & REGS. § 140-2-.09
[25] GA. COMP. R. & REGS. § 205-2-1-.04
[26] GA. COMP. R. & REGS. § 250-5-.01
[27] GA. COMP. R. & REGS. § 250-5-.04
[28] GA. COMP. R. & REGS. § 266-1-.01
[29] GA. COMP. R. & REGS. § 360-2-.02
[30] GA. COMP. R. & REGS. § 360-5-.03

Acupuncturists[31]
Auricular Detoxification Specialists[32]
Owners of driver improvement clinic[33]
Driver training school instructors[34]
Opticians[35]
Optometrists[36]
Law enforcement employees[37]
Law enforcement training school directors[38]
Chaplains[39]
Law enforcement communications officers[40]
Pharmacist[41]
Veterinary Technicians[42]

[31] GA. COMP. R. & REGS. § 360-6-.03
[32] GA. COMP. R. & REGS. § 375-5-1-.05
[33] GA. COMP. R. & REGS. § 375-5-1-.05
[34] GA. COMP. R. & REGS. §§ 375-5-2-.20; 375-5-3-.20 & 375-5-1-.16
[35] GA. COMP. R. & REGS. § 420-5-.01
[36] GA. COMP. R. & REGS. § 430-2-.02
[37] GA. COMP. R. & REGS. § 464-3-.02
[38] GA. COMP. R. & REGS. § 464-5-.19
[39] GA. COMP. R. & REGS. § 464-11-.03
[40] GA. COMP. R. & REGS. § 464-14-.02
[41] GA. COMP. R. & REGS. §§ 480-2-.01, 480-2-.05
[42] GA. COMP. R. & REGS. § 700-6-.01

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Glenn v. Brumby, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009).

Plaintiff, a Legislative Editor for the Georgia General Assembly's Office of Legislative Counsel and a male-to-female transsexual, was fired for "immoral" behavior after she was diagnosed with Gender Identity Disorder and began appearing (upon a doctor's orders) at work as a woman prior to undergoing gender reassignment surgery. A U.S. District Court ruled that Georgia legislative officials may have violated the Fourteenth Amendment's Equal Protection Clause when they terminated an employee because she was undergoing gender transition. Rejecting a motion to dismiss, the court found that Glenn's complaint "clearly states a claim for denial of equal protection" on alternative theories of sex discrimination or discrimination on the basis of a medical condition, gender identity disorder.

Glenn, perceived by the defendants as male, was hired by the Georgia General Assembly's Office of Legislative Counsel in 2005 to be a Legislative Editor, making her responsible for editing proposed legislation and resolutions for grammar, spelling, and format. She did not have any policy-making role. Glenn was diagnosed with gender identity disorder in 2005, and her doctors determined that gender transition was a "medically necessary treatment" for her. In line with the accepted medical protocol for dealing with gender identity disorder, they recommended that she begin living full-time as a woman prior to undergoing gender reassignment surgery. In October 2006, Glenn informed her immediate superior at work that she was a transsexual who planned to transition in 2007. The superior responded that she foresaw no problem with this, but when Glenn showed up to work on October 31 garbed and groomed as a woman, the superior's supervisor sent her home as "inappropriately dressed." In July 2007, Glenn notified her immediate superior that she intended to proceed with gender transition, and a few months later provided educational materials to her, who passed them along to the supervisor, who said he would consult with legislative leaders about how to handle the situation. On October 16, 2007, Glenn was discharged. The court summarized the grounds for termination as, "In the view of Glenn's employers, gender transition surgery and presentation as a woman in the workplace would be seen as immoral, could not happen appropriately in Glenn's workplace, and would make other employees uncomfortable."

Glenn sued her employer, alleging discrimination on the basis of medical condition and on the basis of sex. The defendants moved to dismiss, arguing that she was attempting to bring a "class of one" equal protection claim, of a type the Supreme Court recently ruled cannot be asserted in the context of government employment. The court found that Glenn's allegations were "not consistent with a class-of-one claim, " because she did not asset that the defendants acted against her because of "characteristics unique

solely to Glenn," but rather because of her gender identity disorder and her sex, characteristics shared by others. In denying the motion to dismiss, the court stated, "Unequal treatment fails even the most deferential equal protection review when the disadvantage imposed is born of animosity toward the class of persons affected," quoting the Supreme Court's opinion in *Romer v. Evans*.[43]

Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).

The Eleventh Circuit upheld a district court decision allowing the Georgia Attorney General to withdraw an offer of employment to the Plaintiff after the Attorney General learned that she had participated in a religious wedding ceremony, recognized by her congregation, with her same-sex partner. The Attorney General withdrew the employment offer after concluding that the Plaintiff's participation in the ceremony would create the appearance of conflicting interpretations of Georgia law and affect public credibility about the Department's interpretations, interfere with the Department's ability to handle controversial matters, interfere with the Department's ability to enforce Georgia's sodomy law, and, in general, create difficulties maintaining a supportive working relationship among the office lawyers. The Attorney General also called into question the Plaintiff's judgment. Regarding Plaintiff's First Amendment claim, the Court ruled that strict scrutiny was not the appropriate standard to measure the Attorney General's decision. Relying instead on the balancing test adopted by the Supreme Court in *Pickering v. Board of Ed.*, 391 U.S. 563 (1968), the Court found the Attorney General's interest in promoting efficient public service prevailed over the Plaintiff's personal intimate association interests. The Court did not address Plaintiff's Equal Protection claim on the basis that even assuming Plaintiff has the right to marry a person of the same sex, the Attorney General's act was still lawful. Three judges dissented from the majority en banc decision.[44]

2. Private Employees

E.E.O.C. v. Family Dollar Stores, Inc., 2009 WL 4098723 (N.D.Ga.).

Plaintiff and the EEOC brought an action against Family Dollar Stores alleging that a store manager's vulgar comments and actions constituted discrimination on the basis of the Plaintiff's sex. The store manager made numerous comments about the Plaintiff's perceived sexual orientation. The Plaintiff, however, is not homosexual. In granting summary judgment for the Defendant, the court ruled that the manager's comments about the Plaintiff did not amount to a prima facie case of sexual harassment. According to the court, harassment based on sexual orientation is not actionable under Title VII, although harassment based on sexual stereotyping is actionable.[45]

B. Administrative Complaints

None.

[43] *Glenn v. Brumby*, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009).
[44] *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).
[45] *E.E.O.C. v. Family Dollar Stores, Inc.*, 2009 WL 4098723 (N.D.Ga.).

C. **Other Documented Examples of Discrimination**

Georgia State Universities

In February 2009, State Representatives Calvin Hill and Charlice Byrd criticized the University of Georgia in Athens, Georgia State University and Kennesaw State University for offering courses on queer theory and supporting research on sexuality. Byrd further suggested that openly gay UGA professor Dr. Robert Hill recruited "young teenage gays" to accompany him on international trips, despite the fact that Professor Hill is not involved with study abroad programs and teaches graduate level classes. Professor Hill was cleared of misconduct after an investigation. Representatives Byrd and Calvin Hill further stated that queer theory is not a worthwhile area of study, and suggested that the courses are "advocating one lifestyle" over another. Byrd and Hill said that they will team with the religious groups to pressure fellow lawmakers and the University System Board to eliminate the jobs of the professors. The University of Georgia defended its course offerings and the professors. Nevertheless, Dr. Kirk Elifson, Dr. Mindy Stombler and Dr. Donald Reitzes were called into the State Senate to explain their research on sexuality and outbreak of HIV and AIDS. [46]

State Division of Family and Children Services

In 2006, a DFCS employee reported that after other employees complained about working with her because she was a lesbian, she was subjected to a humiliating and invasive four-hour interrogation during which she was asked if she was a lesbian, who looked after her children, who she lived with and who her friends were. She was then told not to tell anybody else about what happened during the interview. Two weeks later DFCS suspended her for "alleged misconduct."[47]

McDonough Public School

In 2006, five years after a bus driver was hired by public school district in McDonough, Georgia, a co-worker found a personal ad he had posted six years earlier on a gay dating site. The co-worker printed the ad and distributed it at one of the high schools in the district. Immediately after the posting was passed around, he was fired. When he asked for a reason, school officials told him it was "in the best interests of the school system" and that he already "knew the answer." He made a complaint to the Board of Education, but received no response. He called Atlanta Legal Aid to seek legal help, but they turned him away, explaining that sexual orientation discrimination was not

[46] *Pulpit Power: Does the Religious Right Still Control Georgia?*, SOUTHERN VOICE, Mar. 13, 2009; *Georgia Lawmakers Clash Over Queer Theory, Academic Freedom*, SOUTHERN VOICE, Feb. 11, 2009; *Sex Research Puts University of Georgia Professors in Hot Seat*, DIGITAL J., Feb. 23, 2009; *Professor cleared of Allegations*, RED & BLACK, Feb. 17, 2009.

[47] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

prohibited in Georgia. He has not been able to get another job at a school in the area since.[48]

Fulton County Health Department

In 2005, a woman applied for a job as a Disease Investigator with the Fulton County Health Department. When she applied for the job, she was using a male name, but by the time they called her back, she had transitioned and had legally changed her name. The first month went well, but the supervisor at the department was showing increasing discomfort with her transition. He began to make her work life miserable and he forbade her from using the female restroom. Belcher complained to Human Resources, but they did nothing except repeat her complaint to the supervisor without her consent. In February 2006, she was fired without cause and replaced by an untrained and under-qualified employee. Without her job, she was unable to take care of herself and her children financially.[49]

[48] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[49] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

The Georgia sodomy law was struck down in 1998 in *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

B. Hate Crimes

In 2007, a hate crimes bill introduced by state Sen. Vincent Fort (D-Atlanta) included both sexual orientation and gender identity as part of the definition of a hate crime. The bill made it out of the Senate Judiciary committee, but failed to reach the Senate floor. At the time of this memo hate crimes bills are pending in the Georgia state House[50] and Senate.[51] Georgia is one of five states — including Arkansas, Indiana, South Carolina and Wyoming — without a hate crimes law.

C. Health Care

Same-sex partners are not given authority to make medical decisions for an incapacitated patient under Georgia law in the absence of an express advance directive.[52] An adult may execute an advance directive appointing his or her domestic partner as a health care agent. The directive must be in writing, signed by the declarant and witnessed by two individuals.[53]

D. Gender Identity

When a transgender politician identified herself as a female on ballots for a city council position, two politicians filed petitions to contest the general election on grounds of fraud, misconduct, irregularity, and illegality, and sought judgment declaring results of general election invalid. The Georgia Supreme Court ruled in favor of the transgender politician, finding that none of the alleged irregularities was specific enough to cast doubt on the results of the election.[54]

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[50] Introduced on January 16, 2009. Pending as of July 10, 2009: HB 111 (To provide enhanced penalty for crimes motivated by the victims' certain traits, including sexual orientation and gender identity).
[51] Introduced on March 4, 2009. Pending as of July 10, 2009: SB 234 (To provide enhanced penalty for crimes motivated by the victims' certain traits, including sexual orientation and gender identity).
[52] O.C.G.A 31-36A-6.
[53] O.C.G.A. § 31-32-5.
[54] *Fuller v. Thomas*, 284 Ga. 397 (GA 2008).

E. Parenting

The court issued a "final order" in 2007 restricting a gay father from "exposing his children to his homosexual partners and friends." A unanimous Georgia Supreme Court opinion rejected the restriction and followed a line of cases which required evidentiary support of harm to the children. The Court did not find such evidence of harm to the children from such contact and overturned the order.[55]

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Since 1998, after the sodomy law was struck down, the only Georgia statewide law that addresses either sexual orientation or gender expression arose in the marriage context. Georgia law and the state constitution both ban recognition of marriages between same-sex couples[56]. The amendment to the Georgia Constitution[57] originally intended to ban same-sex marriages was struck down by a trial court in May 2006, because it violated Georgia's "single-subject rule," which requires that ballot initiatives pose a single subject at a time to voters, rather than covering multiple issues.[58] The Georgia Supreme Court reversed, effectively validating the amendment's constitutionality.[59]

2. Benefits

In *City of Atlanta v. McKinney et. al.*, the court held that the city exceeded its authority in extending employee benefits to domestic partners because they are not dependents under state law.[60]

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[55] *Mongerson v. Mongerson* - 2009 WL 1649674 (June 15, 2009). *See also Burns v. Burns*, 560 S.E. 2d 47 (Ga. Ct. App. 2002), *In re R.E.W.*, 471 S.E.3d 6 (Ga. Ct. App. 1996), *cert denied*, 472 S.E.2d 295 (Ga. 1996); *Gay v. Gay*, 253 S.E.2d 846 (Ga. Ct. App. 1979); *Buck v. Buck*, 233 S.E.2d 792 (Ga. 1977); *Moses v. King*, 637 S.E.2d 97 (Ga. Ct. App. 2006).

[56] GA. CODE ANN. § 19-3-3.1; GA. CONST. Art. I, §IV.

[57] In 2004, the Georgia Constitution was amended to state:

> This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited by [t]his state. No union between person of the same sex shall be recognized by [t]his state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between person of the same sex that is treated as a marriage under the law of such other state or jurisdiction. The courts of [t]his state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.

GA. CONST. art. I, § IV ¶1 (2009).

[58] GA. CONST., art. X, § I, ¶ 2.

[59] *Perdue v. O'Kelley et al.*, 632 S.E.2d 110 (2006).

[60] *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995).

In *City of Atlanta v. Morgan*, The Georgia Supreme Court ruled that City's domestic partnership benefits ordinance's definition of "dependent," providing that employee's domestic partner is "dependent" if domestic partner has been supported by employee's earnings for at least six months, was consistent with state law, and accordingly, ordinance did not violate either State Constitution or Municipal Home Rule Act.[61]

G. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

University of Georgia "Ex-Gay" Advertisement

The Chancellor of the University System of Georgia requested an opinion as to whether the student-run newspaper at Georgia Institute of Technology may refuse to publish an advertisement because the contents of the advertisement may be "hurtful" to some of the newspaper's readers. A recognized student organization submitted two advertisements for publication by the student newspaper. The contents of the advertisement depicted testimonials by "Ex-Gays" with the slurs "sissy, queer, fag." The opinion of the Attorney General advised that "where there is governmental oversight or involvement, a student-run newspaper at a state educational institution is subject to the free speech requirements of the first Amendment and, therefore, may not exclude materials from publication based on their content absent a compelling state interest for doing so."

[61] *City of Atlanta v. Morgan*, 268 Ga. 586 (1997).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Hawaii – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Hawaii Revised Statutes Section 378, the Fair Employment Practices Act (the "Act"), prohibits public and private employment discrimination on the basis of race, sex, age, religion, color, ancestry, sexual orientation, disability, genetic information, marital status or arrest and court record.[1] Legislation that would have added gender identity to the Act's list of protected categories passed in the Legislature but was vetoed by Governor Linda Lingle. In a court case, the Hawaii Civil Rights Commission ("HCRC") argued that discrimination protections should extend to transsexual and transgender individuals.[2] However, on appeal, the First Circuit of the State of Hawaii disagreed.[3]

HCRC is the agency responsible for enforcing the Act.[4] According to an HCRC Annual Report, there were 617 employment discrimination claims filed from 2007 to 2008; of which eight were instances of purported discrimination based upon sexual orientation.

Documented examples of discrimination by state and local government employers on the basis of sexual orientation or gender identity in Hawaii include:

- When an openly gay teacher at the Nanakuli High and Intermediate School complained to the administration about harassment and homophobic gossip by students, the principal responded by barring him from tutoring students after class and forcing him to remove decorations and books not directly related to coursework from his classroom. Other students at the school circulated a petition "calling for an end to the discriminatory atmosphere on campus" and other teachers at the school agreed that he was being discriminated against on the basis of his sexual orientation.[5] In Hawai'i public school teachers are state employees.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such

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[1] HAW. REV. STAT. § 378-1 –-38 (1991).
[2] *In re HCRC No. 9951*, D..R. No. 02-0015 (H.C.R.C. June 28, 2002), http://bit.ly/edeMI (last visited Sept. 3, 2009).
[3] *RGIS Inventory Specialist v. Haw. Civ. Rts. Comm'n*, Civ. No. 02-1-1703-07 (1st Cir. Haw. Jan. 27, 2003), *available at* http://bit.ly/fwLE9.
[4] § 368.
[5][1] Leland Kim, *Nanakuli Students Rally Around an Openly-Gay Teacher*, KHNL NBC 8 HONOLULU (n.d.) *available at* http://www.khnl.com/Global/story.asp?S=7230012 (last visited Sept. 17, 2009).

laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

Originally enacted in 1991, the Act prohibits employment discrimination on the basis of race, sex, age, religion, color, ancestry, sexual orientation, disability, genetic information, marital status or arrest and court record.[6] The Act does not protect gender identity, which is explicitly excluded from the definition of "disability."[7] The most recent version of the legislation became effective on June 28, 2002 and protects public and private employers. However, the Act provides an exception for religious, charitable and educational organizations.[8] The Act also contains other exceptions, such as bona fide occupational qualifications and undue hardship.[9]

Section 368-1 of the Act defines the purpose and intent of the law:

> "The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations or access to services receiving state financial assistance is against public policy. It is the purpose of this chapter to provide a mechanism which provides for a uniform procedure for the enforcement of the State's discrimination laws. It is the legislature's intent to preserve all existing rights and remedies under such laws."[10]

In the Hawaii House Judiciary Committee's second reading of proposed amendments to the act—which included the "sexual orientation" classification—the Committee found "that the AIDS epidemic has compounded discriminatory treatment of gays and lesbians. To treat someone differently simply on the basis of what the person is and not in relation to the person's behavior is unfair."[11] Thus, the Committee

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[6] § 378-1 to 378-38.

[7] 12 HAW. ADMIN. RULES, Chptr. 46, subchptr. 9 (hereinafter "RULES § 12-46-"), *available at* http://hawaii.gov/labor/hcrc/hcrc-links/har9.shtml; RULES § 12-46-182 (providing that

> "disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs").

[8] HAW. REV. STAT. § 378-3.

[9] 378-3.

[10] § 368-1 (amended by Ch. 33, L. 1992).

[11] HAW. 16 H. J. 907, 1163 (1991).

recommended the legislation for a third reading; the sexual orientation language remained through the amendment's passage.

Under the amended Act, employers may not employ, discharge or discriminate in compensation, terms, conditions or privileges of employment, or refuse to hire because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record.[12]

The Hawaii Administrative Rules expressly exclude transgender individuals from its definition of "disability," thereby precluding any protection under the statute.[13] In a petition to the First Circuit of the State of Hawaii, the Executive Director of HCRC argued that employment discrimination against transgender or transsexual individuals is discrimination "because of" sex and should, therefore, be proscribed under the Act.[14] The circuit court disagreed and reversed a lower court's previous order granting declaratory relief to a transsexual Plaintiff.[15] The court found that Section 378-1 "does not prohibit discrimination which is directed to person's status as transgender or transsexual."[16]

2. Enforcement & Remedies

An aggrieved person must file a charge with the HCRC within 180 days of the occurrence or the last occurrence of a pattern of ongoing discrimination. In the alternative, the Commission may bring charges itself.[17] Thereafter, if there is substantial evidence of a violation, the Commission will attempt to eliminate the effect of the alleged violation through a process of conference, conciliation and persuasion.[18] If this is not successful, then a hearing examiner is appointed to conduct a hearing. Victims of discrimination may also pursue a private right of action; if successful, plaintiffs may be able to recover costs, including reasonable attorney's fees.[19]

Declaratory relief is also available. The employer may be ordered to cease and desist, to hire, to reinstate, to promote the complaining individual (with or without back-pay), to implement compliance reporting, and to pay for the costs of the action.[20]

B. Attempts to Enact State Legislation

Since 1991, Hawaii has banned discrimination based on sexual orientation in the employment context. In 2005, Governor Linda Lingle vetoed a bill that would have added gender identity discrimination to the law. That same year, protection against housing discrimination based on sexual orientation and gender identity was successfully

[12] HAW. REV. STAT. § 378-1.
[13] Rules, *supra* note 7, at § 12-46-9.
[14] *In re HCRC*, D.R. No. 02-0015.
[15] *RGIS Inventory Specialist*, Civ. No. 02-1-1703-07.
[16] *Id.* at *4.
[17] HAW. REV. STAT. § 368-11.
[18] § 368-13.
[19] § 368-14.
[20] § 378-5(c).

enacted.[21] Sexual orientation and gender identity protections were added to the public accommodation law in 2006.[22] Thus, transgender persons in Hawaii, while they enjoy other protections from discrimination, are singularly vulnerable when it comes to earning a living.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

There are no Executive Orders in Hawaii relating to sexual orientation discrimination.

2. State Government Personnel Regulations

The Hawaii Government Employees Association ("HGEA"), Hawaii's largest union, provides no discussion of LGBT rights or issues in its online policies.[23]

The State of Hawaii Department of Human Services Policies and Procedures provides that "[i]t shall be the policy of the Department of Human Services to provide all persons with an equal opportunity to participate in, and benefit from, all departmental programs, services and activities."[24]

3. Attorney General Opinions

There are no Attorney General opinions in Hawaii relating to sexual orientation.[25]

D. Local Legislation

None.

E. Occupational Licensing Requirements

None.[26]

[21] Richard S. Ekimoto, *Sexual Orientation and Gender Identity Discrimination in Real Property Transactions Bill Signed by Governor*, HAWAII CONDO LAW, July 13, 2005, http://bit.ly/IKAgk.
[22] Brian DeWitt, *Over Half the Nation Will be Covered by an Equality Law*, GAY PEOPLE'S CHRON., May 11, 2007, http://bit.ly/jIPYy.
[23] Haw. Gov. Employees Assoc., http://www.hgea.org (last visited Sept. 6, 2009).
[24] HAW. DEP'T OF HUM. SERV. POLICIES & PROC. § 4.10.1 (2007), http://bit.ly/bevAf .
[25] Archives of Attorney General Opinions, http://hawaii.gov/ag/main/publications/opinions (last visited Sept. 4, 2009).
[26] State of Hawaii Department of Commerce & Consumer Affairs Archive of Professional Licensing Requirements, http://hawaii.gov/dcca/areas/pvl (last visited Sept. 4, 2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

RGIS Inventory Specialist v. Haw. Civil Rts. Comm'n, Case No. 02-1-1703-07 (1st Cir. Haw. Jan. 28, 2003).

In HCRC Declaratory Relief Petition D.R. No. 02-0015, the Executive Director argued that employment discrimination against transgender or transsexual individuals is discrimination "because of" sex and therefore proscribed under the Act.[27] In *RGIS Inventory*, the Circuit Court of the First Circuit of the State of Hawaii disagreed and reversed an order of declaratory relief that a lower court had granted in favor of a transsexual plaintiff.[28] The court found that H.R.S. Section 378 "does not prohibit discrimination which is directed to person's status as transgender or transsexual."[29]

Voluntary Assoc. v. Waihee, 800 F. Supp 882 (Dist. Haw. 1992).

Voluntary Association v. Waihee arose shortly after the initial passage of the law banning employment discrimination based on sexual orientation. Religious leaders challenged this law, claiming, *inter alia*, that it violated their freedom of speech and religious freedom under the First Amendment to the U.S. Constitution..[30] In dismissing the case, the court found that: "[t]he Hawaii state legislature has declared that sexual orientation discrimination in employment is against public policy."[31] The court cited the legislative history amending H.R.S. Section 368 to add sexual orientation as an example of such policy in action.[32]

1. State & Local Government Employees

None.

2. Private Employers

Duda v. Rockwell Power Sys. Co., Case No. 95-0251(2) (2nd Cir. Aug. 10, 1998).

In *Duda v. Rockwell Power Systems Company*, the Circuit Court for the Second Circuit of Hawaii held that a homosexual engineer had failed to establish a *prima facie* case of intentional infliction of emotional distress when he was subject to taunting jokes and remarks by co-workers and his employer demanded that he continue to attend work nonetheless. The court found that the Plaintiff had presented no evidence that the

[27] *In re HCRC*, D.R. No. 02-0015.
[28] *RGIS Inventory Specialist*, No. 02-1-1703-07.
[29] *Id.* at 4.
[30] *Voluntary Association v. Waihee*, 800 F. Supp 882 (Dist. Haw. 1992).
[31] *Id*. at 882 (interal citations omitted).
[32] *Id.*

employer had acted intentionally. Moreover, because the employee had never mentioned the harassing conduct to superiors, the court held that that there was no genuine issue of material fact as to whether the employer should have recognized its actions might result in emotional distress. In finding for the employer, the court found that the employer had legitimate business reasons for terminating the Plaintiff's employment.[33]

B. **Administrative Complaints**

HCRC files are confidential.

C. **Other Documented Examples of Discrimination**

None.

[33] *Duda v. Rockwell Power Sys. Co.*, No. 95-0251(2) (2d Cir. Aug. 10, 1998).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Housing & Public Accommodations Discrimination

H.R.S. Section 489 is designed "to protect the interests, rights, and privileges of all persons within the State with regard to access and use of public accommodations by prohibiting unfair discrimination…" [34] This law proscribes discrimination based on sexual orientation and gender identity.[35] The law provides that

> "[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited."[36]

B. Parenting

Hawaii permits single parent GLBT adoption.[37] It does not "clearly prohibit" joint gay adoption.[38] Second-parent adoption is allowed "in some areas."[39]

C. Recognition of Same-Sex Couples

In 1997, Hawaii became the first state to institute state-wide domestic partnership ("recipriocal beneficiary") benefits but did not authorize same-sex marriage. In 1998, Hawaii voters ratified a constitutional amendment permitting (although not requiring) the legislature to restrict marriage to opposite-sex couples. In 1999, the Hawaii Supreme Court denied legal marriage to same-sex couples.[40]

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[34] HAW. REV. STAT. § 489-1 (internal citations omitted).
[35] § 489-2.
[36] § 489-3.
[37] Ramon Johnson, *Where is Gay Adoption Legal?*, ABOUT, Nov. 5, 2008, http://gaylife.about.com/od/gayparentingadoption/a/gaycoupleadopt.htm (last visited Sept. 3, 2009).
[38] *Id.*
[39] *Id.*
[40] *See* CRAIG A. RIMMERMAN ET. AL., THE POLITICS OF GAY RIGHTS 324-26 (2000).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Idaho – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

A 2003 survey of more than 2,000 LGBT Idahoans revealed that more than half the LGBT respondents felt they had been expected to deny or hide their sexual orientation or gender identity at work.[1] Of those, almost 60% had been explicitly asked by employers to do so.[2] Almost a quarter of those surveyed thought they had been fired from a job, not promoted, or not received compensation or a raise as a result of anti-gay attitudes in their workplace.[3] And 16.3% of transgender participants, 12% of gay and bisexual men, and 7.6% of gay and bisexual women were expressly told by their employer that their sexual orientation or gender identity had led to such a result.[4]

Idaho is the only state to have reinstated its felony sodomy law after it was taken off the books; public outcry about the 1971 elimination of the state's law making homosexual conduct subject to felony conviction led the Idaho legislature to reinstate the old criminal code in 1972.[5] Despite *Lawrence v. Texas*,[6] Idaho has not repealed its sodomy law. Thus, Idaho's public code continues to characterize sodomy as "the infamous crime against nature," punishable by imprisonment of not less than five years.[7]

Idaho does not include LGBT persons in any protected category for the purpose of employment discrimination. A bill that would have prohibited employers with more that five employees (including the State of Idaho but excepting certain religious organizations) from discriminating based on sexual orientation or gender identity was proposed in the Idaho Senate on January 21, 2008. The bill was defeated in February of 2009.[8] Similar bills have failed in the past.[9]

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[1] IDAHO LESBIAN, GAY, BISEXUAL, AND TRANSGENDER SURVEY (2003), *available at* http://bit.ly/Inpom.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *See Idaho Sodomy Laws*, http://bit.ly/IV22F.
[6] 539 U.S. 538 (2003).
[7] IDAHO CODE § 18-6605 ("Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years.").
[8] *See* S.B. 1323 (Idaho 2008), available at http://bit.ly/2Hn88. *See also* http://bit.ly/NAM14.
[9] LESBIAN & GAY L. NOTES (Dec. 1994), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1994/12.94.

Documented examples of employment discrimination by state and local government employers on the basis of sexual orientation or gender identity in Idaho include:

- In 1997, an adult probation officer in Power County was fired immediately after supervisors discovered her sexual orientation. She had been employed by the county for six months prior to her termination and had disclosed her sexual orientation only to one trusted co-worker. Two days prior to her termination, while accompanied off-duty by her female partner, she ran into a co-worker in a store. She introduced the co-worker to the woman as her partner. Following the interaction, three Power County Commissioners confronted her, telling her that they were "unhappy" and that she "could either quit or be fired." The officer refused to quit, and the Commissioners fired her.[10]

- The ACLU of Idaho reported that, in 1977, seven female employees of the Boise Police Department were fired when superiors suspected them of lesbianism.[11] The ACLU reported that "[t]wo women were accused of allowing homosexual activities to harm their job performance. Others were ousted for reason such as conduct unbecoming a police officer and having a life-style that interfered with police duties."[12] While there were no anti-discrimination laws under which these women could bring suit, six of the seven sued and won settlements because their phone lines had been illegally tapped.[13]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[10] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[11] See ACLU Idaho, Some Other Examples of Discrimination in Idaho, http://bit.ly/9sgXU (last visited Sept. 6, 2009).
[12] *Id*. (*citing* N.Y. TIMES, Apr. 10, 1977, at32).
[13] *Id.*

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently the state of Idaho has not enacted laws to prohibit employment discrimination based on sexual orientation or gender identity.

B. Attempts to Enact State Legislation

Currently, employers with more than five employees are prohibited from discriminating because of race, color, religion, national origin, sex, age and disability.[14] On January 21, 2008, three state senators and three state representatives co-sponsored a bill that would have altered Idaho's Human Rights Law.[15] The stated purpose of SB 1323 was to expand the categories to add sexual orientation and gender identity:

> "Currently in Idaho a person can be fired from their job simply because they are gay or because someone thinks they are gay. . . . This legislation will end decades of discrimination against men and women in every part of Idaho and set a tone for the state making clear that it is wrong to fire someone from a job, refuse to promote or fairly compensate someone, for no other reason than that they gay."[16]

The proposed legislation also provided an exception to this extension of discrimination law for "any religious corporation, association or society."[17] Two state senators opposed the bill's introduction; one commented: "It just seems to me like it's another effort to impose state sanction or certification of a lifestyle that I think is not particularly beneficial to families."[18]

More than a year has passed since Senate Bill 1323 was introduced and printed; the bill has stalled in the State Affairs committee.[19] The committee has not issued a report.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

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[14] IDAHO CODE § 67-5901, *et seq*.
[15] S.B. 1323.
[16] *Id*. at (Statement of Purpose).
[17] *Id.* at § 10.
[18] Betsy Z. Russell, *Idaho Weighs Anti-Discrimination Law*, SPOKESMAN REV., Jan. 21, 2008, *available at* http://bit.ly/13METB.
[19] S.B. 1323 (Bill Status).

2. State Government Personnel Regulations

Idaho's large state universities are the only state entities that offer protection against employment discrimination based upon sexual orientation. In 1995, the University of Idaho adopted a policy prohibiting discrimination based on sexual orientation.[20] However, sexual orientation is not listed in the section regarding discrimination. Rather, sexual orientation has its own chapter, which states:

> "The University of Idaho regards discrimination on the basis of sexual orientation to be inconsistent with its goal of providing an atmosphere in which students, faculty, and staff may learn, work, and live. The University of Idaho values the benefits of cultural diversity and pledges to students, prospective students, employees and the public that it will defend pluralism in the academic community, and warmly welcomes all men and women of good will without regard to sexual orientation."[21]

The University of Idaho policy states that sexual orientation cannot be considered in regard to personnel decisions. However, the policy also states that to the extent such policy conflicts with state law, state law controls. As a result of this language and the absence of protection in the state's anti-discrimination statute, it is unclear whether the university policy provides any enforceable legal protection against employment discrimination.[22]

Boise State University ("BSU") includes sexual orientation in its employment policy; the policy states that "Boise State University has a strong policy of equal employment opportunity and nondiscrimination. The University does not discriminate on the basis of sex, race, age, color, disability, religion, sexual orientation, or national and ethnic origin."[23] BSU instituted an administrative grievance procedure in 1994 (later revised in 1998), which provides a grievance process for anyone discriminated against because of sexual orientation..[24]

Idaho State University has a policy similar to that of the University of Idaho.[25] Idaho State implemented a "Sexual Orientation Policy" in 1995, which states that

> "to the extent that it does not conflict with a contractual obligation or state, federal or local law or regulation, it is

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[20] UNIVERSITY OF IDAHO FACULTY/STAFF HANDBOOK, Chapter 3215 (Non-Discrimination on the Basis of Sexual Orientation), *available at* http://www.webs.uidaho.edu/fsh/3215.html (last visited Sept. 6, 2009).
[21] *Id.* at A.
[22] *Id.* at B-1, D.
[23] *See* Boise State Human Resources Policies, *available at* http://bit.ly/MJ2xh (last visited Sept. 6, 2009).
[24] *See* Boise State Judicial Procedures, *available at* http://bit.ly/1tL707 (last visited Sept. 6, 2009); Boise State Anti-Harassment Policy, *available at* http://bit.ly/2ECQpi (last visited Sept. 6, 2009).
[25] *See* Idaho State University Faculty/Staff Handbook at Part 4G, *available at* http://bit.ly/NytP0 (last visited Sept. 6, 2009).

> the policy of Idaho State University that an individual's sexual orientation is an irrelevant factor and shall not be a basis for institutional decisions relating to education, employment, or access to programs, facilities or services."[26]

None of the university policies includes gender identity.

3. **Attorney General Opinions**

None.

D. **Local Legislation**

None.

E. **Occupational Licensing Requirements**

Several Idaho statutes require license-seekers and holders to meet "morality" standards. For example, occupations that require licensees possess "good moral character" include: optometrist,[27] physical therapist and physical therapist assistant,[28] accountant,[29] barber and hair stylist,[30] and social worker.[31] Licensed psychologists must also be of "acceptable moral character.".[32]

[26] *See id*. at Part 4P.
[27] IDAHO CODE § 54-1520.
[28] § 54-2210.
[29] § 54-208.
[30] § 54-506.
[31] § 54-3206.
[32] § 54-2307.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

None.

2. Private Employees

None.

B. Administrative Complaints

The Idaho Commission on Human Rights, appointed by the Governor to investigate discrimination complaints in the areas of employment, housing, education, and public accommodations, does not handle claims of sexual orientation or gender identity discrimination.[33] And while it appears that the Commission had supported SB 1323's proposed protection against sexual orientation and gender identity discrimination for the past several years, on February 9, 2009, the Idaho Commission on Human Rights (with some new members) decided, by a vote of 5 to 4, to drop their support for this protective legislation.[34]

C. Other Documented Examples of Discrimination

Power County Probation Department

In September of 1997, a woman was fired from her job as an adult probation officer in Power County, Idaho because of her sexual orientation. She had been employed by the county for six months prior to her termination and had disclosed her sexual orientation to one trusted co-worker. Two days prior to being fired, while accompanied by her female partner, she ran into a co-worker in a store off work hours. She introduced the woman as her partner to the co-worker. Following the interaction, three Power County Commissioners confronted her, telling her that she was "unhappy" and "could either quit or be fired." She refused to quit and the Commissioners fired her. She contacted the Idaho Human Rights Commission in Boise immediately after her termination and was told that she had no means of redress because there was no

[33] *See* Idaho Comm'n on Human Rights, http://humanrights.idaho.gov/about_us/about_us.html (last visited Sept. 6, 2009) (Idaho Commission on Human Rights' purpose is "[t]o secure for all individuals within the state freedom from discrimination because of race, color, religion, national origin, sex, age (40 and over) and disability.").

[34] *See Idaho Human Rights Commission's Big But,* BOISE WEEKLY, Feb. 10, 2009, *available at* http://bit.ly/3pO0r.

protection for sexual orientation discrimination under the state's employment anti-discrimination law.[35]

Boise Police Department

In 1977, seven female employees of the Boise Police Department were fired for their perceived lesbianism.[36] The ACLU of Idaho reported that "[t]wo women were accused of allowing homosexual activities to harm their job performance. Others were ousted for reason such as conduct unbecoming a police officer and having a life-style that interfered with police duties."[37] While there were no anti-discrimination laws under which these women could bring suit, six of the seven sued and won settlements because their phone lines had been illegally tapped.[38]

[35] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[36] *See* ACLU Idaho, Some Other Examples of Discrimination in Idaho, http://bit.ly/3pO0r (last visited Sept. 6, 2009).
[37] *Id*. (*citing* N. Y. TIMES, Apr. 10, 1977, at 32).
[38] *Id.*

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Idaho's strong anti-gay attitudes were shaped during the mid-1950s.[39] On November 2, 1955, Idaho's leading newspaper announced that three homosexual Boise men had admitted their guilt regarding "the infamous crime against nature." One man received a life sentence, and the other two received fifteen years in prison.[40] More than a dozen other men, including a bank vice-president, were arrested in 1955 and sentenced to jail terms ranging from six months to fifteen years.[41] Idaho soon became the epicenter for lurid stories of homosexual men preying on the community's young men.[42] By April 1956, over 1,500 Boise residents (out of the then-population of 40,000) had been interviewed about an alleged "homosexual underworld."[43]

Fifteen years later, in 1971, Idaho was the third state to repeal its sodomy law to eliminate its prohibition on private homosexual acts between consenting persons ages sixteen and older.[44] However, intense public reaction led the legislature to reinstate its felony sodomy law in 1972.[45] As drafted, the statute prohibits both same-sex and opposite-sex conduct.[46] Idaho courts once construed the statute to prohibit fellatio of any kind,[47] but later held that the statute could "not be constitutionally enforced to prohibit private consensual *marital* conduct."[48]

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[39] Seth Randal and Alan Virta, *Idaho's Original Same-Sex Scandal*, N.Y. TIMES, Sept. 2, 2007, *available at* http://www.nytimes.com/2007/09/02/opinion/02.randal.html.

[40] ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE 6 (Wiley-Blackwell 1994) (hereinafter "Moral Panics").

[41] *Id.* at 6-7.

[42] *Idaho Underworld*, TIME, Dec. 12, 1955, *available at* http://bit.ly/bZqnR (naming many of the men who were formally charged with "the infamous crime" and stating that Idaho "had sheltered a widespread homosexual underworld that involved some of Boise's most prominent men and had preyed on hundreds of teen-age boys for the past decade").

[43] Moral Panics, *supra* note 40, at 7.

[44] *See Idaho Sex Reform: Adult Consent Law Adopted; Nation's Third*, ADVOCATE, June 22, 1971, *available at* http://www/glapn.org/sodomylaws/usa.idaho/idnews01.htm (hereinafter "Idaho Sex Reform").

[45] *See* Idaho Sodomy Laws, http://bit.ly/obX0L (last visited Sept. 6, 2009).

[46] *See* Idaho Sex Reform, *supra* note 44.

[47] *See Idaho v. Izatt*, 534 P.2d 1107, 1109-10 (Idaho 1975).

[48] *Idaho v. Holden*, 890 P.2d 341, 347 (Idaho Ct. App. 1995) (emphasis added).

This sodomy law remains on the books, although the U.S. Supreme Court decision in *Lawrence v. Texas*[49] precludes its application to private, consensual adult conduct.[50]

B. Housing & Public Accommodations Discrimination

None.[51]

C. Hate Crimes

The Idaho hate crimes law does not include crimes related to sexual orientation or gender identity.[52]

D. Education

None.[53]

In 2008, a gay University of Idaho student was threatened by a harasser, who wrote "Faggot. Fucking kill you" on the student's dorm room door. The victim made the following remark: "I think people forget that this level of hate and ignorance still exists in the world and maybe reminders like this will keep them aware … this is a high-risk time for people."[54]

E. Health Care

In Idaho, in the absence of a living will or durable power of attorney document,[55] a same-sex partner may make a medical decision on behalf of an incapacitated partner as a "competent individual representing himself or herself to be responsible for the health care of such person."[56] However, in the absence of a power of attorney document, a

[49] 539 U.S. at 538.
[50] In 2008, an Idaho appellate court upheld a conviction for "infamous crime against nature" when an adult male provided oral sex in a gym sauna to an adult male with Down's Syndrome. The defendant challenged Idaho's sodomy law as unconstitutional in light of *Lawrence v. Texas*, but the Court of Appeal held because the matter of whether the disabled male could have consented was at issue, Idaho's felony sodomy law was constitutionally applied. *Idaho v. Cook*, 192 P.3d 1085 (Idaho Ct. App. 2008).
[51] Idaho protects against housing discrimination based on race, color, religion, sex, national origin, and/or disability. *See* IDAHO CODE § 67-5909(8)-(10).
[52] *See* IDAHO CODE § 18-7902 (extending only to crimes involving "race, color, religion, ancestry or national origin").
[53] Idaho protects against educational discrimination based on race, color, religion, sex, and/or national origin. *See* IDAHO CODE § 67-5909(7).
[54] Lianna Shepherd, *Gay Student Threatened*, ARGONAUT, Oct. 6, 2008, *available at* http://www.uiargonaut.com/content/view/6652/1.
[55] *See* IDAHO CODE § 39-4510 (any adult who is not a non-relative employee of the treating heath care facility or a community health care facility can be designated as a person's health care agent).
[56] *See* § 39-4504.

same-sex partner can make health decisions only after the guardian, spouse, parents and relatives have been given the option to decide.[57]

F. **Gender Identity**

Idaho is one of three states in the United States that does not amend birth certificates to change gender designations following sexual reassignment surgery.[58]

G. **Parenting**

In Idaho, single GLBT individuals are permitted to adopt.[59] Although adoptions by same-sex couples and second-parent adoptions are not expressly prohibited in Idaho, no court has heard the issues.

In 2002, the state adoption law was amended to prohibit discrimination against those with disabilities. The amendment expressly states that "transvestism and transsexualism" (grouped with other "sexual disorders"), as well as "sexual preference or orientation," are not to be considered disabilities protected from discrimination in adoption proceedings.[60]

In Idaho, any adult parent can seek custody of his or her child.[61] Like the state adoption law, in 2002, the state child custody law was amended to prohibit discrimination

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[57] *Id.*

[58] *See* § 39-250 (procedures for amending paternity and name); *see also* Lambda Legal, Sources of Authority to Amend Sex Designation on Birth Certificates, http://bit.ly/3ecGEW (last visited Sept. 6, 2009) (

> "Although Idaho generally permits amendment of birth records upon an appropriate evidentiary showing, the Idaho Office of Vital Statistics reports that Idaho does not currently amend birth records to reflect the correct sex of individuals who have changed their sex by surgical procedure.").

[59] § 16-1501 ("Any minor child may be adopted by any adult person residing in and having residence in Idaho. . .").

[60] § 16-1501(2) (

> "Adoptions shall not be denied solely on the basis of the disability of a prospective adoptive parent. . . (b) . . . Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability.").

[61] § 32-1005 (

> "When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require.").

against those with disabilities. The amendment expressly states that "transvestism and transsexualism" (grouped with other "sexual disorders"), as well as "sexual preference or orientation," are not to be considered disabilities protected from discrimination in child custody proceedings.[62]

A 2004 Idaho Supreme Court case, *McGriff v. McGriff*, addresses the issue of whether homosexuality can factor into child custody and visitation.[63] The Court held that, in light of *Lawrence v. Texas*, which "legalized the practice of homosexuality and in essence made it a protected practice under the Due Process clause,"[64] a court could not use sexual orientation as a basis for awarding or removing custody. The court noted that

> "[s]exual orientation, in and of itself, cannot be the basis for awarding or removing custody; only when the parent's sexual orientation is shown to cause harm to the child, such that the child's best interests are not served, should sexual orientation be a factor in determining custody."[65]

However, the Court affirmed the Magistrate's denial of custody and limits on visitation based on the father's homosexuality.

In *McGriff*, the father had been divorced from his wife for three years and shared custody of his two girls when he moved in with a same-sex partner.[66] The ex-wife filed for a modification of custody and visitation based on the "changed circumstance" of his homosexuality.[67] She also complained that her ex-husband made the "unilateral decision to discuss his sexual orientation with one of the children, in direct contravention of [the mother's] wishes."[68] The Magistrate's original decision "found that [the father's] choice of lifestyle should not be minimized in light of the conservative culture and values of the community in which the parties and the children reside." [69] The Magistrate further noted that "[the father's] decision to openly cohabitate with Nick Case, his partner, is a change in circumstances which will generate questions from the girls and their friends regarding their conservative culture and morays [sic] in which the children live."[70]

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[62] § 16-1501(2) (

> "Adoptions shall not be denied solely on the basis of the disability of a prospective adoptive parent. . . (b) . . . Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability.").

[63] *McGriff v. McGriff*, 99 P.3d 111 (Idaho 2004).
[64] *Id.* at 648.
[65] *Id.*
[66] *Id.* at 649.
[67] *Id.*
[68] *Id.* at 650.
[69] *Id.* at 648.
[70] *Id.* at 655 (J. Kidwell, dissenting).

While the Idaho Supreme Court held that sexual orientation could not be used as the sole reason to deny custody, it nonetheless upheld the Magistrate's decision to award full custody to the mother and to allow visitation rights to the father only if his partner would not be in the house.[71] The limitation on visitation was approved because the father's partner had allegedly made two "hang-up" calls to the ex-wife, had complained to the police that the ex-wife tried to cut him off on the road, and had allegedly called the town mayor's office with the intent of complaining that the ex-wife (a city employee) was abusing her work time.[72] The Idaho Supreme Court felt that the Magistrate was justified in light of such "vindictive action" in ordering that the partner not be residing with McGriff when the children were visiting, comparing the restriction to that made in a prior case involving a mother's fiancé with drug abuse problems and a felony record.[73]

There is currently no case law in Idaho regarding transgender parents or same-sex co-parents.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Idaho law does not permit or recognize same-sex unions, whether by marriage or domestic partnership. In January 1996, the Idaho governor signed into law a statute denying recognition to marriages "that violate the public policy of this state" such as same-sex marriages.[74] While the Idaho legislature was considering a Joint Resolution to amend the Idaho Constitution to prohibit same-sex marriage, the Idaho Attorney General issued an Opinion stating that a narrow amendment dealing only with a prohibition on same-sex marriage would be "insufficient to articulate a public policy that seeks not only to define marriage as between a man and a woman but also to prohibit recognition of other relationships such as same-sex marriages, civil unions and domestic partnerships."[75]

Later that year, on November 2, 2006, Idaho voters ratified a revision to the Idaho Constitution that both defined marriage as being only between a man and a woman and barred any domestic legal union other than marriage.[76] The Legislature's Statement of

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[71] *Id.* at 652.
[72] *Id.*
[73] *Id.*
[74] IDAHO CODE § 32-209 (

> "All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.").

[75] Idaho Att'y Gen. Op. No. 1 (2006), at 11.
[76] *See* Idaho Constit., Art. III, § 28; *see also* CNN Election Results (2006), http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures (last visited Sept. 6, 2009).

Purpose for this amendment was clear; the amendment was "intended to prohibit recognition by the State of Idaho, or any of its political subdivisions, of civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage, no matter how denominated."[77]

2. **Benefits**

On December 17, 2007, the city of Moscow (home to the University of Idaho) passed a resolution authorizing the city to financially contribute towards employee health benefits for city employees who filed an affidavit of qualifying domestic partnership with Regence Blue Shield of Idaho.[78] The resolution noted that Moscow "is recognized in the National League of Cities as Idaho's only 'Inclusive Community.'" It also stated that

> "the Council believes that all persons are entitled to equal employment opportunity and does not discriminate against City employees because of … sexual orientation …"; and that "the City believes it is reasonable, equitable, and fair to contribute to its employees who qualify for health insurance benefits as domestic partners in the same way it contributes to its other employees, monetarily, emotionally, philosophically, and inclusively."[79]

This caused immediate uproar from conservative Idaho groups, and on February 12, 2008, the Idaho Attorney General furnished a non-binding opinion arguing that the resolution was unconstitutional. It stated that

> "[t]he City of Moscow's new policy of extending health care benefits to the domestic partners of its employees and the dependents of those domestic partners constitutes recognition of a domestic legal union other than marriage. Consequently, an Idaho court would likely find that this policy violates the Idaho Constitution's Marriage Amendment.[80]

The Attorney General explained that the City of Moscow, as a subdivision of the state, has no power to provide benefits that conflict with state laws.[81] The following month, on March 4, 2008, the Moscow City Council voted (4-1) to continue supporting

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[77] *See* H. JJ. R. 2 (Idaho 2006) (Statement of Purpose). Note: 2006 House Joint Resolution No. 2 passed by a margin of 53-17 in the Idaho House, and 26-9 in the Idaho Senate. *See id*. (Bill Status).
[78] *See* City of Moscow Resolution No. 31 (2007).
[79] *Id.* at 1.
[80] State of Idaho, Office of the Attorney General Lawrence G. Wasden, Feb. 4, 2008 letter to Russell M. Fulcher at 1.
[81] *Id.* at 2.

the measure because it believed the ordinance was written in a way that does not violate the marriage amendment.[82]

A 2008 story that received national attention involved a gay couple with a New Jersey registered partnership who moved to Idaho. After the move, the primary earner's company, Konica Minolta, dropped his partner from the company insurance plan.[83]

I. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Hallmark Stores

In August 2008, a group of Hallmark stores located in Idaho refused to carry Hallmark's new line of cards marketed towards LGBT consumers.[84]

Nampa Recreation Center

In January of 2009, a lesbian couple with a four-year-old child was denied a family pass to the Nampa Recreation Center, which is owned and operated by the City of Nampa, Idaho.[85] The Nampa mayor responded that the two women were not married. He remarked: "We have to protect the integrity of our funding structure. Any two people who happen to be roommates and say, 'Hey we're family, give us a discount', we would suffer financially."[86]

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[82] Greg Meyer, *Moscow Council Votes to Maintain Domestic Partner Benefits*, KLEWtv, Mar. 4, 2008, *available at* http://www.klewtv.com/news/16238552.html.
[83] Jessie Bonner, *Gay Couple Loses Benefits With Move*, A.P., Mar. 31, 2008, *available at* http://abcnews.go.com/TheLaw/wireStory?id=4555406.
[84] *Some Shops Reject Same-Sex Wedding Cards: Owners Of Several Idaho Hallmark Stores Won't Sell New Line Catering To Same-Sex Partners*, CBS NEWS, Aug. 26, 2008, *available at* http://www.cbsnews.com/stories/2008/08/26/business/main4383948.shtml.
[85] Jody May-Chang, *Nampa ID Recreation Center Denies Same-Sex Families*, PRIDE DEPOT, Feb. 2, 2009, http://www.pridedepot.com/modules/wordpress/?p=738862#more-738862.
[86] *Id.*

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Illinois – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Since 2006, an Illinois state law has prohibited employment discrimination based on sexual orientation, a term which the statute defines to include "gender-related identity, whether or not traditionally associated with the person's designated sex at birth."[1] However, notwithstanding this statute and several municipal-level anti-discrimination laws that cover sexual orientation and/or gender identity, there is a pattern of unconstitutional employment discrimination in public sector workplaces in the state, both before *and after* enactment of the 2006 provision.

Documented examples of discrimination based on sexual orientation or gender identity by state and local government employers include:

- Plaintiff sued the Illinois Gaming Board, alleging that he was denied a promotion in 2004 because of his sexual orientation, thereby depriving him of his federally protected right to equal protection.[2] Plaintiff never disclosed his sexual orientation at work, and no one at work ever asked about it, but plaintiff cited several incidents which formed the basis of his belief that his employers were aware of his sexual orientation. In one incident, a co-worker cut out an article in which a homosexual police applicant received a job, and wrote on the top of the article that the "good guys" were not going to get the job – implying, plaintiff argued, that only homosexuals would receive consideration because of their sexual orientation. He also overheard someone saying, "Don't worry, help is on the way," which he interpreted as meaning he would soon be replaced. In another incident, he had a conversation with a co-worker in which he asked if the co-worker knew whether shoes thrown over a telephone line outside a house meant that drugs were sold there, to which the co-worker responded: "I don't know. Do you know what a rainbow flag mean [sic] when it's on a bar window? … That means it's a gay bar." Finally, a co-worker referred to an openly gay actor from Star Trek as a "faggot." When applications were taken to fill the permanent position, another applicant was chosen, and plaintiff alleged that due to his sexual orientation, his competitor was "pushed through." The court denied relief on the ground that plaintiff had failed to establish that his homosexual orientation was known.

[1] Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-102.
[2] *Hamlin v. Tigera*, 2008 U.S. Dist. LEXIS 3926 (C.D. ILL 2008).

- In 2008, a fire department paramedic reported that he had experienced harassment based on his sexual orientation. Co-workers made comments such as, "I wish all fags would die of AIDS." The fire chief said to him: "I want to give you some advice. You need to tone it down a bit." When the paramedic asked if he was being too loud, or if the chief meant he should "gay it down" and the chief responded, "I can't say that, but I'm going to tell you to tone it down." The chief added, "any other chief would find you unfit for duty" and told the paramedic to "change the way you are." In addition, the paramedic's bedding was removed from the firehouse sleeping quarters and his car window was broken in the department's parking lot. The harassment became so bad that he would sleep in the ambulance during his downtime to avoid his co-workers. He believed that he was being set up for termination through an investigation of a false positive drug test that would not have been handled as it was if he were not gay.[3]

- In 2008, a public school teacher reported that he was repeatedly harassed at work because he was perceived to be gay. Students wrote on the tables in his classroom that "[Caller D] is a fag" and included similar derogatory phrases in textbooks in his class, among other things. The teacher made complaints to the administration about this harassment, but received no response. The teacher is perceived to be gay but is heterosexual.[4]

- In 2008, a gay professor at an Illinois community college was subjected to a hostile environment because of his sexual orientation.[5]

- In 2008, a lesbian public school teacher was subjected to a hostile environment because of her sexual orientation.[6]

- In 2007, a corrections officer reported that he was being harassed at work based on his sexual orientation. A fellow officer repeatedly referred to him as a "motherfuckin' faggot" in front of other officers and inmates. The officer who did this was not suspended, even though two employees who had used the "N-word" around the same time had been immediately terminated. After the corrections officer commenced a union grievance, shift commanders told him to "leave it alone" and warned him that he was "playing with fire." Thereafter, even though he was qualified for a promotion, the position was awarded to a heterosexual candidate from outside of the department with much less experience

[3] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).
[4] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).
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[6] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

than he had. The corrections officer eventually resigned because of the harassment.[7]

- In 2007, a transgender city agency chief naturalist was fired because of her gender identity.[8]

- A gay male administrator sued the Suburban Bus Division of the Regional Transportation Authority, claiming that he was subjected to adverse employment actions and hostile work environment due to his sexual orientation.[9] The court found that the evidence of homophobic comments and jokes was insufficient to avoid summary judgment, because it failed to show harassment that is sufficiently severe or pervasive. ("First, the comments were few, and very far between. Paquet claims that there were between 18 and 36 total instances in which an offensive joke or comment was uttered, over the course of approximately twelve years. [citation omitted]. More importantly, none of the jokes or comments were ever directed at Paquet personally.") The court also found that plaintiff was not retaliated against, in violation of his First Amendment rights, when efforts were made to remove him from training session after he asked leader to comment on applicability to homosexuals of a city anti-discrimination ordinance.

- Plaintiff Jeffrey Cash, a nurse's aid in the Murray Development Center, a home for developmentally disabled people in Centralia, Illinois, sued the state agency for discrimination suffered because he was perceived to be gay. In the summer of 1995, plaintiff invited a fellow employee, Donny Hodge, for a Saturday fishing trip on his boat. They spent the day fishing, then returned to Hodge's house. Since Cash's wife and children were away visiting grandparents for the weekend, Hodge invited Cash to stay overnight, and they continued their fishing trip on Sunday. Hodge is an openly gay man, and was known as being gay in their workplace. Cash began to take flak from a group of female co-workers about his perceived failure to emerge from the closet and embrace his homosexuality. Cash's tormentors made the next year of his life at work miserable. They laughed at Cash while simulating fellatio or male masturbation, called him a "he/she" or "the evil one," and bared their breasts and shook them at him while laughing. One woman even rubbed her bare breasts against Cash's arm following a union meeting. Over time, Cash became short-tempered, paranoid, and depressed. He eventually sought psychiatric counseling, which both he and his therapists say stemmed from his stressful working conditions. The court rejected plaintiff's hostile environment claim, finding that the harassment was insufficiently pervasive to state a Title VII claim, and that it was not directed at Cash "because of" sex.[10]

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[7] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

[8] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

[9] *Paquet v. Pace*, 156 F.Supp.2d 761 (N.D. Ill. 2001).

[10] *Cash v. Ill. Div. of Mental Health*, 209 F.3d 695 (7th Cir. 2000).

- Plaintiff James Shermer, an employee of the Illinois Department of Transportation, asserted that he had been subjected to sexually offensive remarks by his male supervisor, who perceived him as gay and ridiculed him for having sex with other men.[11] (Shermer did not state for the record whether he is in fact gay.) Shermer sued under Title VII, alleging sexual harassment that had the effect of creating a hostile environment. The court ruled for defendant, finding that "all the evidence suggests Plaintiff was harassed not because of his gender but because of his sexual orientation....[D]iscrimination based on sexual orientation, real or perceived, however, is simply not actionable under Title VII."

- A former probationary city police officer brought action against the superintendent of the Chicago Police Department under the Illinois Human Rights Act and Chicago's human rights ordinance, alleging, among other claims, discrimination on the basis of sexual orientation.[12] Flynn was terminated after four days during the probationary period following his being hired as a police officer. The state circuit court granted the city's motion to dismiss. With regard to the claims related to sexual orientation, the appellate court affirmed the judgment on the basis that Chicago's Commission on Human Relations had exclusive jurisdiction over claims arising under the ordinance, and Flynn failed to exhaust his remedies under the ordinance before bringing the claim to the circuit court. Furthermore, the appellate court concluded that because nothing in the Human Rights Act at that time prohibited discrimination based on sexual orientation, the court lacked jurisdiction over that claim.

- Plaintiffs, two 16-year-old twin brothers who were subject to "a relentless campaign of harassment by their male co-workers," sued the city as employer, alleging intentional sex discrimination.[13] Although the district court granted summary judgment in favor of the Defendants, holding that victims of same-sex sexual harassment may not claim discrimination because of sex under Title VII, the Seventh Circuit reached the opposite conclusion. The Plaintiffs alleged that their harassment included being called "queer" and "fag," comments such as, "[a]re you a boy or a girl?" and talk of "being taken 'out to the woods'" for sexual purposes. One Plaintiff wore an earring and was subject to more ridicule than his brother, the second Plaintiff, who was overweight and was once asked whether his brother had passed a case of poison ivy to him through anal intercourse. The verbal taunting turned physical when a co-worker grabbed one of the Plaintiff's genitals to determine "if he was a girl or a boy." When the Plaintiffs failed to return to work, supervisors terminated their employment. The Seventh Circuit noted that "a homophobic epithet like 'fag,'…may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation." The court found that a "because of" nexus between the allegedly

[11] *Shermer v. Illinois Department of Transportation*, 937 F.Supp. 781 (C.D.Ill.,1996)
[12] *Flynn v. Hillard*, 303 Ill.App.3d 119 (1999).
[13] *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

proscribed conduct and the victim's gender could be inferred "from the harassers' evident belief that in wearing an earring, [the brother] did not conform to male standards." The U.S. Supreme Court vacated and remanded to the Seventh Circuit for further consideration in light of *Oncale v. Sundowner Offshore Services*[14]. Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[14] *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

As of January 1, 2006, the Illinois Human Rights Act ("IHRA") prohibits private and public employers from discrimination based on "sexual orientation," which is defined as "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth."[15] This definition thus can be interpreted to protect employees from discrimination on the basis of gender stereotyping and gender identity. There have not yet been any reported decisions of cases arising under the revised statute.

2. Enforcement & Remedies

The Illinois Department of Human Rights is the agency charged with enforcing the IHRA.[16]

Based on precedents of cases brought under the IHRA prior to the inclusion of sexual orientation, where the claimant brings a claim in an administrative proceeding, a three-part analysis controls the employment discrimination claim.[17] Under this three-part analysis the employee must: (i) establish a *prima facie* case of employment discrimination by showing the employee was discriminated against solely based on his or her protected status; (ii) if a *prima facie* case is established, the burden shifts to the employer to "'articulate, not prove' a legitimate nondiscriminatory reason for [the employer's] decision [to terminate the employee from their job position];" and (iii) "when the employer carries that burden of production, the presumption of discrimination falls, and the [employee] must then prove by a preponderance of the evidence that the employer's articulated reason was not true but pretexual."[18]

If the claimant successfully proves his or her sexual orientation employment discrimination claim, the remedies allowed are: "(i) actual damages; (ii) back pay; (iii) perquisites; (iv) interest on damages; (v) damages for emotional distress; (vi) reinstatement; (vii) promotion; (viii) membership in apprenticeship or labor organization

[15] Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-102.
[16] *Meehan v. Illinois Power Co*, 347 Ill.App.3d 761, 763 (Ill. App. Ct. 5th Dist. 2004) (*citing Mein v. Masonite Corp.*, 109 Ill.2d 1,7 (Ill. 1985)). *See* ILLINOIS DEPARTMENT OF HUMAN RIGHTS, FILING A CHARGE OF DISCRIMINATION UNDER THE ILLINOIS HUMAN RIGHTS ACT (2008), *available at* http://www.state.il.us/dhr/charges/Chg_Pamp.pdf.
[17] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
[18] *Zaderaka*, 131 Ill.2d at 179. See also *Zunino v. Cook County Com'n on Human Rights*, 289 Ill.App.3d 133, 137 (Ill. App. Ct. 1 Dist. 1997) (citing *Zaderaka v. Illinois Human Rights Com'n*, 131 Ill.2d 172, 179 (Ill. 1989)).

or job training programs; (ix) an order against the employer from violating the Act, and (x) attorney's fees and costs."[19]

Additionally, the Illinois Attorney General is permitted to enforce the Act by bringing a sexual orientation employment discrimination action on behalf of the people of Illinois in state court.[20] If the claim is successfully litigated, the remedy is limited to only equitable relief and a fine to the employer not to exceed $50,000.[21]

B. Attempts to Enact State Legislation

An earlier attempt to reform the Illinois Human Rights Act included testimony indicating that between 30 and 40 percent of gays and lesbians reported concealing their sexual orientation to avoid discrimination.[22]

In 1999, the Illinois legislature rejected a bill[23] that would have prohibited employment discrimination based on sexual orientation. State Rep. Cal Skinner, who voted against the bill, told a reporter that to pass it "would be enabling an addiction" that kills people by transmitting AIDS.[24]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In 1996, Governor Jim Edgar reportedly issued an executive order prohibiting employment discrimination on the basis of sexual orientation in state agencies.[25] Today, discrimination in state hiring would be covered under the 2002 Human Rights Act.

2. State Government Personnel Regulations

Research uncovered a number of school districts with anti-discrimination employment, recruitment or contracting policies that include sexual orientation. Many of the same school districts also have student non-harassment policies that include harassment based on sexual orientation. It is not clear, however, whether such policies, by referencing sexual orientation, intended to protect against discrimination or harassment based on gender identity or gender stereotype.

3. Attorney General Opinions

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[19] Bryan P. Cavanaugh, *How Illinois' New Gay Right Law Affect Employers and Workers*, 94 ILL. B.J. 182, 185 (2006) (*citing* 775 ILL. COMP. STAT. 5/8A-104 (2007)).
[20] 775 ILL. COMP. STAT. 5/10-104 (2007).
[21] 775 ILL. COMP. STAT. 5/10-104(B)(1) (2004).
[22] David Heckelman, *Committee OKs bill to ban discrimination against homosexuals*, CHI. L. DAILY BULL. (Mar. 24, 1993), at 3.
[23] H. 474, 91st Gen. Assemb., Reg. Sess. (Il. 1999).
[24] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 164 (2000 ed.).
[25] Kurt Erickson, *Gay, lesbian employees protected*, THE PANTAGRAPH (Bloomington, Ill.) (Nov. 15, 1996), at A8.

None.

D. Local Legislation

The following municipalities in Illinois specifically prohibit employment discrimination on the basis of sexual orientation and/or gender identity: the Cities of Champaign,[26] Urbana,[27] Evanston,[28] DeKalb,[29] Decatur,[30] Chicago,[31] and Cook County.[32]

In 1996, the town council of Normal, Illinois voted 5-2 against adding "sexual orientation" to their municipal anti-discrimination ordinance.[33] In 2001, the council changed their minds; the Normal code now includes sexual orientation among the categories included in its equal employment opportunity policy and protected from discrimination.[34]

E. Occupational Licensing Requirements

Research did not uncover any published judicial opinions addressing instances in which licensing regulations were applied based on sexual orientation or gender expression.

[26] CHAMPAIGN MUN. CODE art. I, § 17-3 (1977).
[27] URBANA MUN. CODE art. III, § 12-39 (1979).
[28] EVANSTON ORDINANCE 61-0-97 (1997).
[29] DEKALB MUN. CODE § 49-02 (1998).
[30] DECATUR MUN. CODE ch. 28 (2002).
[31] Chicago Human Rights Ordinance § 2-160-030 (2002).
[32] Cook County Human Rights Ordinance (Ord. No. 93-0-13) (1993).
[33] Lesbian & Gay L. Notes (June 1996), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1996/06.96.
[34] NORMAL MUN. CODE ch. 24 § 24.1-1 (2001).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Hamlin v. Tigera, 2008 U.S. Dist. LEXIS 3926 (C.D.ILL 2008).

Hamlin, an interim shift supervisor with the Illinois Gaming Board, filed suit in an Illinois district court against his supervisors in their official capacities, alleging that he was denied a promotion because of his sexual orientation, thereby depriving him of his federally protected right to equal protection.

Hamlin never disclosed his sexual orientation at work, and no one at work ever asked about it. In support of his argument, Hamlin cited several incidents, which formed the basis of his belief that his employers were aware of his sexual orientation. In one incident, a co-worker cut out an article in which a homosexual police applicant received a job, and wrote on the top of the article that the "good guys" were not going to get the job – implying, Hamlin argued, that only homosexuals would receive consideration because of their sexual orientation. Hamlin also overheard someone saying, "Don't worry, help is on the way," which Hamlin interpreted as meaning he would soon be replaced. In another incident, Hamlin had a conversation with a co-worker in which Hamlin asked if the co-worker knew whether shoes thrown over a telephone line outside a house meant that drugs were sold there, to which the co-worker responded: "I don't know. Do you know what a rainbow flag mean [sic] when it's on a bar window? … That means it's a gay bar." Finally, a co-worker referred to an openly gay actor from Star Trek as a "faggot." When applications were taken to fill the permanent position, another applicant was chosen, and Hamlin alleged that due to his sexual orientation, his competitor was "pushed through."

In considering Hamlin's equal protection claim on summary judgment, the District Court required Hamlin to show: (1) that the defendants had treated him differently from other similarly-situated individuals; (2) that the defendants had intentionally treated him differently because of his class membership (i.e., homosexual status); and (3) that the allegedly proscribed conduct was not rationally related to a legitimate government interest (rational basis review, since, in the court's estimation, homosexual status was not afforded any heightened scrutiny).

The court concluded that Hamlin had not established the second element of his equal protection claim (that the defendants had intentionally treated him differently because of his sexual orientation) because "[a] party cannot have any intent to discriminate against a member of a class if they lack knowledge of the individual's class membership." In the instant case, the court determined that, on the facts adduced, Hamlin had not established a *prima facie* case of discrimination because he could not prove, based on the facts adduced, that any defendant— let alone any defendant with

decision-making authority— actually knew of his sexual orientation. Thus, the District Court granted summary judgment in favor of the defendants.[35]

Cash v. Ill. Div. of Mental Health, 209 F.3d 695 (7th Cir. 2000).

Jeffrey Cash claimed he was subject to hostile environment harassment because his co-workers thought he was a closeted gay man. Cash was hired as a nurse's aid in the Murray Development Center, a home for developmentally disabled people in Centralia, Illinois. For seven years, there were no problems with his employment or his life; he owned his own home, where he lived with his wife and children. In the summer of 1995, he invited a fellow employee, Donny Hodge, for a Saturday fishing trip on his boat. They spent the entire day fishing, then returned to Hodge's house. Since Cash's wife and children were away visiting grandparents for the weekend, Hodge invited Cash to stay overnight, and they continued their fishing trip on Sunday. Hodge is an openly gay man, and was known as being gay in their workplace. Cash began to take flak from a group of female co-workers about his perceived failure to emerge from the closet and embrace his homosexuality. Cash's tormentors made the next year of his life at work miserable. They laughed at Cash while simulating fellatio or male masturbation, called him a "he/she" or "the evil one," and bared their breasts and shook them at him while laughing. One woman even rubbed her bare breasts against Cash's arm following a union meeting. Over time, Cash became short-tempered, paranoid, and depressed. He eventually sought psychiatric counseling, which both he and his therapists say stemmed from his stressful working conditions. Cash filed suit in federal court against his employer, claiming he endured hostile environment harassment, in violation of Title VII. After trial, the court ruled against Cash, finding that the employer acted appropriately in response to Cash's complaints about harassment, that the harassment in any event was insufficiently pervasive to state a Title VII claim, and that it was not directed at Cash "because of" sex. On appeal to the Seventh Circuit, the court held that Cash's motion for a new trial was untimely and affirmed the ruling below.[36]

Paquet v. Pace, 156 F.Supp.2d 761 (N.D. Ill. 2001).

Plaintiff John Paquet, a transit administrator who self-identified as homosexual, sued his employer, Pace, the Suburban Bus Division of the Regional Transportation Authority, claiming that he was subjected to adverse employment actions and hostile work environment due to his sexual orientation. The employer moved to dismiss. Paquet made two claims. In Count I, Paquet alleged that the defendants retaliated against him for engaging in certain speech concerning homosexuality and homosexual rights issues, in violation of the First Amendment. In Count II, Paquet alleged that the defendants violated the Equal Protection Clause of the Fourteenth Amendment by intentionally discriminating against him based on his status as a homosexual. The District Court granted defendants' motion for summary judgment on all counts, holding that: (1) employee's equal protection rights were not violated when he was transferred and reduced one pay grade; (2) employee was not subjected to hostile work environment

[35] *Hamlin v. Tigera*, 2008 U.S. Dist. LEXIS 3926 (C.D.I.L. 2008).
[36] *Cash v. Ill. Div. of Mental Health*, 209 F.3d 695 (7th Cir. 2000).

based on nonspecific homophobic comments and investigation of his possible involvement in disruptive e-mails; and (3) employee was not retaliated against in violation of his First Amendment rights when efforts were made to remove him from a training session after he asked leader to comment on the applicability to homosexuals of a city anti-discrimination ordinance.

Paquet's homosexuality (or at least the likelihood that he was homosexual) was revealed in a memo sent by Paquet to one of his supervisors in March 1997, requesting that Pace adopt a policy of providing insurance benefits to homosexual domestic partners in the same way that it does for married spouses. Although Paquet did not make a point of discussing his homosexuality at Pace, there were at least some Pace employees who knew of his homosexual orientation even before this memo was sent.

The court held that Paquet failed to create sufficient evidence from which a reasonable jury could conclude that Pace's reasons for the transfer and demotion were pretextual, and that therefore Pace was entitled to summary judgment on Paquet's disparate treatment claim. The court further concluded that Paquet's proffered evidence was insufficient to create a triable issue of fact as to whether he was subjected to a hostile environment because he is homosexual. The court found that the evidence of homophobic comments and jokes was insufficient to avoid summary judgment, because it failed to show harassment that is sufficiently severe or pervasive. ("First, the comments were few, and very far between. Paquet claims that there were between 18 and 36 total instances in which an offensive joke or comment was uttered, over the course of approximately twelve years. [citation omitted]. More importantly, none of the jokes or comments were ever directed at Paquet personally.") The Court also granted summary judgment on the First Amendment claim, finding that Pace had legitimate reasons for trying to avoid further disruption in the class.[37]

Flynn v. Hillard, 303 Ill.App.3d 119 (1999).

A former probationary city police officer brought action against the superintendent of the Chicago Police Department under the Illinois Human Rights Act and Chicago's human rights ordinance, alleging, among other claims, discrimination on the basis of sexual orientation. Flynn, was hired as a police officer and terminated after four days during the probationary period. The state circuit court granted the city's motion to dismiss. With regard to the claims related to sexual orientation, the appellate court affirmed the judgment on the basis that Chicago's Commission on Human Relations had exclusive jurisdiction over claims arising under the ordinance, and Flynn had failed to exhaust his remedies under the ordinance before bringing the claim to the circuit court. Furthermore, the appellate court concluded that because nothing in the Human Rights Act at that time prohibited discrimination based on sexual orientation, the court lacked jurisdiction over that claim.

Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

[37] *Paquet v. Pace*, 156 F.Supp.2d 761 (N.D. Ill. 2001).

Plaintiffs, two 16-year-old twin brothers who were subject to "a relentless campaign of harassment by their male co-workers," sued the city alleging intentional sex discrimination. Although the district court granted summary judgment in favor of the Defendants, holding that victims of same-sex sexual harassment may not claim discrimination because of sex under Title VII, the Seventh Circuit reached the opposite conclusion. The Plaintiffs alleged that their harassment included being called "queer" and "fag," comments such as, "[a]re you a boy or a girl?" and talk of "being taken 'out to the woods'" for sexual purposes. One Plaintiff wore an earring and was subject to more ridicule than his brother, the second Plaintiff, who was overweight and was once asked whether his brother had passed a case of poison ivy to him through anal intercourse. The verbal taunting turned physical when a co-worker grabbed one of the Plaintiff's genitals to determine "if he was a girl or a boy." When the Plaintiffs failed to return to work, supervisors terminated their employment. The Seventh Circuit noted that,

> [w]hen the harasser sets out to harass a female employee using names, threats, and physical contact that are unmistakably gender-based, he ensures that the work environment becomes hostile to her as a woman – in other words, that the workplace is hostile 'because of her sex.' Regardless of why the harasser has targeted the woman, her gender has become inextricably intertwined with the harassment.

To the Seventh Circuit, "a homophobic epithet like 'fag,' … may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation." In the instant case, the Seventh Circuit found that a "because of" nexus between the allegedly proscribed conduct and the victim's gender could be inferred "from the harassers' evident belief that in wearing an earring, [the brother] did not conform to male standards." In addition, the court found that the sexual orientation of the harasser is irrelevant.

> Shermer v. Illinois Department of Transportation, 937 F.Supp. 781 (C.D.Ill. 1996).

Plaintiff James Shermer worked for the Illinois Department of Transportation (IDOT) as part of an all-male crew. He claimed to have been subjected to sexually offensive remarks by his male supervisor, who perceived him as gay and ridiculed him for having sex with other men. (Shermer did not state for the record whether he is in fact gay.) Shermer sued under Title VII, alleging sexual harassment that had the effect of creating a hostile environment. The defense moved for summary judgment, arguing that same-sex harassment is not actionable under Title VII. The District Court denied the motion, ruling that Title VII does prohibit same-sex harassment.

The defense next moved for reconsideration, arguing that there was no evidence that the defendant discriminated against the plaintiff on the basis of his gender. Specifically, Defendant maintains that Plaintiff worked on an all male crew and that "[t]here is not, and cannot be, any evidence that female workers were treated differently." Defendant also notes that there is no evidence suggesting any IDOT employee did anything more than make comments about Plaintiff engaging in sexual activity with other

men. According to Plaintiff, the hostile environment was created solely because he is a man. In particular, Plaintiff asserts that "[i]n the case at bar the conduct at issue although offensive becomes sufficiently egregious to alter adversely the conditions of his employment not merely because it is conduct of a sexual nature, but rather because of the sex of the Plaintiff since it alludes to the Plaintiff engaging in sexual acts with individuals of his own sex."

The Court granted defendants' motion for reconsideration, finding that "all the evidence suggests Plaintiff was harassed not because of his gender but because of his sexual orientation....Plaintiff has failed to present any evidence, beyond mere speculation, that he would have been discriminated against if Trees would have perceived him as a heterosexual. Conversely, and more importantly, Plaintiff has failed to present any evidence that he was discriminated against because he was a man. Plaintiff maintains that the harassment was sufficiently egregious because it alluded to him engaging in sexual acts with other men….Discrimination based on sexual orientation, real or perceived, however, is simply not actionable under Title VII."[38]

2. **Private Employers**

Pinnacle Partnership v. Illinois Human Rights, 354 Ill.App.3d 819 (Ill. App. Ct 4th Dist. 2004).

The Illinois Human Rights Commission filed a complaint on behalf of a gay male employee who was sexually harassed by another gay male, alleging hostile environment on the basis that the employer did not respond properly to the harassing conduct. Statements were made by the employees' supervisor to both employees stating they should both "go home and have sex," "kiss and make up," and "be married." The Court concluded that the statements proved the supervisor's knowledge of the sexual nature of the hostility between the two co-workers and displayed a "flippant attitude" toward the situation, which perpetuated a hostile work environment.

Chicago Area Council of Boy Scouts of America v. City of Chicago Commission on Human Relations, 332 Ill.App.3d 17 (Ill. App. Ct. 3d Dist. 2001).

This is a case in which a government entity in Illinois attempted to address employment discrimination based on sexual orientation and was sued by a private party. An employment tester filed a claim with the Chicago Commission on Human Relations after being denied employment with the local Boy Scouts organization because of his homosexuality. The Commission issued an injunction prohibiting the Boy Scouts from considering the sexual orientation of the applicant, and issued a fine and damages to the tester. The Circuit Court determined that the tester lacked standing and vacated the award of damages, but affirmed the injunction and fine. The Appellate Court vacated the Commission's order in its entirety and remanded the case back to the Commission for further findings.[39] The Appellate Court stated that "the Commission should designate a representative list of nonexpressive positions within the Boy Scouts where the presence

[38] *Shermer v. Illinois Department of Transportation*, 937 F.Supp. 781 (C.D.Ill.,1996)
[39] Citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

of a homosexual would not 'derogate from [Boy Scouts'] expressive message,'" and make a factual finding as to whether the tester was seeking a nonexpressive position with the Boy Scouts.

B. Administrative Complaints

C. Other Documented Examples of Discrimination

Municipal Fire Department

In 2008, a fire department paramedic reported that he had experienced harassment based on his sexual orientation. Co-workers made comments such as "I wish all fags would die of AIDS." The fire chief said to him: "I want to give you some advice. You need to tone it down a bit." When the paramedic asked if he was being too loud, or if the chief meant he should "gay it down" and the chief responded, "I can't say that, but I'm going to tell you to tone it down." The chief added, "any other chief would find you unfit for duty" and told the paramedic to "change the way you are." In addition, the paramedic's bedding was removed from the firehouse sleeping quarters and his car window was broken in the department's parking lot. The harassment became so bad that he would sleep in the ambulance during his downtime to avoid his co-workers. He believed that he was being set up for termination through an investigation of a false positive drug test that would not have been handled as it was if he were not gay.[40]

Illinois Public High School

In 2008, a public school teacher reported that he was repeatedly harassed at work because he was perceived to be gay. Students wrote on the tables in his classroom that "[Caller D] is a fag" and included similar derogatory phrases in textbooks in his class, among other things. The teacher made complaints to the administration about this harassment, but received no response. The teacher is perceived to be gay but is heterosexual.[41]

Illinois Community College

In 2008, a gay professor at an Illinois community college was subjected to a hostile environment because of his sexual orientation.[42]

Illinois Public School

In 2008, a lesbian public school teacher was subjected to a hostile environment because of her sexual orientation.[43]

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[41] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).
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County Sheriff's Department

In 2007, a corrections officer reported that he was being harassed at work based on his sexual orientation. A fellow officer repeatedly referred to him as a "motherfuckin' faggot" in front of other officers and inmates. The officer who did this was not suspended, even though two employees who had used the "N-word" around the same time had been immediately terminated. After the corrections officer commenced a union grievance, shift commanders told him to "leave it alone" and warned him that he was "playing with fire." Thereafter, even though he was qualified for a promotion, the position was awarded to a heterosexual candidate from outside of the department with much less experience than he had. The corrections officer eventually resigned because of the harassment.[44]

Municipal Department

In 2007, a transgender city chief naturalist was fired because of her gender identity.[45]

Bremen Community High School

In 2004, Richard Mitchell interviewed for the position of superintendent of Bremen Community High School District No. 228 in Chicago. Following his interview, school board member Evelyn Gleason encouraged the board not to hire him because he is gay. But the board chose to hire Mitchell and in 2005 extended his three-year contract through June 2009. Gleason and another board member sought to invalidate Mitchell's contract without informing the Board on the theory that the meeting in which the contract was approved violated the Illinois Open Meetings Act, but were rejected by the Illinois State Board of Education and the Cook County State's Attorney. Shortly thereafter, Gleason became president of the Board and fired the Board's counsel, hiring the law firm where her son works. The new lawyer to the Board promptly circulated a memo asserting that Mitchell's extended contract was invalid. When confronted by a parent wishing to understand why Mitchell's contract was being contested, Gleason responded by saying, "Did you know that he's gay?" When Mitchell notified the board that he intended to pursue his rights under local laws prohibiting sexual orientation discrimination, Gleason retaliated by trumping up false allegations against Mitchell in the media. He was suspended and later fired. Lambda Legal filed a complaint charging that Gleason's and the school board's actions are illegal under the Cook County Human Rights Ordinance."[46]

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[43] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[44] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).
[45] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[46] Lambda Legal, All Cases: Mitchell v. Bremen Community High School District No. 228 and Gleason, et al., at http://www.lambdalegal.org/in-court/cases/mitchell-v-bremen-community-high-school.html.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Illinois became the first state to repeal its sodomy laws in 1961.[47]

B. Housing and Public Accommodations Discrimination

The IHRA also prohibits discrimination on the basis of sexual orientation in housing[48] and public accommodations.[49]

C. Hate Crimes

Illinois' hate crimes statute covers crimes committed because of real or perceived sexual orientation.[50]

D. Education

With respect to enrollment and access to facilities, goods and services, educational institutions are prohibited from discrimination on the basis of sexual orientation under the provisions of the IHRA pertaining to public accommodations.[51] The IHRA also prohibits discrimination on the basis of sexual orientation in higher education.[52]

In a 2006 case, the Seventh Circuit Court of Appeals overturned the Circuit Court's denial of a preliminary injunction in a First Amendment claim brought by a Christian student organization against public university, which had been derecognized by the law school for excluding homosexuals from its voting membership.[53]

E. Gender Identity

[47] *See Bowers v. Hardwick*, 478 U.S. 186, 193 n.7 (1986) ("In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. Criminal Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at ILL.REV.STAT., ch. 38, ¶¶ 11-2, 11-3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962)").
[48] 775 ILL. COMP. STAT.5/5-102.
[49] 775 ILL. COMP. STAT.5/3-102.
[50] 720 ILL. COMP. STAT 5/12-7.1.
[51] 775 ILL. COMP. STAT.5/5-101(A)(11).
[52] 720 ILL. COMP. STAT 5/5A-102.
[53] *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006).

The Illinois Vital Records Act provides that the State Registrar of Vital Records should issue a new birth certificate when provided with an affidavit from a physician stating that "he has performed an operation on a person, and that by reason of the operation the sex designation on such person's birth record should be changed."[54] However, the State Registrar of Vital Records will not issue a new birth certificate if gender confirmation surgery was performed by a doctor licensed in another country, and will not issue a new birth certificate for female-to-male transsexuals who have not completed "surgery to attempt to create/attach/form a viable penis."[55] Litigation challenging these policies as violations of both the Illinois Vital Records Act and the Illinois Constitution is ongoing.[56]

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions, & Domestic Partnership

Illinois law states "A marriage between two individuals of the same sex is contrary to the public policy of this State."[57]

2. Benefits

A State Appellate Court affirmed the Circuit Court's grant of summary judgment against a taxpayer who sought declaratory and injunctive relief against the City of Chicago, challenging the implementation of a city ordinance that extended employee benefits to the same-sex partners of city employees.[58]

[54] 410 ILL. COMP. STAT 535/17(d) (2007).
[55] First Amended Complaint at 2, *Kirk v. Arnold*, No. 09-CH-3226 (Cook County Cir. Court, Chancery Div., April 7, 2009, *available at* http://www.aclu.org/pdfs/lgbt/kirk_v_arnold_1stamendedcomplaint.pdf.
[56] *See* American Civil Liberties Union, *Kirk v. Arnold: Case Profile* (2009), http://www.aclu.org/lgbt/transgender/38491res20090127.html (last visited Sept. 13, 2009).
[57] 750 ILL. COMP. STAT 5/213.1 (1996).
[58] *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. 1 Dist. 1999).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Indiana – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Indiana's state anti-discrimination law does not prohibit employment discrimination based on gender identity or sexual orientation [1] although a Governor's Executive Order does protect state employees from those two forms of discrimination.[2] There is also no state law that prohibits sexual orientation or gender identity discrimination in education, and one county school board adopted a resolution denouncing activities such as … gay and lesbian behavior.

Documented examples of discrimination by state and local government employers based on sexual orientation or gender identity include:

- A gay special education aid in the Clark County Schools was hounded out of his job after teenage boys who crashed his Halloween party alleged that he tried to molest them. The aid sued the school district and various named defendants on various constitutional and tort theories, including defamation per se and intentional infliction of emotional distress. Ruling on various pretrial defense motions, the court rejected his per se defamation claim but allowed the rest of his claims to proceed.[3]

- The State of Indiana denied employee Jana Cornell's request for bereavement leave so she could attend the funeral of her partner's father. Cornell sued the state arguing that the exclusion of same-sex partners from the bereavement leave policy violated the state constitution's protection of equality. Her claim was rejected on the ground that the discrimination was based on marriage rather than sexual orientation. Cornell v. Hamilton, 791 N.E.2d 214 (Ind. App. 2003).

- In 2000, an openly lesbian probation officer was not promoted by her employers, two Carroll County Judges, because of her sexual orientation. The judges together decided against promoting her to chief probation officer. The officer requested the job and the superior court judge told her that they would not promote her because she was a lesbian. Further, the superior court judge told her

[1] Ind. Code, Tit. 22, Art. 9, Chptr. 1(1994), *available at* http://www.in.gov/legislative/ic/code/title22/ar9/ch1.html; *see* Human Rights Campaign, State Law Listings, Indiana Non-Discrimination Law, www.hrc.org/4176.htm (last visited Sept. 3, 2009).

[2] *See infra* Section II.C.1.

[3] *Badger v. Greater Clark County Schools*, 2005 WL 645152 (S.D. Indiana Feb 15, 2005).

that she was embarrassing the court by dating a woman, and that he had asked other court employees about her sexual orientation and personal life. A man with no prior probation experience was promoted to the position.[4]

- From 1997 through 2000, a gay public school principal and a gay public school teacher were subjected to a hostile work environment on account of their sexual orientation.[5]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

4 PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 179 (2000 ed.).

5 Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Indiana has not enacted laws to protect persons from employment discrimination on the ground of sexual orientation and gender identity.[6]

B. Attempts to Enact State Legislation

House Bill 1250, introduced in January 2009, "would extend antidiscrimination and civil rights statutes to include prohibiting discrimination based on sexual orientation, gender identity, national origin, age, disability, and ancestry."[7] It has not been enacted.

C. Executive Orders, State Government Personnel Regulations, & Attorney General Opinions

1. Executive Orders

Current Governor Mitchell Daniels signed an Executive Order, covering all state employees, that prohibits discrimination based on sexual orientation and gender identity.[8] Governor Daniels also included employment protection for sexual orientation and gender identity in his April 2005 Affirmative Action statement.[9] Previous Governor Kernan signed an Executive Order in 2005 prohibiting consideration of sexual orientation or gender identity in decisions concerning hiring, development, advancement, and termination of civilian employees.[10]

2. State Government Personnel Regulations

The Workplace Harassment statement of the Indiana State Personnel Department lists sexual orientation and gender identity as protected classes.[11]

3. Attorney General Opinions

None.

D. Local Legislation

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[6] Ind. Code, Tit. 22, Art. 9, Chptr. 1(1994), *available at* http://www.in.gov/legislative/ic/code/title22/ar9/ch1.html.

[7] Indiana Equality, Indiana Equality Issues Center, http:// www.indianaequality.org/View/Issues.aspx (last visited Sept. 3, 2009).

[8] Indiana Transgender Rights Advocacy Project, State Law Employment Policies Webpage, http://www.intraa.org/civilrights (last visited Feb. 11, 2009).

[9] *See Indiana Equality Update: Summer Advocacy Wrap-Up*, INTRAA CONNECTIONS (Ind. Transgender Rts. Advoc. Proj., Carmel, Ind.) Sept.-Oct. 2004, at 3, *available at* http://intraa-edfund.org/intraaconnections-pdf/200409connections.pdf.

[10] *Gov.Kernan Protects Transgender State Employees*, INTRAA CONNECTIONS (Ind. Transgender Rts. Advoc. Proj., Carmel, Ind.) Sept.-Oct. 2004, at 1, *available at* http://intraa-edfund.org/intraaconnections-pdf/200409connections.pdf.

[11] IND. STATE PERS. DEP'T, WORKPLACE HARASSMENT PREVENTION (2005).

1. Marion County

Marion County, which includes Indianapolis, revised their Human Rights Ordinance in 2006 to include sexual orientation and gender identity among a list of classes to be protected from discrimination in employment.[12]

2. Bloomington County

Bloomington County also includes sexual orientation and gender identity among a list of classes to be protected from discrimination in employment.[13]

3. Tippecanoe County

Tippecanoe County prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.[14]

4. City of Bloomington

The City of Bloomington prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.[15]

5. City of Fort Wayne

The City of Fort Wayne prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.[16]

6. City of Lafayette

The City of Lafayette prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.[17]

7. Michigan City

Michigan City prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.[18]

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[12]Marion County Code, Chptr. 581 (rev. Jan. 11, 2006) (Human Relations, Equal Opportunity).
[13]Indiana Equality, Civil Rights, Hoosiers Believe in Fairness, http://www.indianaequality.org/forward.aspx?c=HTK&u=/view/civil_rights_fact_sheet.aspx#employers (last visited Sept. 3, 2009).
[14]*Id.*
[15]*Id.*
[16] *Id*.
[17] *Id*.

8. City of Terre Haute

The City of Terre Haute prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.[19]

9. City of West Lafayette

The City of West Lafayette prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.[20]

10. City of South Bend

A mayor's executive order signed in June 2009 bans discrimination on the basis of sexual orientation or gender identity, only for city government employees in South Bend.[21]

E. Occupational Licensing Requirements

None.[22]

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[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] BNA Daily Labor Report, 130 DLR A-16 (July 10, 2009).
[22] Many licensing boards, especially for gaming, require applicants to have good moral character, but there is no indication that sexual orientation or gender identity could be used as a disqualifier. *See, e.,g.*, Ind. Code, Tit. 4, Art. 33, Chptr. 3, § 4-33-3-10 (1993).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE &LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Badger v. Greater Clark County Schools, 2005 WL 645152 (S.D. Indiana Feb 15, 2005).

Robert Badger, a gay man employed as a special education aid in the Clark County Schools, was hounded out of his job based on what he claims to be unfounded accusations that he and his gay friends tried to molest some teenage boys who crashed a Halloween party he was giving. Badger sued the school district and various named defendants on various constitutional and tort theories, including defamation per se and intentional infliction of emotional distress. Ruling on various pretrial defense motions, the court rejected Badger's per se defamation claim but allowed the rest of his claims to proceed.[23]

2. Private Employees

Creed v. Family Express Corp., 2009 WL 35237, No. 3:06-CV-465RM (N.D. Ind. Jan. 5, 2009).

The U.S. District Court in Indiana refused to find a cause of action under Title VII for discrimination against a transgendered employee, but nevertheless found that an employee going through the process of gender transition from male to female could proceed with claims that she was terminated for not meeting male gender stereotypes.[24] The court granted summary judgment to defendant, however, because the court found that the plaintiff had not presented sufficient evidence that her firing was based on sex stereotypes rather than on "what is, under today's law, a legitimate discriminatory purpose - because Ms. Creed was transgender."[25]

B. Administrative Complaints

None obtainable.

C. Other Documented Examples of Discrimination

Indiana State Department

The State of Indiana denied employee Jana Cornell's request for bereavement leave so she could attend the funeral of her partner's father. Cornell sued the state,

[23] *Badger v. Greater Clark County Schools*, 2005 WL 645152 (S.D. Indiana Feb 15, 2005).
[24] *Creed v. Family Express Corp.*, 2007 WL 2265630, No. 3:06-CV-465RM (N.D. Ind. Aug. 3, 2007).
[25] *Creed v. Family Express Corp.*, 2009 WL 35237, No. 3:06-CV-465RM (N.D. Ind. Jan. 5, 2009).

represented by the Indiana Civil Liberties Union. Cornell argued that the exclusion of same-sex partners from the bereavement leave policy violated the state constitution's protection of equality. Her claim was rejected on the ground that the discrimination was based on marriage rather than sexual orientation. Cornell v. Hamilton, 791 N.E.2d 214 (Ind. App. 2003).

Carroll County Court System

In 2000, the Indiana Civil Liberties Union brought suit on behalf of an openly lesbian probation officer against two Carroll County judges in federal court for allegedly failing to promote the plaintiff because of her sexual orientation. Sheri Moore claimed that a circuit court judge and a superior court judge together decided against promoting her to chief probation officer. Moore said she requested the job and that the superior court judge told her that they would not promote her because she was a lesbian. Moore asserted, "[the judges] acted out of personal bias and their actions constitute a conspiracy to deprive [me] of equal protection." Moore also claimed that the superior court judge told her that she was embarrassing the court by dating a woman, and that he had asked other court employees about her sexual orientation and personal life. According to Moore, a man with no prior probation experience was promoted to the position.[26]

An Indiana Public School

From 1997 through 2000, a gay public school principal and a gay public school teacher were subjected to a hostile work environment on account of their sexual orientation.[27]

[26] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 179 (2000 ed.).

[27] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments, and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

The Indiana sodomy law was repealed in 1977.[28]

B. Housing & Public Accommodations Discrimination

The Indiana Fair Housing Act does not protect against discrimination based on sexual orientation or gender identity.[29] The city of Bloomington, however, does protect against discrimination in housing based on sexual orientation and gender identity in its Human Rights Ordinance.[30]

C. Hate Crimes

In 2005, there were 11 reported hate crimes based on sexual orientation or gender identity in Indiana.[31] The Indiana law against bias crimes includes sexual orientation motivated crimes but not crimes motivated by the victims gender identity.[32] This legislation was passed in 2000 after several years of legislative resistance to establishing a hate crimes law within Indiana that included specific protection based on sexual identity.[33]

The bill, when it finally passed, did not include a penalty enhancement for hate crimes.[34] Consequently, the effect of the bill is fairly superficial. During the legislature's consideration of the bill, one evangelical church expressed outrage at the thought of tougher penalties, describing it as "an attempt to give special protection to homosexuals and cross-dressers by stating that a crime against them is to be treated more seriously than a crime against a senior citizen, child, or mother."[35] Legislative history suggests

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28 *See* Ind. Code Ann § 35-42-4-2 (2004).

29 Ind. Code Tit. 22, Art. 9.5.

30 Bloomington Mun. Code Tit. 2, Chptr. 2.21 §2.21.020 (1983), *available at* http://bloomington.in.gov/code/_DATA/TITLE02/Chapter_2_21_DEPARTMENT_OF_LAW/2_21_020_Public_policy_and_pur.html.

31 Associated Press, *A look at Hate Crimes in Indiana*, AP ALERT, Mar. 23, 2007.

32 Ind. Code Ann § 10-13-3-1 (2004).

33 Paul Becker et. al, *Hate Crime Legislation in Three Border States: Experiences in Indiana, Kentucky and Ohio*, 44 CRIM LAW BULL 4 (2008).

34 *Id.*

35 Editorial, *Indiana Behind on Hate Crimes Legislation*, UNIV. WIRE, Oct. 22, 2008.

that "the inclusion of sexual orientation [in the bill], given that there was no request for a sentencing enhancement," made the inclusion "palatable to legislators."[36] The provision including "sexual orientation" was not in the bill as it was introduced in the Indiana house, and was added later by the House Judiciary Committee.[37]

Indiana is one of only nine states without a hate crime law that includes enhanced penalties for perpetrators of such crimes.[38]

Senate Bill 91 was introduced in 2009, and would "provide for sentencing enhancements for those convicted of violent bigotry against a person based upon their color, creed, disability, national origin, race, religion, sexual orientation, gender identity, or sex."[39] Press reports suggest that the inclusion of sexual orientation may make it difficult for the bill to pass.[40] It has not been adopted to date.

D. **Education**

A case is currently pending in federal court in Indiana against a school that refused to let a transgender (male to female) student, who had worn girls' clothing throughout the school year, to wear a dress to the prom.[41] The student argues that the school's policy barring clothing that advertises sexual orientation, or indicates that a student's gender is different from the student's sex, violates the first amendment, the fourteenth amendment, and constitutes discrimination on the basis of gender in violation of Title IX.[42]

There are no state statutes that protect against discrimination or harassment on the basis of sexual orientation or gender identity in education. Additionally, Representative Jeff Thompson of the Indiana House of Representatives had proposed an amendment in February of 2009 to House Bill 1187 (calling for cultural competency standards for teachers) to forbid the teaching of "harmful behaviors" including homosexuality.[43]

A state senator has led efforts to prevent Indiana University from founding a support office for gay and lesbian students, stating that homosexuals are not a recognized minority in the state, and suggesting the University's funding be cut by $500,000 (the

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[36] *Id.*

[37] IND. H.R. COMM. REP. H.B. 1011 (Reg. Sess. 2000).

[38] Associated Press, *State Urged to Act to Halt Hate Crime*, J. GAZETTE, Aug. 16, 2008, at 7C.

[39] Indiana Equality, Indiana Equality Issues Center, http://www.indianaequality.org/View/Issues.aspx (last visited Sept. 4, 2009).

[40] *See* Becker, *supra* note 34 at 4.

[41] *See Logan v. Gary Cmty. Sch. Corp.*, 2008 WL 4411518, No. 2:07-CV-431-JVB (N.D. Ind. Sept. 25, 2008) (denying defendant's motion to dismiss).

[42] *See Judge Rebukes School in Trans Student Suit*, 365GAY, Feb. 2, 2009, http://www.365gay.com/news/judge-rebukes-school-in-trans-student-suit.

[43] *See* Press Release, Indiana Equality,Call Your Representative Immediately and Urge Them to Reject Thompson Amendment" (Feb. 5, 2009), http://indianaequality.typepad.com/indiana_equality_blog/2009/02/call-your-representative-immediately-and-urge-them-to-reject-thompson-amendment.html (last visited Sept. 4, 2009).

budget for the office) unless plans were discontinued.[44] He has not been successful to date.[45]

In 1997, the East Allen County School Board passed a resolution that stated, "This is a denunciation of activities such as drug use, premarital sex, violence, or gay and lesbian behavior, or the support of such activities." The resolution was made in response to a statement by the National Education Association that encouraged training educators to deal with the issues of gay and lesbian students. The board member who raised the issue commented, "I think . . . this type of behavior in our classroom is contrary to our values in our community and that we should say we don't approve of that. Homosexuality is contrary to the laws of nature, it's morally unacceptable to our community, and we should teach our children as such."[46]

E. **Health Care**

In the absence of an express advance directive, Indiana law does not explicitly authorize one partner to provide medical consent on behalf of an incapacitated same sex partner.[47] An advance grant to a partner to make medical decisions may be set up through a living will that is signed by the declarant, dated, and witnessed by two other individuals.[48]

F. **Parenting**

Indiana law permits any individual resident of the state or married couple to adopt, without mention of sexual orientation or gender.[49] In 2004, the Indiana Court of Appeals also held that a same-sex partner could petition to adopt his or her partner's biological child.[50] Additionally, the Indiana Court of Appeals ruled in 2006 that an unmarried couple, of the same or opposite sex, may file a joint petition to adopt a child.[51] Some jurisdictions go further and also allow a person to adopt the children that his or her same-sex partner has already adopted.[52]

One member of the state legislature has repeatedly tried to prevent adoption by same-sex couples, invoking the "myth that they are more likely to molest children."[53] Thus far, he has been unsuccessful.

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[44]Tribune Wires, *Legislator Opposes IU Office for Gays*, CHICAGO TRIBUNE, Oct. 7, 1994, at 3; Tribune Wires, *Student Groups Oppose Funds for Gay's Office*, CHICAGO TRIBUNE, Sept. 22, 1994.
[45]*Id.*
[46] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 62 (1997 ed.).
[47]Ind. Code Ann § 16-36-1-5 (2004).
[48]Ind. Code Ann § 16-36-4-10 (2004).
[49]Ind. Code Ann § 31-19-2-3 (2004).
[50]*In re K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004).
[51]*In re Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006).
[52]*See In re M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003).
[53] Steve Sanders, *Hate Speech Can Stir Up Hateful Acts*, BALTIMORE SUN, Oct. 18, 1998 at 1C.

In custody disputes, Indiana courts do not typically consider the sexual orientation of a parent, unless it is actually shown to adversely harm the child. For instance, in *Downey v. Muffley*, the Court of Appeals held that there was no rational basis for prohibiting a mother from cohabitating with her same-sex partner while living with her children.[54] The court specifically stated that "[w]ithout evidence of behavior having an adverse effect upon the children, we find the trial court had no basis upon which to condition Mother's custody of her sons. We therefore find the trial court abused its discretion, and reverse that portion of the custody order which imposes conditions upon the award of custody to Mother. … Visitation and custody determinations must be determined with respect to the best interests of the children, not the sexual preferences of the parents."[55]

However, in *Marlow v. Marlow*, a father was granted visitation only under the condition that during periods of overnight visitation he could not have any non-related person in the house overnight and that he could not include the children in "any social, religious, or educational functions sponsored by or which otherwise promote the homosexual lifestyle."[56] This holding was distinguished by *Muffley*, which justified *Marlow's* holding with the argument that restricting the father's activities was acceptable because there was documented adverse emotional harm his children suffered through being exposed to their father's sexuality.[57]

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Indiana law defines marriage as the union of a man and a woman.[58]

H. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

1. Legal Profession

Through the beginning of 2009, the official Commentary to Canon 3 of the Code of Judicial Conduct required that "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors, and shall not permit staff, court officials and others subject to the judges discretion to do so."[59] Effective January 1, 2009, Canon 3 was updated, and now more specifically prohibits a judge from discriminatory action toward someone based on their sexual orientation,[60] or holding membership in an organization that discriminates on the

[54] *Downey v. Muffley*, 767 N.E.2d 1014 (Ind. Ct. Ap.. 2002).
[55] *Id.* at 1018, 1020.
[56] *Marlow v. Marlow*, 702 N.E.2d 733, 735 (Ind. Ct. App. 1998).
[57] *Muffley*, 767 N.E.2d at 1019.
[58] Ind. Code Ann § 31-11-1-1.
[59] IND. CODE OF JUD. CONDUCT, Canon 3 (Commentary) (effective Jan. 1, 2009).
[60] IND. CODE OF JUD. CONDUCT, Canon 3 (Commentary to Rule 3.1) (effective Jan. 1, 2009).

basis of sexual orientation.[61] It is also misconduct, under the Indiana Rules of Professional Conduct, for a lawyer to engage in conduct that manifests bias or prejudice based upon sexual orientation.[62]

2. Insurance

In the insurance context, the Indiana Administrative Code prevents Multiple Employer Welfare Arrangement insurers from asking an individual about their sexual orientation when making a decision on whether to grant an individual coverage, and also prohibits viatical settlement providers from making settlements based on sexual orientation.[63] Furthermore, some insurers are prevented from using an individual's marital status, living arrangements, medical history, or any other classification to determine an applicant's sexual orientation, and also may not use an outside agency to do so.[64] For example, sexual orientation may not be used (or investigated by an insurer or insurance support organization) in the underwriting process or when determining coverage for AIDS.[65]

[61] IND. CODE OF JUD. CONDUCT, Canon 3 (Rule 3.6) (effective Jan. 1, 2009).
[62] IND. RULES OF PROF'L CONDUCT, Rule 8.4: Misconduct (2003).
[63] 760 Ind. Admin. Code § 1-68-5 (Applications); § 1-61-10 (Misc.).
[64] *See* 760 Ind. Admin Code § 1-68-5 (Applications).
[65] 760 Ind. Admin. Code § 1-39-6 (Underwriting & Rating Determinations).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Iowa – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Iowa amended its civil rights statute in 2007 to prohibit discrimination on the basis of sexual orientation and gender identity in employment, housing, public accommodations, education, and in obtaining credit. Proponents of the amendment had been trying to include these protections in the statute since the late-1980s. Research uncovered examples of public entities discriminating against LGBT persons in the employment context within the last 20 years.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Iowa include:

- A veteran of the Iowa National Guard who was fired by an Iowa state university in 2002 after she informed her superiors that she was a transitioning.[1] Her supervisor, a surgeon for whom she conducted research, stopped coming to the lab after she told him about her plan to transition department administrator told her that her condition was such that they didn't feel that she "could give sufficient effort to the department."[2] She was fired on the spot.[3] Although she reported the firing to the university's affirmative action office, it did not order that she be reinstated and instead only suggested that she seek employment in a different department of the university.[4] After her efforts to do so failed, she ultimately left Iowa altogether.[5]

- An employee of a state-operated casino in Council Bluffs whose employers did not take appropriate action to stem rumors that she was a lesbian, subjected her to harassment and emotional distress, and ultimately retaliated against her for

[1] DEBORAH J. VAGINS, WORKING IN THE SHADOWS 19 (2007); *see also* HEARING BEFORE THE S. COMM. ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS, 110th Cong. (2008) (statement of Shannon Miller, Legal Director for the Nat. Center for Lesbian Rights).
[2] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[3] *Id.*
[4] DEBORAH J. VAGINS, WORKING IN THE SHADOWS 19 (2007); *see also* HEARING BEFORE THE S. COMM. ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS, 110th Cong. (2008) (statement of Shannon Miller, Legal Director for the Nat. Center for Lesbian Rights).
[5] *Id.*

complaining by denying her a promotion.[6] In 2000, she was awarded $54,493 by a federal district court jury

- A worker at a tax-supported nursing home in Davenport who was fired in 1996 because his employer wanted to "weed[] out employees who lack good moral character," including gay men and lesbians who he said were "not part of the Bible" and "not part of society." In an interview, the nursing home administrator commented, "When I first came here, there [were] probably at least three, excuse my French, faggots working here, and I had at least three dykes working here . . . . This isn't the kind of atmosphere that I want to project when a client or family member comes to my nurses' station and sees a 45-year-old-faggot that has got better skin than you and I, and is a man but presents itself more like a woman. This is no way to perceive my operation."[7] The state of Iowa did not take any action against the nursing home for this action.[8]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[6] *Montagne v. Iowa (D. Iowa*, Oct. 25, 2000).
[7] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 64-65 (1997 ed.).
[8] *See* Cedar Rapids Gay & Lesbian Resource Center, http://www.crglrc.org/aboutus.php (last visited Sept. 4, 2009).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

On July 1, 2007, Iowa amended its Civil Rights Act (hereinafter the "ICRA") to prohibit the discrimination of people on the basis of sexual orientation and gender identity in employment, housing, public accommodations, education, and in obtaining credit.[9] The statute defines "sexual orientation" as "actual or perceived heterosexuality, homosexuality, or bisexuality."[10] It defines "gender identity" as "a gender-related identity of a person, regardless of the person's assigned sex at birth."[11] The statute applies to both private and public parties.[12] However, the ICRA does have a small business exemption, housing exemption, and religious exemption.[13] Employers are expected to protect their employees not only from harassment by supervisors and coworkers, but also from third parties such as service users and vendors.[14] According to the Iowa Civil Rights Commission, examples of unlawful discrimination include malicious conduct, sexual advances, and the intentional misuse of gender specific pronouns.[15]

The legislative record on the 2007 amendment is limited.[16] However, proponents of the 2007 amendments conducted extensive research prior to bringing the bill before the state legislature.[17] State Rep. Beth Wessel-Kroeschell and former State Senator, and now Iowa Civil Rights Commissioner, Ralph Rosenberg generously shared their research with this project.

Based on an analysis of similarly situated states, proponents of the 2007 amendments estimated that the Iowa Civil Rights Commission would receive between 34 to 40 cases a year alleging unlawful discrimination based on sexual orientation and/or gender identity.[18] Proponents of the 2007 amendments also planned to highlight the fact that up to 40 percent of gay and lesbian Americans reported facing hostility or harassment in their workplaces on account of their sexual orientation.[19] In addition,

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[9] *See*, *generally*, Iowa Code § 216. The ICRA also prohibits discrimination in these contexts based on a person's HIV status. *See* Iowa Code § 216.2(5).
[10] Iowa Code § 216.2(14).
[11] Iowa Code § 216.2(10).
[12] Iowa Code § 216.2(12).
[13] The statute does not apply to businesses that employ fewer than four unrelated individuals, businesses that operate in the owner's home while the owner and his family reside at the home, to the employment of individuals to provide personal services to the employer or the employer's family, to religious organizations to the extent application to those organizations would wrongfully infringe upon their free exercise rights, or leasing residential property in buildings of six rooms or less when the leasor lives on the premises. *See* Iowa Code §§ 216.6(6); 216.7(2); 216.12.
[14] IOWA CIVIL RTS. COMM'N SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYER'S GUIDE BROCHURE.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] RALPH ROSENBERG, SURVEY OF STATES SUMMARY (2006).
[19] FAIRNESS FOR ALL FACT SHEET (2007).

proponents also had empirical evidence that up to 10 percent of all gay and lesbian Americans have been fired on account of their sexual orientation.[20]

The Iowa Civil Rights Commission, in its statement of 2007 priorities, supported the proposed amendment (through Iowa Act 2007 (82nd Gen. Ass.) ch. 191, S.F. 427 § 1) to Iowa Code § 216, and stated:

> "We no longer wish to see our children, neighbors, co-workers, nieces, nephews, parishioners, or classmates leave Iowa so they can work, prosper, live or go out to eat. Our friends who are gay or lesbian know the fear and pain of hurtful remarks, harassment, attacks, and loss of jobs or housing simply because of their sexual orientation or gender identity."[21]

2. **Enforcement & Remedies**

In order for a person to make a claim under this act, she or he must file a claim with Iowa's Civil Rights Commission within 300 days of the alleged discriminatory act.[22] If the alleged unlawful discriminatory conduct is continuous, then the day of occurrence will be considered to be any date from the time the conduct began to the date it ended.[23] From the time the Commission receives the complaint to the time when an administrative law judge working with the Commission decides whether probable cause exists to believe the alleged conduct took place, the Commission is a neutral fact-finder.[24] If the administrative judge does find probable cause, then the Commission becomes an advocate for the people of Iowa and attempts to negotiate a settlement between the parties with an eye towards ending and mending the harm caused by the unlawful discrimination.[25]

Once a complaint under this statute has been filed, the complainant can request a "right-to-sue" letter from the Commission and file the claim on his/her own behalf in state district court.[26] If a complainant's request is granted, then the Commission closes the complaint and will take no further action on it.[27] A complainant that obtains a "right-to-sue" letter from the Commission has 90 days to bring the cause of action in state court from the date the letter is issued.[28]

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[20] *Id*.
[21] IOWA CIVIL RTS. COMN'N, POLICY STATEMENTS, http://www.iowa.gov/government/crc/publications/index.html (last visited Sept. 4, 2009).
[22] Iowa Code §§ 216.15(12); 216.16(1).
[23] Iowa Admin. Code R. 161-3.3(2).
[24] *See* IOWA CIVIL RIGHTS COMMISSION, HOW TO FILE A COMPLAINT, http://www.iowa.gov/government/crc/file_complaint/neutral.html (last visited Sept. 4, 2009).
[25] *Id*.
[26] Iowa Code § 216.16.
[27] *Id*.; *see also* IOWA CIVIL RIGHTS COMMISSION, HOW TO FILE A COMPLAINT, http://www.iowa.gov/government/crc/file_complaint/neutral.html (last visited Sept. 4, 2009).
[28] Iowa Code § 216.16(3).

Claims made under the ICRA follow the *McDonnell-Douglas* burden-shifting scheme whereby: (1) a plaintiff must establish a prima facie case that the plaintiff was discriminated against by the defendant because of a real or perceived characteristic of the plaintiff's that is protected by under the Iowa Civil Rights Act; (2) if a plaintiff makes this showing, the burden shifts onto the defendant to put forward a legitimate, nondiscriminatory reason for the defendant's action(s) vis-à-vis the plaintiff; and (3) if the defendant makes this showing, then the plaintiff must prove by a preponderance of the evidence that the defendant's articulated nondiscriminatory reason is just a pretext.[29]

If the plaintiff wins a claim under the ICRA, s/he may be entitled to: (1) being hired, reinstated, or promoted with or without pay; (2) admitted or reinstated in a labor organization or work-training program; (3) admitted into a public accommodation or an educational institution; (4) the sale, exchange, lease, rental, assignment, or sublease of real property; and (5) damages caused by the unlawful discrimination, including court costs and reasonable attorney fees.[30] With respect to damages, a plaintiff can obtain damages for emotional distress, but punitive damages are not allowed under the Iowa Civil Rights Act.[31]

B. Attempts to Enact State Legislation

Proponents of including sexual orientation and gender identity in the ICRA started their efforts in the late 1980s.[32] However, according to Rep. Beth Wessel-Kroeschell, these efforts failed due to a lack of bipartisan support .[33]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

On September 14, 1999, then Governor Tom Vilsack signed Executive Order No. 7, which explicitly prohibited the discrimination of people on the basis of their sexual orientation or gender identity in state employment.[34] Immediately after the Executive Order was issued, conservative law-makers began a campaign to have the order rescinded. Senate Majority Leader Stewart Iverson said, "Iowa should be on the cutting edge of educating our children, not the cutting edge of extending civil rights to transsexuals."[35] He dismissed the need for employment protections, saying, "I have friends who are homosexual, but they do their job and that isn't the issue. When you talk

[29] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 618 (8th Cir. 1997) (stating that the ICRA uses the *McDonnell-Douglas* burden-shifting framework).
[30] Iowa Code § 216.15(8)(a).
[31] *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536-37 (Iowa 1996).
[32] Clara Hogan, *Iowa Bill Extending Rights in Effect*, DAILY IOWAN, July 3, 2007.
[33] Telephone Interview by Latham & Watkins LLP with Rep. Beth Wessel-Kroeschell (Dec. 8 ,2008).
[34] *See* Lambda Legal Iowa, http://www.lambdalegal.org/our-work/states/iowa.html (last visited Sept. 4, 2009).
[35] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 184-185 (2000 ed.).

about gender identity and transsexuals, that is unbelievable…how far do you go in setting up special classes of people?"[36] Approximately one year after its issue, Gov. Vilsack was forced to rescind the Executive Order after a state judge ruled it constituted unconstitutional law-making in light of the fact that the ICRA did not at that time prohibit discrimination based on a person's sexual orientation or gender identity.[37]

2. State Government Personnel Regulations

As noted above, Iowa's Civil Rights Act extends to public entities as well as private entities.[38]

3. Attorney General Opinions

A comprehensive database of Attorney General Opinions is expected to be posted on the Columbia Law School Sexuality and Gender Clinic website. At this time, however, the database has not been posted.

D. Local Legislation

In addition to the ICRA, several cities and local political entities in Iowa have ordinances that protect against discrimination based on a person's sexual orientation or gender identity.[39]

1. City of Ames

Ames has a local ordinance that explicitly mentions sexual orientation, enacted on May 28, 2001.

2. City of Bettendorf

Bettendorf has a local ordinance that explicitly mentions sexual orientation, enacted on April 5, 2005.

3. City of Cedar Falls

Cedar Falls has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted on July 7, 2008.

4. City of Cedar Rapids

Cedar Rapids has a local ordinance that explicitly mentions sexual orientation, enacted in 1999. Twenty-two complaints have been filed under this ordinance.

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[36] *Id*.
[37] Darwin Danielson, *Judge Shoots Down Governor's Executive Order on Gays*, RADIO IOWA, Dec. 8, 2000.
[38] *See*, *supra*, Sec. II.A.1.
[39] *See* Spreadsheet of Local Commission Complaints Received (rev. Feb. 12, 2007) http://www.state.ia.us/government/crc/statutes/index.html (last visited Sept. 4, 2009).

5. **City of Coralville**

Coralville has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted November 13, 2007.

6. **City of Council Bluffs**

Council Bluffs has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted March 24, 2008.

7. **City of Davenport**

Davenport has local ordinances that explicitly prohibit discrimination on the basis of both sexual orientation and gender identity, protecting sexual orientation as of March 1, 2000, and gender identity as of September 23, 2008. Forty-nine complaints have been filed under these ordinances.

8. **City of Decorah**

Decorah has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted November 17, 2005.

9. **City of Des Moines**

Des Moines has a local ordinance that explicitly mentions sexual orientation, enacted July 9, 2001.

10. **City of Dubuque**

Dubuque has a local ordinance that explicitly mentions both sexual orientation and gender identity, protecting sexual orientation as of February 10, 2006, and gender identity as of December 8, 2007.

11. **City of Fort Dodge**

Fort Dodge has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted July 20, 2007.

12. **City of Grinnell**

Grinnell has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted October 15, 2007.

13. **Iowa City**

Iowa City has local ordinances that explicitly prohibit discrimination on the bases of both sexual orientation and gender identity. Sexual orientation has been protected since 1977, and gender identity has been protected since 1995. Thirty-five complaints have been filed under these ordinances.

14. **Johnson County**

Johnson County has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted December 28, 2006.

15. **Ottumwa City**

Ottumwa City has a local ordinance that explicitly mentions sexual orientation, enacted April 15, 2008.

16. **Urbandale City**

Urbandale City has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted March 25, 2008.

17. City of **Waterloo**

Waterloo has a local ordinance that explicitly mentions both sexual orientation and gender identity, enacted November 13, 2007.

E. Occupational Licensing Requirements

Iowa has licensing requirements for 39 different professions.[40] The licensing requirements and the regulations allowing for sanction of professionals within these professions did not explicitly raise issues of sexual orientation or gender identity discrimination.

[40] *See* Iowa Dep't of Pub. Health, Bureau of Prof'l Licensure, http://www.idph.state.ia.us/licensure (last visited Sept. 4, 2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

2. Private Employers

B. Administrative Complaints

As noted above, in order for a party to bring a claim under the ICRA, s/he must first file it with the Iowa Civil Rights Commission. *See, supra*, Sec. II.A. Since the ICRA went into effect in July 1, 2007 to Oct. 1, 2008, eighteen sexual orientation and six gender identity cases have been filed with the Iowa Civil Rights Commission.[41]

The Commission has not taken any of these cases to a public hearing at this time.[42] Moreover, the Commission refused to provide any details of these cases beyond what is provided in the sources on the Commission's website.[43] However, in the event the Commission does take such a case to a public hearing, the details of that case will become publicly available.[44]

The number of cases filed is in line with what Commissioner Rosenberg estimated would be prior to the 2007 amendment.[45] Mr. Rosenberg stated that based on analysis comparing similarly situated states with similar civil rights statutes, that about 1 to 3 percent of the Iowa Civil Rights Commission's caseload would involve claims of unlawful sexual orientation or gender identity discrimination.[46] As such, because the commission receives approximately 2,000 cases a year, Mr. Rosenberg estimated that the commission could expect between 20 to 60 cases annually.[47] In addition, although Mr. Rosenberg stated he did not have exact numbers, he estimated that up to 20 percent of the commission's caseload involves complaints against public entities, and that he thought claims alleging unlawful sexual orientation or gender identity discrimination would have a similar percentage brought against public entities.[48]

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[41] IOWA CIVIL RTS. COMM'N ANNUAL REP. 5-6 (2008).
[42] Telephone Interview by Latham & Watkins LLP with Admin. L. Judge Mary Cowdrey, (Dec. 12, 2008).
[43] *Id.*
[44] *Id.*
[45] Telephone Interview by Latham & Watkins LLP with Civil Rights Comm'r Ralph Rosenberg, (Dec. 12, 2008).
[46] *Id.*
[47] *Id.*
[48] *Id.* This opinion was based on the fact that all of the protected classes in the ICRA tend to have roughly the same ratio of cases brought against private and public entities.

C. **Other Documented Examples of Discrimination**

An Iowa State University

In 2002, a state university fired Kathleen Culhane, a veteran of the Iowa National Guard, after she informed her superiors that she was a transsexual and was transitioning from male to female.[49] Kathleen reported the firing to the university's affirmative action office, but the office did not order the department she had been working in to reinstate her and instead only suggested that Kathleen seek employment in a different department within the university.[50] After Kathleen's efforts to find employment in a different department failed, she ultimately left the state of Iowa altogether.[51]

State-Operated Casino

In 2000, a federal district court jury in Iowa awarded $54,493 in damages to Jacqueline M. Montagne, an employee at the state-operated Ameristar Casino in Council Bluffs, who sued the state on a claim that state officials had failed to take appropriate action to stem rumors that Montagne was a lesbian. Montagne claimed harassment and infliction of emotional distress, and included a claim that employers had retaliated against her for complaining, thereby losing Montagne a promotion.[52]

Tax-Supported Nursing Home

A tax-supported nursing home in Davenport fired a gay worker in 1996 for the stated purpose of "weeding out employees who lack good moral character," including gay men and lesbians who he said were "not part of the Bible" and "not part of society." In an interview, the administrator commented, "When I first came here, there [were] probably at least three, excuse my French, faggots working here, and I had at least three dykes working here . . . . This isn't the kind of atmosphere that I want to project when a client or family member comes to my nurses' station and sees a 45-year-old-faggot that has got better skin than you and I, and is a man but presents itself more like a woman. This is no way to perceive my operation."[53] The state of Iowa did not take any action against the nursing home for this action.[54]

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[49] DEBORAH J. VAGINS, WORKING IN THE SHADOWS 19 (2007); *see also* HEARING BEFORE THE S. COMM. ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS, 110th Cong. (2008) (statement of Shannon Miller, Legal Director for the Nat. Center for Lesbian Rights).
[50] *Id*.
[51] *Id*.
[52] *Montagne v. Iowa (D. Iowa*, Oct. 25, 2000).
[53] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 64-65 (1997 ed.).
[54] *See* Cedar Rapids Gay & Lesbian Resource Center, http://www.crglrc.org/aboutus.php (last visited Sept. 4, 2009).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Housing & Public Accommodations Discrimination

As noted above, the ICRA also prohibits the discrimination of people on the basis of sexual orientation and gender identity in housing, public accommodations and in obtaining credit.[55]

B. Education

As noted above, the ICRA also prohibits the discrimination of people on the basis of sexual orientation and gender identity in education.[56]

In 2004, an unnamed high school student sued his school district, the district's superintendent, his high school principal and vice-principal, a police officer assigned to his high school, and his hometown city of Perry in the hope that he could enjoin these parties from taking adverse action against him in his plans to protest the discrimination and threats he had suffered on account of his perceived homosexuality.[57] The student brought this action after alleged rampant and severe verbal and physical harassment during his time as a student as the high school, as well as numerous alleged incidents of vandalism against his personal property.[58] The student sought the injunction under the First Amendment, the Equal Protection clause, and Title IX.[59] The district court rejected plaintiff's request because it found plaintiff did not establish the requisite likelihood of success on the merits.[60] Aside from the district court's order denying the preliminary injunction, the action did not have any other relevant case history.

C. Parenting

Family courts in Iowa generally do not find a person's sexual orientation a material factor in family law cases.[61]

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[55] *See, generally*, Iowa Code § 216.
[56] *See, generally*, Iowa Code § 216.
[57] *See Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *See, e.g., In re Marriage of Walsh*, 451 N.W.2d 492 (Iowa 1990) (Iowa Supreme Court held that a father's visitation rights to see his children should not be limited in anyway because he is gay); *In re Marriage of Cupples*, 531 N.W.2d (Iowa App. 1995) (finding that the "district court properly saw Kelly's sexual orientation as a nonissue" in its custody decision).

D. **Recognition of Same-Sex Couples**

The Supreme Court of Iowa ruled that the exclusion of same-sex couples from marriage was unconstitutional under the state's constitution. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Kansas – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Currently, there is no state law in Kansas that prohibits employment discrimination based upon sexual orientation and gender identity.[1]

Attempts to pass such protection have failed. For example, in 2005, a proposed amendment to add sexual orientation to the Kansas Act Against Discrimination was introduced in the Committee on Federal and State Affairs; the amendment failed.[2] During a hearing on S.B. 285, an opponent stated that "homosexuals want SB 285 as government validation of their sins and to intimidate employers, landlords and the populace." Other opponents stated "homosexuality is an atrocious sin, along with the acceptance of it," asserting that homosexuals have vastly more sexually transmitted diseases, have lower life expectancy, and have a greater tendency to commit suicide and abuse drugs. Another opponent argued that homosexuals account for 20-33% of pedophiles.[3] In January 2009, a bill that would add both "sexual orientation" and "gender identity" to Kansas's Act Against Discrimination[4] was presented in the Senate Federal and State Affairs Committee. [5]

In 2007, Governor Kathleen Sebelius signed an executive order requiring state entities to implement programs to avoid discrimination on the basis of sexual orientation.[6] Additionally, a few localities—Lawrence, Topeka, and Shawnee County—have passed ordinances prohibiting employment discrimination based on sexual orientation by public entities. In 2005, the Topeka ordinance was challenged by an initiative that would have overturned it and prevented the city from passing any laws protecting LGBT public employees from discrimination. The City Council of Topeka voted unanimously for the measure to overturn the anti-discrimination protection, but it was then defeated by the voters.[7]

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[1] Kan. Stat. Ann. § 44-1001 (2007).

[2] Telephone Interview of Kim Horp, Reference Librarian, State Library of Kan. (Jan. 23, 2009) (hereinafter "Telephone Interview").

[3] Minutes, Kan. Sen. Fed. & State Affairs Comm. (Mar. 15, 2005), at 5, *available at* http://bitly/12Kx95 (last visited Sept. 6, 2009).

[4] Scott Rothschild, *Bill Would Include Sexual Orientation and Gender Identity in State Anti-Discrimination Laws.*, LAWRENCE J.WORLD, Jan. 29, 2009, *available at* http://bit.ly/zNh3w (last visited Sept. 6, 2009).

[5] *Id.*; SB 169 (Kan. 2009), *available at* http://www.kslegislature.org/bills/2010/169.pdf.

[6] Exec. Order No. 07-24 (2007), *available at* http://www.governor.ks.gov/executive/Orders/default.htm.

[7] Associated Press, Town Votes to Keep Antidiscrimination Law, Deseret News, Mar. 3, 2005, *available at* http://bit.ly/H30n4.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity in Kansas include:

- In 2004, a Topeka resident and employee of a state agency reported that when a newly appointed supervisor arrived in the office, he harassed the employee until he took a job with another state agency. Prior to the new supervisor's arrival, the employee had received three "Outstanding" employee evaluations, but the new supervisor constantly criticized his work. The employee then found the state discrimination office to be unreceptive to his complaint.[8]

- In 2003, the day after the Supreme Court issued the Lawrence v. Texas decision, members of the Topeka and Shawnee County public library staff ordered an employee who had been a longtime member of Parents, Families, and Friends of Lesbians and Gays to never again speak about the decision at work. In response to a letter from the ACLU, the library admitted that it cannot forbid one of its employees from talking about a Supreme Court decision while at work, and assured the ACLU that it would not restrict employees in that way.[9]

- In 1996 in *Miller v. Brungardt*, a school counselor, brought suit against the school district, her school's superintendent, and its vice principal after the latter allegedly made sexually inappropriate comments that included accusing her "of engaging in a lesbian relationship" with a student's mother and other "sexually explicit comments concerning lesbian behavior." When the counselor reported the vice principal's actions to the school superintendent, she was reprimanded, and the superintendent failed to take remedial action. In addressing whether, when suing individual employees of a municipality (such as the school district) under the Kansas Tort Claims Act, the plaintiff must give them notice of suit prior to its commencement, the court found that notice must be provided to municipal employees only when "the employee's actions occurred within the scope of employment." Taking plaintiff's allegations as true for the purposes of the motion, the court found that the vice-principal's harassment, characterized by school counselor as "threatening, intimidating and abusive," fell outside the scope of the vice-principal's employment. "`[S]exual harassment . . . is not within the job description of any supervisor or any other worker in any reputable business.'"[10] Miller v. Brungardt, 916 F.Supp. 1096 (D. Kan. 1996).

- In 1995, an employee of the Kansas Air National Guard was harassed because she was perceived to be a lesbian. The first sixteen months of her employment passed without incident. Then her superiors and co-workers began harassing her. Her supervisor told her that "some people were wondering" about her sexual

[8] RODDRICK COLVIN, THE EXTENT OF SEXUAL ORIENTATION DISCRIMINATION IN TOPEKA, KS 3 (2004), available at http://www.thetaskforce.org/downloads/reports/reports/TopekaDiscrimination.pdf (crediting the statement to "a gay Topeka resident").
[9] Press Release, ACLU, Kansas Public Library Concedes That it Can't Censor Employee for Discussing Historic Sodomy Ruling (Aug. 5, 2003), *available at* http://bit.ly/Kt0QP.
[10] *Miller v. Brungardt*, 916 F.Supp. 1096 (D. Kan. 1996).

orientation," to which she responded, "No problem. Like Men." On another occasion, she alleged her co-worker was touching his genitals while he was looking at her. In another instance, she accidently brushed up against a co-worker while getting a cup of coffee, to which the co-worker responded, "Don't rub up against me. You're not going to come out of the closet that way." Finally, she alleged her supervisor stated, "I would like to see what you would do if O.J. Simpson asked you out on a date," to which she replied, "Well, he's not my type." Then the supervisor laughed and said, "You mean your type or your gender?" Later that day, the supervisor apologized for his comment.[11] In 1998, the court concluded that she had not stated a *prima facie* case of hostile work environment sexual harassment. Thus, the defendant's motion for summary judgment was granted. Wible v. Widnall, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998).

- In 1991, in *Jantz v. Muci*,[12] a federal discrict court in Kansas found that a Kansas school teacher did have an equal protection claim actionable under 42 U.S.C. § 1983[13] because he had been denied a teaching position because of a principal's perception that he had "homosexual tendencies."[14] The court further held that the principal was not entitled to a qualified immunity defense[15] and denied his motion for summary judgment. The Tenth Circuit reversed, finding that the principal was entitled to qualified immunity.[16] Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991); Jantz v. Muci 976 F.2d 623 (10th Cir. 1992).

- In 1987, in *In re Smith,*[17] the Supreme Court of Kansas disbarred an attorney, in part, because he had a misdemeanor conviction for consensual sodomy with an adult. In 2003, the United States Supreme Court held that it had been wrong in 1986 when it had decided, in *Bowers v. Hardwick*, that sodomy laws did not violate the due process clause of the U.S. Constitution. In re Smith, 757 P.2d 324 (Kan. 1988).

- In 1987, a road patrol deputy for the Saline County Sheriff's Department was fired after rumors circulated that she was a lesbian and involved in a relationship with another employee. The deputy sued, alleging violation of her First Amendment right of association. The court held that the Sheriff's Department had not infringedthe Plaintiff's right of association when it discharged her. The court noted that "defendants acted to protect the public image of the Department and to maintain close working relationships internally and externally with the community. These are legitimate concerns and they provide sufficient justification

[11] *Wible v. Widnall*, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998)
[12] 759 F. Supp. 1543 (D. Kan. 1991).
[13] *Id*.
[14] *Id*. at 1545.
[15] *Id*. at 1552.
[16] 976 F.2d 623 (10th Cir. 1992). For a recitation of the relevant facts, see the summary of *Jantz v. Muci*, 759 F. Supp. 1543, 1543 (D. Kan. 1991).
[17] 757 P.2d 324 (Kan. 1988).

for the action taken against the plaintiff."[18] Endsley v. Naes, 673 F. Supp. 1032 (D. Kan. 1987).

Another case in Kansas also shows the difficulty that LGBT people face in public employment. In 1995, in *Case v. Unified School District,*[19] a federal district court held that a Kansas School board had improperly removed a book from a junior and high school library because of their disapproval of the ideas in the book, thus violating the first amendment and due process rights of students and their parents. In reaching this finding, the court review the reasons that board members gave for removing the book. One board member, who voted to remove the book, stated that "homosexuality is a mental disorder similar to schizophrenia or depression."[20] Another testified that it is not okay to be gay "[b]ecause engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems."[21] Another testified that homosexuality was "unnatural" and the only books about homosexuality that she would find educationally suitable would be ones that say homosexuality is unhealthy.[22]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[18] *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 1987).
[19] 908 F. Supp. 864 (D. Kan. 1995).
[20] *Id.*
[21] *Id.* at 871.
[22] *Id.*

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Kansas has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[23]

B. Attempts to Enact State Legislation

On January 29, 2009, SB 169 was presented in the Senate Federal and State Affairs Committee.[24] This bill would amend the Kansas Act Against Discrimination to include "sexual orientation or gender identity."[25] The bill was formally introduced to the Senate by the Federal and State Affairs Committee on February 2, 2009.[26] The Senate then referred the bill back to the Senate Committee for hearings.[27] The Senate Committee conducted a hearing regarding SB 169 on February 12, 2009.[28] It passed the bill on March 19, 2009, but the Senate referred it back to the same Senate Committee on March 23, 2009.[29]

At the February 12, 2009 hearing on SB 169, Maggie Childs, Chair of the Kansas Equality Coalition, presented a policy brief, entitled "The Extent of Sexual Orientation Discrimination in Topeka, KS,"[30] to the Senate Federal and State Affairs Committee.[31] The brief reported the results of a survey conducted from October of 2003 through January of 2004. One hundred twenty one (121) gay, lesbian, and bisexual residents of Topeka participated in the survey. The results suggest a history of discrimination based on sexual orientation or gender identity in Topeka, including:

1. 16% of respondents reporting that they were denied employment;
2. 11% reporting that they were denied a promotion;
3. 18% reporting that they were overlooked for additional responsibilities at work;
4. 15% reporting that they were fired; and
5. 35% reporting that they had received harassing letters, e-mails, or faxes at work that were

"all based on the respondent's sexual orientation or gender identity.[32] Furthermore, 47% of respondents reported that

[23] KAN. STAT. ANN. § 44-1001 (2007).
[24] Rothschild, *supra* note 4.
[25] S.B. 169 (Kan. 2009).
[26] Kansas Legislature Bill Tracking, http://bit.ly/13MnRN (last visited Feb. 4, 2009).
[27] *Id.*
[28] Minutes, Kan. Sen. Affairs Comm. (Feb. 12, 2009) (hereinafter "Minutes").
[29] Kansas Legislature Bill Tracking, *available at* http://www.kslegislature.org/legsrv-billtrack/searchBills.do (last visited Jul. 14, 2009).
[30] Colvin, *supra* note 8, at 2.
[31] Minutes, *supra* note 28.
[32] Colvin, *supra* note 8.

> they had to conceal their sexual orientation or gender identity to protect their jobs. The report concluded, and 89% of respondents agreed, that a comprehensive nondiscrimination law that includes sexual orientation and gender identity could help to alleviate the pervasive discrimination in employment."

On March 2, 2005, during the 2005 Kansas Legislative Session, Senate Bill 285 ("SB 285") was introduced in the Committee on Federal and State Affairs.[33] This bill would have amended the Kansas Act Against Discrimination to include "sexual orientation."[34] In particular, the proposed language stated:

> "The practice or policy of discrimination against individuals in employment relations, in relation to free and public accommodations in housing by reason of race, religion, color, sex, disability, national origin, or ancestry or sexual orientation or in housing by reason of familial status is a matter of public concern to the state since such discrimination threatens not only the rights and privileges of the inhabitants of the state of Kansas but menaces the institutions and foundations of a free democratic state. It is hereby declared to be the policy of the state of Kansas to eliminate and prevent discrimination in all employment relations, discrimination, segregation, or separation in all places of public accommodations covered by this act, and to eliminate and prevent discrimination, segregation or separation in housing. It is also declared to be the policy of this state to assure equal opportunities and encouragement to every citizen regardless of race, religions, color, sex, disability, national origin or, ancestry or sexual orientation, in securing and holding, without discrimination, employment in any filed of work or labor for which a person is properly qualified, to assure equal opportunities for all persons within this state to full and equal public accommodations, and to assure equal opportunities in housing without distinction on account of race, religion, color, sex, disability, familial status, national origin, or ancestry or sexual orientation…."[35]

[33] Telephone Interview, *supra* note 2.
[34] Kan. S.B. 285 (Kan. 2005).
[35] *Id.*

SB 285 defined "sexual orientation" as "actual or perceived heterosexuality, homosexuality or bisexuality."[36] The bill would have allowed those facing discrimination to file a complaint with the Kansas Human Rights Commission.[37]

On March 15, 2005, the Senate Committee on Federal and State Affairs held a hearing regarding SB 285. The bill's co-sponsor, Jim Yonally, pointed out that SB 285 would not give a preferred status to people based on their sexual orientation, but would instead give the group protection from discrimination, just as the Kansas Act Against Discrimination already did for other groups.[38]

Approximately ten people spoke in favor of the measure at the Senate Committee hearing, including Steve Brown, President of the Gay, Lesbian, Bisexual, and Transgendered Caucus, who argued that in order for Kansas to attract talented workers, it would have to show that it does not allow discrimination on the basis of sexual orientation.[39] Opposing the Kansas bill prohibiting employment discrimination on the basis of sexual orientation were several members of the Westboro Baptist Church. One opponent stated "homosexuals want SB 285 as government validation of their sins and to intimidate employers, landlords and the populace." Other representatives of the Church stated "homosexuality is an atrocious sin, along with the acceptance of it," asserting the following "dangers" of homosexuality: 1) homosexuals have vastly more sexually transmitted diseases; 2) have lower life expectancy; and 3) have a greater tendency to commit suicide and abuse drugs. Another Westboro representative drew attention to claims that homosexuals make up 1 to 3% of the population, but account for 20-33% of pedophiles.[40] SB 285 died in Committee, likely because it was introduced toward the end of the 2005 legislative session.[41]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

On August 31, 2007, Governor Kathleen Sebelius issued an Executive Order prohibiting discrimination and harassment in state employment on account of "race, color, gender, sexual orientation, gender identity, religion, national origin, ancestry, age, military or veteran status, or disability status."[42] In the order, Governor Sebelius noted that the policy "places the State of Kansas in line with approximately 90% of Fortune 500 companies that have implemented similar diversity policies."[43] The policy applies to all state employees under the Governor's jurisdiction. The Office of the Governor of Kansas

[36] *Id.*
[37] Minutes, Kan. Senate Fed. & State Affairs Comm. Minutes (Mar. 15, 2005), at 2, *available at* http://bit.ly/12Kx95 (last visited Sept. 6, 2009).
[38] *Id.*
[39] *Id.* at 2-3.
[40] *Id.* at 4.
[41] Telephone Interview, *supra* note 2.
[42] Kan. Exec. Order No. 07-24 (2007).
[43] *Id.*

issued a press release on August 31, 2007 regarding Executive Order No. 07-24. The release, entitled "Executive Order embraces diversity, prevents discrimination," quoted Governor Kathleen Sebelius' as saying: "…like any successful business, we need to make sure all our employees are treated with dignity and respect, and that the doors of employment are open to all."[44]

2. State Government Personnel Regulations

The Kansas Department of Motor Vehicles has issued regulations that its security clearance requirements "shall not be used to discriminate on the basis of race, color, national origin, religion, sex, disability, age, veteran's status, or sexual orientation."[45]

The University of Kansas has adopted a nondiscrimination policy with respect to university employees that prohibits the university from discriminating on the basis of "sexual orientation, marital status, and parental status" and extends to employment practices, including conditions of employment.[46] Furthermore, the university commits to provide an equal opportunity in employment to all qualified individuals regardless of "sexual orientation, marital status or parental status."[47]

Kansas State University has also adopted a nondiscrimination policy with respect to university employees. The university is "committed to nondiscrimination on the basis of … sexual orientation, gender identity.. or other non-merit reasons" in employment decisions.[48]

D. Local Legislation

1. City of Lawrence

The campaign for gay, lesbian and bisexual equal rights in Lawrence began as early as 1986 when the City Commission refused to recognize Gay and Lesbian Awareness Week.[49] In 1988, following pressure from the group Citizens for Human Rights in Lawrence, the City Commission voted on whether to amend their City Code's anti-discrimination provision to include "sexual orientation." The proposed amendment failed by a vote of 3 to 2.[50] After this defeat, various equal rights groups began an initiative known as "Simply Equal" to rally support for the City Code amendment.[51]

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[44] Press Release, Office of the Governor, Executive Order Embraces Diversity, Prevents Discrimination, (Aug. 31, 2007), *available at* http://bit.ly/3pyWOi.
[45] KAN. ADMIN. REG. § 92-52-15(2008).
[46] UNIV. OF KAN. NON-DISCRIMINATION POLICY (2003), *available at* http://bit.ly/1wSVR1 (last visited Sept. 6, 2009).
[47] *Id.*
[48] Kan. State Univ. Notice of Non-Discrimination (2008), http://bit.ly/E30Va (last visited Sept. 6, 2009).
[49] MARCELO VILELA, CHANGING THE FACE OF LAWRENCE SIMPLY EQUAL FIVE YEARS LATER (Liberty Press 2000) *available at* http://www.libertypress.net/index.php.
[50] *Id.*
[51] *Id.*

In November 1994, the Simply Equal supporters went before the City Commission with their proposal to amend the City Code to include "sexual orientation."[52] Four of the five commissioners were divided, and one vote was undecided.[53] The Commission ordered a "study session" in January 1995, in which each side would present their arguments for 15 minutes.[54] However, the Commission remained undecided even after the January session.[55] Soon after this session, three of the five seats on the Commission were up for re-election, and the Simply Equal initiative became a campaign to elect commissioners who would support their amendment.[56] The group was successful, and on April 25, 1995, immediately following the elections, the City Commission voted 3-2 to approve Ordinance 6658. This effectively added "sexual orientation" to the City Code's anti-discrimination provision and gave the Human Relations Commission the authority to investigate discrimination against homosexuals in housing, employment and public accommodations.[57] The second reading of the ordinance was likewise approved on May 2, 1995.[58]

On May 8, 1995, the ordinance became effective upon its publication in the *Lawrence Journal World.*[59] The Simply Equal initiative was the first to succeed in Kansas, making Lawrence the only city that had prohibited discrimination on the basis of sexual orientation.[60]

2. **City of Topeka**

The issue of discrimination based on sexual orientation and gender identity was first raised in Topeka on July 16, 2002 when the group Concerned Citizens of Topeka approached the City Council.[61] Specifically, the group submitted a report for council review of a Human Relations Commission Ordinance which would include "sexual orientation or gender, identity or expression" as a protected class in the city's policy of discrimination. Following the presentation, the Deputy Mayor referred the proposal to the Committee of the Whole.[62] On November 16, 2004, the Topeka City Council adopted Ordinance 18347, amending Section 86-114 of the Topeka City Code to prohibit discrimination on the basis of sexual orientation by a Topeka official, department head, agent or employee of Topeka.[63]

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[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*; Minutes, Lawrence City Comm'n (Apr. 25, 1995) (on file with Lawrence City Clerk).
[58] Vilela, *supra* note 49; Minutes, Lawrence City Comm'n (May 2, 1995) (on file with Lawrence City Clerk).
[59] Vilela, *supra* note 49.
[60] *Id.* LAWRENCE CODE §10-101 (2008).
[61] Minutes, Topeka City Council (July 16, 2002), http://bit.ly/3Rnrse (last visited Sept. 6, 2009) (hereinafter "Topeka Minutes" ([date])).
[62] *Id.*
[63] TOPEKA ORD. 18347 (2004), *available at* http://bit.ly/Df4sa.

Despite this step forward, Ordinance No. 18380, sponsored by the Westboro Baptist Church, a longtime conservative force in Kansas, was introduced to the City Council on January 18, 2005.[64] Ordinance No. 18380 called for an election to be held on March 1, 2005 to vote on an ordinance that would prohibit the city of Topeka, its Boards and Commissions from enacting, adopting, enforcing or administering any ordinance, regulation, rule or policy that provides homosexual, lesbian, or bisexual orientation or gender identity or expression a protected status or any other preferential treatment.[65] This ordinance would not affect private employers. The City Council unanimously passed and approved Ordinance 18380 on January 25, 2005.[66]

On March 1, 2005, Ordinance 18380 went to the polls and failed, 14,360 no's to 12,880 yes's.[67]

3. **County of Shawnee**

On July 21, 2003, the Shawnee County Commission unanimously passed Shawnee County Resolution 2003-108, which bans discrimination based on sexual orientation in county employment.[68] In response to allegations that the measure was part of a "homosexual agenda," Chairman Vic Miller stated that no one had asked him to introduce the measure, but that he felt it was appropriate given the recent decision of *Lawrence v. Texas*.[69] Prior to the 2003 resolution, the Shawnee County Commission had attempted to pass a similar resolution in 2002. However, that resolution, which would have added gay, lesbian, and transgender to its non-discrimination policy, was rejected in a 5 to 4 vote.[70]

E. **Occupational Licensing Requirements**

A non-comprehensive search of Kansas State occupational licensing boards revealed that there are multiple licensing requirements and/or regulations that reference "moral standards," "moral character", and "good character."[71] The occupations include clinical

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[64] Topeka Minutes (Jan. 25, 2005), *available at* http://bit.ly/OQULi (last visited Sept. 6, 2009).
[65] TOPEKA ORD. 18380 (2005), *available at* http://bit.ly/JsfEf.
[66] *Id.*
[67] Telephone Interview with Elizabeth Ensley, Shawnee County Election Comm'r (Jan. 26, 2009).
[68] LESBIAN & GAY L. NOTES 144 (Sept. 2003), *available at* http://bit.ly/2CkMZT; Mike Hall, *County Adds Sexuality to Clause*, TOPEKA CAPITAL-J., July 22, 2003, *available at* http://bit.ly/36tLh9.
[69] Hall, *supra* note 68; SHAWNEE COUNTY CODE § 10-207 (2006).
[70] Cindy Friedman & Dean Elzinga, *Newswrap*, THIS WAY OUT, Sept. 14, 2002, *available at* http://bit.ly/yuEeM.
[71] State licensing boards that have been reviewed include: Kan. Real Estate Comm'n, http://www.accesskansas.org/krec (last visited Sept. 6, 2009); Kan. Bd. of Healing Arts, http://www.ksbha.org (last visited Sept. 6, 2009); Kan. Behavioral Sci. Reg. Bd., http://www.ksbsrb.org (last visited Sept. 6, 2009); Kan. Bd. Acc., http://www.ksboa.org (last visited Sept. 6, 2009); Kan. Dep't of Health and Env't, http://www.kdheks.gov (last visited Sept. 6, 2009); Kan. Dep't of Ed., http://www.ksde.org (last visited Sept. 6, 2009); Kan. Bureau of Invest., http://www.kansas.gov/kbi (last visited Sept. 6, 2009); Kan. Dental Bd., http://www.accesskansas.org/kdb (last visited Sept. 6, 2009); Kan. Bd of Emer. Med. Serv., http://www.ksbems.org (last visited Sept. 6, 2009); Kan. Bd. of Nurs., http://www.ksbn.org (last visited Sept. 6, 2009); and Kan. Bd. of Pharm., http://www.kansas.gov/pharmacy (last visited Sept. 6, 2009).

social workers, marriage and family therapists, clinical professional counselors,[72] psychologists,"[73] adult care home administrators,[74] attorneys,[75] certified public accountants,[76] private detectives,[77] dentists,[78] car salespersons and manufacturers,[79] title agents,[80] water conditioning contractors,[81] court reporters,[82] county officers and employees,[83] viatical settlement providers and brokers,[84] retailers of alcohol, [85] athlete agents,[86] notaries,[87] appraisers,[88] embalmers and funeral directors,[89] psychologists,[90] key officers and employees in gaming, racetrack, and lottery enterprises,[91] retailers of tobacco products,[92] veterinarians,[93] optometrists,[94] barbers,[95] mediators,[96] and law enforcement officers.[97]

[72] Kan. Behav. Sci. Reg. Bd., http://www.ksbsrb.org (last visited Sept. 6, 2009).
[73] *Id*.
[74] KAN. STAT. ANN. § 65-3503 (2007); Kan. Dep't of Health & Env't, http://www.kdheks.gov (last visited Sept. 6, 2009).
[75] Kan. Sup. Ct. Rule 702 (2007).
[76] KAN. STAT. ANN. § 1-302 (2007); Kan. Bd. of Acc., *supra* note 71.
[77] KAN. STAT. ANN. § 75-7b01, *et seq*. (2007) (Kan. Private Detective Licensing Act).
[78] KAN. STAT. ANN. § 65-1426 (2007); KAN. STAT. ANN. § 65-1421, *et seq*. (2007) (Kan. Dental Practices Act).
[79] KAN. STAT. ANN. § 8-2410 (2007).
[80] KAN. STAT. ANN. § 8-2605 (2007).
[81] KAN. STAT. ANN. § 12-3602 (2007).
[82] KAN. STAT. ANN. § 12-3602 (2007).
[83] KAN. STAT. ANN. § 19-4318 (2007).
[84] KAN. STAT. ANN. § 40-5004 (2007).
[85] KAN. STAT. ANN. § 41-2702-3 (2007).
[86] KAN. STAT. ANN. § 41-2702-3 (2007).
[87] KAN. STAT. ANN. § 53-118 (2007).
[88] KAN. STAT. ANN. § 58-4118 (2007).
[89] KAN .STAT. ANN. § 65-1751 (2007).
[90] KAN. STAT. ANN. § 74-5324 (2007).
[91] KAN. STAT. ANN. § 74-8751 (2007).
[92] KAN. STAT. ANN. § 79-3304 (2007).
[93] KAN. STAT. ANN. § 47-824 (2007).
[94] KAN. STAT. ANN. § 65-1505 (2007).
[95] KAN. STAT. ANN. § 65-1812 (2007).
[96] Kan. Sup. Ct. Rule 902 (2007).
[97] KAN. STAT. ANN. § 74-5605 (2007).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Wible v. Widnall, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998).

In *Wible,*[98] Plaintiff Leasa H. Wible filed suit against Sheila E. Widnall, in her capacity as Secretary of the Department of the Air Force, alleging violations of Title VII arising out of her employment with the Kansas Air National Guard. This matter was before the court on defendant's motion for summary judgment.[99] Plaintiff Leasa H. Wible began her employment with the Kansas Air National Guard in September 1993. The first sixteen months of the plaintiff's employment passed without incident. According to the plaintiff, her superiors and co-workers began harassing her in late 1994. Specifically, the plaintiff claimed that her supervisor told her that "some people were wondering" about her sexual orientation," to which Wible responded, "No problem. Like Men." On another occasion, Wible alleged her co-worker was touching his genitals while he was looking at her. In another instance of alleged harassment, Wible brushed up against a co-worker while getting a cup of coffee, to which the co-worker responded, "Don't rub up against me. You're not going to come out of the closet that way." Finally, Wible alleged that her supervisor stated, "I would like to see what you would do if O.J. Simpson asked you out on a date," to which Wible replied, "Well, he's not my type." According to Wible, the supervisor laughed and said, "You mean your type or your gender?" Later that day, the supervisor apologized for his comment.[100]

The court concluded that Wible had not stated a *prima facie* case of hostile work environment sexual harassment. Thus, the defendant's motion for summary judgment was granted on the plaintiff's hostile work environment claim. Moreover, the court concluded that the plaintiff had failed to produce evidence from which a reasonable jury could conclude that the defendant retaliated against her for complaining about the alleged harassment. Thus, the court granted the defendant's motion for summary judgment on the plaintiff's retaliation claim.[101]

Miller v. Brungardt, 916 F.Supp. 1096 (D. Kan. 1996).

Jane Miller, a school counselor, brought suit against the school district, her school's superintendent, and its vice principal after the latter allegedly made sexually inappropriate comments that included accusing her "of engaging in a lesbian relationship" with a student's mother and other "sexually explicit comments concerning lesbian behavior." When Miller reported the vice principal's actions to the school superintendent, she was allegedly reprimanded, and the superintendent failed to take remedial action.

[98] *Wible v. Widnall*, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998).
[99] *Id.* at 1.
[100] *Id.* at *2-*4.
[101] Id. at *11-*12.

Plaintiff made claims of sexual harassment, retaliatory discharge, and intentional infliction of emotional distress.

In addressing whether, when suing individual employees of a municipality (such as the school district) under the Kansas Tort Claims Act, the plaintiff must give them notice of suit prior to its commencement, the court found that notice must be provided to municipal employees only when "the employee's actions occurred within the scope of employment" since the municipal employer would then be held liable for the acts of the employee.

Taking plaintiff's allegations as true for the purposes of the ruling on defendants' motion to dismiss, the court found that the vice-principal's lesbian-baiting, characterized by plaintiff Miller as "threatening, intimidating and abusive," fell outside the scope of the vice-principal's employment. "'[S]exual harassment . . . is not within the job description of any supervisor or any other worker in any reputable business.'" Thus, the notice requirement did not attach to Miller's claim of intentional infliction of emotional distress against the vice-principal.[102]

Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991); Jantz v. Muci 976 F.2d 623 (10th Cir. 1992).

In *Jantz v. Muci*,[103] plaintiff Vernon Jantz brought this action under 42 U.S.C. § 1983, alleging a violation of his right to equal protection. The plaintiff alleged that he was denied by the defendant, then-school principal Cleofas Muci, employment as a public school teacher on the basis of Muci's perception that Jantz had "homosexual tendencies." The defendant moved for summary judgment.[104] In support of his claim, Jantz relied on the testimony of Sharon Fredin (Muci's secretary) and William Jenkins (the coordinator of social studies at Wichita North). Fredin acknowledged in her deposition that during the 1987-88 school year she "made the offhand comment" to Muci that Jantz reminded her of her husband, whom she believed to be a homosexual. Jenkins testified that when he asked why Jantz was not hired for the new position, Muci told him it was because of Jantz's "homosexual tendencies."[105]

The court held Jantz had articulated a claim which, if proven at trial, would be a violation of his constitutional rights under 42 U.S.C. § 1983.[106] The court further held that Muci was not entitled to a qualified immunity defense.[107] Accordingly, the court denied defendant's motion for summary judgment with respect to those issues.

The Court of Appeals for the TenthCircuit reversed the decision of the district court and remanded for entry of summary judgment in favor of the principal in both his individual and official capacities.[108] In particular, the court held that the principal in his

[102] *Miller v. Brungardt*, 916 F.Supp. 1096 (D.Kan.,1996).
[103] 759 F. Supp. 1543 (D. Kan. 1991).
[104] *Id*. at 1543.
[105] *Id*. at 1545.
[106] *Id*.
[107] *Id*. at 1552.
[108] 976 F.2d 623 (10th Cir. 1992).

individual capacity was entitled to qualified immunity. The court found that the principal did not have final authority under Kansas law to hire teachers, which rested in the school board. The court also found that the school board retained the right to review hiring decisions made by the principal, so there was no delegation of policymaking authority.[109]

In re Smith, 757 P.2d 324 (Kan. 1988).[110]

The Supreme Court of Kansas conducted a disciplinary proceeding against Harry D. Smith, an attorney, and disbarred him. Two complaints were brought against Smith in 1987 and they were consolidated for hearing before a panel of the Kansas Board for Discipline of Attorneys, which found that all the charges in the complaints were true and unanimously recommended that Smith be disbarred.[111] Exhibits used in evidence before the panel included the journal entries of four cases. One case involved a misdemeanor conviction for worthless checks and two others involved Smith's failure to file an accounting for a proceeding in which he was a conservator and conversion for his own use of funds from estates. The fourth case dealt with Smith's Class B misdemeanor conviction for sodomy. The court did not explain what actions led to the charge and conviction for sodomy.[112] The decision focused mainly on the misuse of funds and his conduct involving dishonesty, fraud, deceit or misrepresentation. However, the court noted that the evidence fully established the misdemeanor convictions and that respondent had failed to appear. Therefore the court ordered that Harry D. Smith was disbarred from the practice of law in Kansas.[113]

Endsley v. Naes, 673 F. Supp. 1032 (D. Kan. 1987).

Plaintiff, a road patrol deputy for the sheriff's department, was fired after rumors circulated that she was a lesbian and that she was involved in a lesbian relationship with another employee. She sued, alleging sex discrimination under Title VII and violation of her First Amendment right of association. The court held that the Sheriff's Department had not infringed on Plaintiff's First Amendment right of association when it discharged her because of rumors of a homosexual relationship between her and another female deputy. The court noted that "defendants acted to protect the public image of the Department and to maintain close working relationships internally and externally with the community. These are legitimate concerns and they provide sufficient justification for the action taken against the plaintiff."[114]

[109] *Id*. at 631.
[110] 757 P.2d 324 (Kan. 1988).
[111] *Id.* at 325.
[112] *Id.*
[113] *Id.* at 326.
[114] *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 1987).

2. **Private Employees**

Plakio v. Congregational Home, Inc., No. 93-4222-SAC, 1995 U.S. Dist. LEXIS 7088 *1 (D. Kan. 1995).

In *Plakio,*[115] at issue was defendant's motion to amend the pretrial order to add the issue of whether same-sex sexual harassment is actionable under Title VII.[116] Four days after the pretrial order was entered, the defendant filed a motion for summary judgment arguing, *inter alia,* that the plaintiff did not state a sexual harassment claim because same-gender sexual harassment is not actionable under Title VII.[117]

The court first noted that "[c]ourts that have rejected same-gender sexual harassment claims have concluded that Title VII prohibits discrimination on the basis of gender and not any harassment that has sexual overtones." However, the court ultimately denied the defendant's motion to amend, as it determined that the pretrial order already encompassed the issue that defendant sought to add.[118]

James v. Ranch Mart Hardware, 881 F. Supp. 478, 480 (D. Kan. 1995).

In *James v. Ranch Mart Hardware,*[119] Barbara Renee James, an anatomically male transsexual, alleged sex discrimination under Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000(e) *et seq.*, and the Kansas Act Against Discrimination ("KAAD"), Kan. Stat. Ann. § 44-1001 *et seq.* More specifically, plaintiff claimed that Ranch Mart Hardware, Inc., terminated her employment under circumstances in which "a similarly situated female, living and working full time as a male," would not have been terminated.[120] Ranch Mart moved for summary judgment.

The court began its analysis by noting that it previously determined that James could not state an actionable claim under Title VII or the KAAD for employment discrimination based upon transsexualism, because plaintiff did not fall within a protected class.[121] Consistent with that holding, the court dismissed all claims that plaintiff suffered unlawful discrimination based on transexualism. The court allowed plaintiff to proceed with the limited claim that Ranch Mart fired her for being a male transsexual when it would not have fired her for being a female transsexual.[122] However, the court also granted defendant's motion for summary judgment on that claim, finding

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115 No. 93-4222-SAC, 1995 U.S. Dist. LEXIS 7088 *1 (D. Kan. 1995).
116 *Id.* at *1.
117 *Id.* at *2.
118 *Id.* at *3 - 4*.
119 881 F. Supp. 478, 480 (D. Kan. 1995).
120 *Id.* at 480.
121 *Id.* at 481-82.
122 *Id.* at 481 n4.

that Ranch Mart had advanced a facially nondiscriminatory reason for plaintiff's termination, that is, her failure to report for work.[123]

Goeffert v. Beech Aircraft Corp., No. 92-1609-PFK, 1994 U.S. Dist. LEXIS 5381 (D. Kan. 1994).

In *Geofert*,[124] plaintiff Larry Budenz brought this action pursuant to Title VII of the Civil Rights Act, alleging sexual harassment and retaliation.[125] Defendant moved for summary judgment.

Cynthia Goeffert worked for Beech Aircraft Corporation, and was a member of the International Association of Machinists and Aerospace Workers from April, 1989 until her termination in October, 1991. In August of 1991, she was promoted to crew chief in department 419 at Beech, and began to work the second shift at Beech, which ran from 3:36 P.M. to 12:06 A.M. Goeffert was the only female crew chief in department 419; all of her supervisors were men. During her employment, Goeffert consistently received satisfactory or above average performance evaluations. Immediately prior to her promotion, Darrell Lewis told her that she should "leave all your personal stuff at home." Goeffert took Lewis's comment to refer to her sexual orientation. Goeffert was a lesbian.[126] In October of 1991, Goeffert complained that co-workers made kissing sounds in the direction of Goeffert and another female employee.[127]

The court concluded that the alleged conduct was not so pervasive that it affected a term or condition of Goeffert's employment.[128] The court further found that defendant had articulated a legitimate, nondiscriminatory business reason for Goeffert's termination. Accordingly, the court granted the defendant's motion for summary judgment.

Carreno v. Local Union No. 226, Case No. 89-4083-S, 1990 U.S. Dist. LEXIS 13817 (D. Kan. 1990).

In *Carreno v. Local Union No.* 226,[129] plaintiff, J. Mario Carreno ("Carreno" or "plaintiff"), brought this sexual harassment action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq*., and the Kansas Act Against Discrimination, Kan. Stat. Ann. 44-1001, *et seq.*, alleging that defendants Shelley Electric and Local 226 discriminated against him because of his sex, resulting in his constructive discharge from employment with Shelley Electric.[130]

Carreno was a 39-year-old male licensed as a journeyman electrician. Beginning in July 1986, plaintiff began to suffer harassment from co-workers on the jobsite. This

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123 *Id*. at 482.
124 No. 92-1609-PFK, 1994 U.S. Dist. LEXIS 5381 (D. Kan. 1994).
125 *Id*. at *1.
126 *Id*.
127 *Id*. at *2 - 3.
128 *Id*. at 16.
129 Case No. 89-4083-S, 1990 U.S. Dist. LEXIS 13817 (D. Kan. 1990).
130 *Id*. at *1.

harassment was directed at plaintiff's nontraditional lifestyle. In 1980 plaintiff divorced his wife and began living with another man in a homosexual relationship. The incidents of harassment directed at plaintiff included derogatory comments such as "Mary" and "faggot." Similar incidents of harassment continued over the next year while the plaintiff worked for various employers.[131]

The issue before the court was whether a homosexual male could recover under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, and KAAD, for constructive discharge as a result of verbal and physical harassment directed at him by co-workers who disapprove of his homosexual lifestyle.[132] The court followed Ninth Circuit precedent, finding that because the harassment complained of was not based upon the plaintiff's sex, but rather was based upon his sexual orientation, the plaintiff failed to allege a prima facie case for sexual discrimination under Title VII of the Civil Rights Act of 1964, as amended, or under the Kansas Act Against Discrimination. Therefore, the court granted defendants' motions for summary judgment.[133]

B. **Administrative Complaints**

The Kansas Human Rights Commission accepts and investigates complaints pursuant to the Kansas Act Against Discrimination, which prohibits discrimination based on race, religion, color, sex, disability, national origin, or ancestry. [134] This Commission has issued various regulations. In its "Guidelines on Discrimination Because of a Disability," Section 21-34-20, titled "Exceptions to the definitions of disability," states that the term "disability" does not include transvestism, transexualism, gender identity disorders not resulting from physical disorders or other sexual disorders."[135]

C. **Other Documented Examples of Discrimination**

State Agency

A Topeka resident and employee of a state agency reported that when a newly appointed supervisor arrived in the office, he harassed the employee until he took a job with another state agency. Prior to the new supervisor's arrival, the employee had received three "outstanding" employee evaluations, but the new supervisor constantly criticized his work. The employee then found the state discrimination office to be unreceptive to his complaint.[136]

Topeka & Shawnee County Public Library

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[131] *Id*. at *3.
[132] *Id*. at *6.
[133] *Id*. at *7 and *10.
[134] Kansas Human Rights Commission, Filing a Complaint, http://khrc.net/complaint.html (last visited Sept. 6, 2009).
[135] KAN. ADMIN. REG. § 21-34-20 (2008).
[136] Colvin, *supra* note 8.

The day after the U.S. Supreme Court decided *Lawrence v. Texas*[137], members of the Topeka and Shawnee County public library staff ordered an employee who had been a longtime member of *Parents, Families, and Friends of Lesbians and Gays* to never again speak about the decision at work. In response to a letter from the ACLU, the Topeka and Shawnee County public library admitted that it could forbid one of its employees from talking about the Supreme Court's decision in *Lawrence* while at work and assured the ACLU that it would not restrict it or any other employee in that way.[138]

[137] 539 U.S. 558 (2003).
[138] Press Release, ACLU, *Kansas Public Library Concedes That it Can't Censor Employee for Discussing Historic Sodomy Ruling* (Aug. 5, 2003), *available at* http://www.aclu.org/lgbt/discrim/11870prs20030805.html.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Despite the Supreme Court's ruling in *Lawrence* and the Kansas Supreme Court's subsequent ruling in *State v. Limon,*[139] Kansas' sodomy law remains on the books.[140] Kansas's sodomy law criminalizes: "sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal."[141]

On February 5, 2002, the Topeka City Council passed and approved Ordinance 17789, amending City of Topeka Code Section 54-133 to prohibit prostitution or sodomy within the corporate limits of the city, as well as the solicitation of either.[142] This ordinance was introduced to the City Council by Mayor Felker on December, 11, 2001.[143]

City of Topeka v. Movsovitz, No. 77,372 (Kan. Apr. 24, 1998).

In *Movsovitz,* [144] a man convicted of solicitation of sodomy, in violation of City of Topeka Code Section 54-133, appealed the district court's affirmation of his municipal court conviction. He challenged the constitutionality of the ordinance and of its underlying authority, Kan. Stat. Ann. 21-3505. The court upheld both the ordinance and the statute. The court found that sodomy and the solicitation of sodomy are not fundamentally protected rights and that protecting public morality is a rational basis for the ordinance and the statute under the Equal Protection Clause.[145]

State v. Limon, 122 P.3d 22 (Kan. 2005).

In *State v. Limon,*[146] the Supreme Court of Kansas held Kansas' "Romeo and Juliet" statute to be unconstitutional, applying the Supreme Court's reasoning in Lawrence v. Texas. The statute provided less penalties for sex with a minor when: 1) the victim is of 14 or 15; 2) the offender is less than nineteen years of age and less than 4

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[139] 122 P.3d 22 (Kan. 2005) (declaring Kansas's sodomy law unconstitutional).
[140] KAN. STAT. ANN. § 21-3505 (2007).
[141] *Id.*
[142] TOPEKA ORD. 17789, *available at* http://www.topeka.org/cityclerk/ordinances/17789-prohibiting_prostitution_or_sodomy.pdf (last visited Sept. 6, 2009); Topeka Minutes (Feb. 5, 2005) *available at* http://bit.ly/pVaHk (last visited Sept. 6, 2009).
[143] Topeka Minutes (Dec. 11, 2001), http://bit.ly/pv5UW (last visited Sept. 6, 2009).
[144] *City of Topeka v. Movsovitz,* No. 77,372 (Kan. Apr. 24, 1998) (unpublished).
[145] *Id.*
[146] *Limon,* 122 P.3d at 22.

years older than the victim; and 3) the victim and offender are members of the opposite sex.[147] Upon review, the Kansas Supreme Court recognized the statute's discriminatory classification and applied the rational basis test. The court concluded that the statute did not pass rational basis scrutiny under the United States and Kansas Constitution, stating that the Romeo and Juliet statute is a "broad, overreaching, and undifferentiated status-based classification which bears no rational relationship to legitimate State interests."[148]

State of Kansas v. Blomquist, 178 P.3d 42 (Kan. Ct. App. 2008).[149]

Here, the defendant was convicted of aggravated indecent liberties with a child, aggravated criminal sodomy, and aggravated indecent solicitation of a child. He appealed. The court held that the prosecutor's arguments, questions and presentation of evidence alleging defendant's homosexuality were analogous to prosecutorial appeals to passion, prejudice, and fear. Therefore the prosecutor's conduct was improper. The court found that "the prosecutor framed the State's case around the allegation that William [Blomquist] was a homosexual."[150] The court found "that it was unreasonable for the State to assume that a sexual desire for children is among those desires which define a homosexual orientation."[151] The court further found that "[g]iven the 'prejudicial character' of homosexuality … the prosecutor's conduct … was analogous to prosecutorial appeals to passion, prejudice and fear."[152] The court also found that Blomquist was deprived of a fair trial by prosecutorial misconduct and by cumulative error so it reversed the convictions and remanded the case for a new trial.[153]

B. **Housing & Public Accommodations**

Smith v. Mission Assoc. Ltd., 225 F. Supp.2d 1293 (D. Kan. 2002).[154]

The plaintiffs brought claims for housing discrimination under the Fair Housing Act and Civil Rights Act, as well as defamation and outrage. The claims were mainly based on hostile housing due to racial discrimination. However, the court noted various insults were made about one of the plaintiff's sexual orientation. For example, the on-site property manager told one of the plaintiffs that he was "gay" and told a gay tenant to "hit on" him. Someone also wrote "Rick is gay. ½ black too!" on a blackboard in the complex's leasing office.[155]

The court held that sexual orientation claims are not actionable under the Fair Housing Act or §1982.[156] The court found that the comments were sufficient to

[147] *Id.* at 24.
[148] *Id.* at 38.
[149] 178 P.3d 42 (Kan. Ct. App. 2008).
[150] *Id.* at 46.
[151] *Id.* at 50.
[152] *Id.* (internal citation omitted).
[153] *Id.* at 53.
[154] 225 F. Supp.2d 1293 (D. Kan. 2002).
[155] *Id.* at 1297.
[156] *Id.* at 1299.

overcome summary judgment as to the state defamation claim, though they were not sufficient to overcome a motion for summary judgment on the state claim of outrageous conduct.[157]

Title VII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, applies to housing in Kansas.[158] Discrimination is prohibited in the sale, rental and financing of dwellings, and in other housing-related transactions, based on the race, color, national origin, religion, sex, familial status or disability of those seeking housing.[159] Sexual orientation is not a protected class.

C. **HIV/AIDS Discrimination**

Kansas Administrative Regulation Section 28-1-26 regulates the confidentiality of information regarding individuals with HIV infection.[160] In particular, it mandates each public health agency appoint an HIV confidentiality officer and sets out requirements for maintenance of HIV confidential information.[161]

Paramo v. Smith, 1992 U.S. Dist LEXIS 4126 (D. Kan. 1992).

In *Paramo*,[162] an HIV-positive prisoner at the Leavenworth U.S. Penitentiary complained that he was segregated upon his initial entrance to the prison, which he claimed made his HIV status clear to the staff and other prisoners. The court held that "segregation of HIV-positive of AIDS-afflicted inmates has been upheld repeatedly against challenges premised on constitutional grounds."[163] While the court accepted the gravity of his concerns due to the "near-certainty that plaintiff has been identified by both staff and other inmates as HIV-positive," the court said the mental distress caused by this did not entitle him to relief because the limited isolation upon his initial entry to the prison was supported by legitimate goals and institutional security.[164]

Perkins v. Kansas Dep't of Corr., 165 F.3d 803 (10th Cir. 1999).

In *Perkins*,[165] an HIV positive prisoner appealed a district court's dismissal of his civil rights action seeking redress for, *inter alia*, being required to wear a face mask whenever he left his cell and being denied outdoor exercise for more than nine months. Perkins claimed that he had suffered from AIDS since 1993 and was, at the time of the action, segregated while imprisoned. While incarcerated, Perkins became angry with two of the prison guards and spat on them in the prison yard. As a result, Perkins was

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157 *Id.* at 1304.
158 SEDGWICK COUNTY FAIR HOUSING, HOW THE FAIR HOUSING ACT APPLIES TODAY (2003), *available at* http://bit.ly/M0EDp (last visited Sept. 6, 2009).
159 *Id.*
160 KAN. ADMIN. REG. § 28-1-26 (2008).
161 *Id.*
162 *Paramo v. Smith*, 1992 U.S. Dist LEXIS 4126 (D. Kan. 1992).
163 *Id.* at * 6.
164 *Id.* at *11 - 12.
165 *Perkins v. Kansas Dep't of Corr*., 165 F.3d 803 (10th Cir. 1999).

required to wear a face mask that covered his entire head whenever he left his cell. Guards also forbid him to exercise outside his cell. Perkins alleged that this treatment was demoralizing and further weakened his immune system. Perkins alleged a violation of his due process rights and Eighth Amendments rights. On appeal, the Tenth Circuit concluded that plaintiff's complaint presented facts from which a fact finder could infer both that prison officials knew of a substantial risk of harm to plaintiff's well-being resulting from the lengthy denial of outdoor exercise and that they disregarded that harm. The court concluded that the district court erred in dismissing plaintiff's Eighth Amendment claim regarding the face mask, as it failed to order defendants to prepare a report as to whether the face mask was simply a punishment for his HIV status, given that "prison officials may not punish plaintiff for being an HIV carrier."[166]

D. **Hate Crimes**

The Kansas Hate Crimes Law was amended in 2002 to address crimes that are "motivated entirely or in part by … sexual orientation of the victim or … by the defendant's belief or perception, entirely or in part, of the… sexual orientation of the victim whether or not the defendant's belief or perception was correct."[167] On September 10, 2002, the City Council of Topeka passed and approved Ordinance 17885, which mirrored the State of Kansas's Hate Crimes Law.[168] Likewise, the Municipal Code of Wichita includes an "Ethnic Intimidation or Bias Crimes" section, which criminalizes the violation of certain city ordinances "by reason of any motive or intent relating to, or any antipathy, animosity or hostility based … sexual orientation… of another individual or group of individuals."[169] However, on February 2, 1993, this section of the Wichita Code was amended and repealed by Ordinance 41-937.[170]

E. **Education**

During a trial in U.S. District Court regarding the Olathe school district's banning of a lesbian-themed book from its high school library, Olathe school board president Robert Drummond, a psychologist, testified that homosexuality is both a mental disorder and a sin.[171] Drummond was one of the three board members who voted to remove *Annie On My Mind* by Nancy Garden from three high schools in 1994.[172]

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166 *Id.* at 810.

167 KAN. STAT. ANN. § 21-4716 (2007).

168 TOPEKA ORD. 17885, http://bit.ly/15H34Z (last visited Sept. 6, 2009).

169 5 WICHITA CODE Chapter 5 § 5.01.010 (2008). This provision was added to the City Code by Ordinance 41-204. WICHITA ORD. 41-204 (1990).

170 WICHITA ORD. § 41-937 (1993). Ordinance § 41-937 merely amended those city ordinances referenced in Ordinance No. 41-204 and removed the "police reporting" section from the former ordinance.

171 PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 59-60 (1995 ed.).

172 *Id.*

On May 11 2008, the Wichita Board of Education voted unanimously to revise Policy No. 1464, titled "Pupil Behavior," to prohibit bullying on the basis of "sexual orientation."[173] Efforts to revise the school district policy began in 2007.[174]

Case v. Unif. Sch. Dist. No. 233, 908 F. Supp. 864 (D. Kan. 1995).

In *Case*, [175] students of a junior and senior high school, and their parents, brought suit seeking an injunction to compel reinstatement on school library shelves of a novel depicting fictional romantic relationship between two teenage girls. The court held that the school district had violated the free expression right of current students by denying access to a book based upon their personal disapproval of its ideas and that the due process rights of the students and their parents had not been violated.

The school board members testified as to why they voted as they did on the motion to remove the book. Board member Richard Marriott voted to remove the book because he was offended by the book's "glorification of the gay lifestyle,"[176] and he believed that if the Board allowed the book to remain on the shelf, the community would have perceived that the Board of Education endorsed or approved of "a homosexual lifestyle."[177] Robert Drummond, another Board member who voted to remove the book, stated, "that homosexuality is a mental disorder, immoral, and contrary to the teachings of the Bible and the Christian church" and that "homosexuality is a mental disorder similar to schizophrenia or depression."[178] Board member Ronald Hinkle – who also voted to remove the book –thought the book was not realistic "[b]ecause it didn't deal with some of the practicalities that homosexuals have to deal with and face. Again, in reference to potential disease, potential death [sic]. It just didn't even address those issues, let alone broken relationships with family, friends, et cetera."[179] Hinkle further testified that it is not okay to be gay "[b]ecause engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems."[180] Board member Janet Simpson voted to remove the book because "the book was objectionable because "it was promoting a very unhealthy lifestyle."[181] She testified that homosexuality was "unnatural" and the only books about homosexuality that she would find educationally suitable would be ones that say homosexuality is unhealthy.[182] Two members of the Board voted against the removal. The court determined that the Board removed the book because they disagreed with ideas expressed in the book and that factor was the substantial motivation in their

[173] Press Release, Gay & Lesbian Alliance Against Defamation, Kansas School Board Votes to Protect Gay Students (May 14, 2008), *available at* http://bit.ly/nLsbo (last visited Sept. 6, 2009) (hereinafter "Press Release"); Wichita Pub. Sch. Bd. of Ed. Policies, http://wichita.usd259.net/policies (last visited Sept. 6, 2009).
[174] Press Release, *supra* note 173.
[175] 908 F. Supp. 864 (D. Kan. 1995).
[176] *Id.* at 870.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* at 871.
[181] *Id.*
[182] *Id.*

decision, and that therefore their decision was unconstitutional under *Board of Ed. v. Pico*.[183]

Theno v. Tonganoxie Unif. Sch. Dist., 377 F. Supp. 2d 952 (D. Kan. 2005).

In *Theno*,[184] the district court reaffirmed its denial of the school district's summary judgment motion on plaintiff's claim that it violated Title IX by acting deliberately indifferent to Plaintiff's harassment.[185] The court found that the harassers' conduct was actionable as sex-based discrimination, not sexual-orientation based discrimination, as it was based on the Plaintiff's failure to conform to gender stereotypes.[186] The conduct at issue included phrases like "fag," "likes to suck cock," "masturbates with fish," "how was it fag?" and "Look, I'm Dylan, my name is Jack. I jack off." Harassing conduct included one harasser putting string cheese in his mouth and stating "I'm Dylan sucking a dick" and two boys saying "Look, Dylan was here" after spitting on the bathroom wall to imply that the plaintiff had masturbated and ejaculated in the bathroom.[187] The court noted that the case showed that the harassment of the plaintiff was

> "pervasively comprised of crude sexual gestures, innuendos, teasing, and name calling….[which] contributed to a sexually charged hostile environment that appeared to have been motivated by his peers' belief that he failed to conform to stereotypical gender expectations for a teenage boy their community. Motivated by his failure to conform to those expectations, they used his sexuality to denigrate his masculinity."[188]

The district court further found that the plaintiff had shown a genuine issue as to whether the school district was indifferent to the harassing behavior. The court pointed to evidence that the harassers parents were not called, the harassers were not given detentions or suspensions, the harassment went on for years without appropriate discipline sufficient to deter future harassers, that the school district's meager discipline of talking to the harassers was insufficient, and that the student body was aware of the lack of meaningful discipline of the harassers.

C.T. v. Liberal Sch. Dist., 562 F. Supp. 2d 1324 (D. Kan. 2008).

In *C.T.*,[189] student athletes brought suit against their school district and some of its employees, alleging violation of Title IX, constitutional claims under § 1983, and state law claims. In part, the plaintiffs claimed that the school district and the employee-

[183] *Board of Ed. v. Pico*, 457 U.S. 853, 863-65 (1982).
[184] 377 F. Supp. 2d 952 (D. Kan. 2005).
[185] *Id.* at 970.
[186] *Id.* at 974.
[187] *Id.* at 972-973.
[188] *Id.* at 1308.
[189] 562 F. Supp. 2d 1324 (D. Kan. 2008).

defendants were deliberately indifferent to harassment by other students. The court cited the U.S. Supreme Court holding in *Davis v. Monroe County Board of Education,*[190] in which the Court held that public schools could be liable for student-on-student sexual harassment "but only where the funding recipients acts with deliberate indifference to known acts of harassment in its programs or activities" and "only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[191] While the court granted summary judgment for the defendants on many of the students claims, it found that the record contained sufficient facts for G.B.'s student-on-student harassment claim to withstand summary judgment. After G.B.'s allegations of sexual harassment against a volunteer coach were made public, G.B. was assaulted at school and given a black eye. A teacher was aware of the incident but did not report it to the school administration. Two other students made a death threat to G.B. Further, students daily called him names, such as "fag boy," and said to him that "I hear you are Johnny's little bitch" and "I hear you got butt raped by Johnny."[192] There was no evidence that the students were meaningfully disciplined for the harassment and G.B. transferred to another school at the end of the school year. The court therefore denied the motion for summary judgment as to G.B.'s claim.

F. Health Care

Kansas law does not allow a partner to give informed consent on behalf of his or her incapacitated partner.[193] However, an adult can designate a person in advance, including his or her partner, to be responsible for making medical decisions on his or her behalf.[194]

I. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 1996, the Kansas legislature passed a statute declaring that marriages not between members of the opposite sex are void, and that it is the public policy of Kansas to recognize as valid only those marriages from other states that are between a woman and man.[195] In 2005, Kansas voters approved the Kansas Defense of Marriage Amendment.[196] This ballot initiative amended the Kansas constitution to state that: "Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void and that "No

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[190] 526 U.S. 629 (1999).
[191] *C.T.,* 562 F. Supp.2d at 1334 (*quoting Davis,* 526 U.S. at 633).
[192] *Id.* at 1336.
[193] KAN. STAT. ANN. § 65-9474 (2007).
[194] Kansas HealthCare Laws, Human Rights Campaign, *available at* http://www.hrc.org/your_community/9150.htm (last visited Sept. 6, 2009) ; KAN. STAT. ANN. § 65-28, 101-65-28, 109; 58-625-58-632 (2007).
[195] KAN. ALS 142 (1996); Richard Cook, *Kansas's Defense of Marriage Amendment: The Problematic Consequences of a Blanket Non-Recognition Rule on Kansas Law,* 54 KAN. L. REV. 1165, 1172 (2006).
[196] Cook, *supra* note 195, at 1172.

relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."[197]

In 2007, City Commissioners of Lawrence voted 4-1 to create a domestic partnership registry.[198] The registry provides the opportunity for two individuals to register their domestic partnership if: (1) they are not married to other persons; (2) they do not have another domestic partner; and (3) they are not related by blood more closely than would bar their marriage in Kansas. However, registration does not create any legal rights.[199] In 2007, Kansas state representative Lance Kinzer, Republican from Olathe, introduced Kansas House Bill 2299 ("HB 2299") to prohibit cities or counties from establishing domestic partner registries.[200] This bill was in response Lawrence's domestic partnership registry.[201] Ultimately, the bill died in Committee when the legislature adjourned on May 29, 2008.[202]

In re Gardiner, 42 P.3d 120 (Sup. Ct. Kan. 2002).

In *Gardiner*, [203] the Kansas Supreme court found that a male-to-female post-operative transsexual did not fit the definition of a "female" in the state's marriage statute.[204] In the case, an intestate decedent's son petitioned for letters of administration that would name himself as the sole heir, and claimed that marriage between his father and a post-operative male-to-female transsexual, "J'Noel," was void. J'Noel argued that the marriage was valid under Wisconsin law and that Kansas must give full faith and credit to Wisconsin law. The marriage was valid under Wisconsin law because Wisconsin allows a person who has had sexual reassignment surgery to change his or her sexual identity in conformance with the surgery.[205] The court found that J'Noel "remains a transsexual, and a male for the purposes of marriage" under Kansas's marriage statute. Therefore, as a matter of public policy, the court voided the marriage between Gardiner and J'Noel, leaving the decedent's son as the sole heir.[206]

2. **Benefits**

Att'y Gen. Op. No. 2007-09 (2007).

In this opinion, the Kansas Attorney general addressed a question posed by the Kansas Insurance Department about whether the approval by the Commissioner of

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[197] KAN. STAT. ANN. § 23-101 (2007).
[198] Chad Lawhorn, *Domestic Registry Debate Set for Tonight*, LAWRENCE J. WORLD, May 22, 2009, *available at* http://bit.ly/qeSMq (last visited Sept. 6, 2009).
[199] LAWRENCE CODE § 10-201 (2008).
[200] Human Rights Campaign, Laws: Kansas HB 229, http://www.hrc.org/your_community/9356.htm (last visited Sept. 6, 2009) (hereinafter "HB229"); Lawhorn, *supra* note 198.
[201] Lawhorn, *supra* note 198.
[202] HB229, *supra* note 200.
[203] *In re Gardiner*, 42 P.3d 120 (Sup. Ct. Kan. 2002).
[204] *Id.* at 136.
[205] *Id.* at 134.
[206] *Id.* at 137.

Insurance of an insurance policy form providing benefits to unmarried domestic partners constitutes state recognition of a relationship prohibited by the Kansas Constitution. The Attorney General opined that approval by the Commissioner indicates only that the policy form complies with the criteria in the insurance statute and does not represent a state sanction or recognition of a constitutionally proscribed relationship. In addition, it was the Attorney General's opinion that the history of the "Marriage Amendment" indicated that it was not the intention of the legislature for it to apply to private insurance contracts.

J. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

1. Insurance Law

The Kansas Insurance Department has issued regulations governing life and health insurance applications. Specifically, it provides that "application questions shall be formed in a manner designed to elicit specific medical information and not lifestyle, sexual orientation or other inferential information."[207]

2. Judicial Ethics

Judicial Performance Canon 2 states that: "A judge shall refrain from speech, gestures or other conduct that could be perceived by a reasonable person as harassment based upon ... sexual orientation, and shall require the same standard of conduct of others subject to the judge's direction and control." Judicial Performance Canon 3 states, in part, that

> "[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to .. sexual orientation .., and shall not permit staff, court officials and others subject to the judge's direction and control to do so; .. [a] judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon … sexual orientation…against parties, witnesses, counsel or others."

Judicial Performance Canon 4 states, in part, that "[a] judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties."[208] It further states that "[t]his Section does not preclude legitimate advocacy when race, sex, religion…sexual

[207] KAN. ADMIN. REG. § 40-1-36 (2008).
[208] Kan. Sup. Ct. Rule 601A (2007).

orientation or socioeconomic status, or other similar factors, are issues in the proceeding."[209]

[209] *Id.*

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Kentucky – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Kentucky has no laws prohibiting discrimination on the basis of sexual orientation or gender identity, though there have been several unsuccessful attempts to amend the state's civil rights statute to protect such classes. However, in 1999, local ordinances banning discrimination in employment, housing, and public accommodations due to a person's sexual orientation were passed in Louisville, Lexington-Fayette County, Jefferson County, and Henderson.[1] In 2003, a similar ordinance was passed in the City of Covington. In 2008, Governor Steve Beshear reinstated an Executive Order banning discrimination of state employees based on sexual orientation and gender identity.

Documented examples of discrimination on the basis of sexual orientation and gender identity by state and local governments in Kentucky include:

- In 2008, a gay public school administrator and a bisexual public school administrator reported being subjected to a hostile work environment and denied job-related travel funding on account of their sexual orientation.[2]

In 2004, Kentucky voters approved an amendment banning same-sex marriages and civil unions.[3] One state representative commented that homosexuals could "obviously" change their orientation and did not deserve special civil rights protections.[4] In a 2008 ruling, the Kentucky Court of Appeals blocked a lesbian couple from adopting, citing the state law banning same-sex marriage.[5]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments

[1] The Henderson ordinance was repealed the following year. *See infra* Section II.D.4.
[2] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).
[3] Joe Biesk, *Kentucky Voters Approve Same-Sex Marriage Ban Amendment*, USA TODAY, Nov. 2, 2004, *available at* http://bit.ly/rHeM8 (stating that the amendment had 74% for it, and 26% against it).
[4] Kevin Eigelbach, *Representative Fischer's (R) Statement Upsets Gays*, KENTUCKY POST, Oct. 25, 2006, *available at* http://bit.ly/JVWNA.
[5] *See S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. Ct. App. 2008). *See also Homophobia's Victims*, COURIER-J., Sept. 17, 2008, at 10A.

against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Kentucky has not enacted laws to protect against discrimination based on sexual orientation or gender identity.[6]

B. Attempts to Enact State legislation

1. Proposed Bill to Amend Kentucky's Civil Rights Statute:

On January 8, 2008, a senate bill was introduced to amend Kentucky's civil rights statute to include prohibitions on discrimination because of sexual orientation and gender identity. The bill sought to prohibit such discrimination in various arenas including employment, housing, public accomodation, and credit transactions. However, the bill died in committee with no hearings when the legislature adjourned April 15, 2008. *See* Senate Bill 55.

On January 10, 2008, the same legislation was introduced via a house bill, but similarly died in committee with no hearings when the legislature adjourned April 15, 2008. *See* House Bill 274.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

Kentucky has an interesting history underlying recent Executive Orders addressing discrimination on the basis of sexual orientation and gender identity. It is in this arena that the political tug-of-war is most apparent, beginning with Democratic governor Paul Patton signing an executive order on May 28, 2003 aimed at protecting gay and transgender state employees from discrimination. The 2003 executive order was viewed as a sign of changing attitudes in the South.[7]

On Diversity day in 2006, former Governor Patton's order was rescinded by then Governor Ernie Fletcher by removing language from the Kentucky Affirmative Action Plan specifically prohibiting discrimination on the basis of sexual orientation and gender identity. Defending his action, Governor Fletcher's administration cited several reasons. One was that removing sexual orientation and gender identity categories as protected classes would further increase the number of women and blacks working in state government. Another reason was that the previous affirmative action plan had left the

[6] *See* KY. REV. STAT. ANN. § 344.010 *et seq.* (2008).
[7] *See* Christopher Lisotta, *Kentucky Tug-of-War: A Series of Pro-Gay Decisions in the Bluegrass State Bodes Well for Gay and Lesbian Employees and Brings on the Usual Backlash*, ADVOCATE, July 8, 2003, *available at* http://bit.ly/XnUoE (asking the question: "Is Kentucky becoming a model for pro-gay change in the South?") (last visited Sept. 6, 2009).

state open to potential lawsuits since it would force state government to provide separate bathrooms and other facilities for transsexuals.[8]

In June 2008, Democratic Governor Steve Beshear reinstated a ban on discriminating on the basis of sexual orientation or gender identity. The executive order bars state officials from hiring or firing based on sexual orientation or gender identity. In a statement describing the motivations behind the reinstatement, Governor Beshear said, "Experience, qualifications, talent and performance are what matter."[9]

D. Local Legislation

In 1999, local ordinances banning discrimination in employment, housing, and public accommodations due to a person's sexual orientation were passed in Louisville, Lexington-Fayette County, Jefferson County, and Henderson. In 2003, a similar ordinance was passed in the City of Covington. Each locality is discussed in further detail below.

1. Jefferson County

On October 12, 1999, Jefferson County amended its code of ordinances to prohibit discrimination on the basis of sexual orientation or gender identity in connection with employment, housing, and public accomodation.[10] Jefferson County is the most populous county in Kentucky, made up of approximately one hundred cities and towns.[11] "Sexual orientation" is defined as "an individual's actual or imputed heterosexuality, homosexuality or bisexuality." "Gender identity" is defined as "manifesting an identity not traditionally associated with one's biological maleness or femaleness."[12]

The ordinance allows for an exemption from the prohibition of discrimination on the basis of sexual orientation or gender identity for religious institutions or charitable and educational organizations "operated, supervised, or controlled by a religious corporation, association, or society."[13]

Complaints of such discrimination are reviewed and decided by the Louisville/Jefferson County Human Relations Commission.[14]

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[8] Joe Biesk, *Gay Rights Supporters Criticize Ky. Governor on Affirmative Action*, AP STATE & LOCAL WIRE, Apr. 11, 2006.
[9] The Equality Party, *Kentucky Governor Bans Discrimination for Sexual Orientation/Gender Identity*, June 3, 2008, *available at* http://bit.ly/33g1Xo (last visited Dec. 4, 2008).
[10] *See* Louisville-Jefferson County Metro Government Code Ordinance §§ 92.01-.25 (2008); *Louisville Bound by Ordinance Prohibiting Sexual Orientation Discrimination*, 11 KENTUCKY EMPLOYMENT LAW LETTER 4 (Sept. 2001).
[11] In 2003, Jefferson County merged with the City of Louisville to form Louisville-Jefferson County Metro Government, so it shares the same laws as the City of Louisville, discussed further below.
[12] Louisville-Jefferson County Metro Government Code Ordinance § 92.02.
[13] *Id.* § 92.07(B).
[14] *Id.* § 92.08.

2. City of Louisville

After similar measures had failed in 1992, 1995, and 1997, on January 26, 1999, a City of Louisville ordinance aimed at prohibiting employment discrimination on the basis of sexual orientation and gender identity was enacted.[15] "Sexual orientation" is defined as "an individual's actual or imputed heterosexuality, homosexuality, or bisexuality." "Gender identity" is defined as: "(1) having a gender identity as a result of a sex change surgery; or (2) manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness."[16] While the City of Louisville's original ordinance barred only discrimination in employment, because it fell within Jefferson County, discrimination in employment, housing, and public accomodation also became barred.[17] Today, the City of Louisville's civil rights ordinance prohibits discrimination in housing, employment, and public accommodation on the basis of "race, sex, religion, disability, age, color, sexual orientation, gender identity, and national origin."[18]

One of the Louisville Aldermen to vote in favor of the Louisville civil rights ordinance, Steve Magre, had previously voted against the proposal in three earlier versions. He reportedly changed his mind after hearing "personal testimonials . . . about employment discrimination faced by Louisvillians."[19]

The ordinance allowed for an exemption from the prohibition of discrimination on the basis of sexual orientation or gender identity for religious institutions or charitable and educational organizations "operated, supervised, or controlled by a religious corporation, association, or society."[20] Further, the ordinance provided that employers could enforce an employee dress policy and designate appropriate gender-specific bathroom facilities. Also, the ordinance did not prohibit employers from hiring an employee on the basis of sexual orientation or gender identity if one of those factors was a bona fide occupational qualification that was reasonably necessary to conduct normal business operations.[21]

Complaints of discrimination in Louisville in violation of the ordinance are reviewed and decided by the Louisville/Jefferson County Human Relations Commission.

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[15] *See Anti-bias Ordinances Fuel Debate*, AP STATE & LOCAL WIRE, Oct. 19, 1999.
[16] *Fairness Amendment Added to Louisville's Codes*, 9 KENTUCKY EMPLOYMENT LAW LETTER 6 (March 1999) [hereinafter MARCH KENTUCKY EMPLOYMENT LAW LETTER]. *But see* Louisville-Jefferson County Metro Government Code Ordinance § 92.02. The City of Louisville, after its merger with Jefferson County in 2003, is now governed by the code of ordinances for Louisville-Jefferson County Metro Government.
[17] *Rogers v. Fiscal Court of Jefferson Louisville*, 48 S.W.3d 28 (Ct. App. Ky. 2001) (finding that Jefferson County's more expansive protections against discrimination on the basis of sexual orientation and gender identity applied to the City of Louisville).
[18] LOUISVILLE ORD. 193 (2004).
[19] *Louisville, KY Gets Fairness Law with Some TG Protection*, GENDER NEWS, Jan. 26, 1999, http://bit.ly/wYSO6.
[20] *See* MARCH KENTUCKY EMPLOYMENT LAW LETTER, *supra* note 18.
[21] *See id.*

The Commission enforces the civil rights legislation and also enforces hate crime legislation.[22]

3. **Lexington-Fayette County**

On July 18, 1999, Lexington-Fayette County approved an ordinance prohibiting discrimination in employment, housing, and public accommodations on the basis of sexual orientation and gender identity.[23] The ordinance adopts several provisions found in the Kentucky Civil Rights Act, treating sexual orientation and gender identity like any other category protected under the Act.[24] "Sexual orientation" is defined as "an individual's actual or imputed heterosexuality, homosexuality, or bisexuality." "Gender identity" is defined as "(a) having a gender identity as a result of a sex change surgery; or (b) manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness."[25]

Before the Lexington-Fayette ordinance was passed, the city held public hearings and heard testimony from both supporters and opponents of the measure. One supporter of the ordinance testified that after years of positive reviews and promotions in her employment, her supervisor began criticizing her work and gave her a negative review after discovering she was a lesbian. She testified that "in about four weeks, I went from being an outstanding employee to a horrible one, just because my supervisor believed I was a lesbian."[26] After hearing the testimony and before voting in favor of the measure, Councilwoman Gloria Martin described harsh and disturbing telephone calls and letters that she had received from opponents of the ordinance, saying that "[t]hese correspondences truly opened my eyes and confirmed, unfortunately, why we need to have this ordinance."[27]

The ordinance allows for an exemption from the prohibition of discrimination on the basis of sexual orientation or gender identity for religious institutions or charitable and educational organizations "operated, supervised, or controlled by a religious corporation, association, or society."[28] But if the institution or organization receives "a majority of its annual funding from any federal, state, local or other government body or agency," then it is not entitled to the exception and is accordingly prohibited from discrimination on the basis of sexual orientation or gender identity.[29] Further, the

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[22] Louisville Hum. Rel. Comm'n, http://www.louisvilleky.gov/HumanRelations/ (last visited Dec. 4, 2008).
[23] *See* LEXINGTON-FAYETTE COUNTY ORD. § 2-33; *Lexington Adopts 'Fairness Ordinance,'* 9 KENTUCKY EMPLOYMENT LAW LETTER 11 (Aug. 1999) [hereinafter AUGUST KENTUCKY EMPLOYMENT LAW LETTER].
[24] The provisions of the Kentucky Civil Rights Act that the Lexington-Fayette County Local Ordinance adopt are KY. REV. STAT. ANN. 344.010(1), (5)–(13) and (16), 344.030 (2)–(5), 344.040, 344.045, 344.050, 344.060, 344.070, 344.080, 344.100, 344.110, 344.120, 344.130, 344.140, 344.145, 344.360(1)–(8), 344.365(1)–(4), 344.367, 344.370(1), (2), (4), 344.375, 344.380, 344.400, 344.680 (1998).
[25] LEXINGTON-FAYETTE COUNTY ORD. § 2.33(4), (5).
[26] Videocassettes, Lexington-Fayette Council Meetings (on file with Dean Forster, Northern Kentucky Fairness Alliance).
[27] *Id*.
[28] *Id.* at § 2-33(7).
[29] *Id.*

ordinance provided that employers could enforce an employee dress policy and designate appropriate gender-specific bathroom facilities.[30]

Complaints of discrimination in Lexington-Fayette County in violation of the ordinance are reviewed and decided by the Lexington-Fayette Urban County Human Rights Commission.[31] According to a recent report released by the Kentucky Advisory Committee to the United States Commission on Civil Rights, the Commission investigates about 300 complaints a year, 85 percent of which involve employment issues.[32] Of those employment discrimination complaints, however, the majority of the allegations are based on race and no information was provided as to how many complaints involved discrimination based on sexual orientation or gender identity.[33]

4. City of Henderson

On October 5, 1999, the City of Henderson amended its ordinances to prohibit discrimination in employment, housing, and public accommodation on the basis of sexual orientation. The ordinance passed in spite of a strong showing of opponents that appeared at public hearings.[34] One opponent told city commissioners that anyone voting for the ordinance should be thrown into the Ohio River with "a rope tied around your neck with a rock at the other end."[35]

Two years later, the ordinance was repealed. Opponents believed that Henderson's adoption of such an ordinance was a legitimatization of an "immoral lifestyle."[36] Defending his vote to repeal the ordinance, Commissioner Robby Mills stated, "I believe this is a moral course of action and this is what the public would have us do."[37]

5. City of Covington

On April 29, 2003, the City of Covington Commission voted unanimously to enact new protections against discrimination in employment, housing, and public accommodation on the basis of sexual orientation and gender identity.[38] The Covington Human Rights Commission decided to add the categories to the city's human rights ordinance after receiving two complaints since its formation in July 1998.[39] One commission member, Charles D. King, who was also a member of the Northern

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[30] *Id.* at § 2-33(6).
[31] *Id.* at §§ 199-94, 201-99.
[32] KY. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, FAIR HOUSING ENFORCEMENT IN KENTUCKY (2008), *available at* http://www.usccr.gov/pubs/KYFairHous.pdf.
[33] Lexington-Fayette Urban County Human Rights Commission, About the Commission, http://www.lfuchrc.org/.
[34] A thousand people attended two public hearings held in Henderson in September 1999. *Anti-bias Ordinances Fuel Debate*, AP STATE & LOCAL WIRE, Oct. 19, 1999.
[35] *Id.*
[36] *Fairness Ordinance Expected to Be Repealed in Henderson*, AP STATE & LOCAL WIRE, Nov. 10, 2000.
[37] *Anti-discrimination Repeal May Pass*, LEXINGTON HERALD-LEADER (Kentucky), Feb. 15, 2001, at B3.
[38] *See* COVINGTON CODE ORD. § 37.01 *et seq.*; Cindy Schroeder, *Gays Win Expanded Rights Coverage*, CINCINNATI ENQ., Apr. 30, 2003, at 1A.
[39] *City to Consider Gay Rights Ordinance*, AP STATE & LOCAL WIRE, Dec. 16, 2002.

Kentucky Fairness Alliance, stated that he received various phone calls from gay people who had had their houses vandalized or who suffered confrontations while having no protections.[40]

Community Values ("CVC"), a conservative activist organization, started a mail campaign targeting the ordinance as a step toward "normalizing" homosexual behavior.[41] The CVC, known for its crusade against "adult" businesses, sent to approximately 75 percent of all Covington homes a 24-page booklet by the Washington-based Family Research Council about "the destructive homosexual lifestyle" that "has serious emotional and physical dangers associated with it."[42] The mailings, however, appeared to backfire as Covington residents expressed support for the law during two public hearings and the Commission voting to pass the ordinance in spite of CVC's aggressive campaign.[43]

During public hearings held before passage of the Covington ordinance, there was testimony from Covington residents who had experienced discrimination based on their sexual orientation. One man described how his home had been vandalized and that when he called the police, "I had to suffer through verbal harassment from the cop that responded. That only happened once, because I never reported it again. And I've had the vandalism several times."[44]

"Sexual orientation" is defined as "an individual's actual or imputed heterosexuality, homosexuality, or bisexuality." "Gender identity" is defined as "manifesting an identity not traditionally associated with one's biological maleness or femaleness."[45] The ordinance allows for an exemption from the prohibition of discrimination on the basis of sexual orientation or gender identity for religious institutions or charitable and educational organizations "operated, supervised, or controlled by a religious corporation, association, or society."[46]

A year after the ordinance took effect on May 10, 2003, city officials reported that the Commission had received no complaints about discrimination based on sexual orientation or any other factor.[47]

E. **Occupational Licensing Requirements:**

There are several state licensing requirements that reference "moral turpitude" or similar allusions that could include sexual orientation or gender identity. Additionally,

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[40] *Id.*
[41] Cindy Schroeder, *Letters Target Gay Ordinance: CCV Mailing Critical of Anti-bias Legislation*, CINCINNATI ENQUIRER, Apr. 17, 2003.
[42] *Id.*; Stephanie Simon, *Campaign Targets City's Gay-rights Vote*, LA TIMES, Apr. 29, 2003, at A16.
[43] Simon, *supra* note 42.
[44] Videocassettes, Covington Civil Rights Public Hearings (on file with Dean Forster, Northern Kentucky Fairness Alliance).
[45] COVINGTON CODE ORD. § 37.02.
[46] *Id.* at § 37.09(B).
[47] Mike Rutledge, *Covington Stands Alone for Gay Rights*, COVINGTON ONLINE, May 1, 2004, http://www.covingtonky.com/index.asp?fn=news&id=989.

the Kentucky Revised Statutes provides a blanket provision applying to all occupations for which there is a license, stating that a person "may be denied a license on the grounds that he does not possess good moral character."[48] After checking all occupations for which the state issues a license,[49] the occupational boards with such licensing requirements are listed below with the relevant language. A non-exhaustive search of cases, news articles and websites did not uncover any information concerning specific examples of the occupational licensing standards being applied to LGBT applicants.

> Education Professional Standards Board: An education professional "shall exemplify behaviors which maintain the dignity and integrity of the profession."[50]
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> Kentucky Board of Licensure for Private Investigators: A private investigator must (1) "possess good moral character," (2) "be of good moral character," and (3) "adhere to the highest moral principles of the profession."[51]
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> Fee-Based Pastoral Counselors: A pastoral counselor "shall maintain standards of professional competence and integrity and shall be subject to disciplinary action upon conviction of a felony or misdemeanor involving moral turpitude."[52]
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> Board of Nursing Home Administrators: Nursing home administrators must provide "proof satisfactory to the board that he is of good moral character and is otherwise suitable."[53]
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> Board of Occupational Therapy: Licensees "shall file a written application on a form provided by the Board, showing to the satisfaction of the Board that the person is of good moral character." Further, licensees "must inform the Board of any misdemeanor or civil violation involving an offense of moral turpitude in any state in last five years." Finally, licensees "shall not engage in acts of sexual misconduct with recipients of their services or in their presence."[54]

[48] KY. REV. STAT. § 335B.040 (2008).
[49] The Kentucky occupational boards that issue licenses are Kentucky Real Estate Comm'n, Kentucky State Bd. of Accountancy, Ed. Prof'l Standards Bd., Kentucky Bd. of Licensure for Private Investigators, Kentucky Bar Assoc., Athletic Trainers, Kentucky Chiropractors, Kentucky Bd. of Dentistry, Kentucky Bd.of Respiratory Care, Div. of Reg. Child Care, Kentucky Bd. of Med. Licensure, Kentucky Bd. of Nursing, Kentucky Bd. of Pharmacy, Bd. of Physical Therapy, Alcohol & Drug Counselors Bd., Dietitians & Nutritionists, Fee-Based Pastoral Counselors, Interpreters for the Deaf & Hard of Hearing, Marriage & Family Therapists, Bd. of Licensure for Massage Therapy, Bd. of Nursing Home Admin., and Bd. of Occupational Therapy.
[50] Regulations *available at* http://www.kyepsb.net/certification/certregs.asp (last visited Dec. 4, 2008).
[51] Regulations *available at* http://finance.ky.gov/ourcabinet/caboff/OAS/op/privinve/ (last visited Dec. 4, 2008).

[53] Regulations *available at* http://finance.ky.gov/ourcabinet/caboff/OAS/op/nurhomadm/ (last visited Dec. 4, 2008).
[54] Regulations *available at* http://finance.ky.gov/ourcabinet/caboff/OAS/op/occupth/ (last visited Dec. 4, 2008).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

None.

B. Administrative Complaints

The Kentucky State Personnel Board oversees issues relating to state employees. The Office of Diversity and Equality monitors state compliance with equal opportunity policies and the state's affirmative action program. The policies and the affirmative action program aim to provide equal employment opportunity without discrimination on the basis of race, color, religion, sex, national origin, sexual orientation and gender identity, ancestry, age, disability or veteran status.

When a state employee feels there has been unjust treatment, the employee may file a formal grievance with his or her agency. If a grievance is filed that alleges discrimination on the basis of one of the protected classes like sexual orientation or gender identity, the recipient of the grievance is required to immediately report to an Equal Employment Opportunity Coordinator to apply the state's affirmative action plan.[55] The complaints are not available on electronic sources, but the actual filed grievance forms may be inspected or obtained at the Personnel Board office in Kentucky.[56]

C. Other Documented Examples of Discrimination

Kentucky Public School

In 2008, a gay public school administrator and a bisexual public school administrator reported being subjected to a hostile work environment and denied job-related travel funding on account of their sexual orientations.[57]

[55] Ky. Pers. Cabinet, Office of Diversity & Equality, Complaints & Grievance, http://personnel.ky.gov/diversity/eeo/grievance.htm (last visited Sept. 6, 2009).
[56] Pers. Bd., 28 Fountain Place, Frankfort, KY 40601.
[57] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

The Kentucky sodomy law was struck down in 1992 by the state Supreme Court case *Commonwealth v. Wasson*.[58] Under the sodomy statute, it did not matter if the act was done in privacy. The Court found the law to violate privacy and equal protection rights.

In 1996, an attempt to recriminalize sodomy was made, but was unsuccessful. Floor Amendment 1 to House Bill 219 would have created a right of the General Assembly to define and punish sodomy, including between consenting parties. It was introduced in 1996, but died in committee.[59]

B. Housing & Public Accommodations Discrimination

Lexington-Fayette County, Jefferson County, the City of Louisville, and the City of Covington all have ordinances prohibiting discrimination in housing and public accomodations on the basis of sexual orientation and gender identity.[60]

Kentucky Housing Corporation, the state housing finance agency, provides housing opportunities for low- and moderate-income Kentuckians, and prohibits discrimination based on "race, color, religion, sex, national origin, sexual orientation and gender identity, ancestry, age, disability or veteran status."[61]

As discussed above, complaints by state employees of sexual orientation or gender identity discrimination in violation of the States Affirmative Action program are initially filed with the state Personnel Board.[62] Complaints based on legislation enacted by municipalities protecting such classes are filed with the respective municipal Human

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[58] 842 S.W.2d 487 (Ky. 1992).
[59] *See* NAT'L GAY & LESBIAN TASK FORCE, ACTIVIST ALERT, Mar. 1996, http://bit.ly/JkjOZ (last visited Sept. 6, 2009).
[60] *See supra* Section II.D.
[61] *Compare* KY. REV. STAT. ANN. § 344.010 *et seq*. *with* Kentucky Housing Corp., *Kentucky Recognizes Fair Housing Month*, Apr. 25, 2006, http://www.kyhousing.org/full.asp?id=563 (last visited Sept. 6, 2009).
[62] *See supra* Section III.B (discussing the Personnel Board's enforcement of the State's Affirmative Action Program). The Kentucky Human Rights Commission receives complaints about violations of the state civil rights statute, which currently does not include sexual orientation and gender identity as protected classes.

Rights Commissions.[63] No information was located about complaints filed with other state entities.

C. HIV/AIDS

According to KRS § 304.12-013, sexual orientation may not be used in the underwriting process or as a determining factor as to whether an insurance applicant should be tested for HIV.[64]

A defeated bill would have prohibited a person with HIV in Kentucky from being licensed as a cosmetologist.[65]

Another defeated bill would have required public school teachers to teach that "homosexual sodomy" is the primary method of contracting HIV.[66]

D. Hate Crimes

According to KRS § 164.9485, colleges and universities must report to the police any hate crime based on sexual orientation, among other protected classes, that occurs on campus.

E. Rights of Same-Sex Couples

In 2004, Kentucky voters approved a state constitutional amendment banning same-sex marriages and civil unions.[67] Section 233A of the Kentucky Constitution states that, "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."[68] Marriage is "prohibited and void" by statute in Kentucky if between members of the same sex[69] and "against Kentucky public policy."[70]

The same-sex marriage ban amendment has been used as a basis for taking from gay couples the right to adopt children. In *S.J.L.S. v. T.L.S.*, a lesbian couple's adoption request was rejected. One of the two women decided to be artificially inseminated and had a child. After the couple split, the partner initiated adoption proceedings as a stepparent. The Kentucky Court of Appeals held that stepparent adoptions are allowed only when the stepparent is married to the biological mother or father of the child, and

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[63] *See supra* Section II.D (discussing local ordinances prohibiting discrimination on the basis of sexual orientation and gender identity).
[64] KY. REV. STAT. ANN. § 304.12-013(5)(c) (2008).
[65] *See* QUEER RESOURCES DIRECTORY, ANTI-GAY MEASURES DEFEATED, Mar. 29, 1996, http://www.qrd.org/qrd/usa/kentucky/1996.
[66] *See id.*
[67] Joe Biesk, *Kentucky Voters Approve Same-Sex Marriage Ban Amendment*, USA TODAY, Nov. 2, 2004, *available at* http://bit.ly/rHeM8 (stating that the amendment had 74% for it, and 26% against it).
[68] KY. CONST. § 233a (2008). *See also* KY. REV. STAT. ANN. § 402.005 (2008) (defining marriage).
[69] KY. REV. STAT. ANN. § 402.020 (2008).
[70] § 402.040(2).

since Kentucky banned same-sex marriage, the lesbian "stepparent" could not adopt the child.

In 2006, the University of Louisville Board of Trustees voted to cover domestic partners in its employee health benefits, with the University of Kentucky following suit the year after. In 2007, Senate Bill 152 and House Bill 110 were introduced, seeking to ban benefits for domestic partners. Both were defeated in committee, with no hearing transcripts available. Once again, several representatives pushed to introduce virtually the same bill in 2008 through Senate Bill 112 and House Bill 118. The Senate approved the bill 30-5, motivated by arguments that the legislation was necessary to protect the Constitutional amendment that bans same-sex marriage in Kentucky.[71] But the House committee killed the bill 9-6.[72] Senator Vernie McGaha (R) vowed to reintroduce the bill in 2009, motivated once again by Kentucky's constitutional amendment banning same-sex marriage.[73]

In *Ireland v. Davis*, the Kentucky Court of Appeals reversed the Fayette Circuit and District Courts' dismissal of a domestic violence order entered for a gay man against his partner because the domestic violence statute did not extend protection to same-sex couples. The Court of Appeals found that such an interpretation of the domestic violence statute would be contrary to the purpose of the statute, and noted that excluding same-sex couples from protection under the statute would deny them equal protection of the law. The Court reversed the dismissal without addressing the constitutional argument further.[74]

In 2008, a bill was introduced in the Kentucky House and Senate to prohibit public agencies from providing health benefits to domestic partners of state employees.[75] While the Senate passed the bill, it did not get out of committee in the House.

[71] *Senate Passes Domestic Partner Benefit Ban*, POL WATCHERS, Jan. 30, 2008, http://polwatchers.typepad.com/pol_watchers/2008/01/senate-passes-d.html, http://bit.ly/gGA8W.
[72] Sarah Vos, *Partner Benefits Bill Killed*, LEXINGTON HER. LEADER (Ky.), Mar. 21, 2008, at B1.
[73] *Id.*
[74] *See Ireland v. Davis*, 957 S.W.2d 310 (Ky. Ct. App. 1997).
[75] *See* Kentucky Fairness Alliance, Background Information, Hold the Line on Healthcare Discrimination Campaign, Mar. 24, 2008, http://bit.ly/eIozD (last visited Sept. 6, 2009).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Louisiana – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

While, in 1998, New Orleans became one of the earliest cities in the United States to pass a local ordinance protecting LGBT people from discrimination,[1] repeated attempts to pass state legislation that would prohibit discrimination on the basis of sexual orientation or gender identity/expression have all failed. For example, in 2008, the most recent attempt to protect LGBT rights in the employment context failed to make it out of its first committee in the state House of Representatives and the effort to pass the legislation was subsequently abandoned. In 2008, a bill was also introduced that would have just protected state employees from sexual orientation discrimination. That bill too failed to make it out of its first committee.[2]

Although two former Louisiana governors issued executive orders prohibiting employment discrimination against state employees on the basis of sexual orientation, [3] both orders were allowed to lapse – taking LGBT state employees first in and then out of the law's protection. The first executive order was issued in 1992 and then allowed to lapse in 1996 when the next governor took office. [4] Similarly, a 2004 executive order[5] was allowed to lapse in 2008 when newly-elected Governor Jindal took office. As a result, LGBT people currently have no protection against public or private employment discrimination in Louisiana.

Other state laws and officials have been hostile to LGBT people in Louisiana. For example, prior to the U.S. Supreme Court's decision in *Lawrence v. Texas*,[6] Louisiana had long had one of the broadest state sodomy laws of any state. The law was unsuccessfully challenged on the basis of its disparate impact on LGBT individuals. In addition, the Louisiana Commission on Marriage and Family, recently reorganized by Governor Jindal, has several appointees who have a well-documented history of saying inflammatory, anti-LGBT rhetoric. For example, one member is Gene Mills, executive

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[1] SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE NON-DISCRIMINATION LAW (Transgender L. & Policy Inst. & Nat'l Gay &Lesbian Task Force 2006) *available at* http://bit.ly/6DDBp (last visited Sept. 13, 2009).

[2] H.B. 981 (La. 2008).

[3] In 1992, former Governor Edwin Edwards issued executive orders prohibiting employment discrimination on the basis of sexual orientation and, in 2004, former Governor Kathleen Blanco issued a similar executive order.

[4] La. Exec. Order No. EWE 92-7 (1992).

[5] La. Exec. Order No. KBB 2004-54 (2004).

[6] *Lawrence v. Texas*, 539 U.S. 558 (2003).

director of the conservative Louisiana Family Forum. While heterosexual relationships can result in children, Mills has said, "you don't get the equivalent in a homosexual relationship . . . you get disease."[7] In 2000, Baton Rouge City Council members Mike Tassin and Jim Benham walked out of a council meeting during which a gay and lesbian group gave a presentation on discrimination. Tassin tried to block the presentation but was overruled by his fellow council members. Tassin said he objected to having the group's literature placed at his desk, calling the pamphlets "crap."[8]

Documented examples of employment discrimination by state and local governments in Louisiana on the basis of sexual orientation and gender identity include:

- In 2006, a gay man was hired as a faculty member and coordinator of the 4-H Program at Louisiana State University. He implemented successful youth programs in his position, was promoted in 2007, and received a Distinguished Service Award. At the meeting during a camp event supervised by the faculty member, the Human Resources Manager told him that the school had received an anonymous letter saying that the faculty member had a personal ad on a gay dating website. The faculty member was immediately put on administrative leave without even the opportunity to collect his belongings from the campsite—because he "could not interact with the youth anymore." He refused to quit so he was demoted from his supervisory position and all youth programs were taken away from him. His contract was not renewed for the 2009-2010 school year.[9]

- In 2004, a lesbian bus driver for the Monroe School District reported that she had faced harassment for gender non-conformity and sexual orientation. She complained about the adverse treatment, but her grievance was deemed invalid.[10]

- A tenured teacher and coach for women's sports at Oak Hill High School who was fired on suspicion of being a lesbian. The teacher was suspected of having an inappropriate relationship with a student, who was actually family of a friend with whom she had a close familial relationship. After being discharged on a 5-4 vote, the teacher filed suit and the trial judge found in her favor. The appeals court affirmed the trial court's decision, finding that the charges against her "are replete with insinuations and innuendos" and " the Board's case is seriously lacking in evidence, much less the `substantial evidence' required to support the Board's actions. The court concluded that the School Board's decision "was arbitrary and an abuse of discretion," and assessed the School Board the full costs of the

[7] Scott Gold, *Louisiana Judge Throws Out State Ban on Gay and Lesbian Marriages*, L.A.TIMES, Oct. 6, 2004, *available at* http://bit.ly/1FEdNl.

[8] Allison Kilkenny, *Bobby Jindal Stocks Marriage Commission With Anti-Gay Crusaders*, DAILY NEWS & OPINION, Jan. 6, 2009, http://allisonkilkenny.wordpress.com/2009/01/06/bobby-jindal-stocks-marriage-commission-with-anti-gay-crusaders.

[9] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

[10] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

appeal.[11] Holt v. Rapides Parish Sch. Bd., 1996 WL 709720 (La. Ct. App. Dec. 11 1996).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[11] *Holt v. Rapides Parish Sch. Bd.*, 1996 WL 709720 (La. Ct. App. Dec. 11, 1996).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently the state of Louisiana has not enacted laws to prohibit sexual orientation and gender identity employment discrimination.[12] The state's employment non-discrimination laws do prohibit discrimination on the basis of race, sex, disability, age, religion, national origin, pregnancy or childbirth, sickle cell trait, handicap and smoking.

The provisions of the Louisiana Employment Discrimination Law (the "LEDL") apply to employers of 20 or more employees (and in the case of pregnancy and related medical conditions, more than 25 employees), labor organizations, joint labor management committees, employment and apprenticeship and training programs, and all agencies of state and local governments.[13] The LEDL prohibits discrimination in hiring, compensation, terms, conditions, or privileges of employment.[14] The LEDL also prohibits limiting, segregating, or classifying an employee or applicant in a manner that would deprive, or tend to deprive, an individual of employment opportunities or otherwise adversely affect the status of an employee.[15] In addition, the LEDL makes it unlawful for a labor organization to exclude, expel from membership, or otherwise discriminate against a member or applicant for membership, to limit, segregate, or classify membership or an application for membership, or to fail or to refuse to refer an individual for employment, or to cause an employee to violate any provision of the LEDL.[16]

The Louisiana Commission on Human Rights was established in 1988 by Act 866 in the 1988 Regular Session of the Louisiana Legislature and was mandated to process charges of discrimination on the bases described above, to investigate alleged discriminatory acts, to mediate disputes, and to provide education and training related to discriminatory practices.[17] To make determinations as to whether discrimination has occurred, Commissioners may consider one of two basic theories of discrimination: 1) disparate treatment (based on discriminatory motive or intent); and 2) disparate impact (based on evidence establishing that an employer has a policy or practice that is neutral on its face, but which policy or practice has a substantially greater negative impact on members of a protected group).[18] Because sexual orientation and gender identity/expression are not considered to be improper bases for discriminatory practices

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[12] In 1997, the Louisiana Legislature passed the Louisiana Employment Discrimination Law, LA. REV. STAT. ANN. §23:301, *et seq*. ("LEDL"). Prior to 1997, Louisiana's various discrimination statutes were non-uniform and scattered throughout the revised statutes. The LEDL repealed and reenacted many of Louisiana's employment discrimination statutes as part of a single, comprehensive piece of legislation found in one Title of the Revised Statutes. LA REV. STAT. ANN. §23:301 *et seq.*, as amended.

[13] LA. REV. STAT. ANN. §23:302.

[14] *See, e.g.*, LA. REV. STAT. ANN. §23:312.

[15] *Id.*

[16] *Id.*

[17] "Filing a Complain of Discrimination," Louisiana Commission on Human Rights, *available at* http://www.gov.state.la.us/HumanRights/filingacomplaintofdiscrim.htm (last visited Sept. 13, 2009).

[18] Louisiana Commission on Human Rights, How the Commission Does Its Work, http://gov.louisiana.gov/HumanRights/howthecommissionworks.htm (last visited Sept. 13, 2009).

under the LEDL, LGBT individuals are not afforded any protection under these complaint mechanisms.

B. Attempts to Enact State Legislation

There have been numerous attempts in both the Louisiana House of Representatives and the Louisiana State Senate to enact legislation prohibiting employment discrimination on the basis of sexual orientation or gender identity/expression but these attempts have ultimately failed.

In 2001, State Senators Don Cravins and Paulette Irons introduced Senate Bill 862, which would have provided protection for gays and lesbians in the employment context. The proposed law provided that employers of more than 25 people could not discriminate against an employee simply because of his or her actual or perceived sexual orientation.[19] While the bill made it out of committee, it was killed on the Senate floor before it could be put to a vote. This effort marked the furthest that a bill of that kind had ever progressed in the Louisiana legislature. Since that failed attempt, Louisiana lawmakers have proposed similar legislation in one form or another, with each attempt similarly ending in failure. Most recently, on March 31, 2008, State Representative LaFonta introduced Louisiana House Bill 443, which would have prohibited employment discrimination based on actual or perceived sexual orientation or gender identity or expression.[20] However, after the bill was sent to committee in late May 2008, Rep. LaFonta decided to pull the bill from consideration, effectively tabling the issue indefinitely.

At the same time, Rep. LaFonta also introduced House Bill 981, which would have established a separate law specifically prohibiting the state and its agencies, including "officers" of such agencies, from engaging in discrimination or harassment based on race, color, religion, sex, sexual orientation, national origin, political affiliation, or disability. Proposed HB 981 defined "sexual orientation" to include heterosexuality, homosexuality, and bisexuality. The law also would have expressly recognized such employers' right to establish appropriate dress and appearance requirements for its employees.[21] HB 981 never made it out of the Committee on House and Governmental Affairs.

In 2000, Baton Rouge City Council members Mike Tassin and Jim Benham walked out of a council meeting during which a gay and lesbian group gave a presentation on discrimination. Lambda Group Inc. gave the council postcards from 300 people supporting a state law to prohibit anti-gay discrimination in employment. Tassin tried to block the presentation but was overruled by his fellow council members. Tassin said he objected to having the group's literature placed at his desk, calling the pamphlets 'crap.' He left saying he disagreed with the group's message. Carrie Evans, a member of

[19] S.B. 862 (La. 2001).
[20] H.B. 443 (La. 2008).
[21] H.B. 981 (La. 2008).

the group, noted that more constituents from Benham's district had signed the cards than from anywhere else.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In 1992, then-Governor Edwin Edwards became the first Southern governor to issue an executive order protecting lesbian, gay, bisexual, and transgendered persons from discrimination in state governmental services, employment, and contracts. [22] This executive order, which provided protection only to public employees, expired in August of 1996 and was not renewed when the next governor, Mike Foster, took office.

On December 6, 2004, then-Governor Kathleen Blanco issued a similar executive order barring state agencies and contractors from various sorts of harassment and discrimination by race, religion, gender, sexual orientation, national origin, political affiliation, or disability.[23] The executive order banned discrimination in providing government services, in dealing with government employees and in government dealings with private companies. It also required businesses contracting with the state to pledge not to discriminate on the basis of race, religion, gender, sexual orientation, national origin, political affiliation, or disability in any way related to employment.

Gov. Blanco's successor, Gov. Jindal, did not renew the executive order and it therefore expired in August 2008.[24] Explaining his rationale for declining to renew the executive order, Gov. Jindal said that it was "not necessary to create additional special categories or special rights" because these forms of discrimination are prohibited under existing state and federal laws.[25] Jindal also expressed concern that renewing the executive order could create problems with faith-based organizations' ability to contract with the state, a concern he had raised at the time Gov. Blanco issued the order. When the executive order was issued in 2004, Gov. Blanco's office admitted that much of the language included in the executive order already was covered under existing state and federal law and that the primary objective of the order was to clearly state a policy that everyone should be treated fairly in the workplace. Each of the areas covered by the executive order is covered by existing state and federal laws -- except for sexual orientation.

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[22] La. Exec. Order No. EWE 92-7.

[23] La. Exec. Order No. KBB 2004-54.

[24] Chris Johnson, *A Step Backwards for Equality in Louisiana,* HRC BACKSTORY, Aug.21, 2008, http://bit.ly/6JX8B (explaining that Gov. Jindal's position is not correct as Louisiana remains one of thirty states that does not prohibit discrimination based on sexual orientation and one of thirty eight states that does not prohibit discrimination based on gender identity).

[25] *Id.*

D. Local Legislation

1. City of New Orleans

A 1984 attempt to enact an ordinance to ban discrimination against homosexuals in public accommodations, employment, and housing was narrowly defeated by the New Orleans City Council.[26] However, in 1995, New Orleans enacted a "Bill of Rights" that made it unlawful to discriminate in commercial spaces, employment, housing accommodations, private clubs, and public accommodations on the basis of age, color, creed, gender or sex, marital status, national origin/ancestry, physical condition/disability, race, religion, or sexual orientation.[27] The New Orleans City Council added gender identification to the city's non-discrimination ordinances in 1998.[28]

> New Orleans established the Human Relations Commission to investigate discrimination claims and individuals who believe that that they have experienced discrimination are encouraged to contact the Commission. The Commission employs a staff of three and maintains two offices in New Orleans. Upon being contacted with a complaint, the Commission staff will advise an individual of his/her rights under New Orleans' non-discrimination laws and when appropriate, will assist an individual in filing a confidential complaint with the office.[29] Those who are found to have violated the non-discrimination laws face fines of up to $500 or up to six months in jail.**III.**

[26] *New Orleans Rejects Homosexual Rights Bill*, N.Y. TIMES, Apr. 15, 1984, *available at* http://bit.ly/198pRw.
[27] The City of New Orleans Human Relations Commission, *available at* https://secure.cityofno.com/portal.aspx?portal=58 (last visited Sept. 6, 2009).
[28] NEW ORLEANS ORD. 22021 (June 18, 1998).
[29] *Id.*

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Holt v. Rapides Parish Sch. Bd., 1996 WL 709720 (La. Ct. App. Dec. 11 1996).

Gwendolyn Holt was a tenured teacher and coach for women's sports at Oak Hill High School. One of her students was Lori Robinson, the daughter of Holt's cousin Mike Robinson. Holt and the Robinsons had a close, familial relationship, and that carried over into Holt's relationship with Lori at school. Rumors ran throughout the community that Holt was a lesbian. Seizing on these rumors and a number of unsubstantiated "incidents" involving Holt and Lori, the Superintendent of Schools, Allen Nichols, went to the Board of Education seeking Holt's dismissal on grounds of "willful neglect of duty" based on an "improper relationship" with a student. The Board held a hearing, after which it voted 5-4 that several of the incidents were proven, found Holt guilty of "willful neglect of duty" by a vote of 6-3, and then voted to discharge her by a vote of 5-4.

In the ensuing lawsuit, the trial judge found in favor of Holt. The appeals court affirmed the trial court's decision, finding that the charges against Holt "are replete with insinuations and innuendos, but the Board's case is seriously lacking in evidence, much less the `substantial evidence' required to support the Board's actions".[30] The trial judge stated: "The events did happen, but except for some vague inference, they do not substantiate a charge of an unprofessional relationship. Furthermore, the other facts and circumstances of these events make them completely innocuous. We agree with the trial judge and, thus, find no error in the district court's finding . . . ."[31] The court concluded that the School Board's decision "was arbitrary and an abuse of discretion,"[32] and assessed the School Board the full costs of the appeal.[33]

2. Private Employees

Oiler v. Winn-Dixie, 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002).

In *Oiler*,[34] a New Orleans truck driver, filed suit against his former employer, Winn-Dixie, under federal sex discrimination laws.[35] The driver, Peter Oiler, had worked for Winn-Dixie for 23 years. While attempting to resolve workplace rumors that he was gay, he told his supervisor that he sometimes wore women's clothing away from the job.[36] This information was provided to Michael Istre, president of Winn-Dixie

[30] *Holt v. Rapides Parish Sch. Bd.*, 1996 WL 709720, 2 (La. Ct. App. Dec. 11, 1996).
[31] *Id.* at 3.
[32] *Id.*
[33] *Id.* at 4.
[34] *Oiler v. Winn-Dixie*, 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002).
[35] *Id.*
[36] *Id.* at 6.

Louisiana, who requested that Oiler resign.[37] Oiler, who had been promoted regularly and who had had excellent performance evaluations, repeatedly refused to resign and was subsequently fired.[38] In court testimony, Istre admitted that Oiler was fired for the simple reason that, "I think if my customers recognized him . . . I'd lose business."[39] In September 2002, the U.S. District Court for the Eastern District of Louisiana granted Winn-Dixie's motion for summary judgment, ruling that Oiler's claims did not fall under federal statutes outlawing sex discrimination and were not consistent with the law set forth in *Price Waterhouse*, a Supreme Court case banning sex stereotyping in the workplace.[40] In so holding, Judge Lance Affrick reasoned that "the repeated failure of Congress to amend Title VII supports the argument that Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder. In reaching this decision, this Court defers to Congress who, as the author of Title VII, has defined the scope of its protection. Neither Title VII nor the United States Supreme Court's decision in *Price Waterhouse* affords plaintiff the protection that he seeks."[41]

The judgment notwithstanding, Judge Affrick recognized the injustice that Oiler had suffered, writing: "Defendant's rationale for plaintiff's discharge may strike many as morally wrong. However, the function of this court is not to raise the social conscience of defendant's upper level management, but to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress and it cannot, therefore, afford the luxury of making a moral judgment."[42]

B. **Other Documented Examples of Discrimination**

Louisiana State University

In 2006, a gay man was hired as a faculty member and coordinator of the 4-H Program at Louisiana State University. He implemented successful youth programs in his position, was promoted in 2007, and received a Distinguished Service Award. At the meeting during a camp event supervised by the faculty member, the Human Resources Manager told him that the school had received an anonymous letter saying that the faculty member had a personal ad on a gay dating website. The faculty member was immediately put on administrative leave without even the opportunity to collect his belongings from the campsite—because he "could not interact with the youth anymore." He refused to quit so he was demoted from his supervisory position and all youth programs were taken away from him. His contract was not renewed for the 2009-2010 school year.[43]

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[37] *Id.* at 9.
[38] *Id.*
[39] *Id.* at 12.
[40] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[41] *Oiler*, 2002 U.S. Dist. LEXIS 17417 at 32.
[42] *Id.* at 30-31.
[43] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

Monroe Public School

In 2004, a lesbian bus driver reported that she had faced harassment for gender non-conformity and sexual orientation. She complained about the adverse treatment, but her grievance was deemed invalid.[44]

[44] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Prior to the U.S. Supreme Court's decision in *Lawrence v. Texas*,[45] Louisiana had one of the oldest and most restrictive sodomy laws in the U.S..[46] Any "unnatural carnal copulation" by a human being with another of the same sex, among other behavior, was considered a "crime against nature" and was punishable by up to five years in prison and/or a $2,000 fine.[47] In addition, Louisiana enacted a sex offender registration law in 1992 that included both violent sex offenses and consensual sodomy - also included within the scope of the sodomy law.[48] The sex offender registration law required not only registration and notice of change of address of each offender, but also a photograph and fingerprints to be provided to the sheriff, with failure to register punishable by one year in prison and/or a one thousand-dollar fine.[49] Subsequent violations of the law would lead to a maximum of three years in prison without parole, probation, or suspension of sentence. As a result of the interaction of these two laws, an individual found guilty of engaging in consensual oral sex with an individual of the same sex could be forced to register as a sex offender under Louisiana law.

Prior to *Lawrence*, Louisiana courts had consistently denied privacy challenges to the sodomy law. In *State v. Smith*, Mitchell Smith, a heterosexual man, was convicted of a "simple" crime against nature after he admitted to engaging in oral sex with a woman.[50] Smith appealed the criminal conviction on the grounds that the sodomy law criminalized private, non-commercial sexual activity between consenting adults in violation of the right to privacy guaranteed by Article I, Section 5 of the Louisiana Constitution. The Louisiana Fourth Circuit Court of Appeal heard the appeal and concluded that the sodomy law is unconstitutional on its face as it infringes upon the right to privacy to the

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[45] *Lawrence*, 539 U.S. at 558.

[46] LA. REV. ANN. STAT. §14:89 (defining a "crime against nature" as

> "the unnatural carnal copulation by a human being with another of the same or opposite sex or with an animal. Emission is not necessary, and when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime. Whoever commits the crime against nature shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.")

[47] *Id.*

[48] *Acts of the State of Louisiana 1992*, Act 388 (June 18, 1992).

[49] *Id.*

[50] *State v. Smith*, 766 So. 2d 501 (La. 2000).

extent that it criminalizes private, consensual, non-commercial sex acts.[51] The court did not rule on Smith's claim that the law was applied in a discriminatory manner. On appeal to the Louisiana Supreme Court, the court concluded that "no reasonable Louisiana citizen would consider that the result of voting to ratify a general constitutional guarantee of 'liberty' or 'privacy' would be to divest that citizen's elected legislators of the right to continue the specific statutory proscription against sodomy or any other criminal act. To the contrary, any reasonable citizen would believe that he or she thereby was retaining the liberty to make such determinations through elected legislators. There is no evidence that the people adopting the Louisiana Constitution at referendum intended to create a constitutional right to engage in oral or anal sex."[52]

In 1994, the Louisiana Electorate of Gays and Lesbians, Inc. ("LEGAL"), a non-profit gay rights organization, in conjunction with a number of citizens, filed a class action seeking to have the sodomy law deemed unconstitutional on several grounds, including Equal Protection, arbitrary application and enforcement against gays and lesbians, and cruel and unusual punishment, in addition to raising privacy concerns.[53] In 1999, Orleans Parish Civil District Court Judge Carolyn Gill Jefferson ruled that the sodomy law was unconstitutional on privacy grounds "only insofar as it prohibits non-commercial, consensual, private sexual behavior by adult human beings," and issued an injunction against its enforcement in such instances. [54] The ruling, however, did not address LEGAL's other constitutional claims and LEGAL filed a motion for a new trial. At the same time, LEGAL appealed the case to the Louisiana Fourth Circuit Court of Appeal with respect to the portions of the statute that the trial court had not declared unconstitutional. LEGAL's appeal was stayed by the Louisiana Supreme Court pending resolution of the *Smith* case (described above). In the interim, the ruling by the Louisiana Supreme Court in *Smith* that the sodomy law does not violate the state constitutional right to privacy squarely contradicted the trial court's ruling on the privacy issue and the case was remanded to the trial court for reconsideration on that issue. Judge Jefferson reaffirmed her earlier ruling in March 2001, again ruling solely on privacy grounds. LEGAL again appealed. On March 28, 2002, relying on *Smith*, the Louisiana Supreme Court issued a decision vacating the trial courts ruling and transferred the case to the Louisiana Fourth Circuit Court of Appeal for consideration of the remaining constitutional claims. The Court of Appeal concluded that the plaintiffs had brought no evidence that the "crime against nature" statute discriminates against gays and lesbians. The court reasoned that the sodomy law is facially neutral as it "applies equally to all individuals - male, female, heterosexual and homosexual."[55] The court also reasoned that the sodomy law was not unconstitutional as the result of the legislature's discriminatory purpose. According to the court, "the record is devoid of any evidence that the crime

[51] *State v. Smith*, 729 So. 2d 648 (La. Ct. App. 1999).
[52] *Smith*, 766 So. 2d at 508.
[53] *La. Electorate of Gays & Lesbians, Inc. v. State 94-1679*, 640 So. 2d 1319 (La. 1994)
[54] *La. Electorate of Gays & Lesbians, Inc. v. State*, 2002 La. App. LEXIS 3689 (La. Ct. App. Nov. 20, 2002).
[55] *Id.* at 13.

against nature statute was enacted for the purpose of discriminating against gay men and lesbians."[56] Further efforts at appeal by LEGAL were denied.[57]

In 2001, it appeared as if the state legislature was prepared to overturn the sodomy law without the involvement of the courts.[58] In June 2001, State Senator Charles Jones moved to introduce a sodomy amendment to House Bill 2047 (proposed by State Representative Daniel Martiny), which would have toughened the state's mandatory sex-offender registration laws. The amendment proposed by Sen. Jones would have decriminalized private, noncommercial sex acts between consenting adults.[59] Lawmakers in the Louisiana House of Representatives had narrowly failed to pass a similar bill in May 2001 (the vote was, in fact, a 46-46 tie).[60] The effort in the House was stunted in part by a letter from State Parks Superintendent Gene Young, who complained that overturning the law would make it harder for him to stop gay sex in state parks.[61] The proposed bill suffered a similar fate in the Senate and was never enacted.

B. **HIV/AIDS Discrimination**

In re Cecil Little

In July 2003, Cecil Little Jr.'s family filed a complaint in the U.S. District Court for the Eastern District of Louisiana and complaints with the Department of Health and Human Services Office for Civil Rights against six nursing homes, claiming that all had violated a law prohibiting care facilities receiving federal funds - in this case, Medicare and Medicaid - from discriminating against patients with disabilities.[62] Little claimed that he was denied care because of his HIV-positive status and suffered unlawful discrimination under the Federal Rehabilitation Act among other state and federal laws. Eventually, one of the six facilities named in that complaint - Kentwood Manor in Kentwood, Louisiana - accepted Little. Until Kentwood Manor accepted Little, he was forced to stay at another facility 160 miles away from his family, where his health rapidly deteriorated. He now lives within 20 miles of his sister.[63]

C. **Hate Crimes**

Louisiana hate crime laws include "actual or perceived" gender and sexual orientation as protected classes.[64] The Louisiana Commission on Human Rights has been charged with collecting, studying, and reporting statewide data for such hate crimes,

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[56] *Id*. at 15.

[57] See, e.g., *La. Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d 1090 (La. 2005).

[58] George Painter, *Louisiana Sodomy Law Survives Repeal Effort*, SODOMY LAWS, June 21, 2001, http://bit.ly/imrCo.

[59] *Id*.

[60] *Id*.

[61] George Painter, *Louisiana Upholds Sodomy Law, Rejects Employment Non-Discrimination Bill*, SODOMY LAWS, May 24, 2001, http://bit.ly/oQcf0.

[62] *[Five] rest homes accused of discrimination involving HIV*, DOLAN MEDIA NEWS, June 21, 2004.

[63] *Id*.

[64] LA. REV. STAT. ANN. § 14:107.2 (2002).

which data is reported annually to the governor and members of the Legislature. However, as yet, Louisiana has not addressed gender identity-based violence under these provisions of the hate crimes laws.[65]

D. Education

In March 2008, House Bill 674 - a bill that would have required city, parish, and local school boards to adopt policies prohibiting bullying, harassment, and intimidation based on various characteristics, including sexual orientation but not gender identity or expression - was introduced in the state House of Representatives by State Representative Walt Leger.[66] The bill passed a House committee by an 11-4 vote.[67] However, on April 29, 2008, the bill was defeated by a 28-63 vote in the House.

E. Health Care

Louisiana law does not allow for a partner to make decisions on behalf of his or her incapacitated same-sex partner in the absence of an express advance directive.[68]

F. Gender Identity

Louisiana passed a birth certificate statute in 1968, which reads: "Any person born in Louisiana, who has sustained sex reassignment or corrective surgery which has changed the anatomical structure of the sex of the individual to that of a sex other than that which appears on the original birth certificate of the individual, may petition a court of competent jurisdiction as provided in this Section to obtain a new certificate of birth."[69] This statute is still in effect. On December 23, 2008, the U.S. District Court for the Eastern District of Louisiana granted summary judgment in favor of plaintiffs Oren Adar and Mickey Ray Smith, two gay men who are adoptive parents of a child born in Louisiana but adopted in New York, in their suit against the Louisiana State Registrar seeking injunctive relief and a declaratory judgment that the registrar's refusal to enforce a New York adoption decree and to issue an amended birth certificate including both parents' names violated the Full Faith and Credit Clause of the U.S. Constitution.[70] The Louisiana State Registrar had initially refused the request that both the men's names be added to the birth certificate because gay adoption and same-sex marriage are illegal in Louisiana. Adar and Smith then filed a lawsuit in federal court, taking the position that leaving their names off the birth certificate "singles out unmarried same-sex couples and their adoptive children for the improper use of making them unequal to everyone else."[71] U.S. District Court Judge Jay Zainey granted the plaintiffs' summary judgment motion and ordered the Louisiana State Registrar to recognize the adoption on constitutional grounds, ruling that doing otherwise would violate the Full Faith and Credit Clause,

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65 *Id.*
66 Notice of Committee Meeting, Louisiana House of Representatives (Apr. 23, 2008).
67 *Anti-Bullying Bill Clears House Committee*, ADVOCATE, Apr. 24, 2008.
68 LA. REV. STAT. ANN. § 40:1299.53.
69 LA. REV. ANN. STAT. § 40:62 (A)(2004).
70 *Adar v. Smith*, 2008 WL 5378130 (E.D. La. 2008).
71 *Id.*

which mandates that court-ordered events that take place in other states remain legally binding across state lines. Per this ruling, both Adar and Smith will be recognized as their son's legal parents under Louisiana law. The state has confirmed that it plans to appeal the ruling.[72]

H. **Recognition of Same-Sex Couples**

In 1999, the Louisiana legislature unanimously enacted a statute prohibiting the state from recognizing marriage for same-sex couples.[73] And, in 2004, Louisiana became one of the first states in the country to approve a constitutional amendment banning same-sex marriage as well as civil unions and domestic partnerships. The amendment reads as follows:

> Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.[74]

In August 2004, the Forum for Equality, a statewide civil rights organization, filed suit against the state seeking to have the amendment removed from the ballot.[75] The amendment was initially struck down by Judge William Morvant, who ruled that the amendment was not narrowly tailored as is required under state law. According to state law, constitutional amendments are valid only if they have a single legal purpose and the court ruled that the amendment in fact had two purposes: the first was to ban gay marriage and the second was to ban civil unions and domestic partnerships. An appeal of the trial court decision was heard by the state's five-judge First Circuit Court of Appeal, but the Court of Appeal sent the case to the state's Supreme Court without ruling on the issue.[76] The Louisiana Supreme Court followed the trial court in focusing on the issue of

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[72] *Louisiana Will Appeal Birth Certificate Order*, SHREVEPORT TIMES, Jan. 1, 2009, *available at* http://bit.ly/VuRKj.

[73] Louisiana House Bill 1450 passed by a margin of 95-0 in the House and 37-0 in the Senate. The bill enacted Louisiana Civil Code Annotated, Article 96, which states that

> "[a] purported marriage between parties of the same sex does not produce any civil effects" and Article 3520(B), which states "A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage."

[74] La. Const. art. XII, §15.

[75] *Forum for Equality v. McKeithen*, No. 2004-11324 (La. D., Orleans Parish, Div. J-13 Aug. 6, 2004).

[76] *See generally Forum for Equality PAC v. McKeithen*, 2004 La. App. LEXIS 2407 (La. Ct. App. Oct. 13, 2004)

whether the amendment in fact had more than one purpose. The Louisiana Supreme Court concluded that each part of the amendment was "germane to the object of 'defense of marriage'" and, hence, that the amendment was legally valid.[77]

In contrast, the New Orleans City Council unanimously enacted a Domestic Partnership ordinance in July 1993, and then amended and readopted it in 1999. The Domestic Partnership ordinance establishes a registry in which an adult, cohabiting couple who are not married and who are either different-sex or same-sex, can register their relationship with the city. After the ordinance was enacted, the city's Chief Administrative Officer made access to health insurance available to registered domestic partners of city employees.

In 2002, the Alliance Defense Fund filed suit on behalf of a group of New Orleans taxpayers to challenge the Council's authority to enact the ordinance.[78] The plaintiffs argued that under the home rule charter and the state constitution, the City of New Orleans was precluded from establishing new legal forms of family relationships. They relied primarily on Article VI, Section 9 of the Louisiana Constitution, which states that "no local governmental subdivision shall . . . enact an ordinance governing private or civil relationships." On January 15, 2009, a unanimous three-judge panel of the Louisiana Fourth Circuit Court of Appeal rejected the Alliance Defense Fund's appeal. The court's opinion in *Ralph v. City of New Orleans* affirmed the lower court's ruling that the City of New Orleans had the legislative authority to adopt the measure and intimated that the challenged ordinance did not violate the state's "Defense of Marriage Amendment," passed by the voters in 2004 (as discussed above).[79] Writing for the panel, Judge Joan Bernard Armstrong explained, "[t]he ordinance does not control the making and administration of domestic partnerships, it merely provides a mechanism whereby persons may register these partnerships with the City."[80]

J. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

In October 2008, Gov. Jindal announced that he would revive the Louisiana Commission on Marriage and Family, billed as "an entity within the executive department that serves to propose programs, policies, incentives and curriculum regarding marriage and family by collecting and analyzing data on the social and personal effects of marriage and child-bearing within the state of Louisiana."[81] The Commission will be considering and making recommendations regarding marriage and family issues within the state. According to the statute, the commission is comprised of a maximum of twenty-nine members including the governor, the secretary of the Department of Social Services, the secretary of the Department of Health and Hospitals, the director of the Louisiana Workforce Commission, the commissioner of higher

[77] *Forum for Equality v McKeithen*, 893 So. 2d 715, 2004-2477 (La. 2005)
[78] *Ralph v. City of New Orleans*, 2009 WL 103895 (La. Ct. App. Jan. 15, 2009).
[79] *Id.* at 12.
[80] *Id.*
[81] Press Release, Office of the Gov. of the State of La., Governor Bobby Jindal Announces Appointments to the Louisiana Commission on Marriage and Family (2008), *available at* http://bit.ly/CispX.

education, the superintendent of the Department of Education, the executive director of the Children's Cabinet, the executive director of the Office of Women's Policy, and the director of Temporary Assistance for Needy Families, or their designees. Observers have expressed concerns that many of those appointed by Gov. Jindal to serve on the panel will promote an extreme, anti-gay agenda that sets back, blocks, and battles any attempts to recognize or respect Louisiana's LGBT people or families headed by same-sex couples.[82]

Among those who have been appointed by Gov. Jindal to serve on the Commission are Tony Perkins, the president of the anti-gay advocacy group known as The Family Research Council, Gene Mills, executive director of the conservative Louisiana Family Forum and Michael Johnson, senior legal counsel for the Alliance Defense Fund, a nonprofit group that opposes gay marriage, and the lead lawyer for the organization in its challenge of the New Orleans Domestic Partnership ordinance.[83] Each of these individuals has a long history of anti-LGBT rhetoric. According to reports, Perkins and Mills, especially, are anti-gay advocates, and have been the driving forces behind attempts to ban legal protections for same-sex couples.[84] While heterosexual relationships can result in children, Mills has said, "you don't get the equivalent in a homosexual relationship . . . you get disease."[85]

[82] Bill Barrow, *Advocates Fear Attack on Gay Adoption by Louisiana Lawmaker*, TIMES-PICAYUNE, Dec. 30, 2008.
[83] *See supra* Section IV.A(1).
[84] *Id.*
[85] Scott Gold, *Louisiana Judge Throws Out State Ban on Gay and Lesbian Marriages*, L.A.TIMES, Oct. 6, 2004, *available at* http://bit.ly/1FEdNl.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Maine – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Until 2005, Maine had no state-wide protections against employment discrimination based on sexual orientation or gender identity, nor was there an Executive Order prohibiting such discrimination. In previous years there had been efforts to prohibit the state and municipalities from adding sexual orientation to the state's anti-discrimination law and local ordinances.

During discussion of a state law prohibiting sexual orientation discrimination in 1981, one Maine legislator called gay people "creepy crawlers," and another said of lesbians that if any of them slept with him, they'd never sleep with another woman again.[1] In 1993, the state legislature passed a bill that would prohibit sexual orientation discrimination, but the governor vetoed it.[2] In 1995, a group called Concerned Maine Families obtained enough signatures to place on the state's general election ballot a measure, Question 1, that would prohibit gay-rights laws from being passed anywhere in Maine and invalidate the only existing ordinances, in Portland and Long Island, but the measure failed by a 53 to 47% margin.[3] In 1997, the state legislature passed and the governor signed a bill to prohibit sexual orientation discrimination. However, the law never took effect because a petition drive put the matter before Maine voters, who narrowly voted against the bill.[4] In 2000, the governor again signed a bill that let Maine voters decide whether to amend Maine law to include protections against sexual orientation discrimination.[5] Maine voters again narrowly rejected the amendments.[6]

Finally, in 2005, Maine became the last New England state to amend its anti-discrimination statute to prohibit sexual orientation and gender-identity motivated discrimination.[7] Opponents of the 2005 amendments to Maine's Human Rights Act ("MHRA") tried to remove the prohibitions on sexual orientation discrimination in the

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[1] *See Chronology of Maine's Gay-Rights Legislation,* MAINE SUN. TELEGRAM, Feb. 18, 2001 and Susan Kinzie, *Gay Rights: Evolution of a Debate Once Rarely Discussed Publicly, Subject Now Out of the Closet*, BANGOR DAILY NEWS, Jan. 3, 1998

[2] Peter Poncha and Tess Nacelewiz, PORTLAND PRESS HERALD, MAINE SUNDAY TELEGRAM, Sunday January 25, 1998, *Maine Gay Rights Chronology* available at http://people.maine.com/paula/pph/pph-1.25.98.html#linka.

[3] Lesbian & Gay L. Notes (Dec. 1995), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1995/12.95.

[4] *Chronology of Maine's Gay-Rights Legislation*, MAINE SUNDAY TELEGRAM, Feb. 18, 2001.

[5] *Id*.

[6] *Id*.

[7] Jeff Tuttle, *Debate Over Gay Rights Law Intensifies*, BANGOR DAILY NEWS, Oct. 15, 2005.

years following the 2005 changes, but in 2008 gave up on the efforts reportedly because of lack of funding and volunteers.[8]

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Maine include:

- A gay African-American male employee of the University of Maine, Augusta who reported in 2008 being called a "fagball" and "niggerball" and addressed in other demeaning ways by his immediate supervisor, a department dean. The employee filed a grievance with his head supervisor.[9]

- A gay firefighter who in 2008 reported that he had been harassed by his coworkers when his sexual orientation was disclosed at work. He was "outed" and then his coworkers made offensive and hostile comments. He met with department heads and expressed his discomfort several times, but allegedly the job environment has not changed.[10]

- A gay employee of the Maine Department of Corrections who in 2007 reported that he had experienced harassment and discrimination based on his sexual orientation at work, causing him to go on medical leave. The employee reported that inmates treated him badly because of his perceived sexual orientation and that his supervisors did nothing to address this harassment. He filed a complaint with the Maine Human Rights Commission and was successful in his case.[11]

- The head coach of a high school varsity softball team who alleges that in 2006 she was not rehired after twelve successful years of coaching because of her sexual orientation. In 2009, the Supreme Judicial Court of Maine reversed a lower court's grant of summary judgment for the defendant school district and superintendent, and remanded the case for trial.[12]

- A staff member at a county recycling center who in 2007 reported being denied bereavement leave when her same-sex partner's father passed away. She knew that heterosexual coworkers, whose unmarried partner's relatives have passed away, had been able to use bereavement time. For example, a coworker was permitted to take bereavement leave for the death of his girlfriend's father.[13]

[8] *Id.*
[9] GLAD REP. OF EMPLOY. DISCRIM. (Apr. 11, 2008) (on file with GLAD).
[10] GLAD REP. OF EMPLOY. DISCRIM (Feb. 19. 2008).
[11] GLAD REP. OF EMPLOY. DISCRIM (Oct. 31, 2007).
[12] Lesbian & Gay L. Notes (Summer 2009).
[13] GLAD REP. OF EMPLOY. DISCRIM (Apr. 5, 2007).

- A gay police officer in Maine who reported in 2002 that he was being harassed at work based on his sexual orientation. His was called a "fudgepacker" and a "faggot" by his coworkers.[14]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[14] GLAD REP. OF EMPLOY. DISCRIM (May 16, 2002).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

On November 8, 2005, Mainers voted to keep in place the amendments made to the state's Human Rights Act ("MHRA") by the state legislature and governor to prohibit the discrimination of people on the basis of "sexual orientation" in employment, housing, public accommodations, credit, and education.[15] The MHRA's definition of "sexual orientation" is broadly defined to include discrimination based on an individual's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression."[16] The statute applies to both private and public entities.[17] It forbids employers from refusing to hire, or deciding to fire, someone on the basis of their actual or perceived sexual orientation or gender identity, and forbids employers from taking into account a person's perceived sexual orientation or gender identity in making promotion, transfer, compensation, conditions, or privilege determinations.[18] However, the MHRA does not cover non-profit religious or fraternal corporations or associations.[19]

2. Enforcement and Remedies

In order to make a claim under the MHRA, an individual must file a claim with the Maine Human Rights Commission ("MHRC") within six months of the alleged discriminatory act or acts.[20] Once the MHRC receives a complaint, an investigator will first attempt to resolve the matter.[21] If the investigator is unable to do so, the MHRC will investigate whether there are reasonable grounds to believe the alleged unlawful discriminatory actions took place.[22] During this investigation, the MHRC may examine persons, places and documents, require attendance at a fact-finding hearing, and issue subpoenas for both persons and documents.[23] If the MHRC concludes that there are reasonable grounds to believe that the alleged unlawful discriminatory acts took place, then it will attempt to settle the matter.[24] If no settlement is reached, the MHRC may bring the case itself in superior court.[25]

If the MHRC does not find that there are reasonable grounds to believe the alleged unlawful discriminatory actions took place or if it is unable to settle the case, the

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[15] *See* 5 Me. Rev. Stat. § 4552 *et seq*.; *see also* GLAD, Anti-Discrimination Law in Main, Questions and Answers, http://www.glad.org/rights/maine/c/anti-discrimination-law-in-maine (last visited Sept. 4, 2009) (hereinafter "GLAD").
[16] 5 Me. Rev. Stat. § 4553(9-C).
[17] *See* 5 Me. Rev. Stat. § 4553(4).
[18] *See* 5 Me. Rev. Stat. § 4572(1)(A).
[19] *See* 5 Me. Rev. Stat. § 4553(4).
[20] *See* 5 Me. Rev. Stat. § 4611.
[21] *See* GLAD, *supra* note 15.
[22] *Id*.
[23] *Id*.
[24] *See* 5 Me. Rev. Stat. § 4612.
[25] *Id*.

complainant may file an action in superior court.[26] In addition, a complainant may obtain a right to sue letter from the MHRC if there has been no court action or conciliation agreement in the case within 180 days after the complaint was filed.[27]

If a plaintiff prevails under the MHRA, she or he may be entitled to hiring, reinstatement, or promotion with or without pay, cease and desist orders, and/or damages caused by the unlawful discrimination, including court costs and attorneys' fees.[28]

B. Attempts to Enact State Legislation

Proponents of amending the MHRA to include prohibitions against sexual orientation and gender identity discrimination had been fighting for these provisions in the state legislature since 1977.[29] In 1981, debate on the issue became so heated that the gallery was cleared of children.[30] In 1983, the state senate passed a version of the MHRA that would have included prohibitions against sexual orientation discrimination, but the state house defeated the measure.[31] In 1989, the state house passed a version of the MHRA that would have included prohibitions against sexual orientation discrimination, but the state senate defeated it.[32]

In 1993, both chambers of the state legislature passed a bill that would prohibit sexual orientation discrimination, but the governor vetoed it.[33] In 1995, a group called Concerned Maine Families obtained enough signatures to place on the state's general election ballot a measure, Question 1, that would prohibit gay-rights laws from being passed anywhere in Maine and invalidate the only existing ordinances, in Portland and Long Island, but the measure failed by a 53 to 47% margin.[34] Finally, in 1997, the state legislature passed and the governor signed a bill amending the MHRA to include prohibitions on sexual orientation discrimination However, the law never took effect because a petition drive put the matter before Maine voters, who narrowly voted against the bill.[35] In 2000, the state legislature again passed and the governor again signed a bill that let Maine voters decide whether to amend the MHRA to include protections against sexual orientation discrimination.[36] Despite public polls showing broad support for

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[26] *Id*.
[27] *Id*.
[28] *See* 5 Me. Rev. Stat. § 4582.
[29] *Chronology of Maine's Gay-Rights Legislation*, MAINE SUN. TELEGRAM, Feb. 18, 2001.
[30] *Id*. One legislator called gay people "creepy crawlers," and another said of lesbians that if any of them slept with him, they'd never sleep with another woman again. *See* Susan Kinzie, *Gay Rights: Evolution of a Debate Once Rarely Discussed Publicly, Subject now out of the Closet*, BANGOR DAILY NEWS, Jan. 3, 1998.
[31] *Chronology of Maine's Gay-Rights Legislation*, MAINE SUNDAY TELEGRAM, Feb. 18, 2001.
[32] *Id*.
[33] *Id*.
[34] Peter Poncha and Tess Nacelewiz, Portland Press Hearld, Maine Sunday Telegram, Sunday January 25, 1998, *Main Gay Rights Chronology* available at http://people.maine.com/paula/pph/pph-1.25.98.html#linka.
[35] *Id*.
[36] *Id*.

amending the MHRA to include these protections, Maine voters again narrowly rejected the amendments.[37]

In 2005, after the state legislature and governor once more amended the MHRA to include protections against sexual orientation discrimination (which, as defined, includes gender identity), Mainers voted by a 55% to 45% margin to let the amendments stand.[38] Opponents of the 2005 amendments to the MHRA tried to remove the prohibitions on sexual orientation discrimination in the years following the 2005 changes, but in 2008 gave up on the efforts reportedly because of lack of funding and volunteers.[39]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

Researchers reviewed the state's available archive of executive orders, but none were on point.[40]

2. State Government Personnel Regulations

As noted above, the MHRA's scope includes public entities.

3. Attorney General Opinions

None.

D. Local Legislation

Portland, Falmouth, South Portland, Long Island, Orono, Sorrento, Westbrook, Bangor, Ogunquit, and Bar Harbor have local ordinances prohibiting discrimination on account of a person's sexual orientation or gender identity.[41] In 1993, The Lewiston City Council passed an ordinance banning discrimination based on sexual orientation. But that same year it was overturned by voters by a 2-1 ratio.[42]

1. City of Portland

The Portland City Council found that "(a) The population of the city consists of people of every sexual orientation, some of whom are discriminated against in

[37] *Id*.
[38] Paul Carrier, *League Halts Gay-Rights Repeal Effort*, PORTLAND PRESS HERALD, June 20, 2008.
[39] *Id*.
[40] *See* Maine Office of the Governor Archive of Executive Orders, http://www.maine.gov/governor/baldacci/news/executive_orders/index.shtml (last visited Sept. 4, 2009).
[41] *See* GLAD, *supra* note 15; Tuttle, *supra* note 7; *Gay Rights Activists Regroup: Tourist Towns Work to Reassure Visitors of Tolerance, Acceptance*, BANGOR DAILY NEWS, June 29, 1998.
[42] Peter Poncha and Tess Nacelewiz, Portland Press Hearld, Maine Sunday Telegram, Sunday January 25, 1998, *Main Gay Rights Chronology* available at http://people.maine.com/paula/pph/pph-1.25.98.html#linka.

employment opportunities, housing, access to public accommodations and in the extension of financial credit; ... (c) There has been a disturbing increase in the number of violent incidents within the city in which individuals have been attacked because of their sexual orientation; and (d) The lack of legal protection for individuals discourages them from publicizing acts of discrimination out of fear of reprisal.[43]

2. Town of Falmouth

The Falmouth town council found that "The population of the Town of Falmouth is diverse and includes people of every sexual orientation (they are our family members, neighbors, friends, employees, taxpayers, landlords and tenants, lenders and borrowers), some of whom are at risk of being discriminated against in employment opportunities, housing, access to public accommodations, education, and the extension of financial credit."[44]

3. City of Portland

The City of Portland found that "The population of the City of Portland is diverse and includes people of every sexual orientation, some of whom are at risk of being discriminated against in employment opportunities, housing, access to public accommodations and in the extension of financial credit. [45]

E. Occupational Licensing Requirements

After reviewing the professional licensing requirements of a variety of occupations in Maine, none appeared to raise the specter of potential indirect sexual orientation or gender identity discrimination.[46]

[43] *See* City of Portland, Code of Ord., Ch. 13.5, Art. II, § 13.5-21, *available at* http://www.ci.portland.me.us/Chapter013_5.pdf.
[44] *See* Falmouth Code of Ord. (2009), *available at* http://www.municode.com/resources/gateway.asp?pid=12125&sid=19.
[45] *See* City of Portland Ord. 97/98 (2008-2009), *available at* http://www.memun.org/SchoolsProject/Resources/Ordinance/SexOrientationSP.htm.
[46] *See* Maine Office of Licensing & Registration, List of Professions and Occupations, http://www.maine.gov/pfr/professionallicensing/professions.htm (last visited Sept. 4, 2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST GLBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

2. Private Employers

B. Administrative Complaints

Since 2005, 35 cases have been filed under the MHRA alleging unlawful sexual orientation discrimination.[47] Of these cases, 12 were filed against public entities.[48]

C. Other Documented Examples of Discrimination

Brewer School District

In 2009, the Supreme Judicial Court of Maine reversed a lower court's grant of summary judgment to defendant school district and school superintendent in a sexual orientation discrimination case. Finding disputed issues of material fact, the court remanded for trial Kelly Cookson's claim that she was not rehired as head coach of the Brewer High School varsity softball team because of her sexual orientation.

Cookson was head coach for 12 years between 1993 and 2005. The team was by all accounts quite successful during that period, and made the playoffs in every year but one. Despite the team's success, Cookson was not rehired for the 2005-2006 season. Claiming sexual orientation discrimination and slander, Cookson filed suit against the Brewer School Department and the school superintendent, Daniel Lee. Her complaint alleged that she was not rehired because she was a lesbian, and that Lee made false and defamatory statements about her to the parents of the members of her team. The school claimed that Cookson was not rehired because of nondiscriminatory reasons: that she was involved in hazing, in violation of school policy, and that she failed to provide a balanced sports program.[49]

University of Maine- Augusta

In 2008, a gay, African-American male employee was called a "fagball" and "niggerball" and addressed in other demeaning ways by his immediate supervisor, a department dean. The employee filed a grievance with his head supervisor.[50]

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[47] *See* Williams Institute Complaint Chart (2009) (on file with the Williams Institute). As noted above, the MHRA's definition of "sexual orientation" includes protections against both sexual orientation and gender identity discrimination.
[48] *Id.*
[49] Lesbian & Gay L. Notes (Summer 2009).
[50] GLAD REP. OF EMPLOY. DISCRIM. (Apr. 11, 2008) (on file with GLAD).

City Government Department

In 2008, a gay firefighter reported that he had been harassed by his coworkers when his sexual orientation was disclosed at work. He was "outed" and then his coworkers made offensive and hostile comments. He met with department heads and expressed his discomfort several times, but allegedly the job environment has not changed.[51]

Maine Department of Corrections

In 2007, a gay employee of the Maine Department of Corrections reported that he had experienced harassment and discrimination based on his sexual orientation at work. As a result of discrimination and harassment, the employee went on medical leave. The employee was investigated, but his supervisors would not tell him why the investigation was undertaken. The employee reported that inmates treated him badly because of his perceived sexual orientation and that his supervisors did nothing to address this harassment. The employee filed a complaint with the Maine Human Rights Commission and was successful in his case.[52]

County Recycling Department

In 2007, a staff member at a county recycling center was denied bereavement leave when her same-sex partner's father passed away. She knew that heterosexual coworkers, whose unmarried partner's relatives have passed away, had been able to use bereavement time. For example, a coworker was permitted to take bereavement leave for the death of his girlfriend's father. The department policy states that in the case of an immediate family member's death, including a spouse's parent, staff may take bereavement time.[53]

Police Department

In 2002, a gay police officer in Maine reported that he was being harassed at work based on his sexual orientation. He was called a "fudgepacker" and a "faggot" by his coworkers.[54]

[51] GLAD REP. OF EMPLOY. DISCRIM (Feb. 19. 2008).
[52] GLAD REP. OF EMPLOY. DISCRIM (Oct. 31, 2007).
[53] GLAD REP. OF EMPLOY. DISCRIM (Apr. 5, 2007).
[54] GLAD REP. OF EMPLOY. DISCRIM (May 16, 2002).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Housing & Public Accommodations Discrimination

The MHRA prohibits discrimination on the basis of sexual orientation in housing and public accommodations.[55]

B. Education

The MHRA prohibits discrimination on the basis of "sexual orientation" in education.[56]

C. Recognition of Same-Sex Couples

In 2009, Maine enacted a law granting same-sex couples the right to marry.

[55] *See* 5 Me. Rev. Stat. § 4552 *et seq.*; *see also* GLAD, *supra* note 15.
[56] *See* 5 Me. Rev. Stat. § 4552 *et seq.*; *see also* GLAD, *supra* note 15.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Maryland – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

In 2001, Maryland enacted legislation that prohibits discrimination against gays, lesbians, and bisexuals in employment, housing, and public accommodations.[1] The laws of Montgomery County and Baltimore City also include gender identity as a protected class. Similar legislation has been proposed in the Maryland legislature, but has not passed.[2]

Prior to the passage of Maryland's nondiscrimination law, in October 2000 Governor Glendening created the Special Commission to Study Sexual Orientation Discrimination in Maryland, motivated by the death of his brother, who served for many years in the armed forces and had lived "in the closet."[3] The Special Commission held hearings regarding sexual orientation discrimination. Of the 113 oral testimonies at the hearings, 87 were in favor of passage and 26 were opposed. The testimony of proponents of the bills tended to focus on personal stories of discrimination as well as a desire to simply work on "a level playing field."[4]

Chairman of the Special Commission, Geoffrey L. Grief, wrote an article about the hearings in which he recounted:

> The most common complaint dealt with employment discrimination. Those testifying discussed fearing that someone at work would discover they were gay, and they would lose their job. For a number of those testifying, this had happened. They had been 'let go' because their employers thought 'they would be happier somewhere else.' One man, who had achieved partner in his law firm, was told it was time to 'move-on, no one here wants to work with a faggot.' Others believed they had been hired at lower salaries or had not received raises because they were

[1] Geoffrey Greif, *When a Social Worker Becomes a Voluntary Commissioner and Calls on the Code of Ethics*, NAT'L ASSOC. OF SOCIAL WORKERS, Oct. 30, 2001, *available at* http://bit.ly/1gkdwa. *See* MD. CODE ANN. art 49B (2008).
[2] Md. S.B. 976; Md. H.B. 1598.
[3] Geoffrey Greif & Daphne McClellan, *Being Heard on Sexual Orientation: An Analysis of Testimonies at Public Hearings on an Anti-Discrimination Bill*, 8 J. HUMAN BEH. IN SOC. ENVIRON. 2,3 (2003).
[4] *Id.*

> gay. . . . Several people testified about the lack of domestic partner benefits, which in effect meant that they worked for less compensation than work colleagues with legally recognized spouses. Some had lost jobs that were very meaningful to them as well as financially successful. Others remained on the job but were consumed with fear about what would happen if someone found out they were not heterosexual. The net effect for those in this category was that their work lives were seriously compromised.[5]

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local governments in Maryland include:

- A public school teacher who encountered discrimination by the State of Maryland at every step in his career. First, while a student and student teacher at Penn State University, the teacher was suspended for "public acknowledgement of homosexuality." A state court ordered that he be reinstated and he then finished his degree. Next when he applied for a teaching license Penn State officials differed as to his qualifications and forwarded his application to the Pennsylvania Secretary of Education without recommendation. A hearing about whether he should get his certification resulted in a tie because of a dispute about whether he possessed the requisite "good moral character." The Pennsylvania Secretary of Education broke the tie in his favor, but unfortunately did so at a well-publicized press conference. The teacher had already been hired in Montgomery County, but when the County learned that he was gay he was transferred to a non-teaching position. A district court upheld the transfer, holding that while homosexuality *per se* would not justify transfer or dismissal, the teacher's homosexuality suggested a negative effect on his teaching ability, and his actions in talking to the media further had negative effects on the educational process. On appeal, the Fourth Circuit found that his public discussion was protected by the First Amendment, but affirmed the lower court because the teacher had failed to disclose on his teaching application to Montgomery County his affiliation with an LGBT student organization at Penn State -- an affiliation, which had he disclosed, would have kept the Board, by its own admission, from hiring him in the first place.[6] Acanfora v. Bd. of Educ. of Montgomery County, 491 F. 2d 498 (1974). In 2008, twenty-four years after the Acanfora case, Maryland passed a law to prohibit any discrimination based on sexual orientation in the issuance of occupational licenses.[7]

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[5] Geoffrey L. Greif & Daphne L. McClellan, *Being Heard on Sexual Orientation: An Analysis of Testimonies at Public Hearings on an Anti-Discrimination Bill*, 8 J. HUM. BEHAVIOR IN THE SOC. ENV'T, Issue 2/3 2003, at 15, 21-22.
[6] *Acanfora v. Bd. of Educ. of Montgomery County*, 491 F. 2d 498 (1974).
[7] MD. CODE ANN. Art 49B (2008) (stating that any profession licensed by the state of Maryland cannot discriminate based on sexual orientation.)

- A correctional officer in a state prison who alleged that she was harassed in the workplace by her co-officers, including being subjected to lewd comments, pornography, and sexual advances, and comments that all short haired female guards were lesbians. Her supervisor and co-workers regularly made comments regarding her own and other officers' sexual conduct, her appearance, the female anatomy, the unfitness of women to serve as police officers, the presumed lesbianism of female officers, prostitution, and other inappropriate sexual references and behaviors. In 2003, the officer was forced to work under a supervisor who demeaned her and ordered her and another female officer to shower together with "soap on a rope."[8] In dismissing her complaint in 2005, a United States District court stated that while unpleasant, the stereotyping comments were an example of "the sporadic use of abusive language, gender-related jokes, and occasional teasing" that did not rise to the level of a Title VII action.[9] Ensko v. Howard County, 2005 U.S. Dist. LEXIS 37602 (N.D. Md. 2005).

- When the Maryland sodomy law was overturned in *Williams v. Glendening*, four of the plaintiffs who brought the suit were members of the Maryland bar, including one who wanted to be a judge.[10] For those plaintiffs, loss of state licensure was a real concern.[11] The court noted this effect of the law, and relied on the legitimacy of these fears as the basis for the plaintiffs' standing: "Since many of the plaintiffs are lawyers, they express anxiety that a conviction might jeopardize their licenses to practice law and thereby their means of earning a livelihood. . . . This court cannot say that the concerns of these plaintiffs are not real."[12] On the basis of these fears, the court held that "the Plaintiffs' concerns are real and that a justiciable issue, ripe for resolution, is presented."[13]

- In 1994, three female state police trooper candidates who were not hired as state troopers because of alleged inconsistencies in their polygraph examination questions concerning sexual orientation.[14] Two of the officers had previously filed a complaint in state court requesting injunctive and declaratory relief for sexual orientation discrimination while they were at the Maryland State Police Academy. They claimed their treatment at the Academy violated the Maryland Declaration of Rights, the equal protection clause, the due process clause, and a Governor's Executive Order banning sexual orientation discrimination by the state government. The state settled with the two women, agreeing to the injunctive relief requested and offering the positions sought. They then

[8] Complaint at 17, 18, 20, 26 & 30, *Ensko v. Howard County*, 423 F. Supp.2d 502 (D. Md. 2005) (No. 04 Civ. 03464).
[9] *Ensko v. Howard County*, 2005 U.S. Dist. LEXIS 37602, at *12 (N.D. Md. 2005) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).
[10] No. 9803 6031, 1998 WL 965992, at *1 (Md. Cir. Ct.).
[11] *Id.* at *1 ("Since all are members of the Maryland Bar, they contend that a conviction would affect their ability to continue to practice law.").
[12] *Id.* at *5.
[13] *Id.*
[14] GAY & LESBIAN L. NOTES (Dec. 1995), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1995/12.95.

successfully completed their training at the Academy, but were then denied positions as state troopers, along with a third lesbian candidate.

- An inmate at a Maryland state prison who alleged that he was denied a position in the prison's education department because a guard told the head of that department that he was gay and a rapist. Twice the 4th Circuit reversed dismissals of his case by a United States District Court. The first time the Court determined that the inmate had alleged facts constituting a potentially cognizable equal protection claim. The second time the Court held that the inmate had not been presented with adequate notice about presenting his case de novo to the district court after it had been dismissed by a magistrate.[15] Johnson v. Knable, 934 F.2d 319 (4th Cir. 1991).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[15] *Johnson v. Knable*, 934 F.2d 319 (4th Cir. 1991).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

The Maryland non-discrimination law defines sexual orientation as "the identification of an individual as to male or female homosexuality, heterosexuality or bisexuality." The law applies to private employers with 15 or more employees, state and local public employers, employment agencies, and labor organizations. The law exempts tax-exempt private clubs, religious organizations for work connected with its activities, and religious educational institutions. The Maryland law designates the Maryland Commission on Human Rights to handle discrimination complaints and provides for subsequent judicial enforcement by the Commission.[16] The law also prohibits retaliation against complainants, witnesses, and others who assist in an investigation.

2. Enforcement & Remedies

The Maryland non-discrimination law provides a range of remedies, including cease and desist orders, affirmative action, reinstatement or hiring, with or without back pay, and "any other equitable relief" that is appropriate.

B. Attempts to Enact State Legislation

Various attempts prior to 2001 were made to pass legislation that would add sexual orientation as a protected class to Maryland's anti-discrimination law. The first such attempt was made in 1976.[17] The Maryland Commission on Human Relations introduced such a bill in the 1995 and 1996 sessions, but it was unfavorably reported by the House Commerce and Governmental Matters Committee.[18] In 1997 and 1998, similar legislation was offered in the House of Delegates, but the House Judiciary Committee similarly gave an unfavorable report.[19] In the 1999 session, then-Governor Glendening included HB 315 as part of his administration package, and for the first time the House Judiciary Committee gave the bill a "favorable with amendments" report.[20] However, that bill was not reported out of the Senate Judicial Proceedings Committee. In the 2000 session the legislation was reintroduced in the House of Delegates, but the House Judiciary Committee failed to bring it to a vote.[21]

In October 2000, Governor Glendening created the Special Commission to Study Sexual Orientation Discrimination in Maryland, motivated by the death of his brother,

[16] Md. Comm'n on Hum. Rel., "About Us" Webpage, http://www.mchr.maryland.gov/AboutUs.html (last visited Sept. 6, 2009).
[17] G.L. Greif, *Allowing Freedom to Live and Let Live*, BALT. SUN, Jan. 17, 2001, at A11.
[18] *Id; see, e,g*, Md. H.B. 67; Md. H.B. 325; Md. H.B. 413; Md. H.B. 431; Md. H.B. 1460; Md. H.B. 68.
[19] *See, e.g.*, Md. H.B. 67 (1996) (legislative history), *available at* http://mlis.state.md.us/1996rs/billfile/hb0067.htm (last visited Sept. 6, 2009); Greif, *supra* note 5.
[20] Md. H.B. 315 (1999) (legislative history), *available at* http://mlis.state.md.us/1999rs/billfile/HB0315.htm (last visited Sept. 6, 2009); Greif, *supra* note 1.
[21] Md. H.B. 315.

who served for many years in the armed forces and had lived "in the closet."[22] The Special Commission held hearings regarding sexual orientation discrimination. While 60% of people in Maryland favored a ban on discrimination against gay men and lesbians, 32% were opposed to banning such discrimination.[23] Of the 113 oral testimonies at the hearings, 87 were in favor of passage and 26 were opposed. While the testimony of proponents of the bills tended to focus on personal stories of discrimination as well as a desire to simply work on "a level playing field," opponents' testimony was largely based on the belief that homosexuality is immoral and invoked their religious beliefs to support this position.[24]

Chairman of the Special Commission, Geoffrey L. Grief, wrote an article about the hearings in which he recounted:

> The most common complaint dealt with employment discrimination. Those testifying discussed fearing that someone at work would discover they were gay, and they would lose their job. For a number of those testifying, this had happened. They had been 'let go' because their employers thought 'they would be happier somewhere else.' One man, who had achieved partner in his law firm, was told it was time to 'move-on, no one here wants to work with a faggot.' Others believed they had been hired at lower salaries or had not received raises because they were gay. . . . Several people testified about the lack of domestic partner benefits, which in effect meant that they worked for less compensation than work colleagues with legally recognized spouses. Some had lost jobs that were very meaningful to them as well as financially successful. Others remained on the job but were consumed with fear about what would happen if someone found out they were not heterosexual. The net effect for those in this category was that their work lives were seriously compromised.[25]

After these hearings the Special Commission recommended passage of an anti-discrimination bill including sexual orientation. Rev. Emmett Burns, a state legislator and minister, said of the Maryland anti-discrimination bill, "I don't want to improve the chances for someone who is of the gay persuasion to ply their behavior."[26] Despite resistance, in April 2001 the Maryland legislature passed the anti-discrimination bill. By

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[22] Geoffrey L. Greif & Daphne L. McClellan, *Being Heard on Sexual Orientation: An Analysis of Testimonies at Public Hearings on an Anti-Discrimination Bill*, 8 J. HUMAN BEH. IN SOC. ENVIRON. 2,3 (2003).
[23] T.W. Waldron, *Answers Put State Among Progressives*, BALT. SUN, Jan. 10, 2001, at A1, A14.
[24] *Id.*
[25] Geoffrey L. Greif & Daphne L. McClellan, *Being Heard on Sexual Orientation: An Analysis of Testimonies at Public Hearings on an Anti-Discrimination Bill*, 8 J. HUM. BEHAVIOR IN THE SOC. ENV'T, Issue 2/3 2003, at 15, 21-22.
[26] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 200 (2000 ed.).

June 30, 2001, opponents of the bill had garnered the requisite number of petition signatures to bring it to referendum (47,000) in the 2002 elections.[27] With the bill on referendum, it could not become law on October 1. However, the signatures on the petition and the petitioning process were successfully challenged in court. A judge declared the petition invalid, and on November 21, 2001, the law took effect.

Legislation seeking to add gender identification to the statewide law has been introduced but has yet to pass.[28] Maryland House Bill 474 and Maryland Senate Bill 566, both introduced in February 2009, would have added protection of gender identity to the anti-discrimination law, but both bills failed to be acted upon by the end of the session in April 2009.[29]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In 2007, Governor O'Malley updated the Executive Order prohibiting discrimination in state personnel decisions to include "gender identity and expression."[30] Former Governor Parris Glendening added sexual orientation to the list of characteristics protected from discrimination by executive order on July, 7 1995.[31]

2. State Government Personnel Regulations

In 2006, legislation took effect which prohibited Maryland from entering into a contract with any business entity that has "discriminated in the solicitation, selection, hiring, or commercial treatment of vendors, suppliers, subcontractors, or commercial customers on the basis of…sexual orientation."[32] According to the Fiscal and Policy Note on Senate Bill 897, which contained the legislation, no existing statute at that point addressed discrimination by a contractor or subcontractor in a State procurement contract.[33]

3. Attorney General Opinions

None.

D. Local Legislation

[27] Greif, *supra* note 5.
[28] *See* Press Release, Equality Maryland, Equality Maryland Deeply Disappointed by Defeat of Transgender Equality Legislation (Mar. 23, 2007). http://bit.ly/2tcVIc. *See also* Md. S.B. 976, Md. H.B. 1598.
[29] Human Rights Campaign, Maryland HB 474/SB 566, http://bit.ly/CiHyj (last visited Sept. 6, 2009).
[30] Md. Exec. Order 01.01.2007.16 (2007) (Code of Fair Employ. Practices).
[31] Md. Exec. Order 01.01.1995.19 (1995) (Code of Fair Employ. Practices).
[32] MD. FINANCE & PROCUREMENT CODE ANN. 19-101 *et seq*. *See also* MD. CODE ANN. Art 49B
[33] Md. Dept. of Leg. Serv., Fiscal & Policy Note (2007), http://bit.ly/1pA1gZ. (last visited Sept. 6, 2009).

At the time of the 2000 Special Commission to Study Sexual Orientation Discrimination hearings, four local jurisdictions—Prince George's County, Montgomery County, Baltimore City and Howard County—encompassing 48.5% of the population of Maryland had already passed laws prohibiting discrimination based on sexual orientation, however citizens in the remaining portions of Maryland were not protected.[34] In 2001, Cumberland City added a section prohibiting discrimination based on sexual orientation to its municipal code.[35] The Rockville City code has a similar section.[36]

1. Prince George's County

Prince George's County prohibits discrimination based on sexual orientation.[37]

2. Montgomery County

Montgomery County prohibits discrimination based on sexual orientation and gender identity.[38] In November 2007, the Montgomery County Council voted 8-0 to pass County Bill 23-07 which amends the county anti-discrimination laws to include gender identity and expression.[39] A petition drive sought to overturn the Bill by submitting the measure to a referendum in the November 2008 election, but a court found that the signatures had not been collected pursuant to the correct procedures and the measure did not end up on the ballot.[40]

In 1994, the Montgomery County Council voted 6 to 1 to repeal a section of the county's Human Relations Law, known as the Hanna amendment, that allowed employers to refuse a job applicant "on the basis of advocacy of homosexuality or bisexuality" when the job requires "work with minors of the same gender."[41] The amendment, which was sponsored by County Council President William E. Hanna, Jr., had never been challenged since it was passed in 1984.[42] Hanna objected to the move to repeal the amendment claiming, "I thought then and I still think [homosexuality] is a perversion."[43] Hanna stated that he believes there is a direct correlation between

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[34] Greif & McClellan, *supra* note 13, at 17. MONTGOMERY COUNTY CODE § 27-19 (1994); PRINCE GEORGE'S COUNTY CODE § 2-185 (1995), BALTIMORE CODE, Art. 4, §§9(16), 12(8) (1983); HOWARD COUNTY CODE § 12.200 (1978). *See* Kenneth Lasson, *Homosexual Rights: The Law in Flux and Conflict*, 9 U. BALT. L. REV. 47, 48n.7 (1979).

[35] CUMBERLAND CODE §9-26. On August 14, 2001, the Mayor and City Council passed Ordinance No. 3380 adding protection against discrimination based on sexual orientation. *See* City of Cumberland Hum. Rts. Comm'n, HRC Fact Sheet, *available at* http://bit.ly/SrFBR (last visited Sept. 7, 2009) (hereinafter "HRC Fact Sheet").

[36] ROCKVILLE CODE §11-1.

[37] PRINCE GEORGE'S COUNTY CODE § 2-185 (1995).

[38] MONTGOMERY COUNTY CODE § 27-19 (1994); Montgomery County, Maryland, County Bill 23-07 (2007).

[39] Montgomery County, Maryland, County Bill 23-07 (2007).

[40] *Doe v. Montgomery County Bd. of Elections*, 406 Md. 697 (Md. Ct. App. 2008).

[41] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 42 (1994 ed.).

[42] *Id*.

[43] *Id*.

homosexuality and pedophilia, and justified his vote against the repeal explaining, "I just feel an obligation to protect children."[44]

3. City of Baltimore

The City of Baltimore prohibits employment discrimination based on sexual orientation and gender identity.[45] In December 2002, Baltimore Mayor Martin O'Malley signed into law Council Bill 02-0857, which adds gender identity as a class in the list of prohibited discriminatory categories in the areas of employment, education, health and welfare agencies, housing, and public accommodations.[46]

4. Howard County

Howard County prohibits employment discrimination based on sexual orientation.[47]

5. City of Cumberland

In 2001, Cumberland City added a section prohibiting discrimination based on sexual orientation to its municipal code.[48]

6. City of Rockville

The Rockville City code prohibits employment discrimination based on sexual orientation.[49]

E. Occupational Licensing Requirements

In 2008, Maryland passed a law to prohibit any further discrimination based on sexual orientation in the issuance of occupational licenses.[50]

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[44] *Id*.
[45] BALTIMORE CITY CODE, Art. 4, §§9(16), 12(8) (1983); BALTIMORE ORD. 02-453 Council Bill 02-0857 (2002).
[46] BALTIMORE ORD. 02-453 Council Bill 02-0857 (2002).
[47] HOWARD COUNTY CODE § 12.200 (1978).
[48] CUMBERLAND CODE §9-26. On August 14, 2001, the Mayor and City Council passed Ordinance No. 3380 adding protection against discrimination based on sexual orientation. *See* HRC Fact Sheet, *supra* note 31.
[49] ROCKVILLE CODE §11-1.
[50] MD. CODE ANN. Art 49B (2008) (stating that any profession licensed by the state of Maryland cannot discriminate based on sexual orientation.)

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Ensko v. Howard County, 2005 U.S. Dist. LEXIS 37602 (N.D. Md. 2005).

A correctional officer in a state prison brought suit under Title VII and Section 1983 of Title 42 of the U.S. Code against her co-officers. She alleged that she had been harassed in the workplace including being subjected to lewd comments, pornography, sexual advances, and comments that short-haired female guards were lesbians. Her supervisor and co-workers regularly made comments regarding her own and other officers' sexual conduct, her appearance, the female anatomy, the unfitness of women to serve as police officers, the presumed lesbianism of female officers, prostitution, and other inappropriate sexual references and behavior. In 2003, the officer was forced to work under a supervisor who demeaned her and ordered her and another female officer to shower together with "soap on a rope."[51] The court stated that while unpleasant, the stereotyping comments were an example of "the sporadic use of abusive language, gender-related jokes, and occasional teasing" that did not rise to the level of a Title VII action.[52]

Johnson v. Knable, 862 F.2d 314 (Table), 1988 WL 119136 (4th Cir. (Md.) 1988).
Johnson v. Knable, 934 F.2d 319 (Table), 1991 WL 87147 (4th Cir. (Md.) 1991).

Steven M. Johnson, a Maryland inmate, alleged discriminatory denial of employment in the prison's education department. He alleges that Sgt. Bisser, a guard in the prison, told Dr. Knable, the department head, that Johnson was a homosexual and a rapist. Johnson contends that he was denied the job because of these statements.

The district court dismissed the case, but the Fourth Circuit vacated and remanded because it determined that Johnson alleged facts constituting a potentially cognizable equal protection claim.[53] The district court then referred the case to a magistrate. The magistrate found in favor of the defendants. The case was again appealed to the Fourth Circuit by Johnson, who alleged that he did not receive notice that his right to de novo review of the magistrate's decision would be waived absent timely objection. The court, finding that Johnson did not receive notice, remanded the case to the district court for de novo review.[54]

Acanfora v. Bd. of Educ. of Montgomery County, 491 F. 2d 498 (1974).

[51] Complaint at 17, 18, 20, 26 & 30, *Ensko v. Howard County*, 423 F. Supp.2d 502 (D. Md. 2005) (No. 04 Civ. 03464).
[52] *Ensko v. Howard County*, 2005 U.S. Dist. LEXIS 37602, at *12 (N.D. Md. 2005) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).
[53] *Johnson v. Knable*, 862 F.2d 314 (Table), 1988 WL 119136 (4th Cir. (Md.) 1988).
[54] *Johnson v. Knable*, 934 F.2d 319 (Table), 1991 WL 87147 (4th Cir. (Md.) 1991).

Acanfora faced discrimination first while still a student at Pennsylvania State University, then while seeking licensure in Pennsylvania, and again after he was employed as a teacher by Montgomery County. While a student teaching at Penn State University, Acanfora was suspended for "public acknowledgement of homosexuality." Though a state court ordered reinstatement, the discrimination did not stop. When Acanfora applied for teacher certification, Penn State officials differed as to his qualifications and forwarded his application to the Pennsylvania Secretary of Education without recommendation. While awaiting a decision on his application by the Pennsylvania Secretary of Education, Acanfora was hired to teach junior high school in Montgomery County. Montgomery County learned that Acanfora was gay when the Pennsylvania Secretary of Education held a widely publicized press conference to announce favorable action on his certification application. At that point, the county demoted Acanfora to a non-teaching position.

When analyzing Acanfora's speech in this case, the district court pointed out that it was necessary to realize the degree to which homosexuality was *sui generis* in American culture-- that it is "peculiarly sensitive" and of special concern to the family--distinguishing it from the race relations, armbands, and long hair that were subjects of First Amendment precedent in the schoolhouse setting. The court decided that the correct standard for unprotected speech in the schoolhouse was that "speech which is likely to incite or produce imminent effects deleterious to the educational process." Applying this special standard, the court found Acanfora's "repeated, unnecessary appearances on local and especially national news media" unprotected speech that rendered Defendants' choice to not reinstate Acanfora or renew his contract neither arbitrary nor capricious.

On appeal, the Fourth Circuit found that Acanfora's public discussion was protected by the First Amendment, but affirmed the lower court decision on other grounds. The Court found the decision not to reinstate acceptable because Acanfora failed to disclose on his teaching application his affiliation with Homophiles, a Penn State student organization—an affiliation which, had it been disclosed on his application, would have kept the Board, by its own admission, from hiring him in the first place.[55]

2. **Private Employers**

None.

B. **Administrative Complaints**

All cases of discrimination in Maryland both by the government and private entities covered by statute are processed through the State of Maryland Commission on Human Relations.[56] Despite repeated attempts to contact the Commission, they have been unwilling to release information regarding the facts or numbers of cases involving

[55] *Acanfora v. Bd. of Educ. of Montgomery County*, 491 F. 2d 498 (1974).
[56] Md. Ann. Code art 49B (2008).

discrimination against LGBT individuals. They only provided raw numbers of cases of LGBT discrimination in various areas, and would not break down those numbers by public versus private entities.

The Commission on Human Relations reported the following number of complaints from the years 2004 to 2007:

Year	Employment	Public Accommodations	Housing
2007	28	1	0
2006	22	1	0
2005	22	2	1
2004	22	2	1

[57]

C. Other Documented Examples of Discrimination

1. Maryland State Police

In 1994, two state police trooper candidates filed a complaint in state court requesting injunctive and declaratory relief for discrimination in violation of the Maryland Declaration of Rights, equal protection, due process, and a Governor's Executive Order banning sexual orientation discrimination by the state government. The state settled with the two women, who were lesbians, agreeing to the injunctive relief requested and offering the positions sought. The plaintiffs and a third lesbian successfully completed their training at the Maryland State Police Academy, but then were not hired as troopers because of alleged inconsistencies in their polygraph examination questions concerning sexual orientation.[58]

[57] See ANNUAL REPORTS (Md. Comm'n on Hum. Rel. 2004, 2005, 2006, 2007 eds.), *available at* http://www.mchr.state.md.us.
[58] GAY & LESBIAN L. NOTES (Dec. 1995), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1995/12.95.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Maryland's sodomy law was invalidated by a court decision in 1998.[59] Prior to that, case law in the state indicated that the law was not enforced against "private, consensual, non-commercial sexual activity" including homosexual activity.[60]

B. Housing & Public Accommodations Discrimination

Housing and public accommodations discrimination on the basis of sexual orientation is covered under the same law as employment discrimination.[61]

C. Hate Crimes

Maryland criminalizes hate crimes motivated by the victim's sexual orientation.[62] Here, sexual orientation is defined as identification of an individual as to male or female homosexuality, heterosexuality, bisexuality, or gender-related identity.[63] This definition is in contrast to other state civil protection laws that do not include gender-related identity in the definition of sexual orientation.

D. Education

In 2008 Maryland enacted legislation to stop schoolyard bullying of gay students.[64]

Citizens for a Responsible Curriculum v. Montgomery County Public Schools

[59] *Williams v. State*, 1998 Extra LEXIS 260 (Md. Cir. Ct. 1998)(striking down Maryland's sodomy and unnatural or perverted sexual practices laws, Art. 27, §§ 553-554)
[60] *Id.* at *25. *See, e.g.*, *Acanfora v. Bd. of Educ*., 359 F. Supp. 843, 852 (D. Md. 1973) (noting that while Maryland criminalizes sodomy and unnatural or perverted sexual practices, "no reported case reveals the enforcement of this law against private homosexuality"); *Hughes v. State*, 14 Md. App. 497, 499 (1972) (defendant convicted of sex with a male minor asserted that his "convictions must be set aside because the statute [Art. 27, § 554] proscribing his conduct is unconstitutional"); *Ross v. State*, 59 Md. App. 251, 269-70 (1984) (holding that defendant's ten-year sentence under Art. 27, § 554 could stand even though his "greater offense" of nonconsensual sex with a fifteen-year-old held a maximum sentence of one year).
[61] MD. CODE ANN. Art 49B (2008).
[62] MD. CODE ANN., Crim. Law § 10-304 (2008)
[63] MD. CODE ANN., Crim. Law § 10-301 (2008)
[64] MD. EDUC. CODE ANN. 7-424 (2008); Lynsen, *supra* note 3.

The court granted a temporary restraining against an approved health curriculum that contained information that was determined to be overly pro-gay. A private citizens' group sought the injunction and the school district defended the curriculum.[65]

E. Recognition of Same-Sex Couples

1. Marriage, Civil Unions, & Domestic Partnership

The Court of Appeals of Maryland in *Conaway v. Deane* upheld a Maryland law which states that marriage is between a man and a woman.[66]

Some municipal domestic partnership laws in Maryland cover visitation rights in a health facility, sharing a room in a nursing home, private visits, medical decision making, and tax-free property transfer upon death.[67]

2. Benefits

There are no domestic partnership benefits offered to employees of the Maryland state government. Maryland jurisdictions that offer domestic partner benefits include Montgomery County, Howard County and the cities of Baltimore, College Park, Greenbelt, Hyattsville, Mount Ranier, and Takoma Park. The school systems of Baltimore County and Price George's County also offer domestic partnership benefits.[68]

F. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Maryland's governor approved House Bill 53 on May 7, 2009. The bill originally contained language prohibiting "discrimination in the leasing of commercial property on the basis of sexual orientation" but that language was taken out.[69]

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[65] *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch*., 2005 U.S. Dist. LEXIS 8130 (S.D. Md. 2005).
[66] *See Conaway v. Deane*, 401 Md. 219; 932 A.2d 571 (Md. 2007).
[67] Equality Maryland, Health Care Facility Visitation & Med. Decisions FAQ (Nov. 3, 2008) *available at* http://bit.ly/Oc03W (last visited Sept. 6, 2009); Equality Maryland, The Issue: Domestic Partner Benefits (Jan. 15, 2009), *available at* http://bit.ly/ye9uE (last visited Sept. 7, 2009).
[68] *Id.*
[69] *See* Md. Legislature, House Bill 53 Information, http://mlis.state.md.us/2009rs/billfile/HB0053.htm (last visited Sept. 6, 2009).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Massachusetts – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Massachusetts state law explicitly protects its citizens from discrimination on the basis of sexual orientation, but not gender identity.

In 1989, the Massachusetts legislature amended its anti-discrimination law to include sexual orientation as a protected class.[1] The bill was originally introduced to the House in 1973, but faced insurmountable opposition in the Legislature for 16 years.[2] Legislators opposed to adding "sexual orientation" as a protected class under the anti-discrimination statute argued that the "homosexual way of life" spreads AIDS,[3] gay people have sex with animals[4] and that homosexuality was illegal based on Massachusetts' sodomy laws.[5] In 1987, during the Massachusetts Senate floor discussion of the bill, legislators opposing the bill read aloud from a book that depicted gay people as promiscuous individuals, alleging that most were involved in orgies and one-fifth of them had sex with animals.[6]

Once the bill passed the Senate and was signed into law by Governor Michael Dukakis, its opponents vowed to overturn the amendment by referendum.[7] However, then-Attorney General James Shannon issued a formal opinion excluding the amendment from the referendum process.[8]

On July 14, 2009, there was a Massachusetts Judiciary Committee hearing on "An Act Relative to Gender-Based Discrimination and Hate Crimes," which was introduced in January to the Massachusetts legislature for the second time.[9] If passed, this bill would add "gender identity and expression" to the state's anti-discrimination and hate crime

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[1] *See* MASS. GEN. LAWS ch. 151B, § 4.
[2] *Massachusetts Second State to Enact Gay Rights Law,* L.A. TIMES, Nov. 16, 1989, at 21 (hereinafter "L.A. Times article").
[3] Jane Meredith Adams, *Anger Toward Gays is Out of the Closet with Visibility Comes Abuse, Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.
[4] Jane Meredith Adams, *Anger Toward Gays is Out of the Closet with Visibility Comes Abuse, Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.
[5] *Senate Votes in Favor of Gay Rights*, BOSTON GLOBE, Oct. 31, 1989, at 22.
[6] Jane Meredith Adams, *Anger Toward Gays is Out of the Closet: With Visibility Comes Abuse, Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.
[7] *A Gay Rights Law is Voted in Massachusetts*, N.Y. TIMES, Nov. 1, 1989, at A27.
[8] *See infra* Section II.C.2.
[9] H.B. 1728 (Mass. 2009). Thus far, there has been no further activity on the bill since the July 14, 2009 judiciary committee hearing.

statutes, a classification currently unprotected by Massachusetts state law.[10] At the hearing, there was overwhelming support for the measure, based on the testimony of transgender individuals who expressed concern for their safety, as well as accounts of individuals who lost their jobs as a result of gender transitioning.[11]

The following are documented examples of sexual orientation and gender identity discrimination by state and local governments in Massachusetts:

- In 2009, worker who has worked at a state university for 26 years has been isolated from his fellow workers and he feels that his requests to remedy this have not been addressed because he is gay.[12]

- In 2009, a public school teacher has been suspended four times since 2003, and she feels that the reason is that she is the only out teacher in the district.[13]

- In 2008, a Massachusetts truck driver working for a town experienced harassment because she was a lesbian. People at work displayed pornographic images near her locker. She filed suit against the town for sexual orientation harassment and won a $2.1 million lawsuit.[14]

- In 2008, a police officer who worked at a state university in Massachusetts for four years reported that during training, his drill instructor would yell, "Are you looking at me, boy? Do you like me? Are you a faggot?" After several of his coworkers became aware that the police officer was a gay man, he received phone calls at home from his coworkers, including one who called him and said, "I need a blow job" and then hung up. He eventually left the university for a job with a city police department.[15]

- In 2008, a married lesbian working for the Massachusetts State Trial Court reported that she was demoted and her pay was cut as a result of her recent marriage to a woman. The employee took time off of work for an illness with a doctor's note, but she was called by her union steward to notify her that she had been suspended and that proceedings were under way to fire her.[16]

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[10] *See id.*
[11] *See id.*

[12] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

[13] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

[14] GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (June 13, 2008) (on file with GLAD) [hereinafter GLAD Intake Form (date)].
[15] *Id* at 58-62.
[16] GLAD Intake Form (Jan. 24. 2008).

- In 2008, a mathematics professor at a Massachusetts state university reported that he and his husband, also a mathematics professor, were discriminated against based upon their sexual orientation. Both the professor and his spouse were chosen to serve on a search committee for a new faculty member. They were notified, however, that one of them would need to step down because there was a university policy that family members could not serve together on a search committee. The professor was not able to find any such policy, and believes that he and his husband are being discriminated against based upon their sexual orientation.[17]

- In 2007, a police officer from Massachusetts testified about his experience of discrimination at a U.S. House of Representatives hearing on ENDA. The officer testified that he lost two-and-a-half years of employment fighting to get his job back because he is gay. The officer realized soon after graduating the police academy that because he was gay, his safety as a police officer and his future as a public servant were seriously jeopardized. He worried that if he were killed in the line of duty there would be no one to tell his partner what happened to him and his partner would learn about it on the news. Because Massachusetts has an anti-discrimination law that protects against sexual orientation discrimination he was eventually able to get his job back.[18]

- In 2007, a Massachusetts deputy sheriff, who is gay, experienced two years of harassment by his chief. The chief threatened to suspend him if he continued "to see two guys at one time" because it looked bad for the department. The chief also “outed” him to his coworkers. Due to the harassment he suffered, the deputy sheriff suffered a mild heart attack, and was placed on sick leave. During that time, he was fired for abandonment of post.[19]

- In 2007, a lesbian staff member with the Massachusetts Department of Transitional Assistance applied four times for a promotion and was denied each time, despite having obtained additional training. The employee also received good evaluations and received the Governor's Award for Outstanding Performance. She believed that she was denied advancement due to her sexual orientation. Another employee was, at the time the incident was reported, suing the department for discrimination based upon sexual orientation as well. That employee had already filed paperwork to start the complaint process.[20]

- In 2007, a lesbian staff person working in a Massachusetts town's clerk office was fired after she and her partner filed a birth certificate, listing themselves as the

[17] GLAD Intake Form (Mar. 10, 2008)
[18] Transcript of Statement by Michael Carney Regarding H.R. 2015 (Employment Non-Discrimination Act of 2007), H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY,Sept. 5, 2007; Transcript of Statement by Mass. Rep. George Miller Regarding Mass. H.B. 13228 H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY, Sept. 5, 2007.
[19] GLAD Intake Form (May 24, 2007).
[20] GLAD Intake Form (Aug. 10, 2007).

parents of their child. She was made to feel incompetent and overworked, which resulted in her suffering a breakdown while at work. She was forced to sign a document indicating that she would not sue the town upon her termination.[21]

- In 2007, a public school teacher reported homophobic graffiti and harassment to her supervisor and then was harassed and terminated by the supervisor.[22]

- In 2006, the Appeals Court of Massachusetts affirmed a trial court decision awarding a Suffolk County corrections officer over $620,000 in back pay and damages because his department failed to take adequate steps to remedy the harassment against him. The corrections officer had desired to keep his homosexuality private but a co-worker began spreading rumors, and he was thereafter shunned, harassed and subjected to lewd comments from co-workers. The harassment from his co-workers and supervisor included being called "fucking fag," and having children's toy blocks spelling "FAG" sent to his home.[23] The superior court concluded that the plaintiff had been "subjected to unwelcome, severe, or pervasive conduct by the Defendant…based on sexual orientation that unreasonably interfered with the condition"[24] of his employment. The court further found that the department knew or had reason to know of the hostile environment but failed to take adequate steps to remedy it. *Salvi v. Suffolk County Sheriff's Dep't*, 67 Mass App 596 (Mass. App. Ct. 2006).

- In 2005, while working at the Massachusetts Department of Social Services, a transgender man experienced discrimination in his workplace. He met with his superiors and a civil rights officer to assist in his transition (from female to male) while at work. Despite discussing a plan for his transition, such as training sessions with fellow employees and name changing procedures, no action has been taken by his workplace. His request to formally change his name has been put on hold, and he was not invited to participate in weekly meetings.[25]

- In 2005, an English teacher reported that he had been harassed almost on a daily basis by a group of students at the high school where he teaches. The students called him derogatory names, such as "faggot," left lewd notes, drawings, and pictures on his desk or bulletin board, and signed the teacher up for gay pornographic websites using his school email address. The teacher complained to the principal, who indicated that she would "handle it." However, after she had not addressed these issues, the teacher then sent a letter to the District Superintendent. Shortly thereafter, the teacher was notified that his position had been changed and that he was being terminated. The Superintendent told the teacher that in exchange for a signed agreement to not continue with any

[21] GLAD Intake Form (Mar. 20, 2007).
[22] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).
[23] *Salvi v. Suffolk County Sheriff's Dep't*, 67 Mass App 596 (Mass. App. Ct. 2006).
[24] *Id.* at 597.
[25] GLAD Intake Form (Apr. 20, 2005).

harassment complaints, she would offer him three weeks severance pay and allow him to collect unemployment benefits.[26]

- In 2005, a lesbian probation officer in the Suffolk County court system reported that she received a brochure in her work mailbox that touted a seminar discussing "cures for homosexuality" after she announced her marriage to her female partner. She and two other unmarried women in the department were the only employees to receive the brochure. Her union suggested that she contact the Commissioner of Probation. In response to her complaint, the Commissioner asked if she "expected the whole office to be turned upside down in order to find the culprit." He then suggested that she take up her grievance with someone else.[27]

- In 2005, a Boston police officer, who is a lesbian, overheard and was the target of harassing comments and slurs. After verbally complaining to her supervisors about these comments, no action was taken.[28]

- In 2005, a gay nurse working in a prison as an employee of the Massachusetts Sheriff's Department reported working in a hostile work environment. His coworkers gave him a Christmas present, which included fishnet stockings and obscene gay sex cards. He was given a bag of peanuts by a coworker and told, "Eat my nuts." When he complained, he was told that "this was the way prisons work" and that he shouldn't complain. He filed a complaint with the Massachusetts Commission Against Discrimination.[29]

- In 2005, a Massachusetts deputy sheriff, who is gay, reported being discriminated against after working for more than 13 years in law enforcement. His coworkers began targeting him with "usual locker room homo talk." He was then excluded from meetings and his responsibilities were slowly taken away until finally, he was transferred to an inferior, nonsupervisory position. He was then terminated. He also reported that one other openly gay person, a lesbian, in the department was also forced out after her sexual orientation was disclosed. He reported that he was in settlement negotiations with the Sheriff Department, but they broke down.[30]

- In 2004, a lesbian teacher working in a Massachusetts public school reported that her contract was not renewed. The other lesbian teacher working at the school also did not have her contract renewed. When approached, the principal said that there were "differences in philosophies" and "overarching differences." The teacher also claimed that several teachers had tried to start a gay-straight alliance

[26] GLAD Intake Form (Feb. 12, 2009).
[27] GLAD Intake Form (Aug. 31, 2005).
[28] GLAD Intake Form (Oct. 13, 2005).
[29] GLAD Intake Form (Mar. 21, 2005).
[30] GLAD Intake Form (Oct. 17, 2005).

at the school and had wanted to put up "safe zone" stickers, but they were told by the administration that they could not.[31]

- In 2004, a school psychologist working in a Massachusetts public school reported that despite positive performance reviews, his responsibilities were restricted as a result of his being gay. His office was moved and he no longer has any interactions with students. Administrators at the school told the psychologist that he should not tell students he is gay nor should he say that he is married (to a man). The principal also asked everyone to disclose their sexual orientations during a staff meeting. His union representative did not take any action and advised the psychologist to not take any further steps to address these issues.[32]

- In 2004, a staff member at the Massachusetts Department of Revenue reported being harassed by one of his co-workers because he was openly gay. This co-worker posted and distributed anti-gay news articles and made anti-gay remarks. The gay staff member complained to his supervisor about the harassment, but his supervisor took no steps to stop the harassment.[33]

- In 2003, a gay man, who worked for the Massachusetts Department of Revenue for nineteen years, reported that he had been sexually harassed at work. A supervisor called him "a loser" and a "fucking faggot" behind his back. After telling internal affairs that he did not wish to work in the same space as this particular supervisor, he was asked to move to another location. He filed a formal complaint with internal affairs.[34]

- In 2003, a lesbian direct care worker for the Massachusetts Department of Social Services reported that she was one of seven lesbians fired at the same time. The employee filed a complaint with the Massachusetts Commission Against Discrimination.[35]

- In 2003, one year after a public high school teacher in Medford, Massachusetts was hired the school became aware that he was gay. When his three-year tenure position expired two years later, he was terminated. The only reason given by the Superintendent was that he “shouldn’t be known for [his] activities outside the classroom.” He brought the situation to the attention of his union, which told him that the “discrimination would be very difficult to prove.” Though the school eventually offered him tenure because of support from students and parents, school officials have continued to harass him. He has been in therapy since the incident because of the harassment he endures at work.[36]

[31] GLAD Intake Form (May 27, 2004).
[32] GLAD Intake Form (Aug. 13, 2004).
[33] GLAD Intake Form (July 28, 2004).
[34] GLAD Intake Form (Apr. 28, 2003).
[35] GLAD Intake Form (Jan. 15, 2003).
[36]Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

- In 2003, a gay teacher working in a Massachusetts public school was forced to resign because of his sexual orientation. He was the target of several anti-gay remarks and vandalism. Someone keyed "Gay Faggot" into the paint of his car. The teacher brought these incidents to the attention of the school administration, which did nothing. The union representing the teacher was also made aware of these incidents but did nothing. Even after leaving his job, the teacher continues to receive harassing phone calls.[37]

- In 2003, a facilities employee in a Massachusetts public school district experienced regular harassment by his coworkers because he is gay. One co-worker called the facilities worker a "faggot." He reported that other co-workers drank on the job and then threatened him physically. One coworker pushed him. This incident was caught on video, but the school district now claims that they cannot locate the tape. He started having panic attacks as a result of the harassment and, at the time the incident was reported, was on leave from work. He filed a complaint with the school district and his union, but neither had taken steps to stop the harassment.[38]

- In 2002, a sixteen veteran of the Massachusetts Highway Department was harassed by his immediate supervisor, his boss, and several co-workers. They asked him several questions, including "Are you gay?," "Do you swing both ways?," and "If a girl strapped on a dildo, would that get you excited?" He was offered a lateral transfer, however the harassment continued. As a result of the harassment, he was diagnosed with high blood pressure. He felt that he could not file a complaint with the union because his steward was one of the harassers.[39]

- In 2000, a lesbian working for a city department for sixteen years was harassed by one of her co-workers. The co-worker treated her differently than her co-workers and made comments including, "You just want to give me a hard time; you want a man; you want the forbidden fruit." She filed a grievance with her department and with the Massachusetts Commission Against Discrimination.[40]

- In 2000, a Boston firefighter was awarded $50,000 in damages by the Massachusetts Commission Against Discrimination for being harassed in the workplace, including being subjected to profanity and pornography and being taunted that “lesbians are not women.”[41] Her co-workers also referred to her as “one way Wanda,” referred to her female partner as “Pinky,” and placed a picture of two women engaged in sexual relations in her sleeping bag. *Moore v. Boston Fire Dep’t*, 22 MDLR 294 (M.D.L.R. 2000).

- A book published in 1996 recorded the following story of discrimination and harassment against a prison kitchen guard who was an employee of the

[37] GLAD Intake Form (Feb. 6, 2003).
[38] GLAD Intake Form (July 10, 2003).
[39] GLAD Intake Form (Aug. 8, 2002).
[40] GLAD Intake Form (date unknown).
[41] *Moore v. Boston Fire Dep’t*, 22 MDLR 294 (2000).

Massachusetts Department of Corrections: An employee began working for the Massachusetts Department of Corrections as a kitchen guard in 1990. His superiors and other officers began to harass him when he arrived to work with a pierced ear. The food service director ordered him to leave the earring at home, despite that it was not against the dress code and other officers wore them, saying, "I don't care what you do in private, being a fag or whatever, but you're going to leave it at home." Other officers made remarks about his taking a personal day to attend "the fag parade" and referred to his vitamins as "homo pills." One officer attached a picture of a woman's body with his face to his timecard. The employee recounts that homophobic banter quickly turned into severe harassment when one officer "was telling the inmates to whip their dicks out at [Leahey]"-- the inmates complied. This practice was common in the kitchen, where inmates would lift their aprons to expose themselves to him when instructed to do so by another officer. When he reported the harassment to the food service director, he was accused of fondling the inmates. During a discussion of the 1992 presidential election, a Lieutenant told him, "Perot doesn't like you fags," and proceeded to then grab his testicles in front of several other officers who all laughed along with the Lieutenant. The Lieutenant continued to grope him inappropriately thereafter. When he reported the Lieutenant's behavior to the superintendent because he began to fear the inmates who no longer respected him, he was told that "this stuff happens all the time" and to "go back to work." Eventually he sought help from the Gay and Lesbian Alliance Against Defamation who confronted the superintendent. Some of the officers were then disciplined; others were not. Following an uninvestigated false accusation of harassment by an inmate after GLAAD's well publicized intervention, the superintendent attempted to transfer him involuntarily to Massachusetts Department of Corrections-Shirley— the facility "known for having a lot of gay people." Leahey refused to "be segregated" and then suffered a nervous breakdown as a result of the harassment.[42]

- A book published in 1994 records the story of a teacher in a Boston area high school who was discriminated against and harassed at work because he is gay. After appearing on the news while at a Boston Pride Parade, the teacher noticed that the students didn't react negatively, but some of his fellow teachers did. On the entrance to the women's restroom, someone wrote his name under the sign. A student told him that another teacher said that he was gay and why would anyone want to be in his class and shouted across the gym "If you take off your pants for [the teacher], he'll give you an A!" The teacher spoke with the principal of the school and said that he would be staying home from work until he could be assured a safe workplace. A hearing was arranged during which the teacher harassing him was represented by the teachers' union, whereas he had to represent himself. The teacher who harassed him was required to write a letter of apology

[42] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 156-159 (Routledge 1996).

and a negative review was placed in his file. His district also agreed to anti-homophobia training and issued anti-harassment guidelines.[43]

- In 1986, a professor who was a lesbian was hired as an assistant professor at the University of Massachusetts at Lowell. When she was hired, the dean acknowledged her credentials and accomplishments and promised to promote her within one year. But a student began threatening her life, carrying a gun onto the campus and saying the God had "ordained" him to "kill all homosexuals." Soon afterwards, the university notified her that the school no longer needed her courses or her services and that it was terminating her contract. But the university never canceled her courses after it terminated her. Instead, the university hired another professor, who had no background in the course subjects, to teach the same courses.[44]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[43] ARTHUR LIPKIN, ONE TEACHER IN TEN 39-49 (Kevin Jennings ed., 1994).
[44] Human Rights Campaign, HRC PUBLICATION: DOCUMENTED CASES OF JOB DISCRIMINATION BASED ON SEXUAL ORIENTATION (1995).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

Chapter 151B of the General Laws of Massachusetts is the state's anti-discrimination statute.[45] In 1989, the legislature amended the law, becoming only the second state in the nation to include sexual orientation as a protected class under an anti-discrimination statute.[46] Under the statute as amended, it is unlawful for an employer, by himself or his agent, to refuse to hire, discharge, or discriminate against an individual on the basis of actual or perceived sexual orientation. "Sexual orientation" is defined as "heterosexuality, homosexuality, or bisexuality."[47] The legislature also included a provision noting that nothing in the act, "shall be construed to provide health insurance or related employee benefits to a 'homosexual spouse.'"[48]

As stated above, Massachusetts has not protected individuals from employment discrimination on the basis of their gender identity or expression. However, many courts and the Massachusetts Commission Against Discrimination ("MCAD"), the state's human rights commission, have ruled that gender identity claims can be brought under the category of sex or disability discrimination.[49]

Certain religious institutions and their charitable and educational associations are exempt from the law.[50] This exemption applies where an employer is operated or supervised by a religious institution and expressly states that an employer may not use his or her religious beliefs as basis for discrimination.[51] Employers with six employees or less are also exempt from the non-discrimination law.[52]

2. Enforcement and Remedies

Any person claiming discrimination on the basis of sexual orientation may file, by himself or his attorney, a complaint with the MCAD.[53] Complaints may be filed with a local non-discrimination agency in addition to the MCAD, or exclusively with that agency if the MCAD allows.[54] These complaints must be made within 300 days of the alleged act of discrimination.[55] After this initial filing, the individual may elect to

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[45] *See* MASS. GEN. LAWS ch. 151B (1946).
[46] *See id.* at § 4.
[47] MASS. GEN. LAWS ch. 151B, § 3(6).
[48] MASS. GEN. LAWS ch. 151B, § 19 (1989).
[49] *See Millett v. Lutco, Inc.*, 23 MDLR 231 (2001).
[50] MASS. GEN. LAWS ch. 151B, § 1(5).
[51] *See id.*
[52] *Id.*
[53] MASS. GEN. LAWS ch. 151B, § 5.
[54] MASSACHUSETTS: OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 12 (GLAD June 2009), *available at* http://bit.ly/WFp2W (hereinafter "GLAD OVERVIEW").
[55] MASS. GEN. LAWS ch. 151B, § 5.

terminate proceedings before the MCAD and file his or her case in Massachusetts state court instead.[56] After the complaint has been filed with the MCAD, the chairman is required to designate a commissioner to investigate the case.[57] If the commissioner decides that no probable cause exists for the claim, the complainant will be notified in writing of such determination, which may then be appealed within ten days to the MCAD Investigative Commissioner.[58] On appeal, the Investigative Commissioner will hold an informal hearing where the complainant will have an opportunity to explain why he or she believes that the determination was wrong. After the hearing, the Investigative Commissioner may uphold the MCAD's determination, send the case back to MCAD for further investigation, or reverse the MCAD's finding of no probable cause.[59]

Alternatively, if the MCAD commissioner determines that probable cause does exist, then the case will be sent for "conciliation" or settlement proceedings.[60] If negotiations are unsuccessful, then the case may proceed to a hearing, with a format similar to that of a trial. The available remedies for an employment case include reinstatement or upgrading, back pay, restoration in a labor organization and front pay.[61]

B. **Attempts to Enact State Legislation**

In November 1989, after a 17 year struggle, Governor Michael Dukakis signed the law banning discrimination based on sexual orientation in employment, housing, credit, and public accommodations.[62] The bill was first introduced in 1973, but was not passed by the House until 1983, at that time, by a 75-71 vote.[63] The House passed the measure again in 1987 and 1989. Over the years, the bill was repeatedly defeated in Senate committees and did not reach the Senate floor for a vote until 1989.[64]

In 1985, the fear of AIDS threatened the bill's success.[65] Legislators were unable to separate the gay rights issue from the concern about AIDS because of the belief that "the gay lifestyle leads to diseases such as AIDS."[66] The debate over gay foster parenting also impacted the House's deliberations, leading it to reject the bill.[67]

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[56] GLAD OVERVIEW, *supra* note 54, at 12.
[57] MASS. GEN. LAWS ch. 151B, § 5.
[58] GLAD OVERVIEW, *supra* note 54, at 10.
[59] *See* PRACTICAL GUIDE TO THE COMPLAINT PROCESS AT THE MCAD (M.C.A.D. 2002), http://bit.ly/1u7L1S (last visited Sept. 6, 2009).
[60] *Id.*
[61] *Id.* at 11. Complainants are not entitled to punitive damages under the MCAD. *Id*.
[62] LA Times Article, *supra* note 2. The legislative histories of bills that have gone before the Massachusetts legislature are available only through a personal visit to the Massachusetts State House Library.
[63] *A Gay Rights Law is Voted in Massachusetts*, N.Y. TIMES, Nov. 1, 1989, at A27, *available at* http://bit.ly/5U874 (hereinafter "*Gay Rights Law*"); Kenneth J. Cooper, *Fear of AIDS Threatens Bill on Gay Rights*, BOSTON GLOBE, Sept. 21, 1985, at 21.
[64] *Senate Votes in Favor of Gay Rights*, BOSTON GLOBE, Oct. 31, 1989, at 22 (hereinafter "*Senate Votes*").
[65] Cooper, *supra* note 63.
[66] Jane Meredith Adams, *Anger Toward Gays is Out of the Closet with Visibility Comes Abuse, Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.
[67] Cooper, *supra* note 63.

In 1987, on the Senate floor, legislators opposing the bill read aloud from a book that depicted gay people as promiscuous individuals, alleging that most were involved in orgies and one-fifth of them had sex with animals.[68] In 1989, Representative John Flood opposed the bill stating that he did not think civil rights spring from a private social activity.[69] He further added that he did not believe the gay community had demonstrated that a pattern of discrimination existed against homosexuals.[70] The opposition reasoned that being gay or lesbian is merely a preference, so if an individual feels they are being discriminated against, they can simply choose a different lifestyle.[71] Echoing this sentiment, Senate Minority Leader David Locke characterized the proposed legislation as: "a bill to legalize the homosexual way of life."[72] Locke further argued that homosexuality violated the sodomy laws of Massachusetts, and that the state should therefore not confer civil rights on gays and lesbians.[73] He also expressed fear that this legislation would set the stage for legalizing same-sex marriage.[74]

The Senate ultimately passed the bill by a margin of 22-13. The bill included a disclaimer that Massachusetts does not endorse homosexuality, and that the law does not recognize homosexual partnerships.[75] After the bill passed, Senator Edward Kirby vowed to fight for repeal by referendum, stating "[t]his is bad for society."[76]

In 2007, House Bill 1722 was introduced in Massachusetts that would add "gender identity and expression" as a protected ground to the state's non-discrimination statute, as well as to the existing hate crime law.[77] The bill was sent to the Judiciary Committee which held a hearing on it in March 2008.[78] At the hearing, there was overwhelming support for the measure, based on the testimony of transgender individuals who expressed concern for their safety, as well as accounts of individuals who lost their jobs as a result of gender transitioning.[79] In addition, the parent of a transgender child spoke of the humiliation his son experienced after state employees tactlessly handled the teen's gender transition.[80] Despite this support, the bill floundered in committees and was never brought to a vote in the 2007-2008 legislative session.[81]

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[68] Jane Meredith Adams, *Anger Toward Gays is Out of the Closet: With Visibility Comes Abuse, Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.
[69] Frank Phillips, *Gay Rights Bill Goes Before House Today*, BOSTON GLOBE, Mar. 27, 89, at 49.
[70] *Id.*
[71] Adams, *supra* note 66.
[72] Bruce Mohl, *Parliamentary Maneuvers Delay Gay Rights Bill Action for Second Day*, BOSTON GLOBE, Nov. 11, 1987, at 37.
[73] *Senate Votes*, *supra* note 64.
[74] Mohl, *supra* note 63.
[75] MASS. GEN. LAWS ch. 151B § 19 (1989).
[76] *Gay Rights Law*, *supra* note 59.
[77] *See* Mass. Transgender Political Coalition, http://www.masstpc.org (last visited Sept. 6, 2009).
[78] *See id.*
[79] *See id.*
[80] Video Testimony of Kenneth Garber Regarding H.B.1722 (Mar. 4, 2008), http://bit.ly/Zmlnj (last visited Sept. 6, 2009).
[81] *See* Mass. Transgender Political Coalition, *supra* note 77.

In January 2009, the legislation was re-introduced in the House as H.B.1728.[82] H.B.1728 was drafted by Gay & Lesbian Advocates and Defenders (GLAD).[83] The bill defines "gender identity and expression" as a gender-related identity, appearance, expression, or behavior, regardless of the individual's assigned sex birth.[84] Under H.B.1728, a transgender employee would be ensured non-discriminatory "terms, conditions, or privileges of employment."[85] Thus, the bill offers broad protection, prohibiting discriminatory hiring and firing practices, as well as discrimination in the extension of employment benefits.[86] The bill would also enable the MCAD to hear complaints alleging discrimination based on "gender identity and expression."[87] Opponents have dubbed H.B.1728 the "bathroom bill," contending that it will allow a man to walk into any women's restroom if he happens to be feeling like a woman at that very moment.[88]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In 1992, Governor William Weld issued Executive Order No. 340 which provided non-discriminatory benefit policies for employees of the state of Massachusetts.[89] This Order allows state employees to register their domestic partners for the purposes of obtaining benefits such as "bereavement" leave. [90] In addition, the order allows state employees to take a sick leave in the event of the serious illness or death of their domestic partner and claim benefits related to this absence.[91]

In January 2007, Governor Deval Patrick issued Executive Order No. 478, which mandated that all programs, activities, and services provided by the state shall be conducted without unlawful discrimination based on race, color, age, gender, ethnicity, sexual orientation, religion, creed, ancestry, national origin, disability, veteran's status or background.[92] Patrick further specified that the Office of Diversity and Equal Opportunity ("ODEO") would be responsible for ensuring compliance with the Executive Order.[93]

2. Attorney General Opinions

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[82] H.B. 1728 (Mass. 2009).
[83] *See* Amy Contrada, *Part 1: A Radical Comes to Massachusetts*, MASS RESISTANCE, http://massresistance.org (last visited Sept. 6, 2009).
[84] H.B. 1728 (Mass. 2009).
[85] H.B. 1728 (Mass. 2009).
[86] *Id.*
[87] *Id.*
[88] *Groups Spar Over Massachusetts Transgender "Bathroom Bill*," FOX NEWS, Apr. 8, 2009, http://bit.ly/lDqJe (last visited Sept. 6, 2009).
[89] Mass. Exec. Order 340 (1992).
[90] *Id.*
[91] *Id.*
[92] Mass. Exec. Order 478 (2007) (rescinding prior Exec. Order No. 452 (2003) (Gov. Romney).
[93] *Id.*

In 1989, Attorney General James Shannon issued a formal opinion declaring that the inclusion of sexual orientation as a protected ground in Massachusetts' anti-discrimination statute could not be put to a referendum.[94] Prior to Shannon's opinion, a referendum petition had been filed with the Secretary of State calling for the repeal of the sexual orientation bill, signed by ten voters.[95] Ultimately, Shannon concluded that, under the Massachusetts Constitution, the sexual orientation bill could not be put to referendum because the Constitution contained an exclusion for religious institutions.[96] Article 48 of the Amendments to the Massachusetts Constitution states that "no law that relates to religion, religious practices, or religious institutions…shall be the subject of a referendum petition."[97]

Prior to the opinion issued in 1989, Shannon had issued an order, in 1987, prohibiting discrimination by the Attorney General's office based on sexual orientation or a diagnosis of AIDS or AIDS-related conditions.[98]

3. **Local Legislation**

Boston, Cambridge, Northampton and Amherst all have non-discrimination ordinances that include sexual orientation and preference as a protected ground, as well as gender identity and expression.[99] The Boston ordinance, similar to the state statute, exempts religious institutions from complying with the non-discrimination law.

[94] 1990 MASS. ATT'Y GEN. ANN. REP. 12.
[95] *Id.*
[96] *Id.*
[97] MASS. CONST. AMENDMENTS art. 48, The Referendum, Pt. III, § 2.
[98] *See* Lesbian, Gay, Bisexual &Transgender Political Alliance of Mass. Records (1982-1997), http://www.lib.neu.edu/archives/collect/findaids/m91findbioghist.htm (last visited Sept. 6, 2009).
[99] *See* BOSTON MUN. CODE § 12-9.3 (gender identity or expression added in 2002); CAMBRIDGE MUN. CODE § 2.76.160 (gender definition expanded to include identity or expression in 1997); Northhampton MUN. CODE § 22-104 (gender identity or expression added in 2005); Amherst Town Bylaws Art. 16 (1999) (gender identity or expression added in 2009 by Article 11).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Salvi v. Suffolk County Sheriff's Dep't, 67 Mass App 596 (Mass. App. Ct. 2006).

Salvi was a corrections officer at the Suffolk County sheriff's department who was subjected to severe sexual orientation harassment. A jury awarded him $93,600 in back pay, $380,000 in front pay, $50,000 for emotional distress and $100,000 in punitive damages.[100] The superior court's decision was affirmed by the Appeals Court of Massachusetts.[101]

Salvi had desired to keep his homosexuality private but a co-worker began spreading rumors, and the plaintiff was thereafter shunned, harassed and subjected to lewd comments from co-workers. As a result, Salvi gained weight, became mentally distraught and attempted suicide. The plaintiff further alleged that his co-workers and commanding officer referred to him as a "fucking fag," and sent children's toy blocks spelling "FAG" to his home. The superior court concluded that the plaintiff had been "subjected to unwelcome, severe, or pervasive conduct by the Defendant…based on sexual orientation that unreasonably interfered with the condition"[102] of his employment. The court further found that the department knew or had reason to know of the hostile environment but failed to take adequate steps to remedy it.

2. Private Employees

Lie v. Sky Publ'g Corp., 15 Mass. L. Rptr. 412 (Mass. Super. Ct. 2002)

In *Lie*,[103] the Massachusetts Superior Court held that a male-to-female transgender employee who refused to dress like a man while working as an editorial assistant at a private company was discriminated against on the basis of sex and disability under the state's anti-discrimination statute. The MCAD emphasized that it "cannot be gainsaid that transsexuals have a classically stigmatizing condition that sometimes elicits reactions based solely on prejudices, stereotypes, or unfounded fear."[104]

Millett v. Lutco, Inc., 23 MDLR 231 (2001).

Millett, a male-to-female transgender, filed a complaint with the MCAD contending that Lutco, Inc., a private employer, had discriminated against her because of her sex and sexual orientation. Specifically, Millett alleged that, despite her satisfactory job performance, she was issued written warnings by her superior for insubordination and

[100] *Id.* at 598.
[101] *Id.*
[102] *Salvi v. Suffolk County Sheriff's Dep't*, 67 Mass. App. Ct. 596, 597 (Mass. App. Ct. 2006).
[103] *Lie v. Sky Publ'g Corp*., 15 Mass. L. Rptr. 412 (Mass. Super. Ct. 2002).
[104] *Id.*

threatened with termination of employment after complaining about her superior's harassing behavior towards her. The MCAD held that though "transsexuality" is not protected under the "sexual orientation" category, it is included under the sex discrimination category. The MCAD reasoned that Millett was "subjected to harassment because of the kind of man she was -- one who wanted to be woman."[105] Since "sex discrimination is the result of stereotypes of women and men, mandating conformity with society's expectations of each sex; discriminating against transsexual people is, often times, because the individual is well outside these expectations."[106] The court further noted that the "transgendered person literally embodies a plethora of sexual stereotypes that are contrary to her birth sex."[107]

B. **Administrative Complaints**

Moore v. Boston Fire Dep't, 22 MDLR 294 (M.D.L.R. 2000).

In *Moore*,[108] a Boston firefighter was subjected to severe sexual orientation harassment. Accordingly, the Massachusetts Commission Against Discrimination awarded Moore $50,000 in compensatory damages.[109]

Moore filed a complaint with the MCAD charging the Boston Fire Department with unlawful discrimination in violation of the anti-discrimination statute partly on the basis of sexual orientation. Moore alleged that she was harassed during her work as a firefighter, subjected to unequal terms and conditions of employment and targeted with profanities because she is a lesbian. Specifically, Moore claimed that co-workers referred to her as "one way Wanda" and also referred to her female partner as "Pinky." One co-worker even exclaimed "lesbians are not women." Moore also alleged that co-workers placed a picture of two women engaged in sexual relations in her sleeping bag. The MCAD found that Moore had produced sufficient evidence to state a claim of a hostile work environment, as it was reasonable to infer from the record that she was targeted because of her sexual orientation.

C**. Other Documented Examples of Discrimination**

Massachusetts Department of Corrections

James M. Leahey, a gay man, began working for the Massachusetts Department of Corrections as a kitchen guard in 1990. Leahey's superiors and other officers began to harass Leahey when he arrived to work with a pierced ear. The food service director ordered him to leave the earring at home, despite that it was not against the dress code and other officers wore them, saying to Leahey, "I don't care what you do in private, being a fag or whatever, but you're going to leave it at home." Other officers made remarks about Leahey taking a personal day to attend "the fag parade" and referred to his

[105] *Millett v. Lutco, Inc.*, 23 MDLR 231 at 9 (2001).
[106] *Id.*
[107] *Id.*
[108] *Moore v. Boston Fire Dep't*, 22 MDLR 294 (M.D.L.R. 2000).
[109] *Id.*

vitamins as "homo pills." One officer attached a picture of a woman's body with Leahey's face to his timecard. Leahey recounts that homophobic banter quickly turned into severe harassment when one officer "was telling the inmates to whip their dicks out at [Leahey]"-- the inmates complied. This practice was common in the kitchen, where inmates would lift their aprons to expose themselves to Leahey when instructed to do so by another officer. When Leahey reported the harassment to the food service director, he was accused of fondling the inmates. During a discussion of the 1992 presidential election, a Lieutenant told Leahey, "Perot doesn't like you fags," and proceeded to then grab his testicles in front of several other officers who all laughed along with the Lieutenant. The Lieutenant continued to grope Leahey inappropriately thereafter. When Leahey reported the Lieutenant's behavior to the Superintendent because he began to fear the inmates who no longer respected him, he was told that "this stuff happens all the time" and to "go back to work." Eventually Leahey sought help from the Gay and Lesbian Alliance Against Defamation who confronted the Superintendent. Some of the officers were then disciplined; others were not. Following an uninvestigated false accusation of harassment by an inmate after GLAAD's well publicized intervention, the Superintendent attempted to transfer Leahey involuntarily to Massachusetts Department of Corrections-Shirley— the facility "known for having a lot of gay people." Leahey refused to "be segregated" and then suffered a nervous breakdown as a result of the harassment.[110]

Massachusetts Department of Transitional Assistance

In 2007, a lesbian staff member with the Massachusetts Department of Transitional Assistance applied four times for a promotion and was denied each time, despite having obtained additional training. The employee also received good evaluations and received the Governor's Award for Outstanding Performance. She believed that she was denied advancement due to her sexual orientation. Another employee was, at the time the incident was reported, suing the department for discrimination based upon sexual orientation as well. The employee had filed paperwork to start the complaint process.[111]

Massachusetts Department of Social Services

In 2005, while working at the Massachusetts Department of Social Services, a transgender man experienced discrimination in his workplace. He met with his superiors and a civil rights officer to assist in his transition (from female to male) while at work. Despite discussing a plan for his transition, such as training sessions with fellow employees and name changing procedures, no action has been taken by his workplace. His request to formally change his name has been put on hold, and he was not invited to participate in weekly meetings.[112]

[110] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 156-159 (Routledge 1996).
[111] GLAD Intake Form (Aug. 10, 2007).
[112] GLAD Intake Form (Apr. 20, 2005).

In 2003, a lesbian direct care worker for the Massachusetts Department of Social Services reported that she was one of seven lesbians fired at the same time. The employee filed a complaint with the Massachusetts Commission Against Discrimination.[113]

Massachusetts Department of Revenue

In 2004, an openly gay staff member at the Massachusetts Department of Revenue was harassed by one of his co-workers. This co-worker posted and distributed anti-gay news articles and made anti-gay remarks. The gay staff member complained to his supervisor about the harassment, but his supervisor took no steps to stop the harassment.[114]

In 2003, a gay man, who worked for the Massachusetts Department of Revenue for nineteen years, reported that he had been sexually harassed at work. A supervisor called him "a loser" and a "fucking faggot" behind his back. After telling internal affairs that he did not wish to work in the same space as this particular supervisor, he was asked to move to another location. He filed a formal complaint with internal affairs.[115]

Massachusetts Highway Department

In 2002, a sixteen year veteran of the Massachusetts Highway Department was harassed by his immediate supervisor, his boss, and several coworkers. They asked him several questions, including "Are you gay?," "Do you swing both ways?," and "If a girl strapped on a dildo, would that get you excited?" He was offered a lateral transfer, however the harassment continued. As a result of the harassment, he was diagnosed with high blood pressure. He felt that he could not file a complaint with the union because his steward was one of the harassers.[116]

Massachusetts State Universities

In 2009, worker who has worked at a state university for 26 years has been isolated from his fellow workers and he feels that his requests to remedy this have not been addressed because he is gay.[117]

In 2008, a mathematics professor at a Massachusetts state university reported that he and his husband, also a mathematics professor, were discriminated against based upon their sexual orientation. Both the professor and his spouse were chosen to serve on a search committee for a new faculty member. They were notified, however, that one of them would need to step down because there was a university policy that family members

[113] GLAD Intake Form (Jan. 15, 2003).
[114] GLAD Intake Form (July 28, 2004).
[115] GLAD Intake Form (Apr. 28, 2003).
[116] GLAD Intake Form (Aug. 8, 2002).

[117] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

could not serve together on a search committee. The caller was not able to find any such policy, and he believes that he and his husband are being discriminated against based upon their sexual orientation.[118]

"B," a gay man who asked that his real name not be used, worked as a police officer at a university in Massachusetts for four years. During training, his drill instructor would yell, "Are you looking at me, boy? Do you like me? Are you a faggot?" After several of his coworkers became aware that B was a gay man, he received phone calls at home from his coworkers, including one who called him and said, "I need a blow job" and then hung up. B then left the university for a job with a city police department.[119]

Cambridge Rindge & Latin High School

Arthur Lipkin, a gay man, worked as a teacher at a Boston area high school. After appearing on the news while at a Boston Pride Parade, Lipkin noticed that the students didn't react negatively, but some of his fellow teachers did. On the entrance to the women's restroom, someone wrote under the sign, "And Lipkin." A student told Lipkin that another teacher said "you're gay and why would I want to be in your class?" The same teacher shouted across the gym "If you take off your pants for Lipkin, he'll give you an A!" Lipkin spoke with the principal of the school and said that he would be staying home from work until he could be assured a safe workplace. A hearing was arranged during which the teacher in question was represented by the teachers' union, where as Lipkin had to represent himself. The teacher was required to write a letter of apology and a negative review was placed in his file. Lipkin's district also agreed to anti-homophobia training and issued anti-harassment guidelines.[120]

Massachusetts Public Schools

In 2009, a public school teacher has been suspended four times since 2003, and she feels that the reason is that she is the only out teacher in the district.[121]

In 2007, a public school teacher reported homophobic graffiti and harassment to her supervisor and then was harassed and terminated by the supervisor.[122]

In 2005, an openly gay English teacher reported that he had been harassed almost on a daily basis by a group of students at the high school where he teaches. The students called him derogatory names, such as "faggot," left lewd notes, drawings, and pictures on his desk or bulletin board, and signed the teacher up for gay pornographic websites using his school email address. The teacher complained to the principal, who indicated that she

[118] GLAD Intake Form (Mar. 10, 2008).
[119] *Id* at 58-62.
[120] ARTHUR LIPKIN, ONE TEACHER IN TEN 39-49 (Kevin Jennings ed., 1994).
[121] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).
[122] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

would "handle it." However, after she had not addressed these issues, the teacher then sent a letter to the District Superintendent. Shortly thereafter, the teacher was notified that his position had been changed and that he was being terminated. The Superintendent told the teacher that in exchange for a signed agreement to not continue with any harassment complaints, she would offer him three weeks severance pay and allow him to collect unemployment benefits.[123]

In 2004, a lesbian teacher working in a Massachusetts public school reported that her contract was not renewed. The other lesbian teacher working at the school also did not have her contract renewed. When approached, the principal said that there were "differences in philosophies" and "overarching differences." The teacher also claimed that several teachers had tried to start a gay-straight alliance at the school and had wanted to put up "safe zone" stickers, but they were told by the administration that they could not.[124]

Also in 2004, gay school psychologist working in a Massachusetts public school reported that despite positive performance reviews, his responsibilities were restricted as a result of his being gay. His office was moved and he no longer has any interactions with students. Administrators at the school told the psychologist that he should not tell students he is gay nor should he say that he is married (to a man). The principal also asked everyone to disclose their sexual orientations during a staff meeting. His union representative did not take any action and advised the psychologist to not take any further steps to address these issues.[125]

In 2003, one year after a public high school teacher in Medford, Massachusetts was hired the school became aware that he was gay. When his three-year tenure position expired two years later, he was terminated. The only reason given by the Superintendent was that he “shouldn’t be known for [his] activities outside the classroom.” He brought the situation to the attention of his union, which told him that the “discrimination would be very difficult to prove.” Though the school eventually offered him tenure because of support from students and parents, school officials have continued to harass him. He has been in therapy since the incident because of the harassment he endures at work.[126]

In 2003, a gay teacher working in a Massachusetts public school was forced to resign because of his sexual orientation. He was the target of several anti-gay remarks and vandalism. Someone keyed "Gay Faggot" into the paint of his car. The teacher brought these incidents to the attention of the school administration, which did nothing. The union representing the teacher was also made aware of these incidents but did nothing. Even after leaving his job, the teacher continues to receive harassing phone calls.[127]

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[123] GLAD Intake Form (Feb. 12, 2009).
[124] GLAD Intake Form (May 27, 2004).
[125] GLAD Intake Form (Aug. 13, 2004).
[126] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[127] GLAD Intake Form (Feb. 6, 2003).

Also in 2003, a gay facilities employee in a Massachusetts public school district experienced regular harassment by his co-workers. He reported that his coworkers drank on the job and then threatened him physically. One co-worker pushed him. This incident was caught on video, but the school district now claims that they can't locate the tape. Another co-worker called the facilities worker a "faggot." He started having panic attacks as a result of the harassment and, at the time the incident was reported, was on leave from work. He filed a complaint with the school district and his union, but neither had taken steps to stop the harassment.[128]

City Government Departments

In 2008, a Massachusetts truck driver, working for a town, experienced harassment based upon her being a lesbian. People at work displayed pornographic images near her locker. She filed suit against the town for sexual orientation harassment and won at $2.1 million lawsuit.[129]

In 2000, a lesbian working for a city department for sixteen years was harassed by one of her co-workers. The co-worker treated her differently than her co-workers and made comments, including, "You just want to give me a hard time; you want a man; you want the forbidden fruit." She filed grievances with her union and with the Massachusetts Commission Against Discrimination.[130]

Town Clerk's Office

In 2007, a lesbian staff person working in a Massachusetts town's clerk office was fired after she and her partner filed a birth certificate, listing themselves as the parents of their child. She was made to feel incompetent and overworked, which resulted in her suffering a breakdown while at work. She was forced to sign a document indicating that she would not sue the town upon her termination.[131]

Massachusetts State Trial Court

In 2008, a married lesbian working for the Massachusetts State Trial Court reported that she was demoted and her pay was cut as a result of her recent marriage to a woman. The employee took time off of work for an illness with a doctor's note, but she was called by her union steward to notify her that she had been suspended and that proceedings were under way to fire her.[132]

Suffolk County Court System

In 2005, a lesbian probation officer in the Suffolk County court system reported that she received a brochure in her work mailbox that touted a seminar discussing "cures

[128] GLAD Intake Form (July 10, 2003).
[129] GLAD Intake Form (June 13, 2008)
[130] GLAD Intake Form (date unknown).
[131] GLAD Intake Form (Mar. 20, 2007).
[132] GLAD Intake Form (Jan. 24. 2008).

for homosexuality" after she announced her marriage to her female partner. She and two unmarried women in the department were the only employees to receive the brochure. Her union suggested that she contact the Commissioner of Probation. In response to her complaint, the Commissioner asked if she "expected the whole office to be turned upside down in order to find the culprit." He then suggested that she take up her grievance with someone else.[133]

Boston Police Department

In 2005, a Boston police officer, who is a lesbian, overheard and was the target of harassing comments and slurs. After verbally complaining to her supervisors about these comments, no action was taken.[134]

County Sheriff's Departments

In 2007, a Massachusetts deputy sheriff, who is gay, experienced two years of harassment by his chief. The chief threatened to suspend him if continued "to see two guys at one time" because it looked bad for the department. The chief also "outed" him to his coworkers. Due to the harassment he suffered, the deputy sheriff suffered a mild heart attack, and was placed on sick leave. During that time, he was fired for abandonment of post.[135]

In 2005, a gay nurse working for a Massachusetts Sheriff Department worked in a hostile work environment. His co-workers gave him a Christmas present, which included fishnet stockings and obscene gay sex cards. He was given a bag of peanuts by a coworker and told to "Eat my nuts." When he complained, he was told that "this was the way prisons work" and that he shouldn't complain. He filed a complaint with the Massachusetts Commission Against Discrimination.[136]

Also in 2005, a Massachusetts deputy sheriff, who is gay, worked for more than 13 years in law enforcement. His co-workers began targeting him with "usual locker room homo talk." He was then excluded from meetings and his responsibilities were slowly taken away until finally, he was transferred to an inferior, nonsupervisory position. He was then terminated. He also reported that one other openly gay person, a lesbian, in the department was also forced out after her sexual orientation was disclosed. He reported that he was in settlement negotiations with the Sheriff's Department, but they broke down.[137]

Municipal Police Department

Michael Carney realized soon after graduating the police academy, because he was gay, his safety as a police officer and his future as a public servant was seriously

[133] GLAD Intake Form (Aug. 31, 2005).
[134] GLAD Intake Form (Oct. 13, 2005).
[135] GLAD Intake Form (May 24, 2007).
[136] GLAD Intake Form (Mar. 21, 2005).
[137] GLAD Intake Form (Oct. 17, 2005).

jeopardized. He worried that if he were killed in the line of duty there would be no one to tell his partner what happened to him and his partner would learn about it on the news.

Mr. Carney was a good cop, but he lost two-and-a-half years of employment fighting to get his job back because he is gay. Because Massachusetts has an antidiscrimination law that protects against sexual orientation discrimination he was eventually able to get his job, back but if he lived in a state without such protections or if he were a federal employee living in Massachusetts, he would not have been able to get his job back.[138]

University of Massachusetts, Lowell

Karen Harbeck began teaching as an assistant professor at the University of Massachusetts at Lowell in 1986. When she was hired, the dean acknowledged her credentials and accomplishments and promised to promote her within one year. But a student began threatening Harbeck's life, carrying a gun onto the campus and saying the God had "ordained" him to "kill all homosexuals." Soon afterwards, the university notified Harbeck that the school no longer needed her courses or her services and that it was terminating her contract. But the university never canceled Harbeck's courses. Instead, the school hired another professor, who had no background in the course subjects, to teach the same courses.[139]

[138]Transcript of Statement by Michael Carney Regarding H.R. 2015 (Employment Non-Discrimination Act of 2007), H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY, Sept. 5, 2007; Transcript of Statement by Mass. Rep. George Miller Regarding Mass. H.B. 13228 H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY,Sept. 5, 2007.

[139] Human Rights Campaign, HRC PUBLICATION: DOCUMENTED CASES OF JOB DISCRIMINATION BASED ON SEXUAL ORIENTATION (1995).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

In 2002, the Massachusetts Supreme Judicial Court struck down both of Massachusetts' sodomy laws as unconstitutional.[140]

B. Housing & Public Accommodations Discrimination

The Massachusetts anti-discrimination law prohibits discrimination based on sexual orientation in housing, public accommodations and the granting of credit.[141] Owner-occupied buildings with two or fewer units are exempt from the ban on discrimination in housing.[142]

In Boston, the local anti-discrimination ordinance prohibits discrimination on the basis of sexual orientation and gender identity or expression in labor organizations, credit transactions, bonding, insurance, education, and public accommodations and services.[143] The Boston Fair Housing Commission works to prevent the denial of equal access to, and discrimination in, housing where denial or discrimination is based on sexual preference or gender identity or expression.[144]

The City Discrimination Policy in Cambridge protects against discrimination on the basis of sexual orientation and gender identity in housing and real estate, education, credit, bonding, insurance and public accommodations.[145]

Amherst's Human Rights Policy makes it the policy of the town that no person, public or private, shall be denied any rights guaranteed by law on the basis of sexual preference, gender identity or expression.[146] In addition, the Housing Partnership/Fair Housing Committee in Amherst actively promotes access to housing for all persons regardless of sexual orientation.[147]

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[140] *GLAD v. Attorney General*, 436 Mass. 132 (2002) (striking down MASS. GEN. LAWS ch. 272, §§ 34, 35).
[141] MASS. GEN. LAWS ch. 151B, § 4(6).
[142] *Id.*
[143] *See* BOSTON MUN. CODE §§ 12-9.4, 12-9.5, 12-9.6, 12-9.7.
[144] *See* BOSTON MUN. CODE § 10-3.3.
[145] *See* CAMBRIDGE MUN. CODE § 2.76.
[146] *See* Amherst Town Bylaws Art.16 (1999) (gender identity or expression added in 2009 by Article 11).
[147] *See* Amherst Town Website, http://www.amherst.gov (last visited Sept. 5, 2009).

Executive Order No. 341 provides for non-discriminatory visitation privileges when dealing with inmates, patients, and residents of state facilities.[148] The Order specifies that visitation privileges will be extended to persons who have a "relationship of mutual support" with the inmate, patient, or resident.[149] This phrase may be interpreted to mean "a relationship between two individuals, each unmarried and competent to contract, characterized by mutual caring and emotional support; an agreement to share basic living expenses; a sharing of living quarters and an intent to do so indefinitely; a mutual assumption of responsibility for each other's welfare; and a mutual expectation that the relationship is exclusive and will endure over time."[150] Thus, same-sex couples have the same visitation privileges as heterosexual couples.

C. HIV/AIDS Discrimination

In Massachusetts, it is illegal to discriminate against people who have, or are perceived as having, HIV or AIDS, in employment, housing and public accommodations.[151] Moreover, Massachusetts law prevents an employer from requiring any employee to take an HIV test.[152]

D. Hate Crimes

The Massachusetts "Hate Crimes Penalties Act" penalizes anyone who "commits an assault or a battery upon a person or damages the real or personal property of a person with the intent to intimidate such person because of their race, color, religion, national origin, sexual orientation, or disability."[153] If H.B. 1728 passes, gender identity or expression will be added as a protected class.[154]

E. Education

Under Massachusetts law, no person shall be excluded from or discriminated against in admission to a public school of any town on account of sexual orientation.[155]

Doe v. Yunits, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

In *Doe*,[156] a fifteen-year-old male-to-female transgender student at South Junior High School in Brockton, Massachusetts, brought an action requesting the court to prohibit the school from excluding him on account of her female gender identity. Plaintiff had been diagnosed with gender identity disorder and sought to attend the school

[148] Mass. Executive Order 340 (Gov. Patrick).
[149] *Id.*
[150] *Id.*
[151] MASS. GEN. LAWS ch. 151B.
[152] MASS. GEN. LAWS ch. 111, § 70F.
[153] MASS. GEN. LAWS ch. 265, § 39.
[154] H.B. 1728 (Mass. 2009).
[155] MASS. GEN. LAWS ch. 76, § 5.
[156] *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

wearing clothes and fashion consistent with her gender identity. School officials informed the plaintiff that she could not enroll in school if she wore girls' clothes or accessories. During the 1999-2000 school year plaintiff stopped attending school, citing the hostile environment created by the principal. Because of the absences, she was forced to repeat eighth grade. Plaintiff had also been suspended several times for using the ladies' restroom.

The Court held that the plaintiffs' conduct was protected expressive speech pursuant to Article XVI of the Massachusetts Declaration of Rights. Furthermore, the court reasoned that the plaintiff's ability to dress consistent with her gender identity was important to her health and "not merely a personal preference but a necessary symbol of her identity."[157]

F. **Health Care**

Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002).

In *Kosilek*,[158] an inmate, serving life without the possibility of parole for murdering his wife, brought an action against correction officials seeking to require medical treatment for his gender identity disorder, pursuant to the Eighth Amendment right to adequate medical care. The disorder had caused the plaintiff severe mental anguish, leading him to attempt suicide twice, as well as an attempt to castrate himself. Since being incarcerated in 1990, he had sought, but not received, any form of treatment.

The court held that at a minimum, the Eighth Amendment requires that "psychotherapy, with, or under the direction of, a professional with training and experience concerning individuals with severe gender identity disorder"[159] be performed.

O'Donnabhain v. Comm'r, No. 006402-06 (Ma. Tax Ct.).

This case, which arose in Massachusetts, is currently pending before the United States Tax Court. The issue is whether an individual who was born anatomically male and has been diagnosed with gender identity disorder can deduct sex reassignment surgery costs as necessary medical expenses under 26 U.S.C. § 213 of the tax code. The IRS has argued that the surgery is merely cosmetic, as it is directed at improving the patient's appearance, not promoting the proper functioning of the body or preventing or treating illness or disease. The position taken by the IRS has sparked outrage from some experts who specialize in gender identity disorder. Marshall Forstein, an associate professor of psychiatry at Harvard Medical School, exclaimed, for example, that the IRS is "practicing medicine without a license." O'Donnabhain has countered that the treatments are directed at curing and mitigating her disorder, and are therefore "medically necessary."

G. **Gender Identity**

[157] *Id.* at 3.
[158] *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002).
[159] *Id.*

The Department of Motor Vehicles ("DMV") has added a check off box to their license renewal forms in which individuals may indicate if their sex has changed. The DMV cautions, however, that individuals may be required to show further documentation, without indicating what such a showing would entail.[160]

H. Parenting

The Appeals Court of Massachusetts was one of the first state courts to find that sexual orientation should not be a factor in custody hearings unless it is demonstrated to be harmful to the child.[161]

Same-sex individuals and couples in Massachusetts may also adopt children and become foster parents.[162] This was not always the case. In 1985, then-Governor Michael Dukakis enacted a state policy that categorically banned lesbians and gay men from becoming foster parents.[163]

I. Recognition of Same-Sex Couples

In November of 2003, the Massachusetts Supreme Judicial Court ruled that same-sex couples have the right to marry in Massachusetts.[164] A proposed constitutional amendment to define marriage as a union between a man and a woman was defeated most recently in 2007, after numerous attempts to ban same-sex marriage by opponents.[165] In July 2008, the Massachusetts legislature repealed a 1913 law, which was used to deny marriage licenses to same-sex couples from other states unless they had an intent to reside in Massachusetts.[166] Now same-sex couples from other states may get married in Massachusetts. However, this does not mean that their home state must recognize the marriage.

[160] *See* Mass. Registry of Motor Vehicles License/ID Update Application, http://www.mass.gov/rmv (last visited Sept. 6, 2009).
[161] Philip S. Gutis, *Homosexual Parents Winning Some Custody Cases*, N.Y. TIMES, Jan. 21, 1987, at C1.
[162] MASS. GEN. LAWS ch. 210, § 1.
[163] Kenneth J. Cooper, *Foster-Care Resolution is Voted in Senate*, BOSTON GLOBE, June 4, 1985, at 17.
[164] *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).
[165] Frank Phillips, *Legislators Vote to Defeat Same-Sex Marriage Ban*, BOSTON GLOBE, June 14, 2007.
[166] Remarks by Mass. Gov. Deval Patrick Regarding Repeal of Mass. Stat. 1913 and Signing of MassHealth (July 31, 2008).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Michigan – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Currently, Michigan has not enacted any statewide legislation prohibiting employment discrimination on the basis of sexual orientation and gender identity.[1] The Michigan Civil Rights Act (hereinafter referred to as the "Elliott-Larsen Civil Rights Act"),[2] which prohibits employment discrimination based on various categories, including religion, race, and sex, does not prohibit discrimination based upon sexual orientation or gender identity. Indeed, in *Barbour v. Department of Social Services*,[3] the Michigan Court of Appeals held that harassment and discrimination based upon a person's sexual orientation is not an activity proscribed by the Elliott-Larsen Civil Rights Act.[4] The *Barbour* court, however, did hold that a gender discrimination claim brought pursuant to the Elliott-Larsen Civil Rights Act may be based on incidents of homosexual advances that directly relate to the employee's gender.[5] More recently, a bill was introduced in January 2007 to include "sexual orientation and gender identity or expression," but that bill did not go beyond the Judiciary Committee.[6]

Several executive orders issued between 2003 through 2007 prohibit employment discrimination based on sexual orientation and/or gender identity or expression, but are limited to protecting only state employees and do not provide for a private right of action.[7] Several municipalities in Michigan have passed ordinances banning employment practices, housing practices, and public accommodation practices that discriminate based on sexual orientation and gender identity.

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[1] *See* Sarah Sprague, *Employment Discrimination Prevalent Issue for LGBTs*, MICH. DAILY, Apr. 4, 2005, http://bit.ly/BEHiL (illustrating the fear many members of the LGBT community experience when searching for a job, and once in the workplace, due to the lack of legal protection afforded LGBT employees under Michigan law).

[2] MICH. PUB. ACTS 453 (1976).

[3] 497 N.W.2d 216 (Mich. App. 1993).

[4] *Id.* at 217-18.

[5] *Id.* at 218.

[6] HB 4160 (Mich. 2007).

[7] Exec. Order No. 24 (2003); Exec. Order No. 24 (2007); and Exec. Order No. 22 (2008).

Documented examples of employment discrimination by government employers on the basis of sexual orientation and gender identity or expression in Michigan include:

- In 2008, a gay police officer reported that he was forced to resign because of his sexual orientation.[8]

- In 2007, a professor filed suit against the University of Michigan Law School for unlawfully denying him tenure based on his sexual orientation. He alleged that he was the first openly gay professor to be considered for tenure at the University of Michigan Law School, and the first man in the history of that institution to be denied tenure. He was denied tenure by a faculty vote, which at 18-12 in favor of tenure, fell two votes short of the 2/3 majority required by the school's rules. He had been recommended for tenure with a 4-1 vote from the tenure committee. His complaint alleges breach of contract, predicated on representations of non-discrimination during pre-employment negotiations, as well as University policies and by-laws prohibiting discrimination on the basis of sexual-orientation. Rather than building an affirmative case that no discrimination took place, the University's initial stance was to maintain that its by-laws and non-discrimination policies had no legal meaning and created no rights. The Law School filed motions for summary judgment were denied. The trial court ruled that the professor had established a legitimate claim of discrimination and that a trial on the merits was warranted.[9]

- In 2007, a lesbian corrections officer reported that she was forced to resign because of her sexual orientation.[10]

- In 2004, a public school teacher was terminated after telling students he was gay and had a partner. After the ACLU of Michigan wrote a letter to the school district demanding that the teacher be reinstated, the school district invited him back.[11]

- In 2002, in *Pettway v. Detroit Judicial Council*,[12] plaintiff, a court reporter, brought a lawsuit against his employer, supervisor, the Detroit Judicial Council and the City of Detroit alleging sexual orientation discrimination, retaliation, intentional infliction of emotional distress, and tortious interference with a business relationship.[13] Plaintiff brought this suit pursuant to the Detroit Human

[8] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).
[9] LESBIAN & GAY L. NOTES (Oct. 2007).
[10] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).
[11] *Docket: Discrimination*, ANNUAL UPDATE 39, 43(ACLU, 2004).
[12] No. 226616, 2002 WL 652125 (Mich. Ct. App. Apr. 19, 2002).
[13] *Id.* at *1.

Rights Ordinance.[14] At trial, the trial court granted the employer's motion for summary judgment and held that the Human Rights Ordinance only applied to employees and that the plaintiff was a contractor.[15] The Michigan Court of Appeals affirmed. Pettway v. Detroit Jud. Council, No. 226616, 2002 WL 652125 (Mich. Ct. App. Apr. 19, 2002).

- In 2000, the Michigan Supreme Court issued an opinion dismissing the claims of a Detroit police officer who had been subjected to discrimination and harassment. She alleged that after she was assigned to the sex crimes unit, numerous male officers began hitting on her for sexual favors. She declined, stating that she was a lesbian. She then suffered further discrimination, including being assigned away from law enforcement to busy-work desk jobs. She also alleged that supervisors refused to handle her grievances because of her sexual orientation. Ultimately, she retired from the police force and filed a lawsuit. The officer alleged that she was harassed after she rebuffed the advances of a supervisor because she is a lesbian, and that the consequent harassment violated the city charter's ban on sexual orientation discrimination. The trial judge granted the city's motion to dismiss the claim, finding that the charter provision did not provide a private right of action, and that the officers exclusive remedy was to file a discrimination complaint with the city's human rights agency. However, the Court held that she could still pursue a sex discrimination claim under the state's civil rights law. *Mack v. City of Detroit*, 243 Mich. App. 132 (Mich. Ct. App. 2000).

- In 1993 in *Barbour v. Department of Social Services,*[16] a Department of Social Services employee filed a lawsuit against its employer alleging sexual harassment and sexual discrimination in violation of the Michigan Civil Rights Act. He alleged that throughout his employment his coworkers and the supervisor subjected him to unremitting verbal and nonverbal harassment based on his perceived sexual orientation.[17] Specifically, plaintiff alleged that the various forms of harassment were made by coworkers and supervisor to get him to "come out of the closet . . . and to engage in homosexual sex. . . ." At trial, the court determined, as an issue of first impression, that the Michigan Civil Rights Act's prohibition on sexual harassment does not include a proscription on discrimination or harassment "due to a person's sexual orientation or perceived sexual orientation."[18] On appeal, the Michigan Court of Appeals upheld the trial court's ruling;[19] however, it also held that the employee could bring a gender discrimination claim pursuant to the Michigan Civil Rights Act based on incidents of homosexual advances that directly related to hir gender.[20] The court found that the supervisor's actions were directly related to plaintiff's status as a male,

[14] DETROIT CODE Ch. 27, Art. 3, §§ 3-1, 3-2.
[15] *Pettway*, No. 226616, 2002 WL 652125 at *1.
[16] 497 N.W.2d 216 (Mich. Ct. App. 1993).
[17] *Id.* at 217.
[18] *Id.*
[19] MICH. COMP. LAWS 37.2101, *et seq.*
[20] *Id.*

and thus rendered the act applicable.[21] Barbour v. Dep't of Soc. Serv., 497 N.W.2d 216 (Mich. Ct. App. 1993).

- In 1993, Byron Center High School hired a teacher to revive its floundering music program.[22] The teacher was a tenured music teacher described by many as one of the best teachers on staff and a good role model for students.[23] Two years later in 1995, after he successfully revitalized the Center's music program, he and his partner planned for a commitment ceremony.[24] Before the event took place, someone at the high school learned of the commitment ceremony and spread word to staff, parents and students. At a school board meeting, a few angry parents demanded that the music teacher be fired. The school board did not take immediate action, but issued a statement that said, "The board firmly believes that homosexuality violates the dominant moral standard of the district's community. Individuals who espouse homosexuality do not constitute proper role models as teachers for students in this district" and warned the teacher that they would "investigate and monitor" the situation.[25] In the months that followed the board meeting, many parents removed their children from the teacher's class and he became the center of media attention. After a school official released the names and addresses of his students, parents received antigay letters and videos. While he struggled to maintain his classroom for the remainder of the school year, he ultimately relented at the end of the school year and entered into a settlement agreement with the school district: he agreed not to sue or seek employment in the district in exchange for one-year's salary, health benefits and a letter of reference to leave the school district.[26] Five months later, he collapsed, went into a coma and died days later at the age of thirty-two. A forensic pathologist concluded that his died from a congenital malfunctioning heart valve, adding that this condition was typically not fatal, but the stress from his public struggle may have contributed to his death.[27]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

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[21] *Id.*

[22] Christine Yared, *Where Are the Civil Rights for Gay and Lesbian Teachers,* 24 Hum. Rts. 3 (ABA 1997), *available at* http://www.abnet.org/irr/hr/yared.html.

[23] *Id.*

[24] Jill Smolowe, et al., *The Unmarrying Kind*, TIME, Apr. 29, 1996, *available at* http://www.time.com/time/printout/0,8816,984469.00.html; Yared, *supra* at Note 22.

[25] Yared, *supra* at Note 22.

[26] *Id.*

[27] *Id.*

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently the state of Michigan has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[28]

B. Attempts to Enact State Legislation

Currently, the Michigan Civil Rights Act (hereinafter referred to as the "Elliott-Larsen Civil Rights Act") does not prohibit discrimination based upon sexual orientation or gender identity. Pending before the Michigan Legislature is House Bill 4160, which would add sexual orientation and gender identity or expression to Michigan's civil rights law. The bill was introduced in January 2007 by Representative Steven Tobocman and currently has 19 cosponsors. The bill did not go beyond being referred to the Judiciary Committee.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

Executive Order 2003-24: Issued December 23, 2003, EO 2003-24 prohibits sexual orientation discrimination in hiring, recruiting, and other employment practices by any State department, board, commission, or other agency subject to supervision by the Governor under Section 8 of Article V of the Michigan Constitution of 1963.

Executive Directive 2007-24: Issued November 21, 2007, ED 2007-24 protects employees in the State's executive branch from discrimination and harassment based on "gender identity or expression." The directive states, "[t]o build a more inclusive Michigan our state government must be a model of tolerance, accessibility, equal opportunity -- reaching out to people, knocking down barriers, and dispelling prejudices which hold Michigan back;…when the State of Michigan acts inclusively, the state benefits from the contribution and full participation of all Michiganians;… the employment practices of the State of Michigan should promote public confidence in the fairness and integrity of government, and should reflect a firm commitment to strengthening and developing equal employment opportunities;… state employment policies and procedures that encourage non-discriminatory and equal employment practices provide desirable models for the private sector and local governments and build upon successful policies and procedures of private and public sector employers." The directive adds "gender identity or expression" to a list of other prohibited forms of discrimination and harassment, including religion, race, color, national origin, age, sex, sexual orientation, height, weight, marital status, partisan considerations, disability and genetic information.

[28] MICH. PUB. ACT. No. 453 (1976) (the "Elliott-Larsen Civil Rights Act").

The directive defines "gender identity or expression" as the "perception by an individual or another person of the gender identity, appearance, behavior, or expression of the individual whether or not that gender identity, appearance, behavior or expression is different from the gender identity, appearance, behavior or expression traditionally associated with the sex assigned to the individual at birth." Reporting requirements established by the Civil Service Commission and regulations established by the State Personnel Director relating to discriminatory harassment apply and, as provided in rules promulgated by the Civil Service Commission, an employee who engages in discriminatory harassment may be disciplined by the appointing authority, up to and including dismissal. Bona fide occupational qualifications and affirmative action plans may be authorized by an appointing authority within a department, board, commission or other agency if approved in advance by the State Personnel Director. Different standards for compensation or different terms, conditions, or privileges of employment under a bona fide seniority or merit system are also allowed.

Executive Order 2008-22: Issued December 18, 2008, EO 2008-22 is based on the policy of the administration to "ensure equal access and opportunities in the recruitment, hiring, promotion, and retention of employees in the state's classified service without regard to … sexual orientation, gender identity or expression, … that is unrelated to the person's ability to perform the duties of a particular job or position." The Order provides for the creation of the State Equal Opportunity and Diversity Counsel that issues recommendations on equal opportunity measures.

2. State Government Personnel Regulations

The following departments of the Michigan state government have non-discrimination policies that prohibit employment discrimination either on the basis of sexual orientation and/or gender identity and expression by state government employees: the Department of Human Services,[29] the Department of Civil Service,[30] and the Department of Human Services Bureau of Juvenile Justice.[31] The Equal Opportunity & Diversity Inclusion Advisory Committee is an advisory body to the Department of Human Services, which is committed to integrating the concept of diversity inclusion in the workplace and assuring equal opportunity for employees in all programs through collaboration with the offices of the department. Included in the committee's definition of diversity is sexual orientation.[32]

On March 17, 2006, the Michigan Commission On Services to the Aging held a meeting called "Arab Community Center for Economic & Social Services", where

[29] *Discriminatory Harassment*, AHJ 1305, AHB 2008-003 (June 1, 2008), *available at* http://www.mfia.state.mi.us/olmweb/ex/ahj/1305.pdf (last visited Sept. 6, 2009).
[30] Mich. Dep't Civ. Serv. Rule 1-8 (Prohibited Discrimination), *available at* http://bit.ly/Wo8sl; Mich. Dep't Civ. Serv. Regulation No. 1.03 (Investigating Reports of Discriminatory Harassment), *available at* http://bit.ly/AzFtr.
[31] Mich. Gov. Staff Ethics Rules, JR1 115, JRB 2007-001, (Nov. 11, 2007), *available at* http://www.mfia.state.mi.us/olmweb/ex/JR1/115.pdf (last visited Sept. 6, 2009).
[32] Powerpoint Presentation, Dep't of Hum. Serv., Equal Opportunity & Diversity Inclusion Advisory Comm., *available at* http://bit.ly/4zX0cn (last visited Sept. 6, 2009).

Commissioner Bollinger asked why "sexual orientation" is not a requirement within the Civil Rights compliance section of Statewide Service and Area Agency on Aging Operating Standards. Eric Berke, a OSA staff member, explained that the State of Michigan Elliott-Larsen Civil Rights Act of 1976 and the Federal Civil Rights Act of 1964, Title VII specifically, did not include sexual orientation as a protected category. As a result, "sexual orientation" is only a minimum expectation as reflected in current law or regulation. Mr. Berke further stated that the Commission could include the reference if desired. At that point, Commissioner Guilfoyle made a motion to include sexual orientation in the Area Agency on Aging Operating Standards and the service standards, Commissioner Bollinger seconded the motion, and the Commission unanimously voice-voted approval.[33]

3. Attorney General Opinions

In a 1978 Attorney General Opinion on preemption, the Attorney General opined that municipalities and municipal human rights relations commissions are limited to performing education, counseling and advisory rules in the area of civil rights enforcement in the absence of an authorization from, or certification by, the State Civil Rights Commission for the performance of further functions. The Attorney General opines that the Detroit Charter, Art. 7, Ch 10, Sec. 7-1004(1), which protects against sexual orientation in addition to other bases of discrimination that are state recognized, is in direct conflict with the State Civil Rights Commission rules.

4. Local Ordinances

A number of cities in Michigan have anti-discrimination policies that prohibit discrimination on the basis of sexual orientation and/or gender identity, including Ann Arbor,[34] Lansing,[35] Ferndale,[36] Flint,[37] Grand Rapids,[38] Lansing,[39] Ypsilanti,[40] Saugatuck Township,[41] Spring Lake,[42] and Westland.[43]

Detroit has a number of ordinances prohibiting sexual orientation discrimination in employment. Specifically, these ordinances are geared toward (1) employers and

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[33] Minutes of the Meeting of the Comm'n on Serv. to the Aging (Feb. 17, 2006), *available at* http://bit.ly/bwpIn (last visited Sept. 6, 2009).

[34] *See* ANN ARBOR CODE Ch. 112, §§ 9:150 to 9:164 (1995) (specifically banning discrimination in employment at § 9:155).

[35] *See* EAST LANSING CODE Ch. 22, Art. II, §§ 22-31 to 22-22-39 (specifically banning discrimination in employment at §22-33).

[36] FERNDALE CODE Ch. 28, §§ 28-1 to 28-6.

[37] CITY OF FLINT, MICH. CODE, Part II, Ch. 2, Art. IV, § 2-19.2(a).

[38] CITY OF GRAND RAPIDS, MICH. CODE , Part 2, Ch. 8, Art. 3, § 1.347.

[39] LANSING CODE Part 2, Title 12, Ch. 297, §§ 297.01 to 297.15.

[40] YPSILANTI CODE Ch. 58, Art III, Div. 1, §§ 58-61 to 58-75; *Id.* at Ch. 2, Art. VI, Div. 3, §§ 2-316 to 2-329 (Affirmative Action program that applies to city contractors); *Id.* at Ch. 58, Art II, §§ 58-31 to 58-39 (Human Relations Commission).

[41] Art. V, Sec. 2-251 to 2-258 (Ord. No. 2007-02, §§ 2-9, 8-2-2007).

[42] Art. XVII, Sec. 17.02.

[43] Art. 2, Sec. 54-39 (Code 1981, § 11-27; Ord. No. 194-A-2, § 2, 11-15-04).

contractors with the City;[44] (2) the City's Human Resources Department;[45] and (3) housing commission employment practices.[46] The City also has a Home Rule Charter that declares, as a right for the citizens of the City, that the City has an affirmative duty to secure the equal protection of the law for all persons, and states that no person shall be denied the enjoyment of civil or political rights, or be discriminated against in the exercise thereof, because of race, color, creed, national origin, age, handicap, sex, or sexual orientation.[47] In addition, Detroit has enacted ordinances creating a general human rights commission, which is dedicated to eliminating sexual orientation discrimination.[48] The human rights commission is vested with the power and the general jurisdiction, both inside and outside of city government, to approve of procedures to remedy past effects of discrimination and to prevent discrimination "in education, employment, medical care facilities, housing accommodations, commercial space, places of public accommodation, public service, resort or amusement, or other forms of discrimination prohibited by law, based upon …sexual orientation; and to take such action as necessary to secure the equal protection of civil rights."[49]

D. **Occupational Licensing Requirements**

Michigan Complied Laws § 339.101, *et seq.* ("Occupational Code") consolidates and reclassifies the laws regarding the regulation of certain occupations and creates a board for each occupation and procedures for licensing. A non-exhaustive search of websites has found no occupational licensing requirements that reference "moral turpitude" or similar allusions that could include sexual orientation or gender identity.

[44] DETROIT CODE Ch. 27, Art. 3, §§ 3-1, 3-2.
[45] *Id.* at Part I, Art 6, Ch. 5, § 6-506.
[46] *Id.* at Ch. 14, Art. 5, § 5-3(d).
[47] *Id.* at Part I, Preamble, § 2.
[48] *See Id.* at Ch. 27, Art. 1, § 1-1.
[49] *See generally*, DETROIT CODE Ch. 27, Art. 1-3.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE &LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Pettway v. Detroit Jud. Council, No. 226616, 2002 WL 652125 (Mich. Ct. App. Apr. 19, 2002).

In *Pettway v. Detroit Judicial Council*,[50] plaintiff, a court reporter, brought a lawsuit against his employer, supervisor, the Detroit Judicial Council and the City of Detroit alleging sexual orientation discrimination, retaliation, intentional infliction of emotional distress, and tortious interference with a business relationship.[51] Plaintiff brought this suit pursuant to the Detroit Human Rights Ordinance.[52] At trial, the trial court granted plaintiff's employer and supervisor summary judgment and held that the Human Rights Ordinance only applied to employers.[53] Plaintiff challenged this holding on appeal and the Michigan Court of Appeals upheld the trial court's ruling that the ordinance applied strictly to employers.[54]

Mack v. City of Detroit, 243 Mich. App. 132 (Mich. Ct. App. 2000).

Linda Mack was a Detroit police officer, who had advanced to the rank of lieutenant. She claimed that because she rebuffed sexual advances by several male supervisors, she was subjected to discrimination and mistreatment. Mack argued that she rebuffed these advances because she is a lesbian, and that the consequent harassment violated the city charter's ban on sexual orientation discrimination. The trial judge granted the city's motion to dismiss the claim, finding that the charter provision did not provide a private right of action, and that Mack's exclusive remedy was to file a discrimination complaint with the city's human rights agency. On appeal, the Michigan Court of Appeals found that the city charter did not support the contention that the administrative remedy was exclusive, holding that there is an implied right of action under the Detroit city charter provision that bans sexual orientation discrimination. The case was appealed to the Michigan Supreme Court, which reversed the appellate court, holding that Mack cannot enforce her rights under the Detroit City Charter to be free of sexual orientation discrimination in the workplace by suing the city and its police department in state court. However, Mack is still entitled to pursue a sex discrimination claim under the state's civil rights law.

Mack alleged that when she was assigned to the sex crimes unit, numerous male officers began hitting on her for sexual favors. When she declined, stating that she was a lesbian, she suffered further discrimination, including being assigned away from law

[50] No. 226616, 2002 WL 652125 (Mich. Ct. App. Apr. 19, 2002).
[51] *Id.* at *1.
[52] DETROIT CODE Ch. 27, Art. 3, §§ 3-1, 3-2.
[53] *Pettway*, No. 226616, 2002 WL 652125 at *1.
[54] *Id.* at 2.

enforcement to busy-work desk jobs. She also alleged that supervisors refused to handle her grievances because of her sexual orientation. Ultimately, she retired from the police force and filed a lawsuit.

The Supreme Court held that the fatal flaw in Mack's claim is that although Detroit amended its charter years before to ban sexual orientation discrimination, Michigan had not added that category to the state's civil rights law. According to the majority, Mack's suit for sexual orientation discrimination, which was based solely on the city charter provision, was not within the jurisdiction of the state courts because the city does not have authority to enact exceptions to the Michigan Government Tort Liability Act (GTLA), which provides that, apart from some listed exceptions, government agencies in Michigan are immune from tort liability when "engaged in the exercise or discharge of a governmental function."[55]

Barbour v. Dep't of Soc. Serv., 497 N.W.2d 216 (Mich. Ct. App. 1993).

In *Barbour v. Department of Social Services*,[56] a Department of Social Services employee filed a lawsuit against its employer alleging sexual harassment and sexual discrimination in violation of the Michigan Civil Rights Act, MICH. COMP. LAWS 37.2101, *et seq*. The plaintiff held that throughout his employment with defendant, his coworkers and supervisor subjected him to unremitting verbal and nonverbal harassment based on his perceived sexual orientation.[57] Specifically, plaintiff alleged that the various forms of harassment were made by coworkers and supervisor to get him to "come out of the closet . . . and to engage in homosexual sex. . . ." At trial, the court determined, as an issue of first impression, that the Michigan Civil Rights Act's prohibition on sexual harassment does not include a proscription on discrimination or harassment "due to a person's sexual orientation or perceived sexual orientation."[58] The trial court granted defendants summary judgment.

On appeal, the Michigan Court of Appeals upheld the trial court's ruling regarding the application of the Michigan Civil Rights Act.[59] The appellate court stated that the plaintiff failed to show the alleged harassment by his coworkers was gender-based, noting that plaintiff's deposition indicated his own relief that the harassment was the result of his co-workers perceptions of his sexual orientation.[60] The appellate court found, however, that the lower court erred in dismissing plaintiff's complaint insofar as it alleged specific homosexual advances directed to him by his supervisor. In particular, the court held that a gender discrimination claim brought pursuant to the Michigan Civil Rights Act may be based on incidents of homosexual advances that directly relate to the

[55] *Mack v. City of Detroit*, 243 Mich. App. 132 (Mich. Ct. App. 2000).
[56] 497 N.W.2d 216 (Mich. Ct. App. 1993).
[57] *Id.* at 217.
[58] *Id.*
[59] MICH. COMP. LAWS 37.2101, *et seq.*
[60] 497 N.W.2d at 218.

employee's gender.[61] The court found that the supervisor's actions were directly related to plaintiff's status as a male, and thus rendered the act applicable.[62]

2. Private Employees

Robinson v. Ford Motor Co., 744 N.W.2d 363 (Mich. Ct. App. 2008).

In *Robinson v. Ford Motor Company*,[63] the plaintiff brought a sexual harassment claim against his employer pursuant to the Michigan Civil Rights Act, alleging that a male coworker sexually harassed him while they both worked in defendant's manufacturing plant. Specifically, the plaintiff alleged that the coworker engaged in a variety of conduct unwelcomed by him and other employees that constituted sexual harassment.

With regard to plaintiff, the alleged conduct included the coworker slapping him on the buttocks, pinching his nipples, pulling down plaintiff's pants to expose his underwear, the coworker exposing his testicles to another coworker while grasping plaintiff's hand and attempting to or actually making plaintiff touch them, and placing his hands in plaintiff's pants and placing his finger between plaintiff's buttocks. The coworker also allegedly offered to show plaintiff his penis and asked plaintiff about the size of plaintiff's penis. Additionally, the coworker allegedly made comments about wanting to see plaintiff's "naked butt" in a vat of K-Y Jelly and wanting to "crack [plaintiff's] ass." On several occasions, the coworker told plaintiff, "You're my bitch, I own your ass." Plaintiff alleged that he suffered a breakdown after two consecutive days in which the coworker digitally penetrated plaintiff's mouth. Plaintiff testified in his deposition that he could feel the coworker's erect penis on his back during one of these incidents. Plaintiff reported these and other incidents to his supervisor.[64]

The Court of Appeal held that: (1) the language of the Michigan Civil Rights Act did not exclude same-gender harassment claims; and (2) the employee presented sufficient evidence to allow a reasonable trier of fact to conclude that the coworkers' conduct and communication inherently pertained to sex for the purposes of the employee's same-gender sexual harassment claim under Michigan Civil Rights Act.

The Court further noted that, consistent with the United States Supreme Court's holding in *Oncale*,[65] it interpreted the Michigan Civil Rights Act to present a threshold question: "whether the same-gender harasser's conduct constituted discrimination

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[61] *Id.*
[62] *Id.*
[63] 744 N.W.2d 363 (Mich. Ct. App. 2008).
[64] *Id.* at 366.
[65] In *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998), the United States Supreme Court held that "sex discrimination consisting of same-sex sexual harassment is actionable under title VII. The Court further held that title VII's prohibition against sexual discrimination included sexual harassment of any kind that meets the statutory requirements. The Court also held that discrimination on the basis of sex can be inferred in cases where there is "credible evidence that the harasser was homosexual." The Court did not address the issue of the victim's sexual orientation or perceived sexual orientation.

because of sex."[66] The Court remanded the case for determination as to whether there was sufficient evidence to establish that the coworker acted out of sexual desire when harassing plaintiff or that the coworker was motivated by a general hostility toward the presence of men in the workplace; and whether there was direct comparative evidence about how the coworker treated members of both genders in a mixed-gender workplace. The Court failed to identify any evidentiary routes that plaintiff took to establish his same-gender sexual harassment claim.[67]

Brewer v. Hill, No. 208872, 2000 Mich. App. LEXIS 1033 (Mich. Ct. App. Sept. 15, 2000).

In *Brewer v. Hill*,[68] plaintiff, a paralegal, filed a lawsuit against his employer alleging breach of employment contract as well as sexual and racial discrimination and harassment in violation of the Michigan Civil Rights Act.[69] Specifically, plaintiff alleged defendant derogatorily referred to plaintiff as a homosexual and called him "gay," "faggot," "fairy," "president of the Downriver Fairies Club," and "half-breed" in front of coworkers and clients.[70] Plaintiff also presented evidence that women in his workplace were not subject to the same harassment based on perceived sexual orientation.[71] The trial court granted defendant's motion for directed verdict, reversing a jury's verdict in plaintiff's favor.[72]

The Michigan Court of Appeals upheld the trial court's ruling, holding that the name calling plaintiff endured from the lawyer for whom he worked was not enough to establish a violation of the Michigan Civil Rights Act, because this evidence was insufficient to demonstrate that the harassment was actually based on gender. The Court of Appeals held that "the mere fact that defendant Hill did not demean the women in his office by questioning their sexuality does not establish that, but for the fact of plaintiff's sex, plaintiff would not have been the object of harassment."[73]

B. **Administrative Complaints**

None.

C. **Other Documented Examples of Discrimination**

Municipal Police Department

[66] *Id*. at 369-70 (internal quotations and citations omitted).
[67] *Id*. at 370.
[68] No. 208872, 2000 Mich. App. LEXIS 1033 (Mich. Ct. App. Sept. 15, 2000).
[69] *Id*. at *1.
[70] *Id*. at *2 and *15, n.6.
[71] *Id*. at *16.
[72] *Id*. at *2.
[73] *Id*. at *16.

In 2008, a gay police officer reported that he was forced to resign because of his sexual orientation.[74]

The University of Michigan-Ann Arbor

In 2007, Professor Peter Hammer filed suit against the University of Michigan Law School for unlawfully denying him tenure based on his sexual orientation. Professor Hammer alleged that he was the first openly gay professor to be considered for tenure at the University of Michigan Law School, and the first man in the history of that institution to be denied tenure. Hammer was denied tenure by a faculty vote, which at 18-12 in favor of tenure, fell two votes short of the 2/3 majority required by the school's rules. Hammer had been recommended for tenure with a 4-1 vote from the tenure committee.

The complaint alleges breach of contract, predicated on representations of non-discrimination during pre-employment negotiations, as well as University policies and by-laws prohibiting discrimination on the basis of sexual-orientation. Rather than building an affirmative case that no discrimination took place, the University's initial stance was to maintain that its by-laws and non-discrimination policies had no legal meaning and created no rights.

The Law School filed two Motions for Summary Disposition that were denied. The trial court ruled that Hammer had established a legitimate claim of discrimination and that a trial on the merits was warranted.[75]

Correctional Facility

In 2007, a lesbian corrections officer reported that she was forced to resign because of her sexual orientation.[76]

Byron Center Public School

In 1993 Byron Center High School hired Gerry Crane to revive its floundering music program.[77] Crane was a gay, tenured music teacher described by many as one of the best teachers on staff and a good role model for students.[78] Two years later in 1995, after Crane successfully revitalized the Center's music program, Crane and his partner Randy Block planned for a commitment ceremony.[79] Before the event took place, someone at the Center learned of the commitment ceremony and spread word to staff, parents and students. At a school board meeting, a few angry parents demanded that

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[74] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

[75] LESBIAN & GAY L. NOTES (Oct. 2007).

[76] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

[77] Yared, *supra* at Note 22.

[78] *Id.*

[79] Jill Smolowe, et al., *The Unmarrying Kind*, TIME, Apr. 29, 1996, *available at* http://www.time.com/time/printout/0,8816,984469.00.html; Yared, *supra* at Note 22.

Crane be fired. The school board did not take immediate action, but issued a statement that said, "The board firmly believes that homosexuality violates the dominant moral standard of the district's community. Individuals who espouse homosexuality do not constitute proper role models as teachers for students in this district" and warned Crane that they would "investigate and monitor" the situation.[80] In the months that followed the board meeting, many parents removed their children from Crane's class and Crane became the center of media attention. After a school official released the names and addresses of Crane's students, parents of Crane's students received antigay letters and videos. While Crane struggled to maintain his classroom for the remainder of the school year, Crane ultimately relented at the end of the school year and entered into a settlement agreement with the school district: he agreed not to sue or seek employment in the district in exchange for one-year's salary, health benefits and a letter of reference to leave the school district.[81] Five months later, Crane collapsed, went into a coma and died days later at the age of thirty-two. A forensic pathologist concluded that his died from a congenital malfunctioning heart valve. The pathologist added that this condition was typically not fatal, but the stress from his public struggle may have contributed to his death.[82]

Michigan Public School

In 2004, A public school teacher was terminated after telling students he was gay and had a partner. After the ACLU of Michigan wrote a letter to the school district demanding that the teacher be reinstated, the school district invited him back.[83]

[80] Yared, *supra* at Note 22.
[81] *Id.*
[82] *Id.*
[83] *Docket: Discrimination*, ANNUAL UPDATE 39, 43(ACLU, 2004).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Although Michigan has adopted modern criminal sexual conduct laws based upon the Model Penal Code,[84] the legislature still has not repealed the old sodomy[85] and gross indecency statutes,[86] which criminalize homosexual behavior.

B. Housing & Public Accommodations Discrimination

No state housing regulations exists that addresses sexual orientation discrimination or gender identity discrimination. However, a number of local jurisdictions have passed ordinances prohibiting sexual orientation or gender identity discrimination in housing and public accommodations, including Ann Arbor,[87] Douglas,[88] East Lansing,[89] Ferndale,[90] Lansing,[91] Saugatuck Township in Allegan County,[92] Spring Lake,[93] Westland, [94] Dearborn Heights, [95] West Bloomfield (master cable services only), [96] Port Huron (taxi services only)[97] Birmingham (real estate transactions).[98]

On December 1, 2008, the Commission for the City of Kalamazoo voted 7-0 to adopt an expanded human rights ordinance that makes it illegal to use sexual orientation to discriminate in housing, public accommodations, and employment. The new ordinance went into effect December 11, 2008, but on January 13, 2009, the City

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[84] MICH. COMP. LAWS § 750.520 *et seq*.
[85] *Id.* at § 750.158.
[86] *Id. at* § 750..338a (1952) (male indecency) and § 750.338a. (female indecency).
[87] See ANN ARBOR CODE Ch. 112, §§ 9:150 to 9:164 (1995) (Ord. No. 4-78, 3-13-78; Ord. No. 10-99, § 1, 3-1-99).
[88] CITY OF THE VILLAGE OF DOUGLAS, MICH. CODE, Tit. IX, Ch. 91, § 91.01, *et seq*.
[89] See Art II, §§ 22-31 to 22-22-39; (Ord. No. 977, Ch. 111, §§ 9.301 to 9.308, 3-19-2002; Ord. No. 1127, 10-18-2005).
[90] Ch. 28, §§ 28-1 to 28-6 (Ord. No. 1016, Pt. I, 11-7-06).
[91] Ch. 297 §§ 297.01 to 297.15 (Ord. No. 1120, § 1, 12-18-06).
[92] Art. V, Sec. 2-251 to 2-258 (Ord. No. 2007-02, §§ 2-9, 8-2-2007).
[93] Art. XVII, Sec. 17.02.
[94] Art. 2, Sec. 54-39 (Code 1981, § 11-27; Ord. No. 194-A-2, § 2, 11-15-04).
[95] § 2-581 (Ord. No. H-05-03, § I, 10-11-05)
[96] Art. XIII, Div. 1, Sec. 9-278 (Ord. No. C-591, Art. 15, 9-18-00).
[97] Art. XIII, Div. 1, § 12-606 (Code 1975, § 36-21; Code 1992, § 18-331; Ord. No. 1175, 7-10-2000).
[98] §§ 66-36 (Code 1963, § 9.132; Ord. No. 1520, § 9.132, 4-27-92; Code 1963, § 9.134; Ord. No. 1520, § 9.134, 4-27-92).

Commission unanimously repealed the ordinance after opponents, lead by the American Family Association of Michigan, collected enough signatures to put the ordinance up for a public vote.

The City of Detroit has a number of ordinances prohibiting sexual orientation discrimination: (1) in real estate, insurance and loan practices;[99] (2) by employers and contractors with city;[100] (3) in policing and other immigration status checks;[101] (4) in educational institutional practices;[102] (5) in public accommodation practices;[103] (6) by the City's Human Resources Department;[104] (7) in housing commission applications and employment practices.[105]

C. **Hate Crimes**

Michigan law requires local police agencies to report crimes "motivated by prejudice or bias based on race, ethnic origin, religion, gender or sexual orientation."[106]

Michigan's Ethnic Intimidation Act, the State's hate-crimes law, does not include "sexual orientation" protections, creating an anomaly in which police are required to report a "crime" which is not classified as a crime under state law.[107] As originally drafted and proposed, Michigan's statute included "sexual orientation" as one of the proscribed motivations. This provision, however, was dropped in a legislative compromise to secure the passage of the remainder of the bill.[108] Attempts to amend the Act in order to reinstate the sexual orientation protection began almost immediately and are currently an annual event in the Michigan Legislature.

D. **Education**

Michigan has a general "Statewide school safety information policy", which provides requirements that a school must follow when instances take place at schools that require law enforcement intervention.[109] However, there is no specific legislation protecting transgender, gay, or lesbian students from discrimination or harassment. Senate Bill 0159 seeks to prohibit harassment or bullying of a student based on the student's actual or perceived distinguishing characteristics. Protected characteristics include sexual orientation and gender identity. The bill was referred to the Committee on Education on January 29, 2009.

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[99] (Ord. No. 303-H, § 1(2-7-4), 1-24-79; Ord. No. 330-H, § 1, 6-27-79).
[100] (Ord. No. 303-H, § 1(2-7-3), 1-24-79; Ord. No. 330-H, § 1, 6-27-79).
[101] (Ord. No. 10-07, § 1, 5-9-07).
[102] (Ord. No. 330-H, § 1(2-7-5), 1-24-79).
[103] (Ord. No. 330-H, § 1, (2-7-6), 1-24-79; Ord. No. 303-H, § 1, 6-27-79).
[104] (Art. 6, Ch. 5, Sec. 6-506).
[105] (Code 1964, § 2-7-13; Ord. No. 5-95, § 1, 4-12-95; Ord. No. 12-01, § 1, 9-17-01; Ord. No. 15-01, § 1, 9-26-01; Ord. No. 05-06, § 1, 2-17-06).
[106] *Id.* at §§ 28.251 and 28.257a (1992).
[107] *Id.* at § 750.147b (1989).
[108] Senate Fiscal Agency, First Analysis of HB 4113 (Substitute S-2), (1987-1988).
[109] MICH. COMP. LAWS SERV. § 380.1308 (1999).

The Michigan Career and Technical Institute ("MCTI"), through the Department of Energy, Labor & Economic Growth, conducts vocational and technical training programs and provide the supportive services needed to prepare Michigan citizens with disabilities for competitive employment. The MCTI has a policy under its Ethical Code of Conduct to provide appropriate services to students regardless of … sexual orientation.[110]

The School District of the City of Ferndale (which also encompasses Pleasant Ridge, Royal Oak Township and part of Oak Park), the Wayne-Westland School District (later repealed in August 1997), and Plymouth-Canton High School all protect students and staff from discrimination based on sexual orientation. The Berkley Education Association has forbidden such discrimination against teachers by contract since 1993.[111]

E. **Health Care**

Michigan law does not specifically allow for a partner to make medical decisions on behalf of his/her incapacitated same-sex partner (though a legal guardian may make such decisions).[112] An adult may appoint a patient advocate to make medical decisions on his/her behalf.[113]

The Michigan Public Health Code requires Nursing Homes to "certify . . . that all phases of operation, including its training program, are without discrimination against persons or groups of persons on the basis of . . . sexual orientation."[114] This language protects both residents and staff. In addition, the code prohibits denial of care on the basis of sexual preference.[115]

Michigan prohibits all persons working in psychology, [116] social work, [117] and sanitarians, [118] in the Department of Community Health, from engaging in harassment or unfair discrimination on a number of bases, including gender identity and sexual orientation.

F. **Gender Identity**

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[110] MCTI ETHICAL CODE Policy No. 62 (2005), *available at* http://bit.ly/bqwWO.
[111] Serra, *supra* note 153, at 948.
[112] MICH. COMP. LAWS ANN. § 333.5653 (2005).
[113] MICH. COMP. LAWS ANN. § 700.5506 (2008).
[114] MICH. COMP. LAWS § 333.21761(1) (1998).
[115] *Id.* at § 333.20201(2)(a) (2006).
[116] MICHIGAN ADMIN. CODE, Rule 3383.2515 Rule 15, Dep't of Community Health, Director's Office, Psychology.
[117] MICHIGAN ADMIN. CODE, Rule 3383.2909 Rule 9, Dep't of Community Health, Director's Office, Social Work.
[118] MICHIGAN ADMIN. CODE, Rule 3383.3910 Rule 10, Dep't of Community Health, Director's Office, Advisory Committee on Sanitarians Registration.

Michigan law provides that a transsexual individual born in Michigan may obtain a new birth certificate with a physician's affidavit certifying that sex-reassignment surgery has been performed.[119]

G. Parenting

Michigan allows any adult or married couple to petition to adopt.[120]

In *Boot v. Boot,*[121] the court considered the plaintiff's mother's same-sex relationship as evidence regarding moral fitness.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

On November 2, 2004, Michigan voters approved Proposal 04-2, adding Article 1, Section 25 to Michigan's Constitution. The amendment reads: "To secure and preserve the benefits of marriage of our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."[122]

In 2004, the Attorney General opined that a marriage contracted between persons of the same sex in a state that recognizes same-sex marriages is not valid in the State of Michigan.[123] In that same opinion, the Attorney General also opined that couples of the same sex who marry in a state that recognizes same-sex marriages as valid are not legally authorized to adopt children in Michigan as a couple. One member of a same-sex couple may adopt a child in Michigan as a single person.

Since 1996, marriage is described in MICH. COMP. LAWS 551.1 as "inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state." Furthermore, MICH. COMP. LAWS 551.272 provides that "marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction."

The City of Ann Arbor has a domestic partnership ordinance that recognizes families that are based on committed relationships apart from marriages, including those comprised of lesbians, gay males, bisexual persons, or heterosexuals.[124]

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[119] MICH. COMP. LAWS ANN. § 333.2831(c) (1997).
[120] MICH. COMP. LAWS ANN. § 710.24 (2004).
[121] 2001 WL 766115 (Mich. App. Ct. 2001).
[122] Mich. Const. 1963, Art. I, § 25.
[123] Mich. Att'y Gen. Op. No. 7160, 2004 WL 2096457 (2004).
[124] ANN ARBOR CODE Ch. 110, §§ 9:85-9:95 (Ord. No. 62-91, § 1, 11-4-91).

2. Benefits

In March 2005, Michigan Attorney General Mike A. Cox issued an opinion, stating that, based on the recent Michigan Constitutional Amendment recognizing marriage only between a man and a woman, no city in Michigan may continue offering same-sex benefits when it renews contracts for its municipal employees.[125]

In *American Family Association of Michigan v. Michigan State University Board of Trustees*,[126] a nonprofit corporation brought action against Michigan State University, its board of trustees, and other associated entities, challenging defendants' policy of providing benefits to same-sex domestic partners. Plaintiff alleged that the policy constituted an illegal expenditure of state funds to define and recognize same-sex domestic partnerships in violation of the State Constitution and state law. The Court of Appeals held that: (1) the corporation lacked standing to bring lawsuit, and (2) the lawsuit, brought pursuant to the statute permitting actions to prevent illegal expenditure of state funds to test constitutionality of a statute relating thereto, was not tantamount to a qui tam action challenging unlawful expenditures.[127]

The City of Kalamazoo, in accordance with its Domestic Partner Benefits Policy, previously provided insurance and other benefits to the same-sex "domestic partners" of City employees "identical to those provided to spouses of City employees." However, after the Attorney General issued its opinion that this policy violated the Constitutional Amendment limiting marriage to opposite-sex couples in 2005, and the Michigan Court of Appeals ruled that providing such benefits violated the state Constitutional Amendment defining marriage as between one man and one woman in 2007, the City repealed this ordinance.[128]

In *National Price at Work, Inc. v. Governor of Michigan*,[129] a union constituency group and various public employees and their respective same-sex domestic partners brought action against the Governor of Michigan and the City of Kalamazoo, seeking declaratory judgment that the marriage amendment did not preclude public employers from extending benefits to same-sex domestic partners.[130] A unanimous three-judge panel of the state Court of Appeal ruled that the amendment bans domestic partner benefit plans.

J. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

1. Judicial Ethics

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[125] Mich. Att'y Gen. Op. No. 7171, 2005 WL 639112(2005).
[126] 739 N.W.2d 908 (Mich. App. Ct. 2007).
[127] *Id.*
[128] David Eggert, *Kalamazoo No Longer Will Provide Health Benefits to Gay Partners*, A.P., June 4, 2007, *available at* http://bit.ly/3U2TqN (last visited Sept. 6, 2009).
[129] 732 N.W.2d 139 (Mich. 2007).
[130] *Id.*

When the Representative Assembly of the State Bar of Michigan approached the subject of judges' membership in discriminatory organizations, it failed to take a firm stance against the involvement of judges in such organizations. The proposed MCJC Canon 2C stated: "A judge should not hold membership in any organization which the judge knows invidiously discriminates on the basis of race, religion, disability, age, sexual orientation, gender, or ethnic origin." The adopted MCJC Canon 2E states: "A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, other protected personal characteristic."[131]

2. Government Contracting: Local Ordinances Prohibiting Discrimination

The cities of Detroit, Grand Rapids, Ann Arbor, East Lansing, Flint and Birmingham, as well as the Village of Douglas, have ordinances forbidding sexual orientation discrimination in contracting.[132] Ferndale, Michigan now does, as well.[133]

3. Loans

Michigan provides that loans are available to all eligible borrowers without regard to race, color, sex, creed, religion, disability, sexual orientation, national origin, age, or marital status.[134]

[131] Mich. Ethics Op. No. JI-75, 1993 WL 566226 (1993).
[132] Rudy Serra, *Sexual Orientation and Michigan Law*, 76 MICH. B.J. 948, 948 (1997).
[133] 19 MICH. EMPL. L. LETTER 10 (Dec. 2008).
[134] MICH. ADMIN. CODE R. 390.1603 Rule 3 (Department of Treasury, Michigan Higher Education Student Loan Authority, Federal Family Education Loan Program (FFELP)).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Minnesota – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Battles over LGBT rights began early in Minnesota, when the twin cities amended their anti-discrimination ordinances to include sexual orientation: Minneapolis in 1974 and St. Paul in 1976. Two years later, however, St. Paul voters rescinded the protections for gay people in that city.

In 1993, the debate shifted to the state legislature when Minnesota became one of the first states to pass a civil rights statute, the Minnesota Human Rights Act ("MHRA"), that prohibited sexual orientation and gender identity discrimination in a variety of contexts.

Opponents of the 1993 amendment have tried to strike the MHRA's ban on sexual orientation and gender identity discrimination from the law, most recently in 2004, but to date have been unsuccessful.[1] Prior to its passage, the chief sponsor of the bill in the house chamber of the state legislature even received death threats for her efforts. [2] Former State Rep. Arlon Lindner, one of the chief proponents of stripping these provisions from the Minnesota Human Rights Act, contended that the MHRA as written promoted teaching gay and lesbian sex in school, which in turn would cause HIV transmissions.[3] Therefore, Rep. Lindner argued, failing to amend the MHRA put Minnesota at risk of ending up like "the African continent."[4] Rep. Arlon Lindner also

[1] ACLU ANNUAL REPORT (2004).

[2] Frank Jossi, *Profiling the Minnesota Legislature: State Rep. Karen Clark*, ST. PAUL LEGAL LEDGER, Dec. 20, 2007.

[3] *Committee Leader Lindner Sullies Party, House Name*, DULUTH NEWS TRIBUNE, Mar. 12, 2003. Based on a review of Minnesota newspaper articles covering these opponents efforts, the only evidence put forward to support the argument that the MHRA was being used to teach gay and lesbian sex in schools were teachers answering questions about same-sex practices during a Q&A, a student-made art display featuring nude males, and video of a teacher telling his students about an ice-cream social being thrown by the school's Gay-Straight Alliance. *See*, Conrad de Feibre, *Effort to Repeal Rights Protections for Gays Dropped in Senate*, STAR TRIBUNE, Mar. 22, 2003.

[4] Patricia Lopez & Conrad de Fiebre, *House DFL Files Ethics Complaint Against Lindner: Critics Grow in Number*, STAR TRIBUNE, Mar. 12, 2003. Rep. Arlon Lindner also questioned whether the LGBT community was targeted by the Nazis during the Holocaust, and went so far as to propose state legislation that would require the state of Minnesota to longer recognize the LGBT community as victims of the Holocaust. John Welsh, *Senator Withdraws Rights Bill*, ST. PAUL PIONEER PRESS, Mar. 22, 2003. He also floated the idea that gay guards in the Nazi Concentration Camps were the real perpetrators of the horrors of the Holocaust. Ironically, despite the focus these opponents put on the MHRA's alleged impact on public education, their proposed version of the MHRA, which would not include protections against sexual orientation or gender identity discrimination, did not mention public education at all. *See* Conrad de Feibre, *Effort to Repeal Rights Protections for Gays Dropped in Senate*, STAR TRIBUNE, Mar. 22, 2003.

questioned whether the LGBT community was targeted by the Nazis during the Holocaust, and went so far as to propose state legislation that would require the state of Minnesota to longer recognize the LGBT community as victims of the Holocaust. He also floated the idea that gay guards in the Nazi Concentration Camps were the real perpetrators of the horrors of the Holocaust. [5]

According to research compiled by the Williams Institute, 32 complaints have been filed with the Minnesota Department of Human Rights ("Department") alleging unlawful sexual orientation or gender identity discrimination by a public entity. The Department has agreed to hand over all of the information they have on these cases, but at the present time, has not done so.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Minnesota include:

- In 2007, a lesbian public school teacher who was subjected to a hostile environment because of her sexual orientation.[6]

- A teacher who was discriminated against by her principal based on sexual orientation.[7] In 2002, the Duluth School Board voted unanimously to approve a $30,000 settlement of the claim pending against the school before the Minnesota Department of Human Rights.

- When the Minnesota state sodomy law was invalidated in 2001 by a statewide class action suit,[8] the Minnesota Supreme used the possibility of adverse effects on the plaintiffs' employment to give them standing. The plaintiffs here represented a wide variety of professions--teachers and doctors joined lawyers in fighting the state sodomy law. These being licensed professions, the court notes that the "state-mandated application for a medical license requires applicants to swear under oath that they have 'not engaged in any of the acts prohibited by the statutes of Minnesota'" and that the lawyers must adhere to their rules of professional conduct, which dictates that all attorneys will "follow the requirements of the law."[9] The court then details these "collateral injur[ies]": "Dr. Krebs, who is now in her residency, faces the prospect of having to state under oath, as part of her application later this year for a physician license from the Minnesota Board of Medical Practice, that she has 'not engaged in any of the acts prohibited by the statutes of Minnesota.' Similarly…Mr. Roe, [10] a licensed

[5] John Welsh, *Senator Withdraws Rights Bill*, ST. PAUL PIONEER PRESS, Mar. 22, 2003.
[6] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[7] Lesbian & Gay L. Notes (Dec. 2002), *available at* http://www.qrd.org/qrd/usa/legal/lgln/2002/12.02.
[8] *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minneapolis District Court, May 15, 2001).
[9] *Id.* at *1.
[10] It should be noted that in the case of Mr. Roe, the adverse effect on employment could not be linked to his sexual orientation--he is a heterosexual, married man, and therefore outside the class of plaintiffs who make up the focus of this memorandum.

elementary school teacher, and Mr. Duran and Ms. Doe, licensed Minnesota lawyers, fear adverse licensure consequences from any disclosure, voluntary or otherwise, of their past and future violations" of the state sodomy statute.[11]

- An academic counselor at the University of Minnesota who sued the university alleging discrimination based on his sexual orientation. The university settled with him during the trial for $80,000.[12] The counselor had been working with various athletes since 1984. The university forbade him from rooming with anyone when he traveled with the teams on road trips, and forbade him from participating in athletes' academic meetings held in school locker rooms, both of which he contends were discriminatory measures. In his lawsuit, the counselor contended that he was denied fair pay and subjected to working in a hostile environment because of his sexual orientation, and his suit alleged that 'homophobic attitudes of administrators at Minnesota deprived him of advancement.'[13]

- A transgender middle school teacher who resigned facing mounting pressure from her school and the surrounding community. The teacher, a male who planned to undergo gender reassignment surgery, was living as a woman when she interviewed for the teaching position at Roosevelt Middle School. After an open house for parents at Roosevelt, one parent asked the school principal about the teacher's gender. The principal then contacted the teacher, and upon learning that she was transitioning, immediately placed her on two months' administrative leave while school officials devised a way for her to 'come out' to parents, students, and school staff. In November, the school held a meeting for her and school administrators to meet with teachers and a handful of parents and explain the process she was undergoing. A second meeting drew 400 parents. Some parents excoriated the school for permitting a transgendered teacher to work with children, while others objected to the intolerant vilification of the teacher. She resigned in February 1999, citing pressure from a parents' group.[14]

- A transsexual Minneapolis police trainee who in 1999 was denied appropriate restroom and shower facilities,[15] even though the training program required use of the shower facilities.[16] The trainee filed a discrimination suit against the Department and city claiming unlawful discrimination. The city ultimately won on summary judgment on the grounds that the city was entitled to vicarious official immunity.[17] As such, no determination was made as to the veracity of the

[11] *Id.* at *4.
[12] Lesbian & Gay L. Notes (Table of Cases 2000), *available at* http://www.qrd.org/qrd/usa/legal/lgln/case.table-2000 (citing STARTRIBUNE, June 28, 2000).
[13] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 159-160 (1999 ed.).
[14] *Id*. at 157-58.
[15] Rosalind Bentley, *Transgendered Worker Sues Minneapolis Police*, STAR TRIBUNE, Jan. 21, 1999.
[16] *Id*.
[17] *Doe v. City of Minneapolis*, 2002 WL 31819236 (Minn. App. Dec. 17, 2002).

complaint's allegations. Doe v. City of Minneapolis, 2002 WL 31819236 (Minn. App. Dec. 17, 2002).

- A Minneapolis police officer who, according to Senator Paul Wellstone in 1997, said this about the sexual orientation discrimination in her workplace: "I seem to represent everything that the old boys hate in this department -- female, black and gay. The thing that makes it worst of all is I'm a good cop. When I first came to this shift, my sergeant was like, 'When I saw your name on my list, I tried everything I could to get you the hell out of my precinct. I didn't want you here. I've heard all those bad things about you. You were a trouble maker and you brought the morale down. I'm glad I got you because there's not one person on this shift that won't work with you."[18]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[18] S. Hrg. 105-279, p. 17, Senator Paul Wellstone, Hearing before the Senate Committee on Labor and Human Resources re: S.869: The Employment Non-Discrimination Act of 1997, Thurs., Oct. 23, 1997, 105th Congress, 1st Session. Reprinted in Federal News Service, In the News, Thurs., Oct. 23, 1997.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

In 1993, Minnesota amended its Human Rights Act (hereinafter "MHRA") to prohibit the discrimination of a person based on his or her "sexual orientation" in the employment, housing, public accommodations, public service, education, credit, and business contexts.[19] The statute defines "sexual orientation" as "having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment," and also as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[20] As such, the statute is designed to protect people against both sexual orientation and gender identity discrimination.[21] The MHRA covers public as well as private employers.[22] The statute exempts certain religious and youth-oriented organizations.[23] The MHRA also contains language prohibiting state officials, including educators, from endorsing or advocating homosexuality as moral.[24] Opponents of the 1993 amendment have tried to strike the MHRA's ban on sexual orientation and gender identity discrimination from the law, most recently in 2004, but to date have been unsuccessful.[25]

2. Enforcement and Remedies

In order for a person to make a claim under the MHRA, s/he must file a complaint with the commissioner of the Department within one year of the alleged discriminatory act.[26] If the alleged unlawful discriminatory conduct is continuous, then the Department can take into account alleged discriminatory acts that occurred more than one year ago just so long as at least one act in this pattern of unlawful discrimination occurred within the last year.[27] Once the Department receives a complaint alleging unlawful discrimination, it must conduct an investigation to determine whether "probable cause" exists to believes that the MHRA was violated.[28] The Department has up to one year to complete this investigation.[29] If the Department finds probable exists to believe the MHRA was violated, the Department can act as an advocate on behalf of the aggrieved

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[19] Minn. Stat. § 363A.02(a).
[20] Minn. Stat. § 363A.03(44).
[21] *See* Human Rights Campaign, State Law Listings, Minnesota Non-Discrimination Law, http://www.hrc.org/your_community/1070.htm (last visited Sept. 4, 2009).
[22] *See*, *e.g.*, *Kolton v. County of Anoka*, 628 N.W.2d 643 (Minn. App. 2001).
[23] Donna Halverson, *Gay Rights Bill Nears Final Approval*, *STAR TRIBUNE*, Mar. 27, 1993.
[24] This language is off-handedly referred to as the MHRA's "no promo-homo" provision. *See* John Welsh, *Senator Withdraws Rights Bill*, ST. PAUL PIONEER PRESS, Mar. 22, 2003.
[25] ACLU ANNUAL REPORT (2004).
[26] *See* Minn. Stat. § 363A.28(1), (3).
[27] *Id*.
[28] Minn. Stat. § 363A.28(6).
[29] *Id*.

party and either attempt to negotiate a settlement between the parties that mends and ends the discriminatory practice, or bring suit against the wrongdoing party before an administrative law judge.[30]

A person who files a claim with the Department can initiate his/her own claim under the MHRA in state district court forty-five days after it receives notice that the Department found his/her case lacks probable cause, or forty-five days after it receives notice that the Department found probable cause but still has not brought the case before an administrative law judge.[31]

Claims made under the MHRA follow the *McDonnell-Douglas* burden-shifting scheme whereby: (1) a plaintiff must establish a prima facie case that the plaintiff was discriminated against by the defendant because of a real or perceived characteristic of the plaintiff's that is protected by under the MHRA; (2) if a plaintiff makes this showing, the burden shifts onto the defendant to put forward a legitimate, nondiscriminatory reason for the defendant's action(s) vis-à-vis the plaintiff; and (3) if the defendant makes this showing, then the plaintiff must prove by a preponderance of the evidence that the defendant's articulated nondiscriminatory reason is just a pretext.[32]

If the plaintiff prevails on a claim under the MHRA, s/he is entitled to treble damages and also may be entitled to damages from mental anguish or suffering, attorneys' fees, and punitive damages.[33] In addition, the plaintiff may be entitled to being hired, reinstated, or upgraded at a place of employment and back pay.[34]

B. **Attempts to Enact State Legislation**

Proponents of amending the MHRA to include prohibitions on sexual orientation and gender identity discrimination spent two decades fighting for the changes before seeing them come to pass.[35] The chief sponsor of the bill in the house chamber of the state legislature even received death threats for her efforts.[36] Despite these efforts, the State House had only voted on amending the MHRA to add these protections once, in 1975, and the State Senate had only done so once, in 1977.[37] The successful 1993 effort involved mobilizing most of the state's churches, labor unions, and business organizations in support of the amendments, and reportedly also was helped by the fact the legislature took on a more "suburban" make-up.[38] Nevertheless, the bill passed both

[30] *Id.*; *see also* Minn. Stat. § 363A.28(8).
[31] *See* Minn. Stat. §§ 363A.29; 363A.33(1).
[32] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 439 (8th Cir. 2007) (stating that the MHRA uses the *McDonnell-Douglas* burden-shifting framework).
[33] *See* Minn. Stat. §363A.29(4).
[34] *See* Minn. Stat. §363A.29(5).
[35] Robert Whereatt, *Gay Rights and Other New Laws Take Effect*, STAR TRIBUNE, Aug. 1, 1993.
[36] Frank Jossi, *Profiling the Minnesota Legislature: State Rep. Karen Clark*, ST. PAUL LEGAL LEDGER, Dec. 20, 2007.
[37] Donna Halvorsen, *Carlson Signs Gay-Rights Bill into Law*, STAR TRIBUNE, Apr. 3, 1993.
[38] *Id.*

houses on more narrow margins than expected.[39] In fact, some legislators acknowledged supporting the amendments but voted against them out of fear of losing their seats given the strength of the opposition.[40]

Opponents of the MHRA's prohibitions on sexual orientation and gender identity discrimination have attempted, but also always failed, to repeal those sections of the MHRA since its passage in 1993. Most recently, opponents in the legislature attempted to strip these provisions in 2004.[41] Former State Rep. Arlon Lindner, one of the chief proponents of stripping these provisions from the MHRA, contended that the MHRA as written promoted teaching gay and lesbian sex in school, which in turn would cause HIV transmissions.[42] Therefore, Rep. Lindner argued, failing to amend the MHRA put Minnesota at risk of ending up like "the African continent."[43]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

As noted above, the MHRA's scope includes conduct by public entities.

3. Attorney General Opinions

None.

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[39] *Id*..
[40] Dane Smith & Donna Halverson, *Backlash Hits Gay Rights Bill*, STAR TRIBUNE, Mar. 11, 1993.
[41] ACLU Annual Report (2004).
[42] *Committee Leader Lindner Sullies Party, House Name*, DULUTH NEWS TRIBUNE, Mar. 12, 2003.. Based on a review of Minnesota newspaper articles covering these opponents efforts, the only evidence put forward to support the argument that the MHRA was being used to teach gay and lesbian sex in schools were teachers answering questions about same-sex practices during a Q&A, a student-made art display featuring nude males, and video of a teacher telling his students about an ice-cream social being thrown by the school's Gay-Straight Alliance. *See*, Conrad de Feibre, *Effort to Repeal Rights Protections for Gays Dropped in Senate*, STAR TRIBUNE, Mar. 22, 2003.
[43] Patricia Lopez & Conrad de Fiebre, *House DFL Files Ethics Complaint Against Lindner: Critics Grow in Number*, STAR TRIBUNE, Mar. 12, 2003. Rep. Arlon Lindner also questioned whether the LGBT community was targeted by the Nazis during the Holocaust, and went so far as to propose state legislation that would require the state of Minnesota to longer recognize the LGBT community as victims of the Holocaust. John Welsh, *Senator Withdraws Rights Bill*, ST. PAUL PIONEER PRESS, Mar. 22, 2003. He also floated the idea that gay guards in the Nazi Concentration Camps were the real perpetrators of the horrors of the Holocaust. Ironically, despite the focus these opponents put on the MHRA's alleged impact on public education, their proposed version of the MHRA, which would not include protections against sexual orientation or gender identity discrimination, did not mention public education at all. *See* Conrad de Feibre, *Effort to Repeal Rights Protections for Gays Dropped in Senate*, STAR TRIBUNE, Mar. 22, 2003.

D. **Local Legislation**

Minnesota municipalities with local ordinances protecting LGBT people from employment discrimination include Minneapolis, which passed its ordinance in 1974,[44] and St. Paul passed an ordinance in 1976, repealed it in 1978, and then reinstated it in 1990.[45]

[44] Jill Hodges, *Victim or Advocate? Gay Attorney Sues His Former Firm Over Alleged Job Discrimination*, STAR TRIBUNE, Apr. 17, 1996.
[45] *Id*.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Doe v. City of Minneapolis, 2002 WL 31819236 (Minn. App. Dec. 17, 2002).

In 1999, a transsexual Minneapolis police trainee filed a discrimination suit against the Department and city claiming unlawful discrimination on account of the Department's refusal to provide him with appropriate restroom and shower facilities.[46] The training program requires use of the shower facilities, but according to the complaint filed, the Department refused the trainee access to either male or unisex shower facilities.[47] The city ultimately won on summary judgment on the grounds that the city was entitled to vicarious official immunity.[48] As such, no determination was made as to the veracity of the complaint's allegations.

McConnell v. Anderson, 316 F.Supp. 809 (D.Minn. 1970), *rev'd*, 451 F2d 193 (8th Cir. 1971).

James McConnell filed suit against the University of Minnesota, claiming that his employment application was denied on the basis of his sexual orientation in violation of his constitutional rights to equal protection and due process. The District Court ruled for Plaintiff but the Court of Appeal reversed.

On July 9, 1970, the University of Minnesota Board of Regents rejected the application of James Michael McConnell to head, at the rank of instructor, the cataloging division of the University's St. Paul campus library on the ground that his "personal conduct, as represented in the public and university news media, is not consistent with the best interest of the University." On July 22, 1970, McConnell brought suit for injunctive relief in the United States District Court for the District of Minnesota, naming as defendants the individual members of the Board of Regents and Ralph H. Hopp, the university librarian. McConnell's complaint alleged that he was offered the division head appointment in April 1970; that he accepted the offer in May 1970, but that the offer was withdrawn after he and another male publicly applied for a marriage license at the Hennepin County, Minnesota Clerk's office (this action drew media attention). McConnell's complaint asserted that he was a homosexual and that the Board's resolution not to approve his employment application was premised on the fact of his homosexuality and upon his desire, as exemplified by the marriage license incident, specifically to publicly profess his "earnest" belief that homosexuals are entitled to privileges equal to those afforded heterosexuals. McConnell asserted that his rights to equal protection and due process under the Fourteenth Amendment were violated.

[46] Rosalind Bentley, *Transgendered Worker Sues Minneapolis Police*, STAR TRIBUNE, Jan. 21, 1999.
[47] *Id*.
[48] *Doe v. City of Minneapolis*, 2002 WL 31819236 (Minn. App. Dec. 17, 2002).

The District Court entered judgment for McConnell and enjoined the Board from refusing to employ him "solely because, and on the grounds that he is a homosexual and that thereby 'his personal conduct, as presented in the public and University news media, is not consistent with the best interest of the University."

The Eighth Circuit reversed, concluding: "[T]he Board possessed ample specific factual information on the basis of which it reasonably could conclude that the appointment would not be consistent with the best interests of the University. We need only to observe that the Board was given the unenviable task and duty of passing upon and judging McConnell's application against the background of his actual conduct. So postured, it is at once apparent that this is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct. It is, instead, a case in which something more than remunerative employment is sought; a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning. We know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands. We are therefore unable fairly to categorize the Board's action here as arbitrary, unreasonable or capricious." [49]

2. **Private Employers**

None.

B. **Administrative Complaints**

As noted above, in order for a party to bring a claim under the MHRA, s/he must first file it with the Department.[50] Since 1993, 212 cases have been filed with the Department for allegedly unlawful "sexual orientation" discrimination.[51] Of these 212 cases, 32 were filed against public entities.[52]

C. **Other Documented Examples of Discrimination**

A Minnesota Public School

[49] *McConnell v. Anderson*, 316 F.Supp. 809 (D.Minn. 1970), *rev'd*, 451 F2d 193 (8th Cir. 1971).
[50] *See*, *supra*, Sec. II.A.2.
[51] *See* Williams Institute Complaint Chart (2009) (on file with the Williams Institute). As noted above, the MHRA's definition of "sexual orientation" includes protections against both sexual orientation and gender identity discrimination.
[52] *Id*.

In 2007, a lesbian public school teacher who was subjected to a hostile environment because of her sexual orientation.[53]

Duluth Public School

In 2002, the Duluth School Board voted unanimously to approve a $30,000 settlement of a sexual orientation discrimination claim pending against the school before the Minnesota Department of Human Rights, in which Deborah Anderson claims that the principal of her school discriminated against her based on sexual orientation.[54]

University of Minnesota

An openly gay academic counselor for University of Minnesota athletes sued the university alleging discrimination based on his sexual orientation. Rick Marsden had been working as a counselor with various athletes since 1984. The university forbade him from rooming with anyone when he traveled with the teams on road trips, and it forbade him from participating in athletes' academic meetings held in school locker rooms, both of which he contends were discriminatory measures. In his lawsuit, Marsden contended that he was denied fair pay and subjected to working in a hostile environment because of his sexual orientation, and his suit alleged that 'homophobic attitudes of administrators at Minnesota deprived him of advancement.' Moreover, Marsden alleged that the university did not want to encourage gay athletes to attend the school, and he believed that gay athletes who were considering 'coming out' were directed to speak with him because the university thought he would advise them against it.[55] The university settled with Marsden during the trial for $80,000.[56]

Roosevelt Public School

Alyssa Williams, a male who planned to undergo gender reassignment surgery, was living as a woman when she interviewed for the teaching position at Roosevelt Middle School. After an open house for parents at Roosevelt, one parent asked the school principal about Williams' gender. The principal then contacted Williams, and upon learning that she was transitioning, immediately placed her on two months' administrative leave while school officials devised a way for her to 'come out' to parents, students, and school staff. In November, the school held a meeting for Williams and school administrators to meet with teachers and a handful of parents and explain the process Williams was undergoing. A second meeting drew 400 parents. Some parents excoriated the school for permitting a transgendered teacher to work with children, while others objected to the intolerant vilification of Williams. Williams resigned in February

[53] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[54] Lesbian & Gay L. Notes (Dec. 2002), *available at* http://www.qrd.org/qrd/usa/legal/lgln/2002/12.02.
[55] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 159-160 (1999 ed.).
[56] Lesbian & Gay L. Notes (Table of Cases 2000), *available at* http://www.qrd.org/qrd/usa/legal/lgln/case.table-2000 (citing STARTRIBUNE, June 28, 2000).

1999, citing pressure from a parents' group and local clergy.[57]

Minneapolis Police Department

Gwendolyn Gunther, a police officer serving Minneapolis, said this about the sexual orientation discrimination in her workplace: "I seem to represent everything that the old boys hate in this department -- female, black and gay. The thing that makes it worst of all is I'm a good cop. When I first came to this shift, my sergeant was like, 'When I saw your name on my list, I tried everything I could to get you the hell out of my precinct. I didn't want you here. I've heard all those bad things about you. You were a trouble maker and you brought the morale down. I'm glad I got you because there's not one person on this shift that won't work with you."[58]

[57] *Id*. at 157-58.
[58] S. Hrg. 105-279, p. 17, Senator Paul Wellstone, Hearing before the Senate Committee on Labor and Human Resources re: S.869: The Employment Non-Discrimination Act of 1997, Thurs., Oct. 23, 1997, 105th Congress, 1st Session. Reprinted in Federal News Service, In the News, Thurs., Oct. 23, 1997.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Housing & Public Accommodations Discrimination

As noted above, the MHRA prohibits the discrimination of people based on their sexual orientation or gender identity in housing and public accommodations.[59]

B. Education

As noted above, the MHRA prohibits the discrimination of people based on their sexual orientation or gender identity in the education context.[60]

In 2007, a Gay-Straight Student Alliance at the Maple Grove Senior High School obtained an injunction against the school requiring the school to treat it like any other extracurricular student group.[61] The school district appealed the district court's order to the appeals court, where the matter is still pending.[62]

C. Recognition of Same-Sex Couples

1. Benefits

In 2001, state employees obtained domestic partner benefits in a collective bargaining agreement. However, the legislature delayed the implementation of that agreement by refusing to ratify it, and in 2003, ultimately was able to cut domestic partner benefits from that agreement.[63] In 2008, the state's governor vetoed legislation that would have allowed local counties and municipalities to decide for themselves whether they would provide domestic partner benefits. [64]

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[59] Minn. Stat. § 363A.02(a).
[60] Minn. Stat. § 363A.02(a).
[61] *See SAGE v. Osseo Area Sch. Dist. No. 279*, 2007 WL 2885810 (D.Minn. Sept. 25, 2007); *see also* ACLU ANNUAL REPORT (2007).
[62] *SAGE*, 2007 WL 2885810.
[63] ACLU ANNUAL REPORT (2004).
[64] *See* Human Rights Campaign, *supra* note 16.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Mississippi – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Mississippi has no current or pending state or local statutes recognizing sexual orientation or gender identity as protected classes of citizens.[1] More generally, Mississippi is not welcoming socially or in its laws to LGBT people.[2] Mississippi custody courts consider homosexuality negatively in determining custody disputes.[3] In 2001, Mississippi banned adoption by same-sex couples.[4] In 2004, eighty-six percent (86%) of Mississippians voted in favor of an amendment to the state constitution banning same-sex marriage and the recognition of same-sex marriages performed in other states.[5]

Further, Mississippi politicians and other public servants have, on several occasions, publicly spoken out against gays and gay rights. For example, in March of 2002 in response to a newspaper article on the expansion of rights to gay couples in other states, George County Justice Court Judge Connie Glen Wilkerson wrote a letter to *The George County Times* stating in part: "in my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them." [6] The judge later repeated these views in a telephone interview stating, "homosexuality is an 'illness' which merited treatment, rather than punishment."[7] Also, in July of 2003 in response to the Supreme Court's ruling in *Lawrence*, Mississippi Gulfport city councilman Billy Hewes initiated a resolution condemning the Court's ruling.[8] He called the ruling "the worst thing to happen since they took prayer out of school, and proclaimed Gulfport to be a "straight town."[9]

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[1] *See, e.g.*, MISS. STATE PERS. BD. POLICY AND PROC. MANUAL (2008), *available at* http://www.spb.state.ms.us (hereinafter "MISS. STATE PERS. BD.").

[2] Sherri Williams, *Discrimination Comes with Disease Diagnosis*, CLARION-LEDGER, Dec. 1, 2002, at 10A (*quoting* Craig Thompson, STD/HIV director for the state Department of Health: "In Mississippi we are very conservative, very religious, and it's not OK to be different here. What that translates into for a gay man is, he has to live a very secret life."); Samantha Santa Maria, *I'm Gay…I Carry My Gun*, CLARION-LEDGER, Aug. 13, 2003, at 1E (*quoting* Jody Renaldo, Executive Director, Equality Mississippi: "Unless [homosexuals] are willing to risk being kicked out of their rented homes or their jobs, [they] have to hide").

[3] *See, e.g.*, *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999).

[4] Miss Code. Ann. § 93-17-3 (rev. 2006).

[5] Associated Press, *Voters Pass All Eleven Bans on Gay Marriage*, MSNBC, Nov. 3, 2004, http://www.msnbc.msn.com/id/6383353/ (last visited Sept. 3, 2009).

[6] *See, e.g.*, *Miss. Comm'n on Jud. Performance v. Wilkerson*, 876 So. 2d 1006, 1008 (Miss. 2004).

[7] *Id*.

[8] Santa Maria, *supra* note 2.

[9] *Id*.

Documented examples of employment discrimination by state and local government employers against LGBT people in Mississippi include:

- A social worker at a state-funded center for disabled children near Jackson who was fired after she put photos of her family on her desk. When the social worker, an African-American lesbian, interviewed for the position, an official said, "We will not tolerate discrimination based on race, sex or sexual orientation." She responded, "I'm a lesbian; I have a white lover, and I don't think you'll have any problems with discrimination from me." Two days later, she got the job. At the center, she continually saw photos of co-workers' families. When a coworker asked to see photos of her partner, she brought in an album of pictures of herself, her partner and her two dogs. She was discreet with the photos and showed them only to those who asked. But while she was away from her desk, several co-workers looked at the photo album. Some expressed discomfort that she was in a mixed-race relationship, and one complained to management about the photos. Her boss asked her not to bring them to work. She agreed but suggested it was unfair that she was the only one not allowed to bring in family photos. She was fired 10 days later. The manager praised her work, however, saying she was one of the center's best employees. He claimed he took the step because she brought in photos of her partner, not because she was gay. He alleged that some were obscene, although he had never seen them.[10]

As discussed below, Mississippi has a formal procedure for state employees' grievances, which prevents state employees from filing employment claims in state court without first exhausting this internal grievance procedure. This structure may in part explain the dearth of case law on employment discrimination on the basis of sexual orientation or gender identity

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[10] Human Rights Campaign, *Documenting Discrimination: A special report from the Human Rights Campaign featuring cases of discrimination based on sexual orientation in America's workplaces* (2001), *available at* http://www.hrc.org/documents/documentingdiscrimination.pdf.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

None.

B. Attempts to Enact State Legislation

None.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

The Mississippi State Personnel Board (the "Board") governs all employment issues relating to state employees. The Board's Policy and Procedures Manual (the "Manual") establishes regulations and guidelines for hiring, employee grievances, and termination.[11]

According to the Manual, state employers are not permitted to consider "political affiliation, race, national origin, sex, religious creed, age, or disability in hiring decisions."[12] Moreover, employers should not ask potential candidates questions relating to "age or date of birth, arrest or conviction records, credit or garnishment records, family matters such as number and age of children, childcare requirements, marital status, health history, political affiliation, or religious preference."[13] State licensing applications, such as those for teaching, law enforcement, and fire department typically do not include any of these categories or any reference to sexual preference, moral turpitude, etc.[14] The Manual does not provide for appeals by job applicants, and a comprehensive search did not reveal any claims of discrimination in hiring/recruitment on the basis of sexual orientation or gender identity.

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[11] MISS. STATE. PERS. BD., *supra* note 1.
[12] *Id*. (*citing* Miss. Code Ann. § 25-9-149 (2006)).
[13] *Id*. at 41.
[14] *See* General Guidelines for Mississippi Educator Licensure, http://www.mde.k12.ms.us/ed_licensure/pdf/Licensure%20Guidelines%20revised%2010-08.pdf (last visited Sept. 3, 2009); Full Time Law Enforcement Application for Certification, http://www.dps.state.ms.us/dps/dps.nsf/allforms/727724F91028C14686256D28007562D4/$File/BLEOST%20-%20Full-Time%20App%20&%20BI.pdf?OpenElement (last visited Sept. 3, 2009); Mississippi Fire Personnel Application for Certification, http://www.mid.state.ms.us/minstand/pdf/Applicationforcert.pdf (last visited Sept. 3, 2009).

Discrimination and sexual harassment are "grievable issues" under the Manual for both permanent and probationary state employees. The Manual, however, only provides relief for discrimination on the basis of "race, color, creed, sex, religion, national origin, age, disability, or political affiliation and/or a violation of a right otherwise specifically protected by the U.S. Constitution or other law."[15] Aggrieved employees must first exhaust grievance procedures internally as set forth in the Manual, after which if the employee has still not received a satisfactory result, she can appeal to the Employee Appeals Board ("EAB"), an arm of the Board specifically established to handle such employee grievances. Except as authorized under federal law, no aggrieved party may file a petition for judicial review with a court until a final written decision or order has been filed by the EAB.[16] State courts can only review EAB decisions to the extent that the decision is: "(a) not supported by any substantial evidence; (b) arbitrary or capricious; or (c) in violation of some statutory or constitutional right of the employee."[17] A rebuttable presumption exists in favor of the EAB's decision, and the burden of proof is on the challenging party.[18] EAB decisions are accessible to the public, but only at the EAB office in Mississippi. A comprehensive search through available digital sources did not reveal any claims of discrimination or sexual harassment on the basis of sexual orientation or gender identity.

3. Attorney General Opinions

None.

D. Local Legislation

None.

E. Occupational Licensing Requirements

None.

[15] MISS. STATE. PERS. BD, *supra* note 1 at 73.
[16] *Id*. at 86.
[17] Miss. Code Ann. § 25-9-132 (2006).
[18] *Miss. Transp. Comm'n v. Anson*, 879 So. 2d 958, 963 (Miss. 2004).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

None.

2. Private Employees

None.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

State-Funded Children's Center

Valerie "Jesse" Shaw worked as a social worker at a state-funded center for disabled children near Jackson. When Shaw, an African-American lesbian, interviewed for the position, an official said, "We will not tolerate discrimination based on race, sex or sexual orientation." Shaw responded, "I'm a lesbian; I have a white lover, and I don't think you'll have any problems with discrimination from me." Two days later, Shaw got the job. At the center, Shaw continually saw photos of co-workers' families. When a coworker asked to see photos of Shaw's partner, Shaw brought in an album of pictures of herself, her partner and her two dogs. Shaw was discreet with the photos and showed them only to those who asked. But while Shaw was away from her desk, several co-workers looked at the photo album. Some expressed discomfort that Shaw was in a mixed-race relationship, and one complained to management about the photos. Her boss asked her not to bring them to work. Shaw agreed but suggested it was unfair that she was the only one not allowed to bring in family photos. Shaw was fired 10 days later. The manager praised her work, however, saying she was one of the center's best employees. He claimed he took the step because she brought in photos of her partner, not because she was gay. He alleged that some were obscene, although he had never seen them.[19]

[19] Human Rights Campaign, *Documenting Discrimination: A special report from the Human Rights Campaign featuring cases of discrimination based on sexual orientation in America's workplaces* (2001), *available at* http://www.hrc.org/documents/documentingdiscrimination.pdf.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Another context in which Mississippi law has historically demonstrated animosity towards gays is its sodomy laws. Although struck down by *Lawrence v. Texas*[20] in 2003, Mississippi still has a sodomy statute on the books.[21] While it was constitutional, the statute was used to outlaw gay relations even between consenting adults.[22] Moreover, the statute was also used in other contexts to justify animosity towards gays. For example, in 1983 the Attorney General of Mississippi declined a petition for incorporation from Mississippi Gay Alliance, stating that the organization must be denied corporate status because its activities were prohibited under the sodomy statute.[23]

B. Parenting

Mississippi chancery courts are permitted to consider the sexual orientation of one parent in custody disputes.[24] Although the chancellor is not permitted to use this as the sole determining factor in a custody dispute, if on appeal it is clear that one parent's sexual orientation was the dispositive factor, the appellate court will uphold the decision so long as other factors in the record would lead to the same conclusion.[25]

For example, in *S.B. v. L.W.*,[26] the child's mother and father independently decided to share equal custody of their daughter. Under this arrangement, the daughter lived part-time with her mother and her mother's lesbian partner and part time with her father, his wife, and his wife's children. When the mother decided to quit her job and move out of state, the father brought suit for full custody. The chancellor awarded custody to the father. The chancellor ruled that the following factors were in the father's favor: employment, financial stability, stability of environment, and moral fitness.[27] In other words, the chancellor determined that the mother's lesbian "lifestyle" rendered her

[20] 539 U.S. 558 (2003).
[21] Miss. Code Ann. §97-29-59 (2006) ("Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years.").
[22] *See, e.g.*, *State v. Mays*, 329 So. 2d 65 (Miss. 1976).
[23] Miss. Att'y Gen. LEXIS 39, 1 (1983).
[24] *See Weigand*, 730 So. 2d at 581.
[25] *S.B. v. L.W.*,793 So. 2d 656, 661 (Miss. Ct. App. 2001).
[26] *Id*.
[27] *Id*. at 659.

morally unfit for parenthood.[28] The appellate court upheld the custody award, ruling that the chancellor was not manifestly wrong and did not clearly err in awarding custody to the father.[29] The court, citing to *Weigand*, held that even though the chancellor appeared to give great weight to the mother's homosexuality, it was not the sole factor, and therefore not an abuse of discretion.[30] The concurrence even went as far as saying that the aforementioned marriage, adoption, and sodomy laws evidence Mississippi State legislature's clear public policy against homosexual domestic relations.[31]

C. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

1. George County Justice Court Judge Connie Glen Wilkerson Comments

In March of 2002 in response to a newspaper article on the expansion of rights to gay couples in other states, George County Justice Court Judge Connie Glen Wilkerson wrote a letter to *The George County Times* stating in part: "in my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them."[32] The judge later repeated these views in a telephone interview stating, "homosexuality is an 'illness' which merited treatment, rather than punishment."[33] When the judge was sued for violation of the Code of Judicial Conduct, the Mississippi

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[28] *See id*.

[29] *Id*. at 661.

[30] *Id*.

[31] *Id.* at 662 ("While I do agree with the majority, I write separately because I feel the dissent has delved into an area where our State legislature has made clear its public policy position relating to particular rights of homosexuals in domestic relations settings. In my review of statutory authority, I find that in 2000 the legislature added an amendment to Miss. Code Ann. § 93-17-3 (Supp. 2000) which reads, "(2) Adoption by couples of the same gender is prohibited."… Another statute which shows the legislature's intention concerning homosexuals and family relations is Miss. Code Ann. § 93-1-1(2) (Supp. 2000). A 1997 amendment to that statute added the sub-section which reads, "Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi." Additionally, Miss. Code Ann. § 97-29-59 (Rev. 2000) states, "Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years." That statute has been held to apply to homosexual acts. *See Miller v. State*, 636 So. 2d 391 (Miss. 1994); *Haymond v. State*, 478 So. 2d 297 (Miss. 1985); *State v. Mays*, 329 So. 2d 65 (Miss. 1976). Looking to these cited authorities and to the United States Supreme Court case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld the constitutionality of a Georgia sodomy statute, I find that the legislature has clearly set forth the public policy of our State with regard to the practice of homosexuality." (Payne, J., concurring)). It should be noted that Judge Leslie Southwick, who now sits on the Fifth Circuit, joined in both the majority and concurring opinions in this case. In 2007 when President Bush nominated Judge Southwick for a position to the Fifth Circuit, several prominent gay rights groups spoke out against his unnecessary participation in this concurrence. *See, e.g.*, Letter from Lambda Legal to Patrick J. Leahy, Chairman of the U.S. Senate Committee on the Judiciary (May 9. 2007), http://data.lambdalegal.org/pdf/southwick_uss_x_20070509_letter-of-concern.pdf (last visited Sept. 3, 2009).

[32] *Wilkerson*, 876 So. 2d at 1008.

[33] *Id*.

Supreme Court ruled that the judge had not violated any cannon of judicial conduct because the judge had not actually acted impartially in any proceeding.[34] Moreover, the court ruled that any gay parties before the judge had adequate protection through the recusal process.[35]

2. Councilman Billy Hewes

In July of 2003, in response to the Supreme Court's ruling in *Lawrence*, Mississippi Gulfport city councilman Billy Hewes initiated a resolution condemning the Court's ruling.[36] He called the ruling "the worst thing to happen since they took prayer out of school, and proclaimed Gulfport to be a "straight town."[37]

3. Soulforce Equality Ride

In March of 2007, Clinton, Mississippi police officers harassed and arrested members of the 2007 Soulforce Equality Ride, a group of young adults who walked onto the campus of Mississippi College to educate the students on the university's discriminatory policies towards gay students.[38] According to Lambda Legal and other prominent gay activist groups, the Soulforce members were repeatedly harassed by police officers and ordered to leave town, even though they were not actually violating any laws.[39]

4. Senator Jamie Franks

In September of 2007, Democratic lieutenant governor nominee and former Mississippi Senator Jamie Franks stated in his campaign that he would continue the fight against same-sex marriage and homosexual adoption and that he believed homosexuality was a lifestyle choice.[40]

5. Coffeeville School District

In addition, in *U.S. v. Coffeeville Consol. Sch. Dist.*, the Coffeeville School authorities fired one African American teacher in part because she discussed the meaning

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[34] *Id*. at 1015.

[35] *Id*. at 1016. The current Mississippi Code of Judicial Conduct, promulgated on April 4, 2002, Cannon 3[5] states: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to …sexual orientation." *In re Miss. Code of Jud. Conduct*, NO. 89-R-99013-SCT, 2002 Miss. LEXIS 124, 22 (Miss. 2002).

[36] Santa Maria, *supra* note 2.

[37] *Id*.

[38] Bronwen Tomb, *Five Arrested at Mississippi College; Members of Nationwide Journey of Gay and Straight Young Adult Leaders Challenge Anti-Gay Policy*, SOULFORCE, March 22, 2007, http://www.soulforce.org/article/1212.

[39] Letter from Lambda Legal. to Rosemary G. Aultman, Mayor (Mar. 23, 2007), http://www.thetaskforce.org/press/releases/prSF_032307 (last visited Sept. 3, 2009).

[40] David McRaney, *Not a 'Rubber Stamp,' Frank Says*, HATTIESBURG AMERICAN, Sept. 6, 2007.

of "queer," which led into a discussion on homosexuality with her class of eighth grade boys. 513 F.2d 244, 250-53 (1975).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Missouri – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Missouri has no state statute prohibiting public employment discrimination based on sexual orientation or gender identity. Since 1998, legislators in the Missouri General Assembly have introduced bills that would prohibit discrimination based on sexual orientation and gender identity, specifically in the areas of employment, public accommodations, and housing; none of the attempts have been successful.

At the local level, four major cities - St. Louis, Kansas City, Columbia and University City - have ordinances that prohibit discrimination on the basis of sexual orientation in the employment context. At least one fire department, several school districts, and several public universities have personnel policies that prohibit discrimination on the basis of sexual orientation, and in some cases, gender identity.

The 11-year-long debate over employment anti-discrimination policies at one public state university illustrates the background context of animus and hostility toward LGBT persons. In a 1995 letter to an alumni, Missouri State University President John Keiser wrote that homosexuality is a "biological perversion" and is "intrinsically disordered." In 2004, a bill was introduced in the Missouri legislature that would have prohibited state agencies - including Missouri State University - from adding sexual orientation to non-discrimination policies. The bill did not pass. In 2006, Missouri State University added "sexual orientation" to its list of protected classes over the repeated objections of President Keiser. As a result, Governor Matt Blunt issued a statement saying the change was "unnecessary and bad."

Documented examples of discrimination based on sexual orientation and gender identity by state and local governments include:

- In *Counce v. Kenna*,[1] an inmate claimed he was not promoted in the prison's kitchen to a higher-paying position as a cook because he was homosexual. In an unreported opinion, the Court granted the defendant's motion for summary judgment because the inmate had not established that the "denial of prison jobs to homosexuals because of their sexual orientation is a violation of the United States Constitution." Counce v. Kemna, 2005 WL 579588 (W.D. Mo. 2005).

- Kelly, a gay inmate employee at a correctional facility in Missouri, brought a lawsuit alleging discrimination in violation of the equal protection clause and

[1] *Counce v. Kemna*, 2005 WL 579588 (W.D. Mo. 2005) (unreported).

Title VII when he was terminated from his facility bakery job because of his sexual orientation. The court, in deciding whether Kelley was entitled to unconditional leave to proceed *in forma pauperis*, found that his claim alleging discrimination on the basis of his sexual orientation was not frivolous under the equal protection clause. Kelly v. Vaughn, 760 F.Supp. 161 (W.D. Mo. 1991).

- In 2008, a public school physical education teacher reported that she did not have her contract renewed because of her sexual orientation. During the time that she was still employed by the school, she overheard one of the school board members say that, had he known she was a "dyke," he would never have hired her in the first place.[2]

- In 2008, a teacher reported that he was not hired by a public school because the administration perceived him to be gay.[3]

- In 2008, an applicant for a prosecutor position reported that he had his job offer revoked because he was gay.[4]

- In 2007, two sheriff's office kitchen workers reported that they were fired because they were lesbians.[5]

- In March, a high school history teacher in Mehlville was reprimanded after he informed his students that he is gay. In a class on the Holocaust, the teacher explained that if he had lived during World War II, he could have been persecuted for being gay. Though the students were supportive, several other teachers expressed dismay, and the gay teacher received a memorandum from the assistant superintendent and a school district lawyer informing him that the district "considers it inappropriate conduct for a teacher to discuss facets and beliefs of a personal nature . . . in the classroom." Though the memo did not specifically mention homosexuality, the school's principal requested that the teacher not bring up the topic of homosexuality again in class unless it was relevant to the existing curriculum. Two months later, the teacher received a letter from the school district's law firm reiterating that "Mehlville School District considers your classroom conduct of March 22, 1994 to be inappropriate…" No further action was taken, but another teacher warned, "next year, he'd better watch his step because they may be looking to nab him on some pretense."[6]

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[2] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

[3] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

[4] *Id*.

[5] *Id*.

[6] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 51 (1994 ed.).

Outside the context of employment, state actors have subjected gay citizens to biased treatment. In one instance, which occurred *after* the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas* declaring sodomy laws to be unconstitutional, the state Department of Social Services relied on a Missouri law criminalizing same-sex sexual conduct as a basis to deny a foster care license to a lesbian couple.[7] The Director stated that "but for her sexual orientation, it was agreed by all parties that Applicant and her partner have exceptional qualifications to be foster parents." The denial was overturned by the Missouri Circuit Court, which declared the "sexual misconduct" statute unconstitutional in light of *Lawrence.* In a 1998 custody case, the Missouri Supreme Court upheld the award of custody to the heterosexual father rather than the lesbian mother, after the trial court had forced the mother, under supervision of the guardian ad litem, to tell her two daughters that she was gay.[8]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[7] *Johnston v. Mo. Dep't of Social Serv*., 2005 WL 3465711 (Mo. Cir. 2005).
[8] *J.A.D. v. F.J.D. III*, 978 S.W.2d 336 (Mo. 1998).

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently the state of Missouri has not enacted laws to protect sexual orientation and gender identity from employment discrimination.

B. Attempts to Enact State Legislation

Bills introduced in 2009 – All bills pending as of July 14, 2009

HB518 – To amend existing law to require schools to adopt an anti-bullying policy that includes protection for bullying motivated on the basis of sexual orientation or gender identity. Introduced on January 29, 2009. There has been no activity on this bill as of July 14, 2009.[9]

HB701 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. Introduced on February 12, 2009. There has been no activity on this bill as of July 14, 2009.[10]

SB132 – To amend existing law to require school districts to adopt an anti-bullying policy that include protection for bullying motivated on the basis of sexual orientation or gender identity. Introduced on January 7, 2009. There has been no activity on this bill as of July 14, 2009.[11]

SB500 – To require school districts to adopt policies allowing parents or guardians an opportunity to withhold permission for children to participate in certain activities. Introduced on February 25, 2009. Referred to Senate Education Committee on March 2, 2009. There has been no further activity on this bill as of July 14, 2009.[12]

SB109 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. Introduced on January 7, 2009. Hearings were held before the Senate Progress and Development Committee on February 25, 2009. There has been no further activity on this bill as of July 14, 2009.[13]

Bills introduced in 2008

[9] H.B. 518 (Mo. 2009).
[10] H.B. 701 (Mo. 2009).
[11] S.B. 132 (Mo. 2009).
[12] S.B. 500 (Mo. 2009).
[13] S.B. 109 (Mo. 2009).

SB824 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[14]

SB1019 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[15]

HB1776 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[16]

HB 1751: To amend existing laws for teachers and school administrators to better recognize and stop school bullying. The bill also addresses harassment of LGBT students. The bill was held up by Representative Jane Cunningham, who chairs the Elementary and Secondary Education Committee. [17]

Bills introduced in 2007

SB266 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[18]

HB819 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[19]

Bills introduced in 2006

SB716 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[20]

HB1593 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[21]

[14] S.B. 824 (Mo. 2008).
[15] S.B. 1019 (Mo. 2008).
[16] S.B. 1776 (Mo. 2008).
[17] H.B. 1751 (Mo. 2008).
[18] S.B. 226 (Mo. 2007).
[19] H.B. 819 (Mo. 2007).
[20] S.B. 716 (Mo. 2006).
[21] H.B. 1593 (Mo. 2006).

HB1458 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[22]

Bills introduced in 2005

SB293 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[23]

HB476 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[24]

Bills introduced in 2004

SB1238 – To amend existing laws to prohibit discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity. No action taken.[25]

HB1521 – To amend existing laws to prohibit discrimination in employment, public accommodations and housing on the basis of sexual orientation and gender identity. No action taken.[26]

HB885. This anti-gay bill, introduced by Rep. Kevin Wilson in 2004 with 16 co-sponsors, never passed. It read: "No public institution or any entity that receives state funds shall adopt a discrimination policy that exceeds current federal protections against discrimination." It was an attempt to force universities to remove references to "sexual orientation" from their non-discrimination policies.[27]

C. Executive Orders, State Government Personnel Regulations, & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

Fire Departments:

[22] H.B. 1458 (Mo. 2006).
[23] S.B. 293 (Mo. 2005).
[24] H.B. 476 (Mo. 2005).
[25] S.B. 1238 (Mo. 2004).
[26] H.B. 1521 (Mo. 2004).
[27] H.B. 885 (Mo. 2004).

Most policies are not available online. The Columbia, Missouri fire department prohibits discrimination in hiring on the basis of sexual orientation.[28]

School Districts:

The Kansas City School District (Jackson County) non-discrimination policy prohibits discrimination on the basis of both sexual orientation and gender identity.[29]

School districts whose non-discrimination policies prohibit discrimination on the basis of sexual orientation but make no reference to gender identity include the St. Louis School District (St. Louis City), Francis Howell School District (St. Charles County), and Columbia School District (Boone County).[30]

Public Universities

Northwest Missouri State University's non-discrimination policy prohibits discrimination on the basis of both sexual orientation and gender identity.

Schools whose non-discrimination policies prohibit discrimination on the basis of sexual orientation but make no reference to gender identity include the University of Missouri System – Columbia, Kansas City, Rolla, and St. Louis; St. Louis Community College; and Ozarks Technical Community College.[31]

Missouri State University added "sexual orientation" to the list of factors on which the institution barred bias in 2006. This was after a long-fought battle. After this change, Governor Matt Blunt issued a statement in which he said that Missouri State's "ever-increasing enrollment is proof that a diverse student body feels welcome on campus," adding that the change was "unnecessary and bad." John Keiser, who was president of the university from 1993 to 2005, had repeatedly opposed the change, saying that it wasn't necessary and that discrimination on the campus was not a problem. No formal complaints of discrimination on the basis of sexual orientation had been filed with the University's Equal Opportunity Office because the University's policy did not cover sexual orientation. However, two informal complaints were filed and there were up to seven additional incidences in which people expressed concerns to the Equal Opportunity

[28] Columbia County Equal Employment Opportunity Policy § 19-176, *available at* http://bit.ly/qxdeL (last visited Sept. 6, 2009).

[29] Kansas City School District Notice of Nondiscrimination, *available at* http://www.kcmsd.net/hr (last visited Sept. 6, 2009).

[30] St. Louis School District Notice of Nondiscrimination, *available at* http://bit.ly/AxIp9 (last visited Sept. 6, 2009); Francis Howell School District Equal Opportunity Statement, *available at* http://bit.ly/dwVYE (last visited Sept. 6, 2009) (protecting against actual or "perceived" sexual orientation discrimination); Columbia School District Nondiscrimination Policy, *available at* http://bit.ly/2nosM (last visited Sept. 6, 2009).

[31] University of Missouri Statement of Nondiscrimination, *available at* http://bit.ly/aHucE (last visited Sept. 6, 2009); St. Louis Community College Non-Discrimination Statement, *available at* http://bit.ly/16DvOQ (last visited Sept. 6, 2009); Ozarks Technical Community College Non-Discrimination Statement, *available at* http://bit.ly/4kZWri (last visited Sept. 6, 2009) (also specifically including HIV and AIDS in its description of disability protections).

Office but did not file complaints.[32] Additionally, Jeanne Thomas, the former dean of the College of Health and Human Services, publicly stated that she left the University because its policy did not protect against discrimination on the basis of sexual orientation. Although Thomas did not experience any direct discrimination, she feared that her sexual orientation could be used against her.[33] Keiser's stance became particularly hard for student and faculty leaders to accept when a newspaper printed a letter Keiser had sent an alumnus in 1995 saying that homosexuality is a "biological perversion," and adding that he had always believed that homosexual or lesbian acts are "intrinsically disordered, contrary to natural law, and cannot be approved."

3. Attorney General Opinions

None.

D. Local Legislation

Four municipalities in Missouri have local human rights ordinances that protect against discrimination based on sexual orientation and/or gender identity: St. Louis, Kansas City, Columbia, and University City. It appears that at least other municipality, Kirkwood, is considering a human rights law.

1. City of St. Louis

In 1992, the St. Louis Board of Alderman adopted St. Louis City Ordinance 62710, which is "intended to eliminate, reduce, and remedy discrimination in housing, unemployment, education, services, public accommodations, and real property transactions and uses, and to provide equal opportunity enforcement."[34] Ordinance 62710 protects individuals against discrimination because of "race, marital status, familial status, sexual orientation, sex, color, age, religion, disability, national origin or ancestry, or legal source of income."[35]

The ordinance establishes "a comprehensive civil rights enforcement agency to investigate, conciliate, and recommend remedies of complaints of discrimination," and provides for penalties for unlawful discrimination.[36] Ordinance 62710 also has a provision prohibiting it from being repealed by referendum.

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[32] Angela Wilson, *Discrimination Policy at SMS under Scrutiny*, SPRINGFIELD NEWS-LEADER, May 13, 2001, at 1B.
[33] Angela Wilson, *National Crusade Hits Home*, SPRINGFIELD NEWS-LEADER, Jun. 16, 2001, at 1A, *available at* http://bit.ly/EDgED.
[34] *See* ST. LOUIS CITY ORD. 62710 (1992), *available at* http://bit.ly/158oPE.
[35] ST. LOUIS CITY ORD. 62710 § 7.
[36] ST. LOUIS CITY ORD. 62710 § 7.

According to the New York Times, Ordinance 62710 passed with little opposition or attention.[37] It was also reported that Ordinance 62710 was one of the strongest local laws of its kind at the time of passage.

2. Kansas City

Chapter 38 of the Kansas City Municipal Code contains the human rights and discriminatory practices provisions. It protects against, amongst other things, discrimination in housing, employment, and real estate loans on account of race, religion, color, ancestry, national origin, sex, marital status, handicap, familial status, sexual orientation, or gender identity.[38] "Gender identity" was added in April of 2008.[39] Discriminatory practices are punishable by a fine of up to $500.00 and/or imprisonment of not more than 180 days.[40]

Chapter 38 also creates a Human Relations Division charged with the authority to receive and investigate complaints and assess any necessary penalties.[41] Kansas City's Human Relations Division has a Civil Rights Enforcement Section that was established to "[protect] our citizens against discrimination in employment, housing and public accommodations on the basis of race, national origin, sex, religion, disability, age, sexual orientation, familial status, and marital status."[42] The Division also has a Human Rights Commission that has empowered certain task forces, including a Gay and Lesbian Issues task force.[43]

Kansas City School District No. 33 has an anti-discrimination policy that covers discrimination because of "sex, race, religion, color, national origin, ancestry, age, disability, sexual orientation, gender identity, or any other factor prohibited by law."[44]

3. City of Columbia

In 1991, Columbia adopted Ordinance 13194, which established a Commission on Human Rights and adopted certain human rights provisions.[45] The Ordinance protects individuals from discrimination or retaliation with respect to employment, housing, public accommodations, real estate loans, or membership in real estate organizations.[46]

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[37] *See Virtually Unnoted, St. Louis Approves Gay-Rights Measure*, N.Y. TIMES, Dec. 28, 1992, *available at* http://bit.ly/McW.

[38] *See* KAN. CITY MUNI. CODE § 38-2.

[39] *See* Press Release, Human Rights Campaign, Kansas City, MO City Council Extends Anti-Discrimination Protections to Gender Identity (Apr. 4, 2008), *available at* http://bit.ly/2up7WX.

[40] KAN. CITY MUNI. CODE § 38-131.

[41] KAN. CITY MUNI. CODE § 38-31 *et seq*.

[42] *Id*.

[43] *See* Kansas City, Missouri Human Relations Website, Task Force on Human Rights Commission, http://bit.ly/Y1Jil (last visited Sept. 6, 2009).

[44] Kansas City School Policies, *available at* http://bit.ly/2AiqpX (last visited Sept. 6, 2009).

[45] COLUMBIA ORD. 13192 (1991).

[46] COLUMBIA ORD. 13192.

"Protected Category" is defined as "race, color, religion, sex, national origin, ancestry, marital status, handicap, or sexual orientation."[47]

Individuals may file discrimination complaints with the Commission on Human Rights, which then has powers to investigate and seek resolution of the dispute. The Ordinance also gives the Commission the power to prosecute individuals and seek a misdemeanor penalty of up to thirty days in prison and/or up to $1,000.00 in fines.[48]

4. University City

University City prohibits discrimination in housing, public accommodations, employment based on race, color, religion, national origin, ancestry, sex, sexual orientation, disability, or familial status.[49] Notably, "sexual orientation" is defined as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, or having a self-image or identity not traditionally associated with one's gender."

E. Occupational Licensing Requirements

The State of Missouri requires licensure or registration, or awards certificates in order to operate or practice with respect to 44 professions. Of those, 33 reference moral turpitude or require a degree of good moral or ethical character. However, research has not uncovered any judicial opinions or instances under which an individual was denied a license or certificate on the grounds that he or she lacked the requisite moral character due to sexual orientation or gender expression.

[47] COLUMBIA ORD. 13192.
[48] *Id*.
[49] UNIVERSITY CITY CODE § 9.08.260 *et seq*.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Counce v. Kemna, 2005 WL 579588 (W.D. Mo. 2005).

In *Counce*,[50] an inmate claimed he was not promoted in the prison's kitchen to a higher-paying position as a cook because he was homosexual. In an unreported opinion, the Court granted the defendant's motion for summary judgment because the inmate had not established that the "denial of prison jobs to homosexuals because of their sexual orientation is a violation of the United States Constitution."[51]

Kelly v. Vaughn, 760 F.Supp. 161 (W.D. Mo. 1991).

Kelly, a gay inmate employee at a correctional facility in Missouri, brought a lawsuit under 24 U.S.C. § 1983 alleging discrimination in violation of the equal protection clause and Title VII when he was terminated from his facility bakery job because of his sexual orientation. The court, in deciding whether Kelley was entitled to unconditional leave to proceed *in forma pauperis*, found that his claim alleging discrimination on the basis of his sexual orientation when he was removed from his job as a bakery worker was not frivolous under the equal protection clause.[52]

2. Private Employees

None.

B. Administrative Complaints

None – no state law anti-discrimination enforcement mechanism establishes the basis for filing complaints based on sexual orientation or gender identity.

C. Other Documented Examples of Discrimination

Missouri Public School

In 2008, a public school physical education teacher reported that she did not have her contract renewed because of her sexual orientation. During the time that she was still

[50] *Counce v. Kemna*, 2005 WL 579588 (W.D. Mo. 2005) (unreported).
[51] *Counce*, 2005 WL 579588.
[52] *Kelly v. Vaughn*, 760 F.Supp. 161 (W.D. Mo. 1991).

employed by the school, she overheard one of the school board members say that, had he known she was a "dyke," he would never have hired her in the first place.[53]

Missouri Public School

In 2008, a teacher reported that he was not hired by a public school because the administration perceived him to be gay.[54]

Prosecuting Attorney's Office

In 2008, an applicant for a prosecutor position reported that he had his job offer revoked because he was gay.[55]

Sheriff's Office

In 2007, two sheriff's office kitchen workers reported that they were fired because they were lesbians.[56]

Missouri Public School

In March, a high school history teacher in Mehlville was reprimanded after he informed his students that he is gay. In a class on the Holocaust, the teacher explained that if he had lived during World War II, he could have been persecuted for being gay. Though the students were supportive, several other teachers expressed dismay, and the gay teacher received a memorandum from the assistant superintendent and a school district lawyer informing him that the district "considers it inappropriate conduct for a teacher to discuss facets and beliefs of a personal nature . . . in the classroom." Though the memo did not specifically mention homosexuality, the school's principal requested that the teacher not bring up the topic of homosexuality again in class unless it was relevant to the existing curriculum. Two months later, the teacher received a letter from the school district's law firm reiterating that "Mehlville School District considers your classroom conduct of March 22, 1994 to be inappropriate…" No further action was taken, but another teacher warned, "next year, he'd better watch his step because they may be looking to nab him on some pretense."[57]

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[57] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 51 (1994 ed.).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

The Missouri sodomy law was overturned in a 1999 intermediate appellate court decision,[58] and all remaining sodomy laws were overturned by the U.S. Supreme Court in 2003 in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). However, a sexual misconduct law remained on the books in Missouri, which was used to criminalize same-sex sexual relations. This law was repealed in 2006.

B. Hate Crimes

Mo. Rev. Stat. 557.035 – Enhanced penalties for motivational factors in certain crimes includes crimes motivated because of sexual orientation. Sexual orientation is explicitly defined to include "self-image or identity not traditionally associated with one's gender."

C. Education

GLSEN – From Teasing to Torment: Report on School Climate in Missouri. This report documents the findings of a 2003 survey aimed at determining the environment LGBT students are facing in Missouri schools. This study shows why anti-bullying legislation is needed.

Webb City High School (2004): Brad Mathewson was sent home from school for wearing a shirt from the Gay Straight Alliance at his old high school in Fayetteville, Arkansas. The shirt had the name of the GSA and a pink triangle and the words "Make a Difference!"

D. Health Care

20 Mo. Code of State Regulations 400-2.120 – The accident and health insurance applications relating to HIV infection are prohibited from posing questions designed to determine the sexual orientation of an applicant.

20 Mo. Code of State Regulations 2150-9.130 – Code of ethics of the anesthesiologist assistants include a requirement to deliver health care services to patients without regard to sexual orientation.

[58] *Missouri v. Cogshell*, 1997 S.W.2d 534 (Mo. App. W.D. 1999).

9 Mo. Code of State Regulations 10-7.020 – Psychiatric and substance abuse programs are prohibited from denying admission or services on the basis of sexual orientation.

20 Mo. Code of State Regulations 2150-8.005 – A licensed clinical perfusionist shall deliver health care services without regard to sexual preference.

20 Mo. Code of State Regulations 2235-5.030 – Ethical rules of conduct for psychologists prohibits the imposition of any stereotypes of behavior, values, or roles related to sexual preference on the client which would interfere with the objective provision of therapy.

E. **Parenting**

13 Mo. Code of State Regulations 35-60.030 – The regulations spelling out the minimum qualifications of foster parents explicitly allow for personal information regarding sexual orientation to be elicited.

Johnston v. Mo. Dep't of Social Serv., 2005 WL 3465711 (Mo. Cir. 2005).

In *Johnston*,[59] the Department of Social Services ("DSS") denied plaintiff's application for a foster care license solely because of plaintiff's sexual orientation. The DSS and its Director relied on the Missouri statute which stated, "a person commits the crime of sexual misconduct in the first degree if he has deviate sexual intercourse with another person of the same sex or he purposely subjects another person to sexual contact without that person's consent,"[60] to conclude that plaintiff "was not a person of reputable character" under 13 CSR 40-60.030(2). The Director also found that "but for her sexual orientation, it was agreed by all parties that Applicant and her partner have exceptional qualifications to be foster parents." The Court concluded that DSS could not rely on the statute because under *Lawrence*, the Missouri statute, which purportedly criminalized adult consensual private homosexual conduct, violated the Due Process Clause of the U.S. Constitution, and thus could not be enforced.

N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980).

In *N.K.M.*,[61] the court affirmed the Circuit Court holding that the mother's alleged homosexual relationship with her friend did not serve the best interests of the child, and custody was therefore awarded to child's father. Mother's continued relationship with the "friend" was in violation of original custody decree which required the discontinuance of any relationship between the mother and the mother's friend and forbid the mother from living with any non-related female while residing with her daughter.

The court held that,

[59] *Johnston v. Mo. Dep't of Social Serv.*, 2005 WL 3465711 (Mo. Cir. 2005).
[60] *Id.* at *1 (*citing* MO. REV. STAT. 566.090 (repealed 2006)).
[61] *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980).

> "[a]llowing that homosexuality is a permissible life style—an 'alternative life style', as it is termed these days—if voluntarily chosen, yet who would place a child in a milieu where she may be inclined toward it? She may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness."[62]

Also, in response to the Psychiatrist's finding that no ill effects were evidenced on the 10-year old child, the court provides, "the court does not need to wait, though, till the damage is done."

L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982).

In *L. v. D,*[63] the court held that the conditions placed on a mother's visitation rights with respect to her lesbian partner were proper.

J.L.P. v. D.J.P., 643 S.W.2d 865 (Mo. Ct. App. 1982).

In *J.L.P.*,[64] the court affirmed the trial court order requiring the homosexual father who had visitation rights to not expose the child to the presence of gay activists and to "restrict the child's attendance at a church supporting the practice of homosexuality to the extent that it recognized a 'holy union' between homosexuals as the equivalent of marriage." The trier of fact ignored completely expert witness testimony regarding the impact of a homosexual parent on the sexual development of a child, or the lack thereof.

G.A. v. D.A., 745 S.W.2d 726 (W.D. Mo. 1987).

In *G.A. v. D.A.*,[65] the court held that the welfare of the young son would be better served by awarding custody to the husband rather than his homosexual former wife who lived with her partner. The fact that the former wife was a lesbian "tipped the scales in favor of [the husband]," according to the court. The court reasoned that it cannot ignore the effect of the sexual conduct of a parent on a child's moral development. It refused to overlook the wife's sexual orientation.

However, accompanying the decision is a dissenting opinion that, for the first time, addresses the fact that the court had heretofore conclusively presumed a detrimental impact on a child due to a parent's homosexuality. The dissent argues that this presumption is rebuttable.

J.A.D. v. F.J.D. III, 978 S.W.2d 336 (Mo. 1998).

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[62] *N.K.M.*, 606 S.W.2d at 179.
[63] *L. v. D.*, 630 S.W.2d 240 (Mo. Ct. App. 1982).
[64] *J.L.P. v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982).
[65] *G.A. v. D.A.*, 745 S.W.2d 726 (W.D. Mo. 1987).

In finding that an award of custody to the husband was not improperly based on the fact that the wife was a lesbian, the Supreme Court of Missouri declined to rule on the propriety of the trial judge's act of mandating a "telling session" whereby the mother was required, under the supervision of the guardian *ad litem*, to tell her two daughters of her lesbianism. The court reiterated that it was not error to consider homosexual conduct as one factor in determining custody. However, the court vacated some restrictions on the mother's visitation rights as excessive. [66]

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

MO. CONST., Art. I, Sect. 33 explicitly defines marriage as been a man and a woman.

G. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

1. Law Enforcement

The Springfield Operations Manual provides, in "Bias Based Policing," that

> "[i]n the absence of a specific report, racial, ethnic, sexual preference, socioeconomic, age, gender, cultural, or religious characteristics of an individual shall not be a factor in the decision to stop, detain or arrest an individual. In the absence of a specific report, such characteristics shall not be considered as factors constituting reasonable or articulable suspicion that an offense has been committed so as to justify the detention of an individual, or the investigative stop of a motor vehicle. Officers may take into account the reported racial, ethnic, sexual preference, socioeconomic, age, gender, cultural, and/or religious characteristics of an individual based on credible information that links a person of those specific characteristics to a particular criminal incident or to a specific series of crimes."[67]

The Springfield Operations Manual also provides in "Prohibited Practices," that "No employee shall make offensive or derogatory comments based on race, sex, religion, or national origin either directly or to a third party."[68] The manual is silent as to sexual orientation.

In addition, the Springfield Operations Manual provides, in its traffic violations section, that

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[66] *J.A.D. v. F.J.D. III*, 978 S.W.2d 336 (Mo. 1998).
[67] SPRINGFIELD OPERATIONS MANUAL § 103.3, *available at* http://bit.ly/NZKDr.
[68] SPRINGFIELD OPERATIONS MANUAL § 103.12.

> "[a]ll officers shall have clear, articulable, and lawful reasonable suspicion independent of race, national origin, citizenship, religion, ethnicity, age, gender, or sexual orientation to justify any car stop for either traffic or criminal investigation purposes and upon making such car stops shall conduct investigations and enforce the law fairly and equally. All stops, searches, seizures, and arrests shall be conducted and reported in accordance with the law and with the regulations of this Police Department. Officers shall comply with all statutes on the reporting of traffic stop information … promptly and accurately."[69]

Finally, the Springfield Operations Manual, in its Criminal Intelligence Management Section, provides that "Under **no circumstances** shall information be gathered solely on the basis of race, creed, color, national origin, sexual preference, or political or religious beliefs."[70]

15 Mo. Code of State Regulations 30-70.020 – The Safe at Home Program related to victims of domestic violence, rape, sexual assault, or stalking requires that application assistants not discriminate against any client on the basis of sexual orientation.

2. Supreme Court Rules

Missouri Supreme Court Rules of Prof. Conduct rule 4-8.4 – "It is professional misconduct for a lawyer to … manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation," except when the above categories are at issue.

Missouri Supreme Court Rule 7.03 – Three additional members of the Missouri Bar Board of Governors shall consist of members of the Missouri Bar who have unique experience and knowledge or who represent diverse elements of the bar. The categories of "diverse elements" include sexual orientation.

3. Social Workers & Therapists

20 Mo. Code of State Regulations 2263-3.140 – The ethical standards for social workers include a requirement for social workers to recognize the effects of sexual orientation as a factor on clients in assessment and planning services.

20 Mo. Code of State Regulations 2233-3.010 – Marital and family therapists are prohibited from imposing on the client any stereotypes of behavior, values, or roles related to sexual preference which would interfere with the objective provision of therapy.

[69] SPRINGFIELD OPERATIONS MANUAL § 405.9.
[70] SPRINGFIELD OPERATIONS MANUAL § 406.1.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Montana – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Montana currently has no laws that prohibit employment discrimination based on sexual orientation or gender identity. State personnel rules issued by former Governor Marc Racicot in 2000 prohibit discrimination and harassment on the basis of sexual orientation with respect to employment by state government, but the available remedies are limited due to the lack of a statewide statute. Bills have been introduced to add either sexual orientation or gender identity and expression, or both, to Montana's human rights laws in most of the legislative sessions of the past decade, including the current 2009 legislative session. None have passed despite enjoying recent support from the Governor's office.[1]

Opponents in Montana have been very vocal in their opposition to laws protecting LGBT people from employment discrimination. During the 2005 state legislative session, state senator Dan McGee stated "I'll never be able to support bills which try to overturn centuries of moral ideology. . . . Homosexuality is wrong."[2] Other Montana legislators have expressed similar public sentiments, including state senator Al Bishop of Billings, who made a statement on the Montana Senate floor that homosexual sex was "even worse than a violent sexual act." [3]

In 1997, the Montana Supreme Court recognized the combined impact that the state's sodomy law and licensing requirements had on LGBT employees with professional licenses. The issue of employment discrimination came via arguments for standing to challenge the sodomy law statute: "[Respondents] contend that the damage to their self-esteem and dignity and the fear that they will be prosecuted or will lose their livelihood or custody of their children create an emotional injury that gives them standing to challenge the statute. For example, two Respondents are employed or are seeking employment in positions requiring state licenses. Because they engage in conduct classified as a felony, they fear they could lose their professional licenses."[4] The

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[1] *See, e.g.*, Casey Charles, *Just How Gay is Missoula?*, MISSOULA INDEP., July 5, 2007; Matt Gouras, *Bill Outlawing Bias Against Gays Returns, AP Alert - Montana*, A.P., Feb. 2, 2007; Bob Anez, *Bill Outlawing Bias Toward Gays, Lesbians Draws Fire, AP Alert - Montana*, A.P., Jan. 17, 2005; *Who's Out Now? Conservative Uprising in the "Lost City"*, MISSOULA INDEP., May 27, 2004.

[2] *Legislature Votes Down Gay Rights Bills, AP Alert – Political*, A.P., Apr. 18, 2005.

[3] *See, e.g.*, David W. Dunlap, *Montana Cuts Homosexual Acts from List of Registered Crimes*, N.Y. TIMES, Mar. 24, 1995 (quoting state senator Al Bishop of Billings, who made a statement on the Montana Senate floor that homosexual sex was "even worse than a violent sexual act").

[4] *Id.* at 441.

specifics of the respondents' fears were laid out with greater detail in the filings leading up to the opinion. The two respondents who needed to be licensed by the state were a high school history teacher with more than 25 years experience, and a midwife seeking certification. Neither of these respondents could attain licensure if they were convicted of a felony (which sodomy was under then-existing Montana law).[5] Not only would they have been unable to attain licensure were they prosecuted and convicted under the statute, but they could have had their licensure revoked at any time, even without prosecution: "[C]ertification in both professions requires that the individual be 'of good moral and professional character'."[6] "Even if they are never prosecuted, the statute could be used to support a finding that they are engaged in immoral conduct."[7]

A 2008 survey conducted by Lake Research Partners of 600 likely general election voters commissioned by the Montana Human Rights Network suggests that 55% of voters in Montana would favor changing the state's human rights law to include protections based on sexual orientation (with 39% opposed and 6% responding that they did not know).[8] The poll also suggests that 62% of Montana voters are supportive of extending the state's current laws to offer protections based on sexual orientation when it comes to housing, employment and benefits (with 35% opposed and 3% responding that they did not know).[9] The survey findings revealed little variation when the word "transgender" was added to the scope of the questions asked.[10] "What this poll shows is that the vast majority of Montanans support issues of gay and lesbian equality," according to state senator Christine Kaufmann.[11]

Documented examples of employment discrimination by state and local government employers against LGBT people in Montana include:

- A transgender applicant for a position in the Montana state attorney general's office was not hired on account of her gender identity in 2008.[12]

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[5] Br. of Resp't at 7, *Gryczan v. State*, 283 Mont. 433, No. 96-202 (Supreme Court of Montana, 1997).

[6] *Id.* at 8.

[7] *Id.*

[8] Montana Human Rights Network, Findings from a Statewide Survey of Likely Voters, at 8, Mar. 2008, *available at* http://bit.ly/6WhP6 (last visited Sept. 13, 2009) [hereinafter MHRN Poll Analysis].

[9] Montana Human Rights Network, A Statewide Survey of 600 Likely General Election Voters in Montana, at question 27, Mar. 2008, *available at* http://bit.ly/rVyEW (last visited Sept. 13, 2009).

[10] *See id.* at question 26 (suggesting that 58% of Montana voters are supportive, with 36% of Montana voters opposed and 6% responding that they did not know, to extending state law in the areas of housing, employment and benefits to gay, lesbian and transgender Montanans); *see also* MHRN Poll Analysis, *supra* note 4, at 13.

[11] *See* Editorial, *Poll Shows Montanans Oppose Anti-Gay Discrimination*, Q NEWS, June 18, 2008, http://bit.ly/16iKiL (last visited Sept. 13, 2009). A conservative political group, led by former state representative Jeff Laszloffy, disputed the poll results. *See* Jeff Laszloffy, *A Rebuttal to Cooney Piece on Equality in the Workplace*, MONT. STD., July 15, 2008, *available at* http://bit.ly/3e4SPP (last visited Sept. 13, 2009).

[12] E-mail from Ken Choe, Senior Staff Attorney, ACLU, to Brad Sears, Executive Director, the Williams Institute (Sept. 22, 2009 11:08:00 PST).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Montana has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[13] In providing that "[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas," the Montana Constitution also fails to prohibit discrimination based on sexual orientation or gender identity in its Declaration of Rights.[14]

B. Attempts to Enact State Legislation

Numerous unsuccessful attempts have been made to enact statewide legislation. Bills have been introduced in a series of legislative sessions since at least 1999 to prohibit discrimination based on "sexual orientation" (and in some cases, "gender identity or expression") in employment.[15] New legislation was introduced in the 2009 Montana legislative session by state representative Margarett Campbell to amend the current employment discrimination provision of the Montana human rights law to provide that:

> It is an unlawful discriminatory practice for: (a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, *gender identity or expression, sexual orientation,* or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, *gender identity or expression, sexual orientation,* or sex distinction.[16]

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[13] *See* MONT. CODE. ANN. § 49-2-303(1)(a) (2007) ("It is a discriminatory or unfair employment practice for . . . an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction."); s*ee also id.* § 49-1-102 (right to be free from discrimination based on the same enumerated classes as a civil right); § 49-2-303(1)(b)-(c) (unlawful discriminatory practices based on the same enumerated classes committed by labor organizations, through employment agencies and advertisements, or through referrals for employment).

[14] MONT. CONST. Art. II, § 4.

[15] S.B. 371, 60th Leg. Sess. (Mont. 2007); S.B. 199, 59th Leg. Sess. (Mont. 2005); H.B. 438, 57th Leg. Sess. (Mont. 2001); H.B. 328, 56th Leg. Sess. (Mont. 1999). Senate Bill 266, introduced in the 2001 session, would have also provided recourse by allowing a claim for wrongful discharge if the action was based on the employee's "sexual orientation." S.B. 266, 57th Leg. Sess. (Mont. 2001).

[16] H.B. 252, 61st Leg. Sess. (Mont. 2009) (emphasis in original). The bill would have also, with respect to gender identity or expression or sexual orientation, (1) made the right to be free from discrimination on either basis a civil right, (2) prohibited discrimination on either basis by a labor organization or joint labor

A hearing on the bill was held on February 16, 2009, before the Montana House of Representatives Committee on the Judiciary. Testimony and exhibits from this hearing include anecdotal evidence of discrimination. One woman recounted the story of a close friend who was fired after her employer heard a rumor that she was a lesbian. Prior to the rumor her work ethic and dependability had been praised and her employer had told her that he wished he had 10 employees just like her. Once the rumor surfaced, her employer took her aside and explained that he felt uncomfortable and that her "attitude and lifestyle [were] not conducive to [the work] environment," and then immediately fired her. A gay man living in Montana expressed a sense of dread over the possibility that he or one of his friends would lose a job because of their sexual orientation.[17] The bill failed a committee vote on a 9-9 split the next day, and having missed the deadline for transmittal to the state house floor, appears dead.

Hearings from earlier, unsuccessful bills also included testimony and exhibits regarding incidents of violence, harassment, and discrimination. In 2005, a social worker testifying in support of Senate Bill 199 told of a young man at Carroll College who was beaten and had the term 'faggot' spray painted on his body.[18] In 2001, a student recounted dropping out of school because she faced constant harassment, including people slamming her into lockers, threatening, and yelling at her. She supported House Bill 438 because she was scared that she would not be able to find a job.[19]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In a proceeding held under the Montana Administrative Procedure Act, after a two-year study, the administration of former Governor Marc Racicot issued comprehensive revisions to Montana's state employment anti-discrimination rules in late

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management committee controlling apprenticeship, by an employer or employment agency in employment advertisements or applications, or by an employment agency in making employment referrals, (3) prohibited discrimination on either basis in public accommodations, housing, financing and credit transactions, education, counseling and training programs, and licensing, (4) prohibited discrimination on either basis by the state of Montana or any of its political subdivisions against any person in the use of goods or performance of services or in the distribution of funds, facilities or privileges, and in all public contracting, and (5) prohibited discrimination on either basis by state and local government officials in the employment of state and local government personnel.

[17] *Hearing on House Bill 252*, 61st Leg. Sess. (Mont. 2009) (Exhibit 6), at 1-2, *available at* http://data.opi.mt.gov/legbills/2009/Minutes/House/Exhibits/juh36a06.pdf.

[18] *Hearing on Senate Bill 199*, 59th Leg. Sess. (Mont. 2005) (Exhibit 11), at 1, *available at* http://data.opi.state.mt.us/legbills/2005/Minutes/House/Exhibits/juh58a110.PDF. That same year, a mother testifying in support of Senate Bill 202, which would have added sexual orientation to the state's malicious intimidation law, described threatening instant messages her sixteen year old son received from an anonymous source, who claimed to be "doing others justice," and stated "we know where you live." *Hearing on Senate Bill 202*, 59th Leg. Sess. (Mont. 2005) (Exhibit 2), at 2, *available at* http://data.opi.state.mt.us/legbills/2005/Minutes/Senate/Exhibits/jus16a020.PDF.

[19] *Hearing on House Bill 438*, 57th Leg. Sess. (Mont. 2001), at 4, *available at* http://data.opi.mt.gov/legbills/2001/minutesPDF/010212STH_Hm1.pdf.

1999.[20] The 1999 rules for the first time prohibited discrimination on the basis of sexual orientation against state employees.[21] As codified in the state personnel rules, "[i]t is the policy of the state of Montana that state government . . . does not discriminate in employment based upon . . . *sexual orientation*."[22] Although during the 2001 state legislative session, then-House Speaker Dan McGee of Laurel "fought tooth-and-nail to get the Racicot administration rules reversed,"[23] this repeal effort was unsuccessful.[24]

Last year, Governor Brian Schweitzer issued Executive Order No. 41-2008, broadening state government's equal employment opportunity, non-discrimination and harassment-prevention mandate relative to "*sexual orientation*" and other categories.[25] The findings accompanying the order rested the Governor's action upon the fact that the Montana Constitution "affirms Montanans basic human rights, wherein it declares: 'the dignity of the human being is inviolable.'" Further, the Governor found in his order that "denial of equal opportunity, discrimination, and harassment based on . . . sexual orientation" both violates the principles of equal dignity and respect as well as "results in costs to society and state government, both human and financial."[26]

The Governor's new order requires the state Department of Administration (1) to make "good faith efforts to ensure that all persons employed or served by state government are afforded equal opportunity, without discrimination, based on" any of the enumerated categories, (2) to "[t]ake steps necessary to prevent and stop discrimination, sexual harassment, or harassment based on membership" in any of such categories, and (3) to prepare a non-discrimination policy including specific language to implement the above, applicable to all agencies under the Governor's jurisdiction, including an "internal complaint procedure" and provisions that make conduct in violation of the policy "a form of misconduct . . . subject to discipline, up to and including termination of employment."[27]

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[20] Although cast in most contemporary accounts as an action issuing from the Governor's office, the executive action was not implemented in the form of an executive order of the Governor. *See* E-mail from Susan Lupton, Reference Librarian, State Law Library of Mont., to Tim McAllister, Research Specialist, Kirkland & Ellis LLP (Feb. 11, 2009, 03:29 EST) (on file with authors).

[21] *See In the Matter of the Adoption of Rules Pertaining to Nondiscrimination- Equal Employment Opportunity, the repeal ARM 2.21.1301 through 2.21.1307 and 2.21.1311 in the Sexual Harassment Prevention policy, and the repeal of ARM 2.21.8106 through 2.21.8109 in the Equal Opportunity Policy*, MONT. ADMIN. REG., Dec. 21, 2000, at 3515; *see also* Kathleen McLaughlin, *McGee Uses Trickery to Push Anti-Gays Bill*, BILLINGS GAZ., Mar. 21, 2001, *available at* http://bit.ly/JpkMA (last visited Sept. 6, 2009).

[22] MONT. ADMIN. R. 2.21.4002(b)(1) (2008) (emphasis added); *see also* MONT. ADMIN. R. 2.21.4005, 2.21.4006, 2.21.4012, and 2.21.4013 (2008).

[23] *Anti-Bias Directive Supported*, BILLINGS GAZ., May 9, 2001, *available at* http://bit.ly/7ES8w (last visited Sept. 6, 2009).

[24] H.B. 511, 57th Leg. Sess. (Mont. 2001).

[25] Mont. Exec. Order No. 41-2008 (emphasis added).

[26] *Id.*

[27] *Id.*

2. State Government Personnel Regulations

Many state agencies and state-affiliated entities have issued regulations and other policies prohibiting sexual orientation-based discrimination in the workplace. These regulations and guidelines are generally consistent with and appear to be modeled on the state personnel rules that were revised as of late 1999.[28]

The Montana Governor's office has issued guidance on the state of Montana's equal employment opportunity policies, which reminds all state employees and managers that the "State of Montana's policy is [that] . . . [h]arassment of employees, clients, customers, and any other person doing business with state government because of a person's . . . *sexual orientation* . . . is prohibited."[29] The state government has also issued an equal employment opportunity guide, which includes sexual orientation-based workplace discrimination as a category of sex-based discrimination. The guide contains a review of attempts to enact the Employment Non-Discrimination Act into federal law, and concludes that in the same spirit, the state of Montana's equal employment opportunity policy is premised on the view that "to continue to discriminate against a particular group of people with no reference to workplace skills and abilities is wrong."[30] The guide states the following about sexual orientation discrimination:

> Sexual orientation is emerging as a critical diversity issue in the workplace. As greater social acceptance of gays and lesbians emerges, greater numbers of employees are revealing their sexual orientation. Many advocacy groups have identified the workplace as one of the best avenues for a campaign to achieve tolerance and acceptance (IPMA conference). It must be understood that EEO and non-discrimination policies are designed as an issue of fairness. All employees deserve to be judged by their job performance, not their personal choices. Sexual orientation is just like any other protected group; it has no basis in employment decisions and is unlikely to justify discriminatory treatment by employers. Employment discrimination based on sexual orientation, whether such orientation is real or perceived, effectively denies qualified individuals equality and opportunity in the workplace. Those who experience this form of discrimination have no recourse under current federal law or under the constitution as the courts have interpreted it. Employment discrimination strikes at a fundamental value—the right of

[28] *See supra* Section II.C.1.

[29] GOV. BRIAN SCHWEITZER, A GUIDE FOR STATE OF MONTANA EMPLOYERS AND MANAGERS, HARASSMENT IS AGAINST THE LAW 3 (2009) *available at* http://bit.ly/4o84tU (emphasis added).

[30] STATE OF MONTANA NONDISCRIMINATION-EQUAL EMPLOYMENT OPPORTUNITY GUIDE 32 (Mont. State Pers.Div., Dep't of Admin. 2004) *available at* http://mt.gov/Statejobs/ReasonableAccommodationandEEO.asp (last visited Sept. 13, 2009).

> each individual to do his or her job and contribute to society, without facing unfair discrimination.[31]

The Montana Judicial Branch has issued a non-discrimination policy that declares that the Judicial Branch "[d]oes not discriminate in employment based upon . . . sexual orientation."[32] But the policy contains a caveat on jurisdiction to hear complaints based on sexual orientation, similar to that found in the Montana state personnel rules.[33] The policy provides that an individual who has been subjected to prohibited discrimination may contact the Judicial Branch's office of Human Resources, the Montana Human Rights Bureau or the U.S. Equal Employment Opportunity Commission ("EEOC").[34] But the policy notes that jurisdiction to hear certain complaints varies, as "[f]or example, neither the EEOC nor the Montana Human Rights Bureau can consider discrimination complaints based on sexual orientation."[35] As noted throughout this memorandum, state employees uniformly appear to have little legal recourse to enforce state agency non-discrimination policies if they are subjected to sexual-orientation based discrimination in violation of those same policies and regulations.[36]

The Montana Department of Corrections has issued a non-discrimination policy, effective for all Department divisions, facilities and programs, declaring that the Department of Corrections "is an equal employment opportunity employer" and "does not tolerate discrimination in employment or in provisions of services based on . . . *sexual orientation* . . . ."[37] As with the above, the available remedies for sexual orientation discrimination appear limited.

The Montana State Library Commission has issued a similar non-discrimination policy, stating that it is the policy of the Montana State Library Commission "to provide equal employment opportunity and the services of the agency to all persons regardless of *sexual orientation* . . . with the exception of special programs established by law."[38] As with the above, the available remedies for sexual orientation discrimination appear limited.

The University of Montana ("UM"), a publicly-funded state university with its primary campus in Missoula, has a non-discrimination/equal opportunity policy that provides that UM "is committed to a program of equal opportunity for education,

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[31] *Id*.
[32] MONT. JUD.BRANCH, PERS. POLICIES & PROC. (2002), Policy No. § 200, *available at* http://bit.ly/2oyIV.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *See supra* Section II.A.5.
[37] MONT. DEP'T OF CORR. POLICY DIRECTIVE (1996) Policy No. DOC 1.3.20 (Nondiscrimination and Sexual Harassment), *available at* http://bit.ly/utsbB (last visited Feb. 10, 2009) (emphasis added).
[38] Mont. State Library Comm'n Nondiscrimination Policy (2003), *available at* http://bit.ly/3rE0j (last visited Sept. 13, 2009) (emphasis added). Additional state agencies to issue substantially similar nondiscrimination policies include the Montana Chemical Dependency Center (*available at* http://bit.ly/PdtQT (last visited Sept. 13, 2009)), and the State Auditor's Office (*available at* http://bit.ly/P0hrV (last visited Sept. 13, 2009))

employment and participation in University activities without regard to . . . *sexual orientation*"[39] and that UM "will protect against retaliation any individual who participates in any way in any proceeding concerning alleged violations of laws, orders, or regulations requiring equal education and/or employment opportunity."[40]

Consistent with the UM policy, the UM School of Law further "expects each employer utilizing its facilities or assistance for interview/hiring functions to abide by the principles of equal opportunity."[41]

Montana State University ("MSU"), a publicly-funded state university with its primary campus in Billings, has a similar non-discrimination/equal opportunity policy. Pursuant to this policy, MSU states that it "does not discriminate on the basis of . . . *sexual preference* . . . in admission, access to, or conduct of its education programs and activities nor in its employment policies and practices," and that MSU provides "an academic and work environment" free from discrimination and harassment based on "*sexual orientation or preference*."[42] MSU affords any student, employee, applicant for employment or admission, participant in University activities, or other person who believes he or she was discriminated against by the University the right to file a grievance.[43] As a condition of their employment and enrollment, employees and students of MSU are expected to cooperate with investigations of complaints of discrimination, or else face disciplinary action.[44]

After former Governor Marc Racicot changed the Montana state government's personnel rules to prohibit discrimination in state employment based on sexual orientation, the state of Montana's internal personnel rules were officially amended in conformance with this action.[45] The Montana Department of Administration's regulations now provide that:

> [t]he state of Montana is an equal employment opportunity employer and prohibits discrimination based on …*sexual orientation* … unless based on a bona fide occupational qualification (BFOQ). The state of Montana's prohibition

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[39] *See* Univ. of Mont., Equal Opportunity & Affirmative Action Office, http://www.umt.edu/president/eeo (last visited Sept. 13, 2009) (emphasis added).

[40] *See* UNIVERSITY OF MONT., HUM. RESOURCE SERV., PERS. POLICIES & PROC. (2002) Non-Discrimination/Equal Opportunity Policy No. 406.4, *available at* http://bit.ly/AmttM (last visited Sept. 6, 2009).

[41] *See* Univ. of Mont. L. Sch. Career Serv., Equal Opportunity Statement, http://bit.ly/phfjM (last visited Sept. 13, 2009).

[42] *See* MONT. STATE UNIV., POLICY & PROCEDURES (2002), Nondiscrimination Policy & Proc. 200.00 Policy *available at* http://bit.ly/4yhxvE (last visited Sept. 13, 2009) (emphasis added).

[43] *Id.*

[44] *Id*.

[45] *See* MONT. ADMIN. R. 2.21.4005(1) (2007); *see also* MONT. ADMIN. R. 2.21.4002(1)(b) (2007) (setting forth the policy of the state of Montana that state government "does not discriminate in employment based upon . . . sexual orientation"); *see also* MONT. ADMIN. R. 2.21.3702(1)(a) (2007) (setting forth policy of the state of Montana to recruit and select employment on the basis of merit and qualifications and without regard to impermissible characteristics, including sexual orientation).

> of discrimination includes discrimination in hiring, firing, promotions, compensation, job assignments and other terms, conditions or privileges of employment.[46]

The administrative rules provide that an employee or applicant for employment with the state who believes he or she has suffered prohibited discrimination based on any of the enumerated factors may contact the relevant department EEO officer or the EEOC.[47] Nonetheless, the regulations caveat:

> Jurisdiction to address any one of the above types of discrimination complaints varies. For example, neither the EEOC nor the Montana human rights bureau considers discrimination complaints based on sexual orientation.[48]

It thus appears that state employees who have been subjected to sexual orientation-based discrimination in violation of the state's personnel regulations would have no legal recourse, but would rather be limited in remedies to pursuing any available human resources grievances with their department's EEO officer.

To implement its non-discrimination policy, UM has instituted a grievance procedure for employees, students, and applicants for employment or admission who claim to have been unlawfully discriminated against because of any UM regulation, policy, practice, or official action of any University employee in violation of this policy. Comprised of both an "informal" and a "formal" procedure for initiating a complaint, the UM discrimination grievance procedure provides that information about the complaint and witness statements are kept confidential, with the final report and conclusions disclosed only to the complainant, respondant, and UM officials as necessary.[49]

3. **Attorney General Opinions**

None.[50]

D. **Local Legislation**

No local government in Montana has issued legislation prohibiting employment discrimination based on sexual orientation or gender identity.[51] However, certain local governments have incorporated such a policy into their internal personnel rules.

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[46] MONT. ADMIN. R. 2.21.4005(1) (emphasis added).
[47] MONT. ADMIN. R. 2.21.4005(2) (2007).
[48] *Id.*
[49] *See* UNIV. OF MONT., HUM. RESOURCE SERV., PERS. POLICIES & PROCEDURES (2002), Discrimination Grievance Procedure, *available at* http://bit.ly/2G4tir (last visited Sept. 13, 2009).
[50] *See* Archive of Mont. Dep't of Justice, Att'y Gen. Opinions & Letters of Advice, http://www.doj.mt.gov/resources/opinions.asp (last visited Sept. 13, 2009).
[51] Jennifer McKee, *Human Rights Network Takes on Cause of Gays*, BILLINGS GAZ., Mar. 29, 2008 ("Next year, [Linda Gryczan, of the Montana Human Rights Network] said, she hopes at least one Montana city will outlaw discrimination based on sexual orientation or identity within that city."), *available at*

1. **County of Missoula**

Missoula County's personnel regulations provide that the county "will not refuse employment or discriminate in compensation, benefits, or the other terms, conditions, and privileges of employment based upon . . . *sexual orientation*."[52] A county employee who is subjected to discrimination based on protected characteristics is directed by the county policy to contact the Missoula County Human Resources Department or the Montana Human Rights Commission (as applicable).[53] To the extent any county employees may have filed grievances on the basis of sexual orientation discrimination, the complaints are not publicly available.

E. **Occupational Licensing Requirements**

Many Montana professional commissioning boards may deny and revoke occupational licenses for issues involving "moral turpitude" after providing the subject a fair hearing.[54] Legislation which was introduced, but died, in the 2009 session of the Montana Legislature would have amended Montana law to prohibit discrimination based on "gender identity or expression" or "sexual orientation" in licensing by state and local government agencies.

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http://bit.ly/1qX2qx (last visited Sept. 6, 2009); *see also* E-mail from Travis McAdam, Interim Director, Montana Human Rights Network, to Michael A. Woods, Kirkland & Ellis LLP (Jan. 26, 2009, 05:26 EST) (on file with author).

[52] MISSOULA COUNTY PERS. POLICIES (2007) 301.00, *available at* http://bit.ly/phUep (last visited Sept. 13, 2009) (emphasis added).

[53] *Id.*

[54] *See, e.g.*, MONT. ADMIN. R. § 24.156.1307(1) (forms of unprofessional conduct for licensing of nutritionists), and *id.* § 24.156.1005(1) (forms of unprofessional conduct for licensing of podiatrists) (2007). Most of these statutes require a criminal conviction involving "moral turpitude" or include definitions of "moral turpitude" that could not be reasonably interpreted to include sexual orientation or gender identity. *See, e.g.*, MONT. CODE ANN. § 20-4-110(e) (2007) (issuance of reprimand or suspension, revocation or denial of teacher's certificate for "conviction of, entry of a guilty verdict, a plea of guilty, or a plea of no contest to a criminal offense involving moral turpitude").

III. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Montana's "deviate sexual conduct" law was struck down by the Montana Supreme Court in 1997.[55] In *Gryczan v. State*, the court held that the law unconstitutionally infringed on the fundamental right to privacy expressly guaranteed by the Montana Constitution.[56] In at least one Montana Senate hearing, however, one private individual relied on the existence of the law as a reason to oppose the enactment of a state-wide law prohibiting employment discrimination based on sexual orientation.[57]

Despite the Montana Supreme Court's ruling, the law remains part of the Montana Code, in part due to opposition from political conservatives. For example, when legislation was introduced in the 2001 legislative session to remove it from the Montana statutes,[58] certain lawmakers opposed the effort, with state representative Verdell Jackson of Kalispell going so far as to offer that the law "protects me from propositions on the street."[59]

In 1995, the Montana Legislature considered a bill that sought to add "deviate sexual conduct," including homosexual sodomy and fellatio, to a measure requiring lifetime state registration of violent criminals.[60] Under the bill (which was introduced prior to the Montana Supreme Court's decision in *Gryczan*), individuals convicted of homosexual acts would have had to register with the local police or sheriff anywhere in the state where they planned to reside for over 14 days.[61] However, after a national

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[55] *See* Gryczan v. State, 942 P.2d 112 (Mont. 1997).

[56] *Id.* at 125-26 ("The right of consenting adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy; and, absent an interest more compelling than a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals, state regulation, much less criminalization, of this most intimate social relationship will not withstand constitutional scrutiny.").

[57] *See* Kathleen McLaughlin, *Senators Discuss Bill Barring Discrimination*, BILLINGS GAZ., Jan. 26, 2001 (noting testimony before the Montana Senate Judiciary Committee arguing that the proposed bill "would protect the employment of anyone who engaged in deviate sex"), *available at* http://bit.ly/uBNnq (last visited Sept. 6, 2009).

[58] H.B. 323, 57th Leg. Sess. (Mont. 2001). What appears to be the most recent bill that would have removed the statutory provision also failed to secure passage. *See* H.B. 294, 58th Leg. Sess. (Mont. 2003).

[59] *Out in Montana: After a Winter of Fear and Defeat, Advocates Renew Their Fights for Same-Sex Rights*, MISSOULA INDEP., June 7, 2001.

[60] *See* David W. Dunlap, *Montana Cuts Homosexual Acts from List of Registered Crimes*, N.Y. TIMES, Mar. 24, 1995.

[61] *See id.*

media uproar, the Montana Senate voted unanimously to amend the bill to remove homosexual acts from its scope.[62]

B. Housing and Public Accommodations Discrimination

Legislation to prohibit housing and public accommodations discrimination on "gender identity or expression" or "sexual orientation" was introduced, but died, in the 2009 session of the Montana Legislature.

C. Hate Crimes

Montana's "malicious intimidation or harassment" law does not extend to attacks or harassment motivated by a victim's sexual orientation or gender identity. Several bills have been introduced in the Montana legislature in recent sessions seeking to add "sexual orientation" to the enumerated classes of "biased-based" offenses.[63] None of these legislative attempts have been successful. The bill introduced by state senator Carol Juneau in the current legislative session, which would expand Montana's hate crimes law to cover both "sexual orientation" and "gender expression," was recently tabled before the Montana Senate Judiciary Committee on a 7-5 vote.[64] Although backers continued to support the bill,[65] it has now missed the deadline for transmittal to the state senate floor and appears dead.

D. Education

There have been small gains at the local level in education policy. The Bozeman School Board voted last year to update its discrimination policy to protect gay and lesbian students by adding "sexual orientation" to its scope.[66] The new policy provides that the school district "will make equal educational opportunities available for all students without regard to race, creed, religion, gender, *sexual orientation*, marital status, color, age, physical, or mental disability, national origin, or political beliefs."[67] Trustee Carson Taylor argued for adding "sexual orientation" to the list to protect gay and lesbian students because the "School Board's long-range strategic plan calls for teaching Bozeman students to be accepting, and the board should lead by setting an example."[68] Chairman Gary Lusin was the only member of the Bozeman School Board to vote against the proposal, based on his belief that gay and lesbian students were already sufficiently protected, and that to offer additional protections would purportedly send a message that

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[62] *Id.*

[63] S.B. 454, 60th Leg. Sess. (Mont. 2007); S.B. 202, 59th Leg. Sess. (Mont. 2005); S.B. 66, 56th Leg. Sess. (Mont. 1999).

[64] S.B. 223, 61st Leg. Sess. (Mont. 2009); *see also* Michael A. Jones, *Montana and Florida to Take Up LGBT Rights Measures*, CHANGE, Jan. 18, 2009, http://bit.ly/UihZy.

[65] *See* Press Release, Montana Human Rights Network, Committee Votes "NO" on Hate Crimes Protections and Restorative Justice (Jan. 29, 2009).

[66] *School Board Updates Policy to Protect Gays, AP Alert - Montana,* A.P., Oct. 14, 2008.

[67] *See* Gail Schontzler, *School Board Votes to Protect Gay Students from Discrimination,* BOZEMAN DAILY CHRON., Oct. 14, 2008, *available at* http://bit.ly/8FT51 (emphasis added).

[68] *Id.*

"[y]ou're different."[69] The school system superintendent, Kirk Miller, also opposed adding sexual orientation to the policy, expressing that sexual orientation bullying and discrimination was supposedly not a problem in the schools and speculating that if this protection was added, then "[w]here does the list stop?"[70] However, student president Cody Combs testified to the School Board that anti-gay intimidation and insults were commonplace, such that "[t]o be called gay now in high school is a huge fear."[71]

Apart from this local initiative, legislation which was introduced, but died, in the 2009 session of the Montana Legislature would have also extended the scope of existing state law to prohibit discrimination based on "gender identity or expression" or "sexual orientation" by any educational institution in the state.[72]

E. **Health Care**

Montana law does not permit a same-sex partner to make decisions for his or her incapacitated partner.[73] But Montana law does permit a same-sex adult partner to execute a written declaration giving his or her partner authority to make certain medical decisions in the event of incapacitation.[74]

The Montana Chemical Dependency Center (the "Center"), a state operated in-patient chemical dependency and co-occurring disorders treatment facility, has issued an Organizational Code of Ethics, stating that Center employees "will honor and respect all racial, sexual, ethnic, cultural and religious differences and refrain from any and all acts of harassment or slurs related to race, sexual orientation, religion, ethnicity, cultural diversity, or position within the organization by treating others with courtesy and respect."[75] Under this Code of Ethics, the professionals employed by the Center are obligated to perform and fulfill their duties consistent with the principles, values, and obligations established in this and other applicable professional codes of ethics and are subject to sanctions for violations of the same.

The Montana State Hospital has issued a similar Code of Ethics for its employees, stating that its employees "will honor and respect all racial, sexual, ethnic, cultural and religious differences and refrain from any and all acts of harassment or slurs related to race, *sexual orientation*, religion, ethnicity, cultural diversity or position within the organization by treating others with courtesy and respect."[76] Under this Code of Ethics,

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[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See supra* Section II.B.
[73] MONT. CODE. ANN. § 50-9-106 (2007). The authority to make such decisions is vested in the following order of priority: the spouse, an adult child (or the majority of the adult children reasonably available), the parents, an adult sibling (or the majority of the adult siblings reasonably available), or the nearest other adult relative who is reasonably available, of the incapacitated individual. *Id.*
[74] MONT. CODE. ANN. § 50-9-103 (2007).
[75] *See* MONT. CHEMICAL DEPENDENCY CENTER, ORG. CODE OF ETHICS (2004), *available at* http://bit.ly/TYvSG (last visited Sept. 13, 2009) (emphasis added).
[76] *See* Mont. State Hospital, Policy & Proc. Code of Ethics for Employees of MSH (2006) Policy No. HR-05, *available at* http://bit.ly/16b2ar (last visited Sept. 13, 2009) (emphasis added).

the professionals employed by the Montana State Hospital are obligated to perform and fulfill their duties consistent with the principles, values, and obligations established in this and other applicable professional codes of ethics and are subject to sanctions for violations of the same.

F. **Gender Identity**

The Montana Department of Public Health and Human Services previously had issued regulations which provided that a transsexual individual born in Montana could amend his or her birth certificate "if the department receives a certified copy of the order of a court of competent jurisdiction indicating that the sex of [the] individual born in Montana has been changed by surgical procedure."[77] However, this regulatory provision was recently repealed.[78] It is unclear whether this action was taken due to political or other reasons. A new provision has been promulgated in its place that permits the amendment of filed birth certificates upon request or court order, if accompanied "by an order from a court with appropriate jurisdiction."[79] But the new regulation does not explicitly provide, as did the former, that an individual who undergoes sex reassignment surgery may obtain an amendment of his or her birth certificate, and it is unclear whether the new regulation makes it more difficult to obtain one.

The Montana Department of Motor Vehicles ("MTDMV") permits a licensed driver to change the individual's gender on his or her driver's license.[80] Under MTDMV policy, "[a]ny individual who presents a letter from their physician stating that they are in the process of a gender change may have a driver license issued with the proposed gender change (it will not be necessary for the individual to present a statement showing the process is completed)."[81] The policy apparently does require follow-up documentation for license renewal "to see that transition has been completed."[82]

H. **Parenting**

In one 1993 case, the Montana Supreme Court reversed a trial court judge's order awarding sole custody to the mother and restricting the father to supervised visitation, which was based on the judge's findings that the father was a cross-dresser and this behavior would irreparably harm his son.[83] The Montana Supreme Court found that "there was no competent evidence to support the District Court's findings which formed

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[77] MONT. ADMIN. R. 37.8.106(6) (2006); *see also* MONT. CODE ANN. § 50-15-204(2) ("The department or its designee may amend a birth, death, or fetal death certificate upon submitting proof as required by the department.").

[78] *See* MONT. ADMIN. R. 37.8.106(6) (2007) (noting repeal, effective Jan. 1, 2008).

[79] *See* MONT. ADMIN. R. 37.8.106(1) and (3) (2007).

[80] *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 826 n.420 (2008).

[81] *Id.* (quoting Letter enclosure from Patrick McJannet, Program Supervisor, Mont. DOJ/MVD Field Operation Bureau, to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Aug. 9, 2004) (*citing* MONT. DEP'T OF MOTOR VEHICLES, POLICY (2004) 300.6.1 (Gender Change))).

[82] *Id.* (*quoting* Enclosure Regarding Mont. Dep't of Motor Vehicles, Policy 600.6.2.1 (2004)).

[83] *See* In re D.F.D., 862 P.2d 368, 371-72 (Mont. 1993).

the basis for its denial of joint custody."[84] The Montana Supreme Court also found that, contrary to the trial judge's findings, the evidence showed that the father had sought counseling and no longer engaged in cross-dressing.[85] However, the Montana Supreme Court still concluded that "even assuming that, contrary to the counselor's expectation, the husband did cross-dress, and further assuming, contrary to all prior behavior, his cross-dressing was observed by his son, every counselor who testified in this case testified that the negative impact on the son would be less than the impact from not having a normal relationship with his father."[86]

In what appears to be Montana's first reported same-sex custody case,[87] Missoula District Court Judge Ed McLean in 2008 awarded parental rights over two children to their adoptive mother's (Barbara Maniaci) former female partner, Michelle Kulstad.[88] The central issue in the case was whether the women's live-in relationship, which lasted from about 1995 to 2006, allowed a parental relationship to form between Ms. Kulstad and the children adopted by Ms. Maniaci such that it would be in the best interest of the children to allow that relationship to continue.

The court chronicled the partnership the women had established, which included long-term domestic and financial commitments to each other and in which they held themselves out as "partners."[89] The court found that with the exception of two breaks in contact, "Ms. Kulstad has resided with the children, and functioned as a parent to them, on a day-to-day basis for the same length of time as has Ms. Maniaci."[90] Further, the court found that "[s]ignificant evidence" supported that the children regard Ms. Kulstad as their parent, and that based on expert testimony, the children would suffer significant psychological harm with long-term consequences if the children were not allowed to continue their relationship with Ms. Kulstad.[91] Not only had Ms. Maniaci engaged in conduct contrary to an exclusive child-parent relationship with the children, according to the court, but Ms. Kulstad had "established a child-parent relationship" and was their de facto parent.[92] The court thus found that it was in the best interest of the children to continue that relationship, and entered an order awarding joint custody to Ms. Kulstad under a "Positive Alternative for Children Team" plan, which would be supervised by the children's guardian ad litem for one year prior to an order on a final parenting plan.[93]

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[84] *Id.* at 371.
[85] *Id.* at 375-76.
[86] *Id.* at 376.
[87] *See* Tristan Scott, *Court: Same-Sex Parent has Custody Rights*, MISSOULIAN, Oct. 30, 2008, *available at* http://bit.ly/W3a48 (last visited Sept. 6, 2009).
[88] *See* Kulstad v. Maniaci, No. DR-07-34 (Mont. Dist. Ct. Sept. 29, 2008).
[89] *Kulstad*, slip op. at 2-3.
[90] *Id.* at 8.
[91] *Id.* at 8-16; *see also id.* at 29 ("Indeed, the evidence shows that rupture of the children's relationship with Ms. Kulstad would be not only contrary to their best interests, but severely detrimental to their well being.").
[92] *Id.*
[93] *Id.* at 37-38.

Ms. Maniaci has since appealed the decision to the Montana Supreme Court.[94]

In addition to married couples jointly, or singly if the other spouse is the parent of the child, Montana law permits "an unmarried individual who is at least 18 years of age" who otherwise meets the requirements for adoption proceedings to be eligible to adopt a child.[95] In issuing an adoption decree, the Montana courts must "consider all relevant factors in determining the best interests of the child."[96] Although there are no specific statutory prohibitions on homosexuals or real or perceived gender nonconforming individuals with regard to adoption, it remains unclear as to whether a court would deem such a person "unfit" or "incompetent" to be a parent. It similarly remains unclear whether the state would permit a same-sex couple to jointly petition to adopt. It also remains unclear whether Montana would permit a same-sex partner of a biological parent to petition to adopt the partner's child.

I. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The Montana Code prohibits "a marriage between persons of the same sex."[97] Additionally, in 2004, the Montana electorate approved Constitutional Initiative 96. The Montana Constitution now provides that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state."[98]

2. Benefits

In *Snetsinger v. Montana University System*, the Montana Supreme Court ruled in favor of a challenge brought by gay employees of the Montana University System, Carol Snetsinger and Carla Grayson, to a policy which denied them dependent insurance coverage for their same-sex domestic partners (Nancy Siegel and Adrianne Neff, respectively).[99] The employees argued that the policy, under its definition of "dependent," impermissibly discriminated against them on the basis of their sex, sexual orientation, and marital status in violation of their rights to equal protection and dignity (as well as other rights) under the Montana Constitution.[100] Although the University System's group health insurance plan excluded same-sex domestic partners under its definition of "dependent," it did permit an employee to enroll not only children or

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[94] *Maniaci Appeals Custody Ruling*, MISSOULA INDEP., Oct. 9, 2008. *See Lesbian Parent Case Heads to Montana Supreme Court*, 365GAY, Oct. 4, 2008, http://bit.ly/DYqkZ (last visited Sept. 6, 2009). Although Ms. Maniaci's attorney told the press that he questioned why the judge made sexual orientation an issue in his ruling, *see id.*, the court's decision reveals that the parties put on opposing experts who testified as to the effects of parental sexual orientation on the development of children. *See Kulstad*, slip op. at 14-17.

[95] MONT. STAT. ANN. § 42-1-106 (2007).

[96] MONT. STAT. ANN. § 42-5-107(1) (2007).

[97] MONT. CODE ANN. § 40-1-401(d) (2007).

[98] MONT. CONST. Art. XIII, § 7.

[99] 104 P.3d 445 (Mont. 2004).

[100] *Id.* at 448.

spouses, but also an opposite-sex "common-law spouse" upon the filing of an affidavit of common-law marriage.[101]

The Montana Supreme Court analyzed the University System policy under the equal protection clause of the Montana Constitution.[102] It concluded that "the policy [was] inherently flawed" because it permitted unmarried opposite-sex couples, "who may only have a fleeting relationship," to obtain health insurance benefits through an affidavit process.[103] Because unmarried opposite-sex couples could avail themselves of the affidavit process to obtain benefits whereas similarly-situated unmarried same-sex couples could not, the Montana Supreme Court found that no legitimate basis existed for treating the two groups differently, in violation of equal protection.[104]

Four days after the lawsuit was initially filed, on February 8, 2002, an unknown person committed an arson at the home of plaintiffs Carla Grayson and Adrianne Neff, while the couple and their toddler child were at home asleep.[105] The arson incident spurred the Missoula City Council to begin exploring the possibility of offering health benefits to domestic partners of city employees.[106] The County of Missoula preceded the City in amending its health plan on the same basis, which became the subject of a lawsuit by conservative activists that was also rejected by the Montana Supreme Court.[107] In the wake of the Montana Supreme Court's rulings, the City of Missoula finally approved changes to its health plan to permit employees to obtain health benefits for their same-sex partners by filing an affidavit as to their relationship status and meeting other requirements.[108]

J. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

1. Judicial Code

In 2008, the Montana Supreme Court adopted a new Montana Code of Judicial Conduct (the "Judicial Code"), which provides as follows:

> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon . . . *sexual orientation* and shall

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101 *Id.*

102 *Id.* at 449.

103 *Id.* at 451. The Court noted that such persons "may choose not to marry at all, but rather may choose to sign a document in order to receive employment benefits." *Id.*

104 *Id.* at 451-52 ("These two groups, although similarly situated in all respects other than sexual orientation, are not treated equally and fairly.").

105 *Wedding Bills: The Ledge Debates the Same-Sex Marriage Question*, MISSOULA INDEP., Feb. 6, 2003.

106 *Id.*

107 *See* Jones v. County of Missoula, 127 P.3d 406, 413 (Mont. 2006) (rejecting challenge asserting that Missoula County had not given plaintiffs proper notice of its vote to offer domestic partner health insurance benefits to county employees).

108 *See* MISSOULA CITY COUNCIL ADMIN. & FINANCE COMM. REPORT (2005).

> not permit court staff, court officials, or others subject to the judge's direction and control to do so.
>
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited . . . *sexual orientation* . . . against parties, witnesses, lawyers or others.[109]

These restrictions "do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding."[110]

With respect to the conduct of state judges, the Judicial Code also notes that a judge may engage in extrajudicial activities, except as prohibited by law or the Judicial Code. However, when engaging in extrajudicial activities, a judge may not "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."[111] The comments to the rule note:

> Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon … sexual orientation…. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination.[112]

The Judicial Code further provides that "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of . . . *sexual orientation* and a judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on more or more of the [above] bases."[113] But the Judicial Code also states that "[a] judge's

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[109] MONT. CODE OF JUD. CONDUCT, R. 2.3(A)(C) (2008), adopted by the Montana Supreme Court in *In re 2008 Montana Code of Judicial Conduct*, No. AF 08-0203 (Mont. Dec. 12, 2008) (hereinafter No. AF 08-0203), *available at* http://bit.ly/yl0yy (last visited Sept. 6, 2009) (emphasis added).

[110] *Id.* R. 2.3(D). Comment 3 to Rule 2.3 of the Judicial Code defines harassment as "verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status or political affiliation."

[111] *Id.* R. 3.1(C).

[112] *Id.* R. 3.1(C) cmt. 3 (emphasis added).

[113] *Id.* R. 3.6(A) through (B) (emphasis added). According to Comment 2 to Rule 3.6 of the Judicial Code:

> [a]n organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or

membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of [Rule 3.6]."[114]

2. Addiction Counselors

Professional codes applicable to licensed addiction counselors in Montana define acts of "sexual misconduct" as unprofessional conduct.[115] Given the status of Montana's "deviate sexual acts" law, the impact on licensing of individuals who are gay, lesbian, or transgendered is unclear. Nonetheless, the very same code of conduct also deems it unprofessional conduct to "discriminate[e] against or refus[e] professional services to anyone on the basis of . . . sexual orientation."[116]

3. Montana Department of Corrections

The Montana Department of Corrections has issued a similar policy, stating that "[n]o facility may discriminate against any youth based on . . . *sexual orientation*."[117]

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sexual orientation persons who would otherwise be eligible for admission. *Id.* R. 3.6 cmt. 2.

[114] *Id.* at R. 3.6(C).

[115] MONT. ADMIN. R. 8.11.120(2) (2007).

[116] MONT. ADMIN. R. 8.11.120(15) (2007).

[117] MONT. ADMIN. R. 20.9.620(4) (2007) (emphasis added).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Nebraska – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Attempts to pass a law in Nebraska prohibiting employment discrimination based on sexual orientation have failed for the last fourteen years.[1] As a result, in 1996, the Nebraska Attorney General opined that the Nebraska Equal Opportunity Commission (NEOC) does not have jurisdiction to consider any claim based on sexual orientation discrimination.

Most recently, a bill introduced in January 2007, which would have prohibited employers (including the State of Nebraska) from discriminating based on sexual orientation, was debated briefly and then postponed indefinitely. Former state Senator Ernie Chambers, who had introduced the bill, characterized the debate over the bill as "unsatisfactory, even silly."[2] Opponents of the bill questioned whether it would protect pedophiles or transvestites who want to be teachers, said it was not needed based on their false belief that gay households have higher incomes, and argued that the bill was unnecessary as long as people "keep private what goes on in their bedrooms."[3] A state senator opposing the bill said, "I don't think we should unleash such things on the unsuspecting public. . . . We're talking here about values. We're talking here about behavior. We're talking here about ethics."[4]

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Nebraska include:

- An openly gay and HIV positive man who was recently terminated from his position as a volunteer firefighter when a city employee learned of his HIV status and sexual orientation. He was eventually reinstated after ACLU Nebraska

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[1] *See, e.g.*, Neb. Leg. 759, 99th Leg., 1st Reg. Sess. (2005); Neb. Leg. 19, 97th Leg., 1st Reg. Sess. (2001); Neb. Leg. 869, 95th Leg., 2d Reg. Sess. (1997); Neb. Leg. 395, 93d Leg., 1st Reg. Sess. (1993); *see also* Arthur S. Leonard, *Other Legislative Notes*, LESBIAN & GAY L. NOTES *108 (*June 2007), *available at* http://old.nyls.edu/pdfs/ln0706.pdf; Martha Stoddard, *Gay Discrimination Ban Again Fails To Become Nebraska Law*, OMAHA WORLD-HERALD, May 23, 2007, *availbale at* http://www.omaha.com/index.php?u_page=2798&u_sid =238883.

[2] JoAnne Young, *Senators Shoot Down Bill To Protect Gays*, LINCOLN J. STAR, May 22, 2007, *available at* http://www.journalstar.com/articles/2007/05/23/news/politics/doc46537b7ef3703942207604.txt.

[3] Stoddard, *supra* note 1.

[4] *Id.*

contacted the city.[5] The firefighter later decided to run for office in city government and won.[6]

- An academic advisor who in 2002 sued Metropolitan Community College ("Metro"), alleging that he had suffered harassment because he was gay. [7] According to the advisor, he began to receive anonymous harassing correspondence after he attended a staff meeting during which he came out to other staff members. He reported the situation to his supervisors, who responded by investigating his claims and disciplining a specific employee who had made fun of him. Nonetheless, the harassment continued, so the advisor resigned. He filed suit, claiming that Metro violated his substantive due process rights, since no state law prohibited sexual orientation discrimination. The court granted summary judgment to Metro, finding that the harassment did not "shock the conscience" as would be required for a substantive due process violation and that Metro had done enough to address it.[8]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[5] *See* ACLU Nebraska Legal Program, GLBT Rights, http://www.aclunebraska.org/glbt.htm (last visited Sept. 4, 2009).
[6] *See id.*
[7] *Cracolice v. Metropolitan Community College*, No. 8:01CV3240, 2002 WL 31548706 (D. Neb. Nov. 15, 2002).
[8] *Id.* at 4.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Nebraska has not enacted laws to prohibit sexual orientation and gender identity employment discrimination. Nebraska statutes do prohibit employment discrimination based only on race, color, religion, sex, disability, marital status, national origin, or age.[9] As a result, the NEOC, which has the power and duty to "receive, investigate, and pass upon charges of unlawful employment practices anywhere in the state,"[10] does not recognize sexual orientation as a basis for filing a complaint.[11]

B. Attempts to Enact State Legislation

Attempts to pass a law in Nebraska prohibiting employment discrimination based on sexual orientation have been ongoing for more than fourteen years, since former state Senator Tim Hall introduced the first such bill in 1993.[12] Most recently, former state Senator Ernie Chambers introduced L.B. 475 on January 17, 2007, which proposed to (i) prohibit employers (including the State of Nebraska, governmental agencies, and political subdivisions), employment agencies, and labor organizations from discriminating based on sexual orientation and (ii) authorize all cities and villages within Nebraska to enact ordinances prohibiting discrimination based on sexual orientation.[13] L.B. 475 never became law because a motion to indefinitely postpone the bill, offered by former state Senator Phil Erdman, passed on May 22, 2007 by a 24-15 vote.[14]

Former state Senator Chambers characterized the debate over L.B. 475 as "unsatisfactory, even silly," saying that high school students have more intellectual conversations.[15] State Senator Tony Fulton, an opponent of L.B. 475, questioned whether the bill would protect pedophiles or transvestites who want to be teachers.[16] He also stated that job discrimination is not a problem for homosexuals as demonstrated by studies showing that gay households have higher average incomes.[17] Another opponent of L.B. 475, state Senator Tom Carlson, argued that the bill was unnecessary as long as people "keep private what goes on in their bedrooms."[18] State Senator Carlson was quoted as saying, "I don't think we should unleash such things on the unsuspecting

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[9] *See* Age Discrim. in Employ. Act, NEB. REV. STAT. §§ 48-1001-10; Neb. Fair Employ. Practice Act, NEB. REV. STAT. §§ 48-1101-26; Equal Pay Act, NEB. REV. STAT. §§ 48-1210-27.01.
[10] NEB. REV. STAT. § 48-1117.
[11] *See* Nebraska Equal Opportunity Commission FAQ No.16, http://www.neoc.ne.gov/ faq/faq.htm (last visited Sept. 4, 2009).
[12] *See* sources cited *supra* note 1.
[13] Neb. Leg. 475, 100th Leg., 1st Reg. Sess. (2007).
[14] *See* Neb. Leg. 100-85, 1st Reg. Sess., at 22 (2007).
[15] Young, *supra* note 2.
[16] Stoddard, *supra* note 1.
[17] *Id.*
[18] *Id.*

public. . . . We're talking here about values. We're talking here about behavior. We're talking here about ethics."[19]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

In general, personnel regulations for state/local government employees prohibit state agencies from employment discrimination, and prohibit state employees from workplace harassment, based only on race, color, religion, national origin, age, sex, marital status, or physical or mental disability.[20] However, the personnel rules for the Nebraska Department of Education, and the workplace policies for the Nebraska Commission for the Blind and Visually Impaired, also prohibit harassment based on sexual orientation.[21] Moreover, the University of Nebraska-Lincoln has adopted a non-discrimination policy, which provides that "educational programs, support services and workplace behavior, including decisions regarding hiring, promotion, discipline, termination and all other terms and conditions of employment, should be made without discrimination on the basis of . . . sexual orientation."[22]

3. Attorney General Opinions

In 1996 the Nebraska Attorney General issued Opinion No. 96042, concluding that the NEOC should prescreen complaints to determine which complaints the commission lacks subject matter jurisdiction to investigate.[23] The opinion specifically provides that the NEOC would not have jurisdiction to investigate a claim of discrimination based on sexual orientation because sexual orientation is not protected by the Nebraska Fair Employment Practice Act.[24] A few months later, the Nebraska Attorney General issued Opinion No. 96044 regarding same-sex harassment, which included a statement that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination against a homosexual employee.[25]

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[19] *Id.*

[20] *See* 273 NEB. ADMIN. CODE §§ 4-001, 14-003.16; DEP'T OF ADMIN. SERV., HUMAN RES. POLICIES AND PROC. MANUAL 4, 7 (2002), *available at* http://www.das.state.ne.us/personnel/hrcentral/policymanual/P&P SectionII.pdf (last visited Jan 23, 2009).

[21] 93 NEB. ADMIN. CODE §§ 13-001.15 to .16; 192 Neb. Admin. Code §§ 4-005.01.

[22] UNIV. OF NEB.-LINCOLN, POLICY AND PROCEDURES ON UNLAWFUL DISCRIMIN., http://bf.unl.edu/hrpolicy/OtherPolicies.shtml (last visited Feb. 10, 2009).

[23] Neb. Op. Att'y Gen. 96042 (1996), 1996 WL 263228.

[24] *Id.* at 1.

[25] Neb. Op. Att'y Gen. 96044 (1996), 1996 WL 283722.

D. Local Legislation

None.

E. Occupational Licensing Requirements

A comprehensive search of internet sources did not uncover any occupational licensing requirements that expressly reference sexual orientation or gender identity; however, several licenses subject the applicant or license holder to morality-type requirements. Certificates and permits to teach, provide special services, and administer in schools may be based upon "moral, mental, and physical fitness for teaching, all in accordance with sound educational practices"; moreover, the school board may determine that a certificated employee's contract shall be amended or terminated based on "immorality."[26] A health professional's credentials may be denied or refused renewal based on "immoral or dishonorable conduct evidencing unfitness to practice the profession."[27] Finally, licenses for attorneys, nursing home administrators, and employment agency operators all require the holder to have "good moral character."[28]

[26] NEB. REV. STAT. §§ 79-808, -824, -827, -829.
[27] *Id.* § 38-178.
[28] *Id.* §§ 7-102, 38-2419, 48-503.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Cracolice v. Metropolitan Community College,2002 WL 31548706 (D. Neb. Nov. 15, 2002).

In *Cracolice v. Metropolitan Community College*,[29] Gregory Cracolice, an academic advisor, sued Metropolitan Community College ("Metro"), alleging that he had suffered harassment and had been denied a promotion because he is gay. According to Cracolice, he began to receive anonymous harassing correspondence after he attended a staff meeting during which he and other staff members announced their sexual orientation. Cracolice reported the situation to his supervisors, who responded by investigating Cracolice's claims, having his mail box watched, reminding employees how to treat each other, and disciplining a specific employee who made fun of Cracolice. Nonetheless, the harassment continued, so Cracolice resigned. Cracolice also asserted that Metro failed to fulfill its promise to promote him to one of three coordinator positions (out of over one hundred applicants, Cracolice made the top fifteen but was ultimately not selected). Cracolice claimed that Metro violated his substantive due process rights (no claim under Title VII and no claim to the Nebraska Equal Opportunity Commission was made in this case). The court granted summary judgment to Metro, finding that Metro essentially did all it could to address the harassment, conduct which did not "shock the conscience" as would be required for a substantive due process violation; moreover, Cracolice offered no evidence that he was guaranteed a coordinator position.[30]

2. Private Employees

Miller v. Kellogg USA, Inc., 2006 WL 1314330 (D. Neb. May 11, 2006).

Miller v. Kellogg USA, Inc.,[31] a case involving claims of same-sex harassment and retaliatory discharge in the private employer context, could have implications for state action as well. While most of the opinion is not relevant to employment discrimination based on sexual orientation or gender identity, the court did mention the possibility that harassment based on sex under Title VII of the Civil Rights Act of 1964 could include harassment based on the perception that the plaintiff is homosexual, i.e., that the plaintiff fails to conform to gender stereotypes.[32] The court noted that it is unclear whether the Eighth Circuit recognizes this type of same-sex harassment claim because, in one case, the Eighth Circuit held that the defendant's conduct was sufficient to support a same-sex harassment claim even though some acts indicated harassment

[29] No. 8:01CV3240, 2002 WL 31548706 (D. Neb. Nov. 15, 2002).
[30] *Id.* at 4.
[31] No. 8:04CV500, 2006 WL 1314330 (D. Neb. May 11, 2006).
[32] *Id.* at 6.

based on perceived sexual orientation, while in another case, the Eighth Circuit held that harassment based on perceived homosexuality is not actionable.[33] Ultimately, the court in *Miller* did not attempt to resolve this issue, ruling that it did not matter in this case since the plaintiff could not prove another element required to support a prima facie case for same-sex harassment.[34]

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

According to ACLU Nebraska, an openly gay and HIV positive man was recently terminated from his position as a volunteer firefighter for a small rural community when a city employee learned of his HIV status and sexual orientation; however, he was reinstated after ACLU Nebraska contacted the city.[35] It appears that the firefighter later decided to run for office in city government and won.[36] Non-exhaustive research of electronic sources did not uncover further details about this matter.

[33] *Id.* at 6 n.2 (*citing Schmedding v. Tneme Co., Inc.*, 187 F.3d 862, 865 (8th Cir. 1999) *and Klein v. McGowan*, 198 F.3d 705, 890 (8th Cir. 1999)).
[34] *Id.* at 6.
[35] *See* ACLU Nebraska Legal Program, GLBT Rights, http://www.aclunebraska.org/glbt.htm (last visited Sept. 4, 2009).
[36] *See id.*

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indica of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Nebraska's sodomy law b was repealed in 1978..

B. Housing & Public Accommodations Discrimination

Nebraska statutes relating to housing and public accommodations prohibit discrimination based only on race, color, creed, religion, national origin, ancestry, handicap, familial status, or sex.[37] A comprehensive search of internet sources did not uncover any directly relevant housing regulations involving state agencies or facilities. As of this time, there have been no regulations promulgated under the Nebraska Fair Housing Act.[38]

While there have been attempts to add sexual orientation as a protected category in housing and public accommodations statutes, none of these attempts have been successful. For example, L.B. 50, which would have prohibited discrimination based on sexual orientation with respect to housing and places of public accommodation, was postponed indefinitely on April 13, 2006.[39] In addition, L.B. 215 contained a provision that would have made it an unfair trade practice for real estate agents and brokers to discriminate based on sexual orientation when showing, selling, or renting real estate.[40] The main purpose of L.B. 215 had been to revise and update Nebraska's real estate law, and neither the Nebraska Real Estate Commission nor the Nebraska Board of Realtors objected to the sexual orientation provision.[41] The initial version of L.B. 215 introduced on January 4, 2001 did not include any anti-discrimination provisions,[42] but former state Senator Ernie Chambers offered an amendment to the bill that added the anti-discrimination language, which was approved by the Nebraska Legislature 26-8.[43] The amended version of L.B. 215 passed 27-16 but was ultimately vetoed by the governor on May 31, 2001, and the Nebraska Legislature fell just four votes short of overriding the

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[37] *See* Act Providing Equal Enjoyment of Pub. Accom., Neb. Rev. Stat. §§ 20-132 to -143; Neb. Fair Housing Act, Neb. Rev. Stat. §§ 20-301 to -344.

[38] Nebraska Equal Opp. Comm'n, Neb. Fair Housing Act, http://www.neoc.ne.gov/laws/ hsng.htm (last visited Jan. 23, 2009).

[39] Neb. Leg. 50, 99th Leg., 1st Sess. (2005).

[40] Neb. Leg. 215, 97th Leg., 1st Sess. § 16 (2001).

[41] Robynn Tysver, *Gay-Housing Veto Stands*, Omaha World-Herald, June 1, 2001.

[42] *See id.*

[43] Arthur S. Leonard, *Lesbian/Gay Legal News: Legislative Notes*, LESBIAN & GAY L. NOTES 86 (May 2001), *available at* http://old.nyls.edu/pdfs/lgln0105.pdf.

veto.[44] The governor stated in his veto letter that he could not support L.B. 215 because it "'goes beyond mere tolerance and clearly creates a legal classification based upon sexual choices that our citizens make in their personal lives.'"[45]

C. Hate Crimes

Nebraska's hate crimes law, which was enacted in 1997, enhances the penalties for certain crimes committed against people based on their "race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability" or based on their association with a person who fits within one of these classifications.[46]

D. Education

According to ACLU Nebraska, Norfolk Senior High's school administration and school board formally denied a request by students who formed a Gay Straight Alliance student club to have the same privileges as other non-curriculum clubs (such as the ability to meet at school, use the photocopier, advertise their meetings in print and announcements, and have speakers); the school changed its mind after an ACLU staff attorney wrote a letter to the school in 2002.[47]

E. Health Care

A law passed in 2005 specifically provides that recipients of medical research funds from the Nebraska Health Care Cash Fund cannot discriminate based on sexual orientation.[48]

F. Gender Identity

Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2001).

In *Brandon v. County of Richardson,*[49] the mother of Brandon Teena (Brandon was a murder victim who was a transsexual biological female and who had assumed a male identity[50]) sued the county and the sheriff for negligence, wrongful death, and intentional infliction of emotional distress on Brandon during police questioning. Two of Brandon's male acquaintances who were suspicious of his sexual identity had pulled his pants down at a party, and, after discovering that Brandon was female, had beat and raped Brandon, threatening to kill him if he told the police. Brandon reported the

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[44] NANCY CYR ET AL., A REVIEW: NINETY-SEVENTH LEGISLATURE FIRST SESSION 28 (2001); Arthur S. Leonard, *Lesbian/Gay Legal News: Legislative Notes*, LESBIAN & GAY L. NOTES 140 (Summer 2001), *available at* http://old.nyls.edu/pdfs/lgln0107.pdf.

[45] *Id.*

[46] NEB. REV. STAT. § 28-111; NANCY CYR ET AL., A REVIEW: NINETY-FIFTH LEGISLATURE FIRST SESSION 74(1997).

[47] *See id.*

[48] NEB. REV. STAT. § 71-7611; *see also* Neb. Leg. 426, 99th Leg., 1st Reg. Sess. § 12 (2005).

[49] 624 N.W.2d 604 (Neb. 2001).

[50] Brandon's story is the basis for the movie *Boys Don't Cry*, starring Hilary Swank. BOYS DON'T CRY (Fox Searchlight Pictures 1999).

incident to the police, but the sheriff was vulgar and abusive when questioning Brandon about the incident. Moreover, the police did not arrest the perpetrators, even though the sheriff was aware that they both had criminal records and that they had threatened Brandon's life. A few days later, the perpetrators of the original crime murdered Brandon, who was hiding out at a friend's house. They were ultimately convicted for Brandon's murder. In the civil action brought by Brandon's mother, the district court found the county negligent but reduced the award by 85% for the intentional torts of the perpetrators and by 1% for Brandon's contributory negligence; it also denied recovery for intentional infliction of emotional distress on Brandon and awarded only nominal damages for the mother's loss of society.[51]

On appeal, the Nebraska Supreme Court wrote a strongly worded opinion, holding that (i) negligence awards cannot be reduced for the acts of intentional tortfeasors, (ii) there was no evidence that Brandon was contributorily negligent, (iii) nominal damages for the mother's loss of society claim is inadequate as a matter of law, and (iv) the sheriff's conduct was "extreme and outrageous, beyond all possible bounds of decency" as a matter of law and could therefore support a claim of intentional infliction of emotional distress on Brandon.[52] On remand, however, the district court awarded only $7,000 for the intentional infliction of emotional distress claim and $5,000 for the loss of society claim, a result upheld by the Nebraska Supreme Court because it was not "clearly wrong."[53]

G. Parenting

1. Adoption

Nebraska statute permits adoption "by any adult person or persons";[54] however, the Supreme Court of Nebraska held in *In re Adoption of Luke*[55] that, under Nebraska adoption statutes, a child is not eligible for adoption by a second parent unless the first parent relinquishes his or her parental rights, except when the prospective adoptive parent is the spouse of the first parent (i.e., in a step-parent adoption).[56] In *Luke*, the biological mother's same-sex partner sought to adopt her child, but the court held that the child was not eligible for adoption because the biological mother did not relinquish her parental rights.[57] Notably, the court in *Luke* did not address the issue of whether two non-married persons can adopt.[58] In summary, Nebraska statute seems to allow adoption by a *single* person regardless of his or her sexual orientation (because it permits adoption by "any adult person"), and Nebraska case law does not explicitly prohibit same-sex couples from jointly petitioning to adopt; however, *Luke* established that a same-sex partner cannot adopt his or her partner's child.

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[51] *Brandon*, 624 N.W.2d at 611.
[52] *Id.* at 620, 624, 626-27.
[53] *Brandon v. County of Richardson*, 653 N.W.2d 829 (Neb. 2002).
[54] *Id.* § 43-101.
[55] 640 N.W.2d 374 (Neb. 2002).
[56] *Id.* at 382-83.
[57] *Id.* at 382.
[58] *Id.* at 378.

2. Child Custody & Visitation

In contrast to its laws governing other areas, Nebraska's laws regarding custody and visitation are relatively favorable to LGBT parents. *Hassenstab v. Hassenstab*[59] indicates that Nebraska courts will not take a parent's sexual orientation into consideration in custody decisions unless it adversely affects the child. In *Hassenstab*, the court of appeals allowed the mother to continue custody after she had a homosexual relationship, even though there was evidence that she would engage in sexual activity when her daughter was in the house and that her daughter was generally aware of the homosexual relationship.[60] The court's ruling was based on a lack of evidence that the daughter was directly exposed to the mother's sexual activities or was adversely affected or damaged because of the homosexual relationship, or that the daughter's best interests would require a change in custody.[61] (One judge filed a dissent in *Hassenstab*, arguing that the father should have custody because the mother's conduct would "necessarily impair [the daughter's] moral training."[62]) In *Russell v. Bridgens*,[63] a concurring opinion noted that a same-sex co-parent should be able to petition for custody and visitation if she can establish an *in loco parentis* relationship with the child, even if she has no biological or legal (i.e., adoptive) relationship with the child.[64]

H. Recognition of Same-Sex Couples

In 2000, Nebraska voters adopted Initiative Measure No. 416, a constitutional amendment that bans not only same-sex marriages but also any recognition of same-sex relationships.[65] In 2005, in *Citizens for Equal Protection, Inc. v. Bruning*,[66] the United States District Court for the District of Nebraska found this amendment to be unconstitutional in violation of the Equal Protection Clause and the First Amendment.[67] On appeal, the Eighth Circuit reversed, holding that the amendment is rationally related to legitimate government interest in procreation.[68] In 2003 the Nebraska Attorney General issued Opinion No. 03004, concluding that legislation granting rights to domestic partners with respect to organ donation or disposition of remains would not be allowed under Article I, Section 29 of the Nebraska Constitution because such legislation would put a same-sex relationship "on the same plane as" a marital relationship.[69]

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[59] 570 N.W.2d 368 (Neb. Ct. App. 1997).
[60] *Id.* at 373.
[61] *Id.* at 372-73.
[62] *Id.* at 375 (Hannon, J., dissenting).
[63] 647 N.W.2d 56 (Neb. 2002).
[64] *Id.* at 65 (Gerrard, J., concurring).
[65] Article I, Section 29 of the Nebraska Constitution currently reads: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."
[66] 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006).
[67] *Id.* at 995-1000.
[68] *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-70 (8th Cir. 2006).
[69] Neb. Op. Att'y Gen. 03004 (2003), 2003 WL 21207498.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Nevada – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

With respect to employment, Nevada law has prohibited discrimination on the basis of sexual orientation since 1999.[1] However, the statute also contains a broad exception to its provisions for any 501(c)(3) non-profit organization. This exception applies solely to discrimination based on sexual orientation and not to any other protected class. There is no coverage in the statute for discrimination based on gender identity.

During legislative consideration of the bill, oral and written testimony entered into the record evidencing animus against LGBT persons included (i) arguments that protection should not be granted to persons who engage in deviant sexual conduct,[2] (ii) an article submitted as evidence that homosexuals were more likely to molest children than others,[3] (iii) evidence that homosexuals have higher incomes than heterosexuals,[4] (iv) testimony that the statute would force employers to hire individuals who may not be "trustworthy" or who are "perhaps infected with the AIDS virus,"[5] and (v) testimony that the legislation was "fascist" and constituted "reverse discrimination" by requiring employers to hire homosexuals despite personal convictions on the immorality of homosexuality.[6]

Documented examples of discrimination based on sexual orientation or gender identity by state or local governments include:

- Since the enactment of the statute, 27 complaints have been filed with the Nevada Equal Rights Commission against state actors claiming discrimination on the basis of sexual orientation.[7]

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[1] *See infra* Section II.A.1.
[2] *See* Minutes of Nev. Assem. Comm. (Mar. 10, 1999). Testimony in the record included an article published by the Family Research Council, entitled "Homosexuality Is Not A Civil Right," which asserted: "Homosexual activists realize that when people become aware of common homosexual practices, such as anal intercourse, anal-oral contact -- along with other homosexual practices such as inserting arms inside each other's bodies and 'sports' involving bodily excretions -- they will see that these behaviors do not merit special protection in our laws." *Id; see* Nev. Online Research Library, http://bit.ly/3r2gOX (last visited Sept. 7, 2009).
[3] *See* Minutes of Nev. Assem. Comm. (Mar. 10, 1999).
[4] *See* Minutes of Nev. Sen. Comm. (May 6, 1999).
[5] *See* Minutes of Nev. Assem. Comm. (Mar. 10, 1999).
[6] Minutes of Nev. Assem. Comm. (Mar. 10, 1999).
[7] *See infra* Section II.A.2.

- In 2008, a transgender public school teacher was fired because of her gender identity.[8]

Nevada's law concerning discrimination in places of public accommodations does not protect against discrimination on the basis of sexual orientation, gender identity or sex. While there is a bill pending that would prohibit discrimination on the basis of sexual orientation (and sex) in places of public accommodation (and extend protection against housing discrimination to discrimination on the basis of familial status), the same bill does not propose to extend Nevada's fair housing laws to prohibit discrimination on the basis of sexual orientation.[9] Finally, despite the repeal of its sodomy law in 1993, the history behind that law, which applied only to same-sex sexual relations before its repeal, evidences a concerted bias against gays and lesbians.[10]

Nevada law contains no protections against discrimination on the basis of gender identity, and no such laws have been formally proposed.[11] Research uncovered several cases outside the employment discrimination context involving claims of discrimination on the basis of gender identity.[12]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[8] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).
[9] *See infra* Section IV.B.
[10] *See infra* Section IV.A.
[11] *See* TRANSGENDER LAW & POLICY INSTITUTE: NON-DISCRIMINATION LAWS IN THE US THAT EXPLICITLY INCLUDE TRANSGENDER PEOPLE (2006), *available at* http://www.transgenderlaw.org (last visited Sept. 12, 2009).
[12] *See infra* Section IV.F.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

In 1999, Nevada enacted legislation to prohibit discrimination in employment based on sexual orientation.[13] The statute provides, in pertinent part, that "it is unlawful employment practice for an employer: (a) [t]o fail or refuse to hire or to discharge any person, or otherwise discriminate against any person with respect to his compensation, terms, conditions or privileges of employment, because of his … sexual orientation; or (b) [t]o limit, segregate or classify an employee in any way which would deprive or tend to deprive him of employment opportunities or otherwise adversely affect his status as an employee, because of his … sexual orientation."[14] The statute defines "sexual orientation" as "having or being perceived as having an orientation for heterosexuality, homosexuality, or bisexuality."[15] The statute does not cover discrimination on the basis of gender identity.

In addition to general prohibitions on employment discrimination on the basis of sexual orientation, Nevada law prohibits (i) employment agencies, labor organizations, and employers, labor organizations or joint labor-management committees controlling apprenticeship or other training or retraining, from discriminating against any person on the basis of sexual orientation (among other factors),[16] and (ii) any employer, labor organization or employment agency from publishing any advertisement relating to employment indicating a preference, limitation, specification or discrimination based on sexual orientation (among other factors).[17]

In addition to chapter 613, in 1999 Nevada revised certain other sections of the Nevada code pertaining to government entities to expressly prohibit discrimination on the basis of sexual orientation by government entities. Chapter 281 prohibits discrimination in employment by state actors, providing that state, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof shall not refuse to hire a person, discharge or bar any person from employment, or discriminate against any person in compensation or in other terms and conditions of employment because of his sexual orientation.[18] Chapter 338 prohibits state contractors from discrimination on the basis of sexual orientation, and provides that contracts with such contractors must contain

[13] NEV. REV. STAT. ANN. § 613.010 *et seq.* (2008) (amended by A.B. 311 (Nev. 1999)).
[14] NEV. REV. STAT. ANN. § 613.330(1).
[15] NEV. REV. STAT. ANN. §§ 610.010(5), 613.310(6); *see also* NEV. REV. STAT. ANN. § 281.370(3)(b) (2008). In 2007, Nevada further amended its employment discrimination statute to expressly include human immunodeficiency virus (HIV) as a disability for which discrimination in employment is prohibited. NEV. REV. STAT. ANN. § 613.310(1)(a) (2008) (amended by A.B. 443 (Nev. 2007)).
[16] NEV. REV. STAT. ANN. § 613.330(2)-(4) (2008). Nevada law also contains various provisions providing for the prohibition on discrimination on the basis of sexual orientation (among other factors) in the sponsorship, recruiting, selection employment and training of apprentices. NEV. REV. STAT. ANN. §§ 610.020(1), 610.150(10), and 610.185; NEV. ADMIN. CODE §§ 610.510, 610.530 and 610.665.
[17] NEV. REV. STAT. ANN. § 613.340(2) (2008).
[18] NEV. REV. STAT. ANN. § 281.370(2).

a provision pursuant to which the contractor agrees that, in the performance of the contract, it shall not discriminate against any employee or applicant for employment because of sexual orientation.[19]

Nevada's anti-discrimination law includes several exceptions. The provisions of the statute do not apply to any religious corporation, association or society "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of its religious activities."[20] The statute also provides that it is not an unlawful employment practice for a school or other educational institution to hire employees of a particular religion if the school is supported substantially by a religious organization or if the curriculum of the school is directed toward the propagation of a particular religion.[21] There are also exceptions for cases where an otherwise prohibited basis for employment is a "bona fide occupational qualification"[22] and, with respect to disability, specific instances where the lack of the disability is necessary to perform the work required.[23] For purposes of Nevada's employment discrimination laws, "employer" is defined to exclude persons or entities with fewer than fifteen employees, the United States or any corporation owned by the United States, Indian tribes, and "private membership clubs" exempt from taxation pursuant to 26 U.S.C. §501(c)(3).[24]

In addition to the aforementioned exceptions, Nevada's employment discrimination law contains a broad exclusion under which its provisions "concerning unlawful employment practices related to sexual orientation do not apply to organizations that are exempt from taxation pursuant to 26 U.S.C. § 501(c)(3)."[25] No other exclusion to Nevada's employment discrimination statute is limited to employment practices related to a single class of individuals that are otherwise protected by the statute. Specifically, the aforementioned exclusions for religious organizations and private membership clubs apply to all classes of persons protected by the statute (e.g., race, sex, age, disability, etc.).[26] Further, the statute's exclusions for religious organizations are not blanket exclusions but, rather, exclusions tied to employees performing a specific job function (e.g., carrying on religious activities) or working in a specific setting (e.g., a parochial school).[27] By contrast, the exclusion of non-profit organizations from the statute's prohibition on discrimination on the basis of sexual orientation is a blanket exclusion.

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[19] NEV. REV. STAT. ANN. § 338.125.
[20] NEV. REV. STAT. ANN. § 613.320(1)(b).
[21] NEV. REV. STAT. ANN. § 613.350(4).
[22] NEV. REV. STAT. ANN. § 613.350(1).
[23] The exception for disability applies in instances "where physical, mental or visual condition is a bona fide and relevant occupational qualification necessary to the normal operation of that particular business or enterprise, if it is shown that the particular disability would prevent proper performance of the work for which the person with a disability would otherwise have been hired, classified, referred or prepared under a training or hiring program. NEV. REV. STAT. ANN. § 613.350(2).
[24] NEV. REV. STAT. ANN. § 613.310(2).
[25] NEV. REV. STAT. ANN. § 613.320(2).
[26] NEV. REV. STAT. ANN. §§ 613.320(2)(1)(b) & 613.350(4). Nevada's employment discrimination law also provides for circumstances under which it is not unlawful for an employer to consider a person's disability, but contains specific parameters to ensure the exception is applied narrowly. NEV. REV. STAT. ANN. § 613.350(2) (2009).
[27] NEV. REV. STAT. ANN. §§ 613.320(2)(1)(b) and 613.350(4).

2. Enforcement and Remedies

Nevada law provides for the processing of complaints under Nevada's equal opportunity employment statute by the Nevada Equal Rights Commission (the "NERC").[28] The NERC also administers the remedies for employment discrimination available under Nevada law.

The NERC administers complaints pertaining to discriminatory practices in employment. Nevada law charges the NERC with promulgating a process for the review of complaints and determining whether to hold informal meetings or investigations concerning a complaint.[29] Complaints must be filed within 300 days of the occurrence of the allegedly unlawful practice.[30]

The process established by the NERC for filing and processing a complaint is as follows: (i) complainant completes and submits an intake form describing the alleged discriminatory employment practice, (ii) complaint is reviewed, and, if it falls within the NERC's jurisdiction, a formal charge is drafted for signature by the complainant and sent to the employer, (iii) complaint is submitted for investigation or an informal settlement meeting is scheduled (all complaints for which the settlement meeting is unsuccessful are submitted for investigation), (iv) both parties are offered the opportunity to present evidence supporting their position, with complainant bearing the initial burden of proof of demonstrating an unlawful employment practice, and (v) upon completion of investigation, the NERC issues a right to sue letter (valid for 90 days) or advises complainant that there does not appear to be a case of illegal employment discrimination.[31]

With respect to remedies, Nevada law provides that if attempts to settle a complaint fail, the NERC may order that a person cease and desist from unlawful employment practices and restore the benefits of the aggrieved person, including rehiring and back pay up to two years.[32] The NERC may also apply to the district court to order injunctive relief with respect to any employment practice it deems to be unlawful.[33] Complainants also have a statutory right to submit an application to the district court for an order to restore rights after an unfavorable decision of the NERC.[34] However, Nevada

[28] NEV. REV. STAT. ANN. § 613.405.
[29] NEV. REV. STAT. ANN. § 233.157 (2008).
[30] NEV. REV. STAT. ANN. § 233.160(1)(b).
[31] *See* Nevada Equal Rights Commission, Fact Sheet and Frequently Asked Questions (Nov. 2004), *available at* http://bit.ly/RvyKs.
[32] NEV. REV. STAT. ANN. § 233.170(4)(b) (2008). The Nevada statute pertaining to the NERC provides for an award of actual damages and attorneys' fees for the prevailing party, as well as a civil penalty of up to $25,000, for cases involving unlawful housing practices, however it does not expressly provide for such remedies for unlawful employment practices. *Id.* § 233.170(5). Discrimination on the basis of sexual orientation is not covered by Nevada housing law. See *infra* Section IV.B.; NEV. REV. STAT. ANN. §§ 118.020 and 118.100.
[33] NEV. REV. STAT. ANN. § 233.180.
[34] NEV. REV. STAT. ANN. § 613.420. Claims must be brought within 180 days of the complained action, however, that period is tolled while a complaint is pending before the NERC. NEV. REV. STAT. ANN. § 613.430 (2009). Pending legislation proposes to extend such period to 300 days. *See* A.B. 43 (Nev. 2008).

law also provides that an order of the NERC is a "final decision in a contested case for purposes of judicial review."[35]

B. Attempts to Enact State Legislation

Assemblyman David Parks[36] introduced A.B. 311 — the law that added sexual orientation to the prohibited bases of discrimination in employment — in the Nevada Assembly on February 23, 1999.[37] Mr. Parks and the other sponsors introduced the bill as the "Employment Non-Discrimination Act."[38] The bill passed in the Assembly on April 1, 1999 by a 30-11 vote and in the Senate on May 20, 1999 by a 13-8 vote. The governor approved the bill on May 29, 1999, and it became effective on October 1, 1999.[39]

Extensive debate over A.B. 311 took place during committee-level hearings in the Assembly and Senate.[40] Reflecting the tenor of the hearings on A.B. 311, during a work session of the Nevada Assembly Committee on Commerce and Labor, Chairman Barbara Buckley noted that "there were strong feelings both of support and concern. Some of the concerns made in the hearing were very hateful in her opinion and she did not think those statements were shared even by those who opposed the bill."[41]

In committee hearings, proponents of A.B. 311 cited specific examples of discrimination against gays and lesbians as support for the need for protections against discrimination on the basis of sexual orientation. Proponents also cited, among other things, public support among Nevada citizens for the legislation, similar laws in other states, and similar policies already adopted by the Las Vegas Metropolitan Police Department, University of Nevada, Las Vegas, and University of Nevada, Reno, as support for passage of the legislation.[42]

Opponents of the legislation raised various objections, citing concerns over immoral behavior, public health and safety, preservation of the family, freedom of religion, and freedom of association, among other arguments commonly raised against legislation seeking to grant rights to LGBT persons.[43] Opponents also argued that the bill was unnecessary to achieve its stated goals and would, instead, extend "special rights" to gay and lesbian persons by virtue of their sexual behavior.[44] Oral and written testimony

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[35] NEV. REV. STAT. ANN. § 233.170(6) (2008).
[36] David Parks is currently Nevada's only openly gay lawmaker and responsible for the proposal of many of Nevada's statutes protecting LGBT persons and persons with HIV-AIDS. *See* Erin Neff, *Commentary: 'Closed' Is A Dirty Word*, L.V. REV.-J., Mar. 22, 2007, at 9B.
[37] *See* 70 NEV. ASSEM. J. 23 (Feb. 23, 1999).
[38] Senate committee minutes indicate that A.B. 311 was modeled after the failed federal legislation of the same name. Minutes of Nev. Senate Comm. (May 6, 1999).
[39] *See* A.B. 311 (1999) (legislative history).
[40] *See* Minutes of Nev. Assem. Comm. (Mar. 10, 1999); Minutes of Nev. Assem. Comm. (May 6, 1999). The legislative history does not indicate any significant debate held on the floor of the Assembly or Senate. *Id.*
[41] *See* Minutes of Nev. Assem. Comm. (Mar. 22, 1999).
[42] *See* Minutes of Nev. Assem. Comm. (Mar. 22, 1999).
[43] *See* Minutes of Nev. Assem. Comm. (Mar. 22, 1999); Minutes of Nev. Sen. Comm. (May 6, 1999).
[44] *See* Minutes of Nev. Assem. Comm. (Mar. 22, 1999); Minutes of Nev. Sen. Comm. (May 6, 1999).

entered into the record evidencing animus against LGBT persons included (i) arguments that protection should not be granted to persons who engage in deviant sexual conduct,[45] (ii) an article submitted as evidence that homosexuals were more likely to molest children than others,[46] (iii) evidence that homosexuals have higher incomes than heterosexuals,[47] (iv) testimony that the statute would force employers to hire individuals who may not be "trustworthy" or who are "perhaps infected with the AIDS virus",[48] and (v) testimony that the legislation was "fascist" and constituted "reverse discrimination" by requiring employers to hire homosexuals despite personal convictions on the immorality of homosexuality.[49]

Debate on A.B. 311 led to one amendment of particular significance. Opponents of the bill claimed that the existing exclusions in Nevada's anti-discrimination law for private clubs and religious organizations were insufficient to address the concerns of non-profit organizations, such as the Boy Scouts of America, that prohibit homosexuals from participation.[50] In light of these concerns, the Senate added a provision providing that the provisions of Nevada's equal employment statute "concerning unlawful employment practices related to sexual orientation do not apply to organizations that are exempt from taxation pursuant to 26 U.S.C. § 501(c)(3)."[51] As discussed in Section II.A.1, *supra*, this is the only blanket exclusion to Nevada's equal opportunity employment statute that applies to a single class of individuals otherwise protected by the statute.

Certain other amendments were made to A.B. 311 after its introduction.[52] The bill originally contained a provision that prohibited employees from inquiring into or

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[45] *See* Minutes of Nev. Assem. Comm. (Mar. 10, 1999). Testimony in the record included an article published by the Family Research Council, entitled "Homosexuality Is Not A Civil Right," which asserted: "Homosexual activists realize that when people become aware of common homosexual practices, such as anal intercourse, anal-oral contact -- along with other homosexual practices such as inserting arms inside each other's bodies and 'sports' involving bodily excretions -- they will see that these behaviors do not merit special protection in our laws." *Id; see* Nev. Online Research Library, http://bit.ly/3r2gOX (last visited Sept. 7, 2009).

[46] *See* Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

[47] *See* Minutes of Nev. Sen. Comm. (May 6, 1999).

[48] *See* Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

[49] Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

[50] *See* Minutes of Nev. Assem. Comm. (Mar. 10, 1999); Minutes of Nev. Sen. Comm. (May 6, 1999). A lobbyist for the Boy Scouts of America testified at the Senate Committee on Commerce and Labor hearing on A.B. 311. *See* Minutes of Nev. Sen. Comm. (May 6, 1999).

[51] *See* 70 NEV. ASSEM. JOUR. 111 (May 22, 1999) (Assembly resolution adopting Senate amendment to A.B. 311 (Nev. 1999), codified at NEV. REV. STAT. § 613.320(2)).

[52] For example, Assemblyman Parks described multiple instances in which he had been discriminated against in a work setting. In 1984, he was fired as a department head for the City of Las Vegas because his superiors admittedly believed he was a gay man dying of AIDS. Assemblyman Parks then was flatly told in a government job interview that he should not consider applying for the position because he was openly gay. A deputy attorney general in Nevada, Pam Roberts, also testified in the A.B. 311 hearings about her personal experiences with employment discrimination. Ms. Roberts had worked at a public school in Nye County, teaching and coaching, before she was outed for being a lesbian. During class one day, she received a message over the intercom to report to the principal's office. The principal explained the accusations that Ms. Roberts was gay; stated that the accuser demanded Ms. Roberts' dismissal; fired Ms. Roberts on the spot; and then suggested that Ms. Roberts move to a larger and more accepting city. Since that time, Ms. Roberts enrolled in law school and became a successful attorney in the public sector, though

investigating the sexual orientation of an employee or prospective employee unless sexual orientation is a "bona fide occupational qualification."[53] The Assembly struck this provision in a draft circulated on March 29, 1999, but there is no discussion of the rationale in the legislative history.[54]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

Nevada law expressly prohibits discrimination on the basis of sexual orientation by state agencies. Consistent with this policy, the University of Nevada, Las Vegas and University of Nevada, Reno, both publicly-funded state universities, maintain equal employment programs under which they state a commitment to provide equality in employment and educational opportunities regardless of sexual orientation (among other factors).[55] Other state entities, such as the Las Vegas Metropolitan Police Department, also maintain policies prohibiting discrimination on the basis of sexual orientation (among other factors).[56]

The Nevada Department of Personnel has also advanced an equal employment opportunity policy that includes sexual orientation. The Nevada Administrative Code provides, in pertinent part, that the Department of Personnel will "identify barriers in the personnel management system which may adversely affect the ability of applicants and employees to reach their full employment potential without regard to … sexual orientation," among other factors.[57] To effectuate the purposes of this law, the Director of the Department of Personnel sent an "Affirmative Action Plan" to all department directors on July 16, 2007. The stated purpose of the plan was to provide an amended, comprehensive guide for supervisors and managers to "identify and remove discriminatory barriers to equal employment opportunity" in state employment.[58]

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in 1999 she continued to fear being laid off if a new, more socially conservative attorney general was elected.

[53] Proposed as NEV. REV. STAT. § 613.340(3)(b).

[54] *Compare* A.B. 311 (Nev. Feb. 23, 1999) *with* A.B. 311 (Nev. Mar. 29, 1999). Other changes made to A.B. 311 were generally non-substantive or unrelated to sexual orientation.

[55] *See* University of Nevada, Las Vegas, Official University Statements, http://www.unlv.edu/about/statements.html (last visited Sept. 6, 2009); University of Nevada, Reno, Equal Opportunity & Affirmative Action, http://www.unr.edu/eoaa/ada.html (last visited Sept. 6, 2009). In their affirmative action statements, both universities also state a general commitment to enhancing diversity, citing gender, race and ethnicity, but not sexual orientation, as examples of valued forms of diversity. *Id*.

[56] *See supra* Section II.B.

[57] NEV. ADMIN. CODE § 284.114(2)(a) (2008).

[58] *See* Nevada Department of Personnel, http://dop.nv.gov/fshome.html (last visited Sept. 6, 2009).

3. Attorney General Opinions

None.

D. Local Legislation

None.

E. Occupational Licensing Requirements

There are several state licensing requirements that reference "good moral character" and similar allusions that could be interpreted so as to discriminate against LGBT persons.[59] However, non-exhaustive research of electronic sources did not uncover any specific examples of occupational licensing standards being applied in a discriminatory manner to LGBT applicants.

[59] *See* NEV. ADMIN. CODE §§ 118B.140, 489.628, 504.600, 616C.353, 624.137, 628.020, 628.280, 630.310, 630.500, 630.510, 630A.535, 631.170, 632.175, 633.295, 634A.075, 638.0525, 638.760, 638.810, 639.295, 639.900, 641.025, 641.028, 641B.126, 644.151, 644.255, 644.260, 645.095, 645.180 and 706.453 (2008).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

None.

2. Private Employers

Jespersen v. Harrah's Operating Co., ECR Inc., 444 F.3d 1104 (9th Cir. 2006).

In *Jespersen v. Harrah's Operating Company, ECR Inc.*,[60] a female bartender was terminated after she refused to adhere to her employer's new policy which required certain female employees to wear makeup. Ms. Jespersen brought an action claming that the policy constituted disparate treatment sex discrimination in violation of Title VII. Ms. Jespersen contended that the appearance requirements of the casino in which she worked forced her to conform to sex stereotypes. In affirming the district court's decision, the Ninth Circuit found, *en banc*, that Ms. Jespersen could not proceed with her claim of sex discrimination in that she failed to demonstrate that the casino's grooming policy impeded her work or singled her out in any way, as all other bartenders were required to comply with the same grooming policy, and she failed to demonstrate that the policy imposed an unreasonable burden on women as opposed to men. The court noted, further, that the basis for Ms. Jespersen's claim was a product of her own "subjective" view, and there was no evidence of a stereotypical motivation on the part of the employer. Citing the *Rene* case, among others, the court noted that, while Ms. Jespersen failed to make such a claim, a claim of sex discrimination can be made on the basis of gender stereotyping, for example when an employee is harassed by co-workers as a result of a failure to conform with certain gender stereotypes.[61] In his dissent, Judge Pregerson argued that the grooming standards in the *Jespersen* case were in fact a policy motivated by gender stereotyping and Ms. Jesspersen was in fact terminated "because of" her sex.[62]

Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002).

In *Rene v. MGM Grand Hotel, Inc.*,[63] in an *en banc* decision, the Ninth Circuit found in favor of an openly-gay employee who brought a claim of sexual harassment under Title VII after he was subject to severe sexual harassment by his male co-workers. Mr. Rene presented extensive evidence that his coworkers subjected him to a hostile work environment on an almost daily basis, calling him "sweetheart" and "muñeca" (Spanish for "doll"), telling crude jokes, giving him sexually-oriented joke gifts, and forcing him to look at pictures of men having sex. Mr. Rene's co-workers went as far as to grab his crotch, put their fingers in his anus, and fondle his body "like they would to a

[60] 444 F.3d 1104 (9th Cir. 2006).
[61] *Jespersen*, 444 F.3d at 1112-13.
[62] *Jespersen*, 444 F.3d at 1113-14 (J. Pregerson, dissenting).
[63] 305 F.3d 1061 (9th Cir. 2002).

woman". The district court dismissed Mr. Rene's claim on the basis that title Title VII did not protect against discrimination on the basis of sexual orientation. The Ninth Circuit reversed, finding that Mr. Rene's sexual orientation was irrelevant to a finding of hostile work environment sexual harassment. The court noted that the assault and ridicule of Mr. Rene clearly met Title VII's requirement that the discrimination be "because of sex" since it was sexual in nature; it did not matter that the harassment might also have been because of Mr. Rene's sexual orientation.[64]

B. Administrative Complaints

According to research conducted by The Williams Institute since 1999, annual complaints filed with respect to state actors between 1999 and 2007 have ranged from two to five, with five complaints filed in 2007 and a total of twenty-seven filed between 1994 and 2007. Copies of complaints filed with the NERC are not available through electronic sources, and non-exhaustive electronic searches of news articles did not uncover details concerning specific complaints received the NERC about employment discrimination by state or local government agencies on the basis of sexual orientation or gender identity.

Since 1999, the year Nevada's law prohibiting discrimination on the basis of sexual orientation went into effect, documented complaints of sexual orientation discrimination (both private and public) have ranged from two (2000) to a high of forty-six (2003) in a given year. In 2007, the number of such complaints stood at thirty.[65]

C. Other Documented Examples of Discrimination

Nevada Public School

In 2008, a transgender public school teacher was fired because of her gender identity.[66]

[64] *Rene*, 305 F.3d at 1067 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)).
[65] Chart of Discrimination Claims (2009) (on file with the Williams Institute).
[66] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

In 1993, the Nevada legislature repealed Nevada's law prohibiting consensual, same-sex sexual relations.[67] Prior to its repeal, Nevada's sodomy law prohibited the "infamous crime against nature" defined as "anal intercourse, cunnilingus or fellatio between natural persons of the *same sex*" (emphasis added). Despite the decriminalization of consensual, same-sex sodomy, Nevada criminal law continues to distinguish between same-sex and opposite-sex sexual conduct. The crime of "solicitation of a minor to engage in acts constituting crimes against nature" applies only to sexual conduct between persons of the same sex.[68]

Non-exhaustive research of electronic sources identified no case in which Nevada's sodomy law was used to support other forms of discrimination on the basis of sexual orientation or gender identity.

B. Housing & Public Accommodations Discrimination

Nevada law does not prohibit discrimination on the basis of sexual orientation or gender identity in housing practices.[69] A.B. 43, currently pending in the Senate, proposes to revise Nevada's housing law to add familial status to the prohibited bases for discrimination in housing, but does not propose to add sexual orientation.[70]

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[67] LAWS OF NEV. ch. 236 (1993). In 1986, a constitutional challenge to Nevada's sodomy law had been unsuccessful. The court dismissed the case as there was no evidence that the law had been enforced against consenting adults. *Doe v. Bryan*, 728 P.2d 443 (Nev. 1986); *see also Jones v. Nevada*, 456 P.2d 429 (Nev. 1969) (finding that fact that statute might be unconstitutional to extent it applied to conduct of consenting adults did not render it unconstitutional with respect to defendant charged with committing the crime by force against a 12-year-old victim). In 1993, the same year Nevada repealed its sodomy law, the Nevada Supreme Court had upheld the convictions of four men for consensual sexual relations in a public restroom despite privacy arguments raised in the case. *Young v. Nevada*, 849 P.2d 336 (decided Mar. 24, 1993).

[68] When Nevada repealed its prohibition on consensual, same-sex sodomy, it did so by narrowing its crimes against nature law to cover only the solicitation of minors to engage in "crimes against nature." Thus, the law uses the same definition of the "infamous crime against nature" as the Nevada sodomy statute used prior to its repeal. *See* NEV. REV. STAT. ANN. § 201.195(2) (2009); *see also* GEORGE PAINTER, THE SENSIBILITIES OF OUR FOREFATHERS, THE HISTORY OF SODOMY LAWS IN THE UNITED STATES (2001), *available at* http://www.sodomylaws.org.

[69] NEV. REV. STAT. ANN. §§ 118.020 & 118.100 (2009). The NERC also does not include sexual orientation as a prohibited basis for discrimination in housing in its educational material. *See* Nevada Equal Rights Commission, Housing Discrimination, http://bit.ly/hW1fg (last visited Sept. 6, 2009).

[70] NEV. REV. STAT. ANN. §§ 118.020 and 118.100.

Nevada's statute providing for equal enjoyment of places for public accommodation does not expressly prohibit discrimination on the basis of sexual orientation or gender identity or even sex.[71] However, Nevada law states that it is the "public policy of the State of Nevada … to foster the rights of all persons to seek and be granted services in places of public accommodation without discrimination" because of sexual orientation (among other factors).[72] Nevada law also charges the NERC with the power to investigate "tensions, practices of discrimination and acts of prejudice" against any person or group in public accommodation because of sexual orientation (among other factors).[73] In 2005, the Nevada Attorney General affirmed that the NERC may accept and investigate charges of discrimination based upon sexual orientation by places of public accommodation.[74]

In 2009, the Nevada legislature passed a bill amending the state's non-discrimination law to prohibit discrimination by places of public accommodation on the basis of sexual orientation.[75]

C. **Hate Crimes**

Nevada's hate crimes law, enacted in 2001, explicitly includes sexual orientation, and provides for enhanced remedies for such crimes.[76] The law does not include gender identity.

D. **Education**

No provision of Nevada law explicitly addresses school safety or other education matters with respect to gender identity or sexual orientation.

There are two federal cases in which a student brought a discrimination claim against a school district in Nevada involving gender identity, including one case that resulted in a school district promulgating policies with respect to discrimination against gay and lesbian students.

In *Henkle v. Gregory*,[77] a student sued school district claiming violations of his rights under Fourteenth Amendment, First Amendment, and Title IX due to discriminatory treatment while enrolled in district schools. The student alleged severe

[71] NEV. REV. STAT. ANN. § 651.070 (2009).
[72] NEV. REV. STAT. ANN. §§ 233.010 (2009).
[73] NEV. REV. STAT. ANN. §§ 233.150 (2009). The NERC accepts complaints with respect to violation of the state's public policy with respect to discrimination in public accommodations. *See* Nevada Equal Rights Commission, Public Accommodations, *available at* http://bit.ly/8GXLz (last visited Sept. 6, 2009).
[74] Nev. Att'y. Gen. Op. No. 11 (2005).
[75] S.B. 207 , 75th Reg. Sess. (Nev. 2009) (enacted).
[76] A.B. 43 § 41.690 (in addition to other liability imposed by law, person who suffered injury may bring an action to recover actual damages and punitive damages and, if successful, court shall award reasonable attorney's fees); A.B. 43 § 193.1675 (in addition to term of imprisonment prescribed by statute for the crime, perpetrator may be punished by imprisonment for a minimum term of one year and maximum term of 20 years, depending on the circumstances); A.B. 43 § 179A.175 (establishing program requiring collection of data with respect to crimes that manifest evidence of prejudice).
[77] 150 F. Supp. 2d 1067 (D. Nev. 2001).

harassment while enrolled at three district high schools and that school officials, after being notified of the harassment, failed to take any action, including in an instance where the student was subjected to physical violence by fellow students after they called him a "fag" and other anti-gay epithets.[78] The school district moved to dismiss the action, and the court found that, while the student's § 1983 action was subsumed by his Title IX claims, the student could move forward with his Title IX and First Amendment claims.[79] In a settlement brokered by Lambda Legal, the school district paid the student $451,000 and agreed to implement new policies to protect gay and lesbian students from discrimination, including policies requiring the training of staff on preventing and responding to harassment.[80]

In *Doe v. Clark County School District*,[81] parents of a preoperative male-to-female transgendered student claimed that school's stated intention to bar her from using the communal ladies' room violated her rights under the Fourteenth Amendment and Title IX.[82] Plaintiffs contended that they enrolled their daughter in a charter school rather than a district high school after the principal of the district high school took the position that the student should use a unisex nurse's restroom.[83] Court found that plaintiffs could not proceed with their claim as they failed to demonstrate an "injury in fact"; the parents never enrolled their daughter in any district high school and the district never told the student or her parents that she could not enroll in any district high school.[84] Court held further that even if the principal had prohibited the student from use of the communal ladies' room upon enrollment, there would have been no Title IX violation as Title IX requires discrimination under an educational program or activity and use of a restroom is not such a program or activity.[85]

E. **Health Care**

Nevada law does not permit a partner to make decision on behalf of his or her same-sex partner unless a durable power of attorney has been executed designating such partner.[86]

Nevada law requires the adopting party in a surrogacy agreement to have a valid marriage.[87] Therefore, gays and lesbians are unable to enter into such agreements, whether individually or together as a couple. Further, Nevada law recognizes a legal

[78] *Henkle*, 150 F. Supp. 2d at 1069-70.
[79] *Henkle*, 150 F. Supp. 2d at 1072-78.
[80] *See* Press Release, Lambda Legal, Groundbreaking Legal Settlement is First to Recognize Constitutional Right of Gay and Lesbian Students to be Out at School & Protected From Harassment (Aug. 8, 2002), *available at* http://www.lambdalegal.org/news/pr/groundbreaking-legal.html.
[81] No. 206-CV-1074-JCM (RJJ), 2008 WL 4372872 (D. Nev. Sept. 17, 2008).
[82] *Doe*, 2008 WL 4372872 at *1.
[83] *Doe*, 2008 WL 4372872 at *3.
[84] *Doe*, 2008 WL 4372872 at *1-*2.
[85] *Doe*, 2008 WL 4372872 at *3.
[86] NEV. REV. STAT. ANN. §§ 449.626 & 449.810.
[87] NEV. REV. STAT. ANN. § 126.045.

relationship to the resulting child between a sperm donor and woman only if such persons are married.[88]

F. **Gender Identity**

The state registrar of Nevada will amend an individual's birth records upon receipt of a court order verifying that the individual has undergone sex-reassignment surgery.[89]

Doe v. Bellam.[90] Transsexual plaintiff alleged violation of his right against an unreasonable search when, in connection with his arrest for a misdemeanor, sheriff's deputies ordered plaintiff to lift his shirt and drop his pants subjecting plaintiff to a humiliating strip search.[91] Plaintiff alleged that after he informed arresting officer that he was a transsexual, the officer told other deputies at the jail that arrestee was a transsexual and those deputies assembled and ordered him to drop his pants so they could "check out his equipment."[92] Defendants argued that there was a reasonable suspicion for the search since, when patting down the plaintiff, a deputy identified something "unusual" in plaintiff's crotch area. Plaintiff had told the deputy that he was a transsexual and there was a rolled-up sock in his crotch area.[93] The court had previously found that the county's policy of strip searching all arrestees absent reasonable suspicion that the arrestee was smuggling contraband was impermissible. In this case, the court found that the plaintiff's rights had not been violated as the deputies had a reasonable suspicion that something would be uncovered by the search and were not required to take the arrestee at his word that all he was concealing was a rolled-up sock. The court noted that failure to perform the search could in fact have resulted in liability for the jail if the arrestee went on to use contraband to injure other occupants of the jail.[94]

G. **Parenting**

Nevada law permits any adult person or married couple to adopt.[95] Further, Nevada law provides that the application process for the adoption of a child through an agency that provides child welfare services must be available to all persons regardless of sexual orientation (among other factors) and that such factors may only be considered "to the extent they affect or may affect the ability of the person to meet the needs of a specific child."[96]

Nevada law does not expressly prohibit or permit a same-sex couple to jointly petition to adopt, and no court has heard the question of whether such a petition can be filed. Similarly, Nevada law does not expressly prohibit or permit a same-sex partner to

[88] NEV. REV. STAT. ANN. § 126.061.
[89] NEV. REV. STAT. ANN. ch. 440, § 130 (2008).
[90] 524 F. Supp. 2d 1238 (D. Nev. 2007).
[91] *Bellam*, 524 F. Supp. 2d at 1239-40.
[92] *Bellam*, 524 F. Supp. 2d at 1240.
[93] *Bellam*, 524 F. Supp. 2d at 1241-42.
[94] *Bellam*, 524 F. Supp. 2d at 1243.
[95] NEV. REV. STAT. § 127.030 (2008).
[96] NEV. ADMIN. CODE § 127.351 (2008).

petition to adopt his or her partner's child, and no court has heard the question of whether such a petition can be filed.[97]

Nevada law provides that a child placement or child welfare services agency may deny approval of an applicant based on concerns "relating to the applicant's moral character" (among other factors).[98] No cases have been reported where homosexuality was used to support a finding that an applicant lacked good moral character and, thus, could not adopt a child.

There are no reported custody or visitation cases concerning gay or lesbian parents or same-sex co-parents.[99] Under Nevada law, a court may only consider the "best interest of the child."[100] Nevada law provides that the court shall order custody with preference, among other things, to the persons "in whose home the child has been living and where the child has had a wholesome and stable environment" unless the best interest of the child requires otherwise.[101]

Nevada courts have used a parent's gender identity as a factor in determining custody and visitation rights. In *Daly v. Daly*,[102] the father revealed to his daughter that he was a transsexual and would undergo sex reassignment surgery in a visitation session. When the daughter returned home, she was withdrawn and exercised atypical behavior. The mother, advised by a psychologist that it would be dangerous for her daughter to be in the company of her father again, sought to terminate the father's parental rights. The lower court terminated the father's rights and the father appealed. The Nevada Supreme Court upheld the decision, stating that if visitation were permitted, "there would be a risk of serious maladjustment, mental or emotional injury."[103] In affirming the lower court's conclusion that terminating the father's rights was in the best interest of the child, the Supreme Court also noted the father's infrequent communication with the child and failure to pay support for over one year.[104]

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Beginning in 2009, with the adoption of Senate Bill 283 (the Domestic Partnership Act), Nevada has recognized domestic partnerships between same-sex couples. The Nevada state constitution bans same-sex marriages.[105]

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[97] Human Rights Campaign, Nevada Adoption Law, http://www.hrc.org/1285.htm (last visited Sept. 6, 2009).
[98] NEV. ADMIN. CODE §§ 127.240 and 127.42 (2008).
[99] *See* Human Rights Campaign, Nevada Custody and Visitation Law, http://www.hrc.org/1280.htm (last visited Sept. 6, 2009).
[100] NEV. REV. STAT. ANN. § 125.480(3) (2008).
[101] NEV. REV. STAT. ANN. § 125.480(3)(b).
[102] 715 P.2d 56 (Nev. 1986).
[103] *Daly*, 715 P.2d at 50.
[104] *Daly*, 715 P.2d at 59-60.
[105] Nev. Const. Art. I, § 21; *see also* NEV. REV. STAT. ANN. § 122.020 (2008).

2. Benefits

The extension of benefits to the same-sex partners of state employees has been the subject of recent debate. In January 2008, the state board that oversees public benefits recommended that the legislature extend benefits to domestic partners.[106] However, it appears that the proposed regulations have been held up in the legislature due to budget concerns.[107]

I. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Matthews v. Endel.[108] In a *pro se* action, a prison inmate brought various claims of violation of his constitutional rights, including violation of his Fourteenth Amendment equal protection rights, when state prison allegedly failed to place him in protective segregation on the basis of his sexual orientation.[109] The inmate had been labeled by prison officials as an "aggressive homosexual", including in a note in the prisoner's file.[110] The court found that the inmate's equal protection claim failed as homosexuals are not a protected class under the Fourteenth Amendment and the inmate failed to show that there was no rational, non-discriminatory basis to support the prison's actions.[111]

[106] *See* Sean Whaley, *Panel OKs Domestic Partner Benefits*, L.V. REV.-J., Jan. 11, 2008, *available at* http://bit.ly/mpvr0.
[107] *See* Press Release, GLAAD, Nevada Legislators Consider Domestic Partner Benefits (Aug. 27 2008) *available at* http://bit.ly/yyY2V (last visited Sept. 6, 2009).
[108] No. 306-CV-00401-RLH-VPC, 2009 WL 44001 (D. Nev. Jan. 5, 2009).
[109] *Matthews*, 2009 WL 44001 at *4.
[110] *Matthews*, 2009 WL 44001 at *1.
[111] *Matthews*, 2009 WL 44001 at *4.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **New Hampshire – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. Introduction

Since 1998, New Hampshire law has prohibited discrimination in employment, housing, and public accommodations on the basis of sexual orientation. Employment discrimination on the basis of gender identity is not prohibited in the state.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity discrimination in New Hampshire include:

- In 2009, a transgender public school teacher who began to transition was fired because the principal said that "things were not working out." She had received no complaints or warnings prior to being let go.[1]

- In 2009, a teacher who had been at the school for 19 years was terminated when a new superintendent and principal were hired who said disparaging things about his being gay.[2]

- In 2008, a teacher was being considered for tenure at a public school. He had favorable reviews and compliments from his co-workers. The principal said it wasn't the "right fit" and he was denied tenure.[3]

- In 2007, a nurse at a public school in New Hampshire was harassed by the principal at her school because of her sexual orientation. The principal asked several co-workers about the nurse and her partner, who is a special education teacher at the school. Specifically, the principal asked about their sexual orientation and the nature of their relationship. The principal told a co-worker that if they were lesbians, they must be doing something inappropriate behind closed doors. The principal also noted that she didn't understand why they "had to hire" lesbians. The nurse complained to her union and to the human resource staff at the school, but she was told to "make nice."[4]

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[1] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).
[2] *Id*.
[3] *Id*.
[4] GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 19, 2007) (on file with GLAD) (hereinafter "GLAD Intake Form" ([date])).

- In 2007, a transgender correctional officer resigned after she endured three years of harassment and physical abuse based on her gender identity. Her immediate supervisor harassed her, saying "Your tits are growing" and "You look gay when you walk." Other co-workers then began physically assaulting her; kicking her, snapping her in the breasts, and threatening to handcuff her to a flagpole and take off her clothes. One officer grabbed her and slammed her into a concrete wall while her co-workers watched. No one reported this event. She was later placed on a shift with the abusive officer. She resigned as a result of the harassment she faced.[5]

- In 2007, a corrections department applicant reported that she was discriminated against based on her sexual orientation. In applying for a position with a corrections department, she was required to take a polygraph test. During the test, she was asked twice about her marital status, through which she disclosed that she was a lesbian. She was then not hired for the job.[6]

- In 1995, Penny Culliton, a high school English teacher in New Ipswich, was fired for 'gross insubordination' for using three novels with gay themes as optional reading in her classes after the principal had ordered her not to.. The books in question . . . were selected by a school board committee that included school board members, parents, students and community members and were purchased by Culliton with money from a grant from the Respect for All Youth Fund. According to Culliton, the principal informed her after the books had been purchased that the school board did not want books with gay and lesbian characters in the classroom. At that time, Culliton questioned the principal, the superintendent, and the school board chair with little response. Later in the school year, when they were scheduled to be read, she decided to use them as planned. The books had already been distributed to students by the time the school board ordered their recall. At the next board meeting, students and community members accused the board of censorship and presented a petition in protest. Subsequently, the superintendent recommended that Culliton be dismissed. The board agreed with that recommendation following a public dismissal hearing. Approximately 40 students walked out of class to protest her firing; they were suspended.[7]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

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[5] GLAD Intake Form (Nov. 26, 2007).

[6] GLAD Intake Form (Oct. 15, 2002).

[7] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 79-80 (1995 ed.).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

On January 1, 1998, the New Hampshire Legislature amended its employment non-discrimination law to include sexual orientation within its list of protected classes. New Hampshire law declares that "the opportunity to obtain employment without discrimination . . . is hereby recognized and declared to be a civil right" and that "no person shall be denied the benefits of the rights afforded by this section on account of that person's sexual orientation."[8] This protection generally applies both to public[9] and private employment.[10] Employers are prohibited from refusing to hire a person, discharging a person, or discriminating against a person in "compensation or in terms, conditions, or privileges of employment" on the basis of, *inter alia*, sexual orientation.[11] New Hampshire also forbids labor unions from excluding a person from full membership rights, expelling a person from membership, or discriminating "in any way against any of its members or against any employer or any individual employed by an employer" on the basis of, *inter alia*, sexual orientation.[12] Additionally, New Hampshire prohibits employers and employment agencies from printing and/or circulating statements which express any limitation, specification, or discrimination with respect to sexual orientation. [13]

The law has several exemptions. First, the law does not apply to employers with fewer than six employees.[14] Second, it does not apply to employers who are non-profit social clubs or fraternal or religious associations or corporations.[15] Third, an employer, agency, or labor union may defend against a claim for discrimination on the grounds that it is a "bona fide occupational qualification" of the particular job at issue to have someone in it who is not gay.[16]

Finally, New Hampshire expressly prohibits sexual harassment in the workplace.[17] Sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature . . . when (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work performance or creating an intimidating, hostile, or offensive working

[8] N.H. REV. STAT. § 354-A:6.
[9] N.H. REV. STAT. § 21-I:42, XVI; N.H. REV. STAT. § 21-I:52, I.
[10] N.H. REV. STAT. § 354-A:7, I.
[11] N.H. REV. STAT. § 354-A:7, I.
[12] N.H. REV. STAT. § 354-A:7, II.
[13] N.H. REV. STAT. § 354-A:7, III.
[14] N.H. REV. STAT. § 354-A:2, VI. For purposes of this section an employer's spouse, parent, or child do not count as employees. N.H. REV. STAT. § 354-A:2, VII.
[15] N.H. REV. STAT. § 354-A:2, VII.
[16] N.H. REV. STAT. § 354-A:7, I, II, III.
[17] N.H. REV. STAT. § 354-A:7, V.

environment."[18] Both explicitly anti-gay harassment on the basis of sexual orientation and implicit conduct of a sexual nature are prohibited.[19]

B. Attempts to Enact State Legislation.

In March 2009, the New Hampshire House of Representatives introduced a bill that would define gender identity and expression and add it to the list of classes of people protected from discrimination.[20] The bill would have inserted a new statutory definition of gender identity as "a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth."[21] The bill also would have added "gender identity or expression" to anti-discrimination provisions dealing with employment, housing, and public accommodations. During a public hearing for the proposed bill on April 23, 2009, a transgendered woman named Sarah Blanchette testified that she was fired after revealing to her employer that she intended to transition from a man to a woman. Blanchette said that "I had been a good person. A good employee. But because I was different, they were allowed to get rid of me."[22] On April 29, 2009, the New Hampshire Senate deemed the bill "inexpedient to legislate," stopping any further consideration of the bill in 2009.[23]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

On February 25, 2005, Governor John Lynch issued Executive Order 2005-2, establishing a judicial selection commission. The purpose of the selection commission is to "seek out the best judicial talent in the State of New Hampshire, evaluate all potential applicants for judicial nominations, and recommend qualified applicants to the Governor."[24] In exercising its responsibility, the commission is required to consider applicants "without regard to . . . sexual orientation."[25]

2. State Government Personnel Regulations

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[18] *Id*.

[19] *See* GLAD, New Hampshire: Overview of Legal Issues for Gay Men, Lesbians, Bisexuals and Transgender People (December 2008) (hereinafter "GLAD Overview") at 3; *see also* N.H. REV. STAT. § 14-B:1. In addition, a federal court in New Hampshire found that same-sex sexual harassment violated federal civil rights law. *King v. Town of Hanover*, 959 F. Supp. 62 (D.N.H. 1996).

[20] 2009 H.B. 415 (NS).

[21] *See id*, at proposed new N.H. REV. STAT. § 21:51.

[22] Jason Claffey, *Transgendered woman testifies on "bathroom bill,"* FOSTERS.COM, April 24, 2009 *available at* http://www.fosters.com/apps/pbcs.dll/article?AID=/20090424/GJNEWS_01/704249871.

[23] Legislative Cumulative Report for New Hampshire at 5 *available at* http://www.shrm.org/Advocacy/PublicPolicyStatusReports/State/PendingLegislativeReport/Documents/New%20Hampshire%201.22.09.pdf; *see also* About New Hampshire's Legislative Process, http://www.portsmouthchamber.org/legislativeprocess.cfm (last visited Sept. 9, 2009).

[24] N.H. Exec. Order 2005-2, ¶ 1.

[25] N.H. Exec. Order 2005-2, ¶ 5.

State employees may make complaints about employment discrimination on the basis of sexual orientation to the State Human Rights Commission, which, in turn, is authorized to investigate and pass upon complaints alleging violations of anti-discrimination laws.[26] Additionally, individuals who have experienced an unwelcome inquiry or comment about their actual or perceived sexual orientation by a member, officer, or employee of the state legislature may make a complaint to the Legislative Ethics Committee, which is empowered to investigate and act upon the complaint.[27]

The University System of New Hampshire (the "USNH") prohibits discrimination on the basis of, *inter alia*, sexual orientation in the employment of faculty and staff; the awarding of grants, scholarships and other funds; in the acceptance of grants and donations; and in the operation of all courses, programs and services.[28] The University of New Hampshire, the largest component of the USNH, maintains a broad non-discrimination policy in order to "seek excellence through diversity among its administrators, faculty, staff, and students. The university prohibits discrimination on the basis of, *inter alia*, sexual orientation and gender identity or expression."[29]

[26] *See* N.H. REV. STAT. ANN. § 354-A:5.
[27] N.H. REV. STAT. ANN. §§ 14-B:1, 14-B:4.
[28] *See* University System of New Hampshire Board of Trustees Bylaws, Article VI, available at http://usnholpm.unh.edu/Bylaws/Article.6.htm, last accessed June 16, 2009.
[29] Revised Nondiscrimination Policy of the University of New Hampshire, available at http://www.unh.edu/diversity/pdf/RevNondiscrimPolicy.pdf, last accessed June 16, 2009.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

None.

2. Private Employees

None.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

New Hampshire Public School

In 2009, a transgender public school teacher who began to transition was fired because the principal said that "things were not working out." She had received no complaints or warnings prior to being let go.[30]

New Hampshire Public School

In 2008, a teacher who had been at the school for 19 years was terminated when a new superintendent and principal were hired who said disparaging things about his being gay.[31]

New Hampshire Public School

In 2008, a teacher was being considered for tenure at a public school. He had favorable reviews and compliments from his co-workers. The principal said it wasn't the "right fit" and he was denied tenure.

New Hampshire Public School

In 2007, a nurse at a public school in New Hampshire was harassed by the principal at her school because of her sexual orientation. The principal asked several co-workers about the nurse and her partner, who is a special education teacher at the school. Specifically, the principal asked about their sexual orientation and the nature of their relationship. The principal told a co-worker that if they were lesbians, they must be doing something inappropriate behind closed doors. The principal also noted that she didn't understand why they "had to hire" lesbians. The

[30] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).
[31] *Id*.

nurse complained to her union and to the human resource staff at the school, but she was told to "make nice."[32]

County Corrections Department

In 2007, a transgender correctional officer resigned after she endured three years of harassment and physical abuse based on her gender identity. Her immediate supervisor harassed her, saying "Your tits are growing" and "You look gay when you walk." Other co-workers then began physically assaulting her; kicking her, snapping her in the breasts, and threatening to handcuff her to a flagpole and take off her clothes. One officer grabbed her and slammed her into a concrete wall while her co-workers watched. No one reported this event. She was later placed on a shift with the abusive officer. She resigned as a result of the harassment she faced.[33]

Corrections Department

In 2007, a corrections department applicant reported that she was discriminated against based on her sexual orientation. In applying for a position with a corrections department, she was required to take a polygraph test. During the test, she was asked twice about her marital status, through which she disclosed that she was a lesbian. She was then not hired for the job.[34]

New Ipswich Public School

In 1995, Penny Culliton, a high school English teacher in New Ipswich, was fired for 'gross insubordination' for using three novels with gay themes as optional reading in her classes after the principal had ordered her not to.. The books in question were selected by a school board committee that included school board members, parents, students and community members and were purchased by Culliton with money from a grant from the Respect for All Youth Fund. According to Culliton, the principal informed her after the books had been purchased that the school board did not want books with gay and lesbian characters in the classroom. At that time, Culliton questioned the principal, the superintendent, and the school board chair with little response. Later in the school year, when they were scheduled to be read, she decided to use them as planned. The books had already been distributed to students by the time the school board ordered their recall. At the next board meeting, students and community members accused the board of censorship and presented a petition in protest. Subsequently, the superintendent recommended that Culliton be dismissed. The board agreed with that recommendation following a public dismissal hearing. Approximately 40 students walked out of class to protest her firing; they were suspended.[35]

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[32] GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 19, 2007) (on file with GLAD) (hereinafter "GLAD Intake Form" ([date])).
[33] GLAD Intake Form (Nov. 26, 2007).
[34] GLAD Intake Form (Oct. 15, 2002).
[35] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 79-80 (1995 ed.).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

New Hampshire's sodomy law was repealed legislatively in 1975.

B. Housing & Public Accommodations Discrimination

New Hampshire law guarantees as a civil right the opportunity to obtain housing without discrimination on account of a person's sexual orientation.[36] The law prohibits discrimination in connection with renting or selling (or negotiating to rent or sell) a dwelling or commercial structure; in the terms, conditions, or privileges of sale or rental of a dwelling or commercial structure; or in the listing of any property for rental or sale.[37] It is also illegal to misrepresent that any dwelling or commercial structure is unavailable for inspection, rental, or sale when such structure is so available,[38] or to induce or attempt to induce any person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person of a particular sexual orientation.[39] Moreover, it is unlawful to deny a person access or participation in any multiple-listing service, real estate brokers' association, or facility relating to the rental or sale of dwellings, or to discriminate against a person in the terms or conditions of such access or participation, on account of that person's sexual orientation.[40] Finally, it is illegal to discriminate in making mortgage and real estate loans because of the applicant's sexual orientation.[41]

There are several exceptions to the housing laws. First, a person who owns only one single-family house is exempt from the non-discrimination law in renting or selling the house, provided that they do not use the services of any broker (or like person) and provided that they do not circulate any discriminatory advertisements or notices.[42] Second, the owner of a one, two, or three-family unit who lives in one of the units is exempt with repect to the other units.[43] Third, an owner who lives in a dwelling is exempt in the rental of rooms in that dwelling, so long as he rents no more than five rooms.[44] Fourth, a religious organization (or organization supervised by a religious organization) that does not rent or sell property for commercial

[36] N.H. REV. STAT. ANN. § 354-A:8.
[37] N.H. REV. STAT. ANN. § 354-A:10, I-III.
[38] N.H. REV. STAT. ANN. § 354-A:10, IV.
[39] N.H. REV. STAT. ANN. § 354-A:10, V.
[40] N.H. REV. STAT. ANN. § 354-A:10, VIII.
[41] N.H. REV. STAT. ANN. § 354-A:10, VII.
[42] N.H. REV. STAT. ANN. § 354-A:13, I-a.
[43] N.H. REV. STAT. ANN. § 354-A:13, I-b.
[44] N.H. REV. STAT. ANN. § 354-A:13, I-c.

purposes may give preference to members of that same religion (provided that membership in the religion is not restricted by race, color, or national origin).[45]

New Hampshire law also guarantees the opportunity for every person to have equal access to places of public accommodation without discrimination on account of that person's sexual orientation.[46] "Places of public accommodation" include any place that offers its services or facilities or goods to the general public, including "any inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store of other establishment" except for "any institution or club which is in its nature distinctly private."[47] Under New Hampshire law, it is an unlawful discriminatory practice for anyone to "refuse, withhold from or deny to [any] person any of the accommodations, advantages, facilities [or] privileges" of any place of public accommodations on account of a person's sexual orientation.[48] Moreover, it is illegal to publish or circulate any communication to the effect that any of the foregoing rights shall be refused, denied, or withheld from any person on account of their sexual orientation, or that a person is unwelcome or objectionable, or acceptable, desired, or solicited, on account of their sexual orientation.[49]

It is also a fundamental right for any guest receiving emergency shelter services in New Hampshire not to be discriminated against in any manner because of, *inter alia*, that person's sexual orientation.[50]

C. **Hate Crimes**

New Hampshire's hate crimes law explicitly addresses sexual orientation and provides for increased penalties when a violent perpetrator is "substantially motivated to commit [a] crime because of hostility towards the victim's . . . sexual orientation."[51] In order to impose an extended term of imprisonment, a defendant must be notified of the possible application of the enhanced penalty twenty-one days prior to the commencement of jury selection for his or her trial.[52]

D. **Education**

New Hampshire does not explicitly protect LGBT students from harassment and bullying in schools.[53] However, LGBT students are covered under a more general safe schools law, the

[45] N.H. REV. STAT. ANN. § 354-A:13, II.
[46] N.H. REV. STAT. ANN. § 354-A:16.
[47] N.H. REV. STAT. ANN. § 354-A:2, XIV.
[48] N.H. REV. STAT. ANN. § 354-A:17.
[49] N.H. REV. STAT. ANN. § 354-A:17.
[50] N.H. CODE ADMIN. R. ANN. He-M 314.04.
[51] N.H. REV. STAT. § 651:6, I(f).
[52] N.H. REV. STAT. § 651:6, III.
[53] *See* GLAD Overview at 38.

New Hampshire Pupil Safety and Violence Prevention Act, which requires any school employee with "reliable information that a pupil has been subjected to insults, taunts or challenges, whether verbal or physical in nature, which are likely to intimidate or provoke a violent or disorderly response" to report any such incident to the school principal, who shall then report the incident to the superintendent or school board.[54] Additionally, the school board must develop a "pupil safety and violence prevention policy" to proactively address school harassment,[55] and the state Board of Education must prepare an advisory to help school districts implement these policies.

In addition, one federal court in New Hampshire has construed the federal prohibitions against harassment on the basis of sex in schools to include harassment of LGBT students. In that case, the plaintiffs argued that the harassment they experienced was actionable under Title IX because it arose from the perpetrators' sex-based stereotypes.[56]

E. Gender Indentity

New Hampshire issues new birth certificates to transsexuals who have undergone sex-reassignment surgery.[57]

F. Health Care

New Hampshire's Patients' Bill of Rights guarantees that patients will not be denied appropriate care on the basis of their sexual orientation.[58] Moreover, administrative regulations adopted by the state Department of Health and Human Services precludes discrimination on the basis of sexual orientation with respect to persons receiving drug and alcohol treatment services,[59] community mental health services,[60] developmental or acquired brain disorder services[61], peer support services,[62] physical rehabilitative services,[63] or care in state mental health facilities[64] or long-term acute care hospitals.[65]

G. Parenting

[54] N.H. REV. STAT. ANN. § 193-F:3, II.
[55] N.H. REV. STAT. ANN. § 193-F:3, I.
[56] *See, e.g., Snelling v. Fall Mountain Regional School District*, No. Civ. 99-448-JD, 2001 WL 276975, at *4 (D.N.H. Mar. 21, 2001).
[57] N.H. REV. STAT. ANN. § 5-C:87, V.
[58] N.H. REV. STAT. ANN. § 151:21, XVI.
[59] N.H. CODE ADMIN. R. ANN. He-A 303.04, 303.07.
[60] N.H. CODE ADMIN. R. ANN. He-M 309.04, 303.06.
[61] N.H. CODE ADMIN. R. ANN. He-M 310.04, 310.06.
[62] N.H. CODE ADMIN. R. ANN. He-M 315.03, 315.06.
[63] N.H. CODE ADMIN. R. ANN. He-Hea § 702.05.
[64] N.H. CODE ADMIN. R. ANN. He-M § 311.04.
[65] N.H. CODE ADMIN. R. ANN. He-Hea § 2102.05.

1. Adoption

Until 1999, it was illegal under New Hampshire statutory law for a homosexual person to adopt a child or to be a foster parent.[66] Indeed, it was illegal to place a child in a foster family home where one or more adults was homosexual. At present, New Hampshire law permits any unmarried adult (regardless of their sexual orientation) or a husband and wife jointly to petition to adopt a child.[67] New Hampshire also now permits any person, regardless of sexual orientation, to apply for a foster family care license.[68]

It is an open question, however, whether a same-sex couple may jointly petition to adopt. In 1987, the New Hampshire Supreme Court ruled that two unmarried adults may not jointly petition to adopt a child.[69] However in recent years several judges in the state have allowed same-sex couples to petition to adopt in some circumstances.[70] As of 2006, judges in six of New Hampshire's ten counties had permitted same-sex couples to jointly adopt.[71] While there is no explicit prohibition on a same-sex partner to petition to adopt his partner's child, no New Hampshire court has heard the issue.[72]

2. Child Custody and Visitation

There are no published cases addressing child custody and visitation rights where one of the parents seeking such rights is gay, lesbian, bisexual, or transgender. As a matter of general principle, New Hampshire will not consider factors that do not affect the best interests of the child. Moreover, there is a statutory presumption that "in the making of any order relative to such custody...joint legal custody is in the best interest of minor children."[73] The state Supreme Court has stated that the paramount and controlling consideration in deciding child custody is the overall welfare of the child, and that each case must be determined on its own set of particular facts.[74]

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66 *See* N.H. REV. STAT. ANN §§ 170-B:4, 161:2 (1999). The New Hampshire legislature enacted the explicit ban on homosexuals adopting and acting as foster parents in 1987 after the New Hampshire Supreme Court ruled that such a law would not violate the Due Process or Equal Protection Clauses of the New Hampshire or U.S. Constitutions. *See Opinion of the Justices*, 530 A.2d 21 (N.H. 1987). The Court reasoned that since the U.S. Supreme Court had ruled that there was no fundamental right to engage in homosexual behavior, and that statutes discriminating against homosexuals were subject to rational basis review only, the provisions in the 1987 law were constitutional. *See id.* at 22-24.

67 N.H. REV. STAT. ANN. § 170-B:4. New Hampshire permits the following adults to adopt: (1) husband and wife together; (2) an unmarried adult; (3) the unmarried parent of the adoptee; or (4) in certain circumstances, a married person without that person's spouse joining as a petitioner.

68 N.H. CODE ADMIN. R. He-C 6446.03.

69 *In re Jason C.*, 533 A.2d 32 (N.H. 1987).

70 *See* HUMAN RIGHTS CAMPAIGN, HRC New Hampshire Adoption Law, *available at* http://www.hrc.org/issues/parenting/adoptions/8464.htm.

71 *See* Advocate.com, "Gay adoption policies vary by county in New Hampshire," THE ADVOCATE, available at http://www.advocate.com/news_detail_ektid29397.asp, last accessed June 16, 2009.

72 *See* HUMAN RIGHTS CAMPAIGN, HRC New Hampshire Adoption Law, *available at* http://www.hrc.org/issues/parenting/adoptions/8464.htm.

73 N.H. REv. STAT. ANN. § 458:17.

74 *See Del Pozzo v. Del Pozzo*, 309 A.2d 151 (N.H. 1973).

3. Surrogacy

While New Hampshire generally will enforce surrogacy agreements, New Hampshire law requires the "intended parents" to sign the surrogacy contract and to subsequently receive judicial preauthorization.[75] The definitions section of the surrogacy statute defines "intended parents" as "people who are married to each other, and who enter a surrogacy contract with a surrogate by which they are to become the parents of the resulting child."[76] When New Hampshire's marriage equality law takes effect, presumably same-sex spouses will be treated the same as different-sex spouses in the state.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 2009, New Hampshire extended marriage to same-sex couples.[77] When the law takes effect, it will modify the New Hampshire statutes which previously prohibited same-sex marriages. [78] In 2007, the state legislature passed a bill creating the legal status of civil unions for same-sex couples, affording couples who registered all state-level spousal rights and responsibilities. The bill took effect on January 1, 2008. The newly-signed marriage bill permits any couple who entered into a civil union before January 1, 2010 to apply to convert their civil union into a marriage.[79] Any couple in a civil union that has not applied for a marriage license by January 1, 2011 will be automatically considered married by the state of New Hampshire.[80] Under the law, civil unions entered into outside of New Hampshire will be treated as marriages in New Hampshire.[81]

2. Benefits

In *Bedford v. New Hampshire Community Technical College System*,[82] two lesbians employed at the publicly-funded New Hampshire Technical Institute appealed a New Hampshire Commission for Human Rights (the "Commission") finding of no probable cause over the couples' claim for unlawful employment discrimination in connection with the provision of health benefits to their partners. Each petitioner, as a full-time employee, was entitled to receive employee benefits, including health and dental insurance, dependent care, and bereavement leave. After seeking to extend these benefits to their partners, petitioners were informed that they were not entitled to them based upon applicable state statutes, administrative rules, and their collective bargaining agreement. Petitioners filed a complaint with the Commission alleging that the failure to provide benefits to their partners constituted unlawful employment discrimination.

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[75] N.H. REV. STAT. ANN. § 168-B:25.
[76] N.H. REV. STAT. ANN. § 168-B:1.
[77] *See* 2009 Chaptered Law 59 (2009 N.H. H.B. 436 (NS)). At the hearing on H.B. 436 was held before the House Judiciary Committee on February 5, 2009.
[78] *See* N.H. REV. STAT. ANN. §§ 457:1, 457:2. *See* 2009 Chaptered Law 59 (2009 N.H. H.B. 436 (NS)).
[79] *See id.*
[80] *See id.*
[81] *See id.*
[82] Nos. 04-E-229, 04-E-230, 2006 WL 1217283 (N.H. Super. May 3, 2006).

Petitioners argued that because those same benefits were available to the married partners of state employees, and because state law prohibits same-sex marriage, conditioning eligibility for employment benefits upon marriage unlawfully discriminates based upon sexual orientation. The Commission found it lacked jurisdiction to "override the various statutes and statutory schemes set in place by the legislature which do not extend benefits to same-sex partners" and that even if it could, it found no probable cause to believe that petitioners were discriminated against on the basis of sexual orientation.[83]

Reviewing the Commission's findings, the Court found that the women had established a *prima facie* case of sexual orientation discrimination under both a disparate treatment and a disparate impact theory. Reversing the Commission's finding that the law did not discriminate because the petitioners were similarly situated to unmarried heterosexual employees, the Court found that because New Hampshire then prohibited same-sex marriage, same-sex partners had no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of. Thus, unmarried heterosexual employees were not similarly situated to unmarried GLBT employees for purposes of receiving benefits.[84] The Court further found that the State's justification for the policy -- that the laws do not permit the extension of employment benefits like those sought to same-sex couples -- was insufficient because the state's anti-discrimination law trumps any contradictory agency or regulatory rule. Thus, the Court found, the petitioners met their burden under a disparate treatment analysis of showing that the policy impermissibly discriminates on the basis of sexual orientation.[85] Accordingly, the Court reversed the Commission's decision.

I. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

The Rules of the New Hampshire Supreme Court states that "a judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so."[86] Additionally judges cannot engage in extra-judicial activities that interfere with the proper performance of his or her judicial duties -- including making remarks or remarks demeaning individuals on the basis of, *inter alia*, sexual orientation as it may cast reasonable doubt on the judge's capacity to act impartially.[87]

As with judges, it is professional misconduct for an attorney licensed by the State of New Hampshire, in the course of representing a client, to knowingly manifest by words or conduct any bias or prejudice based on race, sex, religion, national origin, disability, age, sexual

[83] *Id*. at *2.
[84] *Id*. at *6-*7.
[85] *Id*. at *10. The Court also noted, without much analysis, that the policy would also violate state law on a disparate impact theory.
[86] N.H. Sup. Ct. Rules, Rule 38, Code of Jud. Conduct, Canon 3.
[87] N.H. Sup. Ct. Rules, Rule 38, Code of Jud. Conduct, Canon 4 § A(3).

orientation or socioeconomic status when such actions are prejudicial to the administration of justice.[88]

With respect to nurses licensed by the State of New Hampshire, it is considered an act of misconduct to practice "in a manner that discriminates on the basis of age, race, sex, handicap, national origin, sexual orientation, nature of illness or health status, physical or mental infirmity."[89]

[88] N.H. Rules of Prof. Conduct, Rule 8.4 (2004 ABA Commentary to Model Code Rule 8.4).
[89] N.H. CODE ADMIN. R. Nur. § 402.04.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **New Jersey– Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

New Jersey's Law Against Discrimination ("LAD") protects against discrimination based on marital status, domestic partnership status, affectional or sexual orientation, gender identity or expression, and mental or physical disability, including AIDS and HIV related illnesses.[1] In addition to the LAD, New Jersey's Administrative Code includes an anti-discrimination policy for state government employees.[2] This policy also prohibits discrimination on the basis of sexual orientation and gender identity.[3]

Despite having one of the nation's strongest sets of laws prohibiting discrimination, incidents of sexual orientation and gender identity discrimination by state and local governments still arise. Documented examples include:

- In 2009, former police officer Robert Colle received a $415,000 settlement against a New Jersey town after his police force discriminated against him because of his sexual orientation. Colle was ridiculed by his chief and by other officers because of his sexual orientation. Dispatch refused back-up after he called for assistance in apprehending a woman who had bit his finger to the bone.[4]

- In 2008, the town of Dover agreed to settle a discrimination claim brought by a lesbian former-police sergeant, for $750,000. According to an announcement made by the Civil Service Commission, Sharon Whitmore received compensation for salary, pension and promotional pay dating back to her suspension from duty in 2004, which she challenged first in an administrative hearing and then a lawsuit in Superior Court, Morris County. Whitmore, described in a report by the Newark Star-Ledger as an openly-gay woman who was the only female member of the Dover police force, alleged that she was subject to "discriminatory, retaliatory or harassing conduct" by the male town supervisor, the police chief, and other department officials. Under the terms of the settlement, Whitmore was reinstated to the active payroll of the department as a sergeant for nine months, during which time she actively sought work, as her pay was to terminate either

[1] N.J. STAT. ANN. § 10:5-1-49 (2008).
[2] N.J. ADMIN. CODE § 4A:7-3.1 (2009).
[3] § 4A:7-3.1(d)-(l) (2009).
[4] Negotiated Settlement and General Release, *Colle v. City of Millville*, D. Conn., Civil Action No. 07-5834.

when she found a new job or by the end of the nine months, whichever came first. Whitmore was a twelve-year veteran of the department.[5]

- In 2006, an employee of a New Jersey State Department reported that she was demoted and assigned tasks below her skill level because she was a lesbian.[6]

- In 1997, fifteen years after he was hired by the New Jersey State Police, a trooper was attacked by other troopers while on assignment, due to his sexual orientation. The troopers were to join Schmitt in a sting operation, but instead headed straight for him when they arrived and began beating him with their batons. They knocked Schmitt to the ground and continued to beat and kick him while shouting anti-gay slurs. The incident made Schmitt fear for his safety and he suffered depression as a result of the hostility he faced at work.[7]

- George DeCarlo, a former substitute teacher who had been frequently harassed by students based on his perceived sexual orientation, sued Watchung Hills Regional High School District. In June 1994, he received a letter in which the district approved his application to be a substitute in the district for the following school year. However, in September, he failed to receive a single request to teach. In January of 1995, he was informed that he should have applied the year before and that his services were no longer needed by the district. DeCarlo filed a complaint with the State Division on Civil Rights. The agency found that "[i]t [was] reasonable to conclude that complainant was denied reappointment as a substitute because of his sexual orientation and as an act of reprisal." DeCarlo then filed the sexual-orientation discrimination lawsuit against the district. In February, the court ruled that DeCarlo could not seek punitive damages from the school district but that he could seek lost and future wages and compensation for the emotional distress he had endured.[8]

- A heterosexual pilot filed a lawsuit in a county court alleging that he had been the victim of anti-gay harassment by staff at the New Jersey Air National Guard and that his complaints about the harassment had been ignored. Major Robert Scott sued four officers in the 177th Fighter Wing in March, alleging that had been harassed by his peers, who had assumed he was gay because he was not married, did not have a girlfriend, and lived with female flight attendants. Scott claimed that fellow enlistees suggested he had a boyfriend and that Major General James McIntosh had retaliated against Scott for complaining, by issuing a written reprimand about his relationship with an unmarried woman. A spokesperson said that the Air National Guard had completed its own investigation into the allegations but did not make its findings public. The court denied the state's

[5] LESBIAN & GAY L. NOTES (Sept. 2008).
[6] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[7] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[8] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 88 (1997 ed.) (hereinafter HOSTILE CLIMATE ([YEAR])).

motion to dismiss Scott's claim and rejected the state's argument that this was an internal military matter over which the courts lacked jurisdiction.[9]

- A gay high school Spanish teacher, who was "outed" by one of his students, sued the Collingswood Board of Education for violating the Family & Medical Leave Act ("FMLA") by refusing to allow him to return to work after taking a medical leave of absence.[10] The plaintiff, Daniel Curcio, was harassed by students and fellow teachers once rumors of his homosexuality began to circulate throughout the school. In response to a question from a student, plaintiff disclosed his sexual orientation to the class and proceeded to inform each of his classes that he is gay. Rather than ending the rumors, these frank discussions exacerbated the problem. The school issued plaintiff a formal reprimand for discussing his homosexuality during class time, and plaintiff was put on administrative leave. At the start of the following school year, plaintiff again informed his students that he is gay, and again plaintiff was issued a reprimand. Although plaintiff stated that he did nothing more than state that he is gay, the school determined that he was misusing class time by discussing his sexuality with students. The school's continued hostility and student harassment caused Curcio to suffer from a severe anxiety disorder and several stress-induced panic attacks. As a result, Curcio took a medical leave of absence at the recommendation of his doctor. When Curcio was medically cleared to return to work, the school refused to reinstate him unless he presented written medical reports indicating his diagnosis and fitness for duty. In addition, the Board reserved the right to conduct its own evaluation of Curcio's fitness for duty. Based on Curcio's prior dealings with the school, he determined that the Board was attempting to bar him from returning based on his sexual orientation. The District Court found that his leave of absence qualified under the FMLA and that, therefore, the Board interfered with his FMLA rights by refusing to allow him to return to work. The Court found that a genuine issue of material fact existed regarding Curcio's claim of retaliation under the FMLA.

- DePiano, a corrections officer since 1987, brought an action against the County of Atlantic as well as Gary Merline, Warden of the Atlantic County Justice Facility ("ACJF"). DePiano alleged, *inter alia*, that Merline showed pictures of him in women's clothes to other employees, and circulated rumors that he was a cross-dresser. In allowing a sex stereotyping harassment claim to proceed, the court specifically held that "the LAD prohibits discrimination, including harassing conduct, on the basis of gender stereotyping. From the record, one could conclude that Merline and his staff harbored negative perceptions of DePiano as a male who did not conform to the male stereotype because he wore women's clothes." The court also found that "the record in this case permits the conclusion that DePiano was subjected to severe and pervasive harassment because of his cross-dressing. DePiano was taunted throughout the facility by numerous officers. Furthermore, the inmates also knew of DePiano's cross-dressing and subjected him to their own taunts. Though Defendants do not acknowledge that the taunts of

[9] HOSTILE CLIMATE238 (2000).
[10] *Curcio v. Collingswood Bd. of Educ.*, 2006 WL 1806455 (D. N.J. Jun 18, 2006).

prisoners may create a hostile working environment, there appears no more effective a way to engender horrible working conditions for a prison guard than to reveal one of his embarrassing secrets to the general population. The cumulative effects of the frequent taunting endured by DePiano may have created a hostile work environment. For that reason, the Court will deny Defendants' motion for summary judgment on this claim."[11]

- Karen Caggiano, a lesbian officer with the Essex County Sheriff 's Department, filed suit under the LAD, claiming harassment and discrimination based on gender and sexual orientation.[12] A jury awarded her nearly $3 million in 2004.[13] Her complaint detailed various incidents in which she was verbally and sexually harassed based upon her gender and sexual orientation. All but the last of the incidents on which she based her hostile environment claim occurred prior to the cut-off date set by the two-year statute of limitations, and the Superior Court dismissed the hostile environment claim, finding it could only consider the last incident which, by itself, was insufficient to sustain a hostile environment claim. The appellate court found, in line with the U.S. Supreme Court's reasoning under Title VII, that a sensible interpretation of the statute would allow the claim to relate back to all the conduct contributing to the hostile environment, so long as at least some of that conduct occurred within the time limit.

- In 2008, a gay public school bus driver reported that he was subjected to a hostile work environment and was fired because of his sexual orientation.[14]

- In 2007, the borough of Haledon and Sergeant James Len reached a settlement of Len's sexual orientation discrimination claim while the case was pending in Superior Court. Len, who had worked for the department since 1986, "came out" to his family as gay in 2002. Len claimed that soon after word spread about his sexual orientation, he began to suffer on-the-job harassment and discrimination at the hands of various co-workers and local government officials, including the mayor and a city council member. Under the terms of the settlement, Len received $450,000 and was entitled to be considered for promotion without discrimination.[15]

In the non-employment context, the LAD also prohibits sexual orientation or gender identity discrimination in public accommodations and housing right."[16]

[11] *DePiano v. Atlantic County*, 2005 WL 2143972 (D. N.J. 2005).
[12] *Caggiano v. Fontoura*, 2002 WL 1677472 (July 25, 2002).
[13] *Caggiano v. County of Essex*, No. L-1608-00, 42 (2084) G.E.R.R. (BNA) 1106 (N.J. Super. decided Nov. 15, 2004).
[14] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).
[15] LESBIAN AND GAY L. NOTES (Feb. 2007).
[16] N.J. STAT. ANN. § 10:5-4.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

LAD prohibits all employers from discriminating in any job-related action, including recruitment, interviewing, hiring, promotions, discharge, compensation and the terms, conditions and privileges of employment on the basis of any of the law's specified protected categories. These protected categories are: race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy and sexual harassment), marital status, domestic partnership status, affectional or sexual orientation, gender identity, atypical hereditary cellular or blood trait, genetic information liability for military service, or mental or physical disability, including AIDS and HIV related illnesses. The LAD prohibits intentional discrimination based on any of these characteristics. Intentional discrimination may take the form of differential treatment or statements and conduct that reflect discriminatory animus or bias.[17]

In December 2006, the LAD was amended to specify that gender identity or expression is a protected class against discrimination.[18] The 2006 Bill codified a New Jersey Superior Court decision holding that "gender dysphoria" (or transsexualism) is a handicap under the New Jersey LAD, and that the LAD precludes an employer from discriminating against a person based on that person's sexual identity or gender.[19]

2. Enforcement & Remedies

None.

B. Attempts to Enact State Legislation

None.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

Executive Order No. 39, issued by the Governor in 1991, prohibits executive branch agencies from discriminating in the provision of services or benefits on the basis of sexual orientation. [20] It provides, in part, that

[17] N.J. STAT. ANN. § 10:5-1-49 (2008).
[18] S.B. 362 (N.J. 2006) (Legislative History).
[19] *Enriques v. West Jersey Health Sys.*, 342 N.J. Super. 501 (2001), *cert. denied*, 170 N.J. 211 (2001); 2006 Legis. Bill Hist. NJ S.B. 362.
[20] *See Rutgers Council of AAUP Chapters v. Rutgers*, 298 N.J. Super. 442, 462 (App. Div. 1997), *cert. denied* 153 N.J. 48 (1998).

> "[n]o Executive Branch department, agency, board, commission or other body shall discriminate on the basis of sexual orientation against any person in the provision of any service or benefit by such department, agency, board, commission or other body."

2. State Government Personnel Regulations

In addition to the LAD, the New Jersey Administrative Code contains a "policy prohibiting discrimination against state government employees in the workplace."[21] The relevant code section provides that

> "[t]he State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race…sex/gender (including pregnancy), *marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression*…or disability. To achieve the goal of maintaining a work environment free from discrimination and harassment, the State of New Jersey strictly prohibits the conduct that is described in this policy. This is a zero tolerance policy. This means that the State and its agencies reserve the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment."[22]

The Administrative Code (the "Code") lists "examples of behaviors that may constitute a violation" of the policy, such as "calling an individual by an unwanted nickname that refers to one or more of the above protected categories, or telling jokes pertaining to one or more protected categories."[23] The Code delineates administrative procedures and policies for complaints, appeals, rehabilitation, training programs and disciplinary action.[24] Therefore, although the LAD applies to state government employers as well as private employers, the Administrative Code provisions are more specific with respect to the procedural and substantive protections given to state employees.

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[21] N.J. ADMIN. CODE § 4A:7-3.1 (2009).
[22] § 4A:7-3.1(a) (2009) (emphasis added).
[23] § 4A:7-3.1(b) (2009).
[24] §§ 4A:7-3.1(d)-(l) and 4A:7-3.2 (2009) (the administrative code does not address a right of private action, although this may already be contemplated in the LAD).

3. Attorney General Opinions

None.

D. Local Legislation

None.

E. Occupational Licensing Requirements

None.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Curcio v. Collingswood Bd. of Educ., 2006 WL 1806455 (D. N.J. Jun 18, 2006).

In New Jersey, a gay high school Spanish teacher who was "outed" by one of his students sued the Collingswood Board of Education for violating the Family and Medical Leave Act ("FMLA") by refusing to allow him to return to work after taking a medical leave of absence.[25] The plaintiff, Daniel Curcio, was harassed by students and fellow teachers once rumors of his homosexuality began to circulate throughout the school. In response to a question from a student, plaintiff disclosed his sexual orientation to the class and proceeded to inform each of his classes that he is gay. Rather than ending the rumors, these frank discussions exacerbated the problem. The school issued plaintiff a formal reprimand for discussing his homosexuality during class time, and plaintiff was put on administrative leave. At the start of the following school year, plaintiff again informed his students that he is gay, and again plaintiff was issued a reprimand. Although plaintiff stated that he did nothing more than state that he is gay, the school determined that he was misusing class time by discussing his sexuality with students. The school's continued hostility and student harassment caused Curcio to suffer from a severe anxiety disorder and several stress-induced panic attacks, which required him to take a doctor-recommended medical leave of absence. When Curcio was medically cleared to return to work, the school refused to reinstate him unless he presented written medical reports indicating his diagnosis and fitness for duty. In addition, the Board reserved the right to conduct its own evaluation of Curcio's fitness for duty. Based on his prior dealings with the school, plaintiff determined that the Board was attempting to bar him from returning based on his sexual orientation. The District Court found that his leave of absence qualified under the FMLA and that, therefore, the Board interfered with his FMLA rights by refusing to allow him to return to work. The Court found that a genuine issue of material fact existed regarding Curcio's claim of retaliation under the FMLA.

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[25] *Curcio*, 2006 WL 1806455.

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> "the record in this case permits the conclusion that DePiano was subjected to severe and pervasive harassment because of his cross-dressing. DePiano was taunted throughout the facility by numerous officers. Furthermore, the inmates also knew of DePiano's cross-dressing and subjected him to their own taunts. Though Defendants do not acknowledge that the taunts of prisoners may create a hostile working environment, there appears no more effective a way to engender horrible working conditions for a prison guard than to reveal one of his embarrassing secrets to the general population. The cumulative effects of the frequent taunting endured by DePiano may have created a hostile work environment. For that reason, the Court will deny Defendants' motion for summary judgment on this claim."[26]

Caggiano v. Fontoura, 2002 WL 1677472 (July 25, 2002).

Karen Caggiano, a lesbian officer with the Essex County Sheriff 's Department, filed suit under the New Jersey Law Against Discrimination, claiming harassment and discrimination based on gender and sexual orientation. A jury awarded her nearly $3 million in 2004.[27] Her complaint detailed various incidents in which she was verbally and sexually harassed based relating to her gender and sexual orientation. All but the last of the incidents on which she based her hostile environment claim occurred prior to the cut-off date set by the two-year statute of limitations, and the Superior Court dismissed the hostile environment claim, finding it could only consider the last incident which, by itself, was insufficient to sustain a hostile environment claim. The appellate court found, in line with the U.S. Supreme Court's reasoning under Title VII, that a sensible interpretation of the statute would allow the claim to relate back to all the conduct contributing to the hostile environment, so long as at least some of that conduct occurred within the time limit.[28]

Gish v. Bd. of Educ., 145 N.J. Super. 96 (N.J. Super. Ct. App. Div. 1976), cert. denied, 74 N.J. 251 (N.J. 1977), cert. denied, 98 S. Ct. 233 (1977).

New Jersey public school forced Gish, a teacher, to undergo psychiatric testing after he publicly supported gay rights and became president of a gay rights activist group. The school admitted that Plaintiff's participation in the gay rights movement was the basis for the required psychiatric testing. Gish subsequently filed suit, arguing that the examination violated his First and Fourteenth Amendment rights. The court held that the

[26] *DePiano*, 2005 WL 2143972.
[27] *Caggiano*, No. L-1608-00, 42 (2084) G.E.R.R. (BNA) 1106.
[28] *Caggiano v. Fontoura*, 2002 WL 1677472.

school could require Plaintiff to undergo the psychiatric testing, so as to determine whether he posed a danger to "impressionable" students because of the unconventional nature of his political activities, which showed evidence of "deviation" from normal mental health. The court also found that the board's determination that Gish was unfit for interacting with students was a fair and reasonable one.[29]

In re Grossman, 316 A.2d 39 (N.J. 1974).

Grossman, a tenured elementary school music teacher and male-to-female transsexual, was fired after undergoing sex-reassignment. The school district suspended Plaintiff without pay and filed multiple charges against Plaintiff, including charges of "deviant" behavior. The state Board of Education affirmed Plaintiff's dismissal, finding that Plaintiff was "incapacitated to teach children because of potential psychological harm to the students." The court upheld Plaintiff's dismissal, relying upon the potential for psychological harm to the students. The court found that when a teacher's mere presence will have an adverse effect on the students in the classroom, a determination of "incapacity" is properly supported.[30]

2. **Private Employers**

Enriques v. West Jersey Health Sys., 342 N.J. Super. 501 (2001), cert. denied, 170 N.J. 211 (N.J. 2001).

A transsexual was hired by the medical center as a man, and was terminated after she assumed female traits and began to identify as transsexual. The plaintiff argued that gender dysphoria or transsexualism was a handicap under the LAD, and that the LAD prohibited an employer from discriminating on the basis of sexual identity or gender. The court found that sex discrimination under the LAD included gender discrimination so as to protect the transsexual from gender stereotyping and discrimination for transforming herself from a man to a woman. The court held that the term "sex" embraced an individual's gender, and was broader than anatomical sex, and that the LAD should be interpreted to include protecting from discrimination on the basis of sex or gender. The court found that gender dysphoria is a handicap and a recognized disability under the LAD because it is a recognized mental or psychological disability that could be demonstrated psychologically by accepted clinical diagnostic techniques.[31]

B. **Administrative Complaints**

2002 N.J. AGEN LEXIS 1492 (Feb. 13, 2002), N.J. Dep't L. & Pub. Safety Div. Civil Rts.

[29] *Gish v. Bd. of Educ.*, 145 N.J. Super. 96 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 74 N.J. 251 (N.J. 1977), *cert. denied*, 98 S. Ct. 233 (1977).
[30] *In re Grossman*, 316 A.2d 39 (N.J. 1974).
[31] *Enriques*, 342 N.J. Super. at 501.

Respondents engaged in unlawful discrimination by refusing to hire complainant because of his sexual orientation and perceived disability (HIV-positive) in violation of the LAD. Both the administrative law judge and the Director found for the complainant, and ordered lost wages and emotional distress damages.

C. **Other Documented Examples of Discrimination**

Municipal Police Department

In 2009, former police officer, Robert Colle, procured a $415,000 settlement against his New Jersey town after he was discriminated against by the force because of his sexual orientation. Colle was ridiculed by his chief and other officers because of his sexual orientation and was refused back up when a woman he was apprehending bit his finger to the bone.[32]

Town of Dover Police Department

In 2008, the town of Dover agreed to settle a discrimination claim brought by a lesbian former police sergeant for $750,000, according to an announcement on July 31 by the Civil Service Commission. Sharon Whitmore received compensation for salary, pension and promotional pay dating back to her suspension from duty in 2004, which she challenged first in an administrative hearing and then a lawsuit in Superior Court, Morris County. Whitmore, described in a report by the Newark Star-Ledger as an openly-gay woman who was the only female member of the Dover police force, alleged that she had been subjected to "discriminatory, retaliatory or harassing conduct" by the male town supervisor, the police chief, and other department officials. Under the terms of the settlement, Whitmore was reinstated to the active payroll of the department as a sergeant for nine months, during which time she actively sought work, as her pay was to terminate when she finds a new job or by the end of the nine months, whichever came first. Whitmore was a twelve-year veteran of the department.[33]

New Jersey Public School.

In 2008, a gay public school bus driver reported that he was subjected to a hostile work environment and was fired because of his sexual orientation.[34]

Borough of Haledon Police Department

In 2007, the borough of Haledon and Sergeant James Len reached a settlement of Len's sexual orientation discrimination case while it was pending in Superior Court. Len, who had worked for the department since 1986, "came out" to his family as gay in 2002. Len claimed that soon after word spread about his sexual orientation, he began to

[32] Negotiated Settlement and General Release, *supra* note 4.
[33] LESBIAN & GAY L. NOTES (Sept. 2008).
[34] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

suffer on-the-job harassment and discrimination at the hands of various co-workers and local government officials, including the mayor and a city council member. Under the terms of the settlement, Len received $450,000 and was entitled to be considered for promotion, discrimination-free.[35]

New Jersey State Agency.

In 2006, an employee of a New Jersey State Department reported that she was demoted and assigned tasks below her skill level because she was a lesbian.[36]

New Jersey State Police

In 1997, fifteen years after he was hired by the New Jersey State Police, a trooper was attacked by other troopers while on assignment because of his sexual orientation. The troopers were to join Schmitt in a sting operation, but instead headed straight for him when they arrived and began beating him with their batons. They knocked him to the ground and continued to beat and kick him while shouting anti-gay slurs. The incident made Schmitt fear for his safety and he suffered depression as a result of the hostility he faced at work.[37]

Watchung Hills Regional High School District

George DeCarlo, a former substitute teacher who had been frequently harassed by students based on his perceived sexual orientation, sued Watchung Hills Regional High School District. In June of 1994, he received a letter in which the bdistrict approved his application to be a substitute in the district for the following school year. However, in September, he failed to receive a single request to teach. In January of 1995, he should have applied a year earlier, and that his services were no longer needed by the district. DeCarlo filed a complaint with the State Division on Civil Rights. The agency found that "[i]t [was] reasonable to conclude that complainant was denied reappointment as a substitute because of his sexual orientation and as an act of reprisal." DeCarlo then filed the sexual-orientation discrimination lawsuit against the district. In February, the court ruled that DeCarlo could not seek punitive damages from the school district, but that he could seek lost and future wages and compensation for the emotional distress he had endured.[38]

New Jersey Air National Guard

A heterosexual pilot filed a lawsuit in a county court alleging that he had been the victim of anti-gay harassment by staff at the New Jersey Air National Guard and that his complaints about that had been ignored. Maj. Robert Scott sued four officers in the 177th

[35] LESBIAN AND GAY L. NOTES (Feb. 2007).
[36] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[37] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[38] HOSTILE CLIMATE 88 (1997).

Fighter Wing in March, saying he had been harassed by his peers, who had assumed he was gay because he was not married, did not have a girlfriend, and lived with female flight attendants. Scott claimed that fellow enlistees suggested he had a boyfriend and that Major General James McIntosh had retaliated against Scott for complaining, by issuing a written reprimand about his relationship with an unmarried woman. Scott also alleged that Captain James Gordon, the unit's only black member, was taunted by peers with racist epithets and jokes. According to Scott, after Gordon complained about the harassment, his flight privileges were suspended for ten weeks. A spokesperson said that the Air National Guard had completed its own investigation into the allegations but did not make public its findings. The court denied the state's motion to dismiss Scott's claim and rejected the state's argument that this was an internal military matter that should not be handled in the courts.[39]

[39] HOSTILE CLIMATE 238 (2000).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Housing & Public Accommodations Discrimination

The LAD also provides protections beyond employment, as follows:

> "All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination."[40]

Sexual orientation and gender identity are protected characteristics in each of these fields.

B. HIV/AIDS Discrimination

Poff v. Caro, 228 N.J. Super. 370 (1987).

The New Jersey Division of Civil Rights sought a preliminary injunction to prevent defendant landlord from renting an apartment while a complaint was pending for refusing to rent to three gay men. The court found that the defendant had refused to rent to the men because he feared they would contract AIDS and spread it to his family, who lived in the same building. The court determined that under the LAD, persons with AIDS were considered handicapped and protected by the statute as well as those who were perceived as likely to contract AIDS. Because plaintiff had made a strong *prima facie* case of discrimination and because there was a local housing shortage, the court issued a preliminary injunction to prevent irreparable harm to the men.

C. Hate Crimes

New Jersey hate crime law now expressly covers crimes motivated by animus based on gender identity and sexual orientation.[41]

D. Education

New Jersey expressly prohibits discrimination and harassment based on sexual orientation and gender identity or expression in public schools. School districts are required to adopt harassment and bullying prevention policies. Notice of the school district's policy must appear in any publication of the school district that contains the

[40] N.J. STAT. ANN. § 10:5-4.
[41] § 2C:16-1 (2002).

comprehensive rules, procedures and standards of conduct for schools in the district, and in any student handbook.[42]

L.W. ex rel. L.G. v. Toms River Reg. Sch. Bd. of Educ., 189 N.J. 381 (2007).

In this case, a child was repeatedly subjected to harassment by his peers due to his perceived sexual orientation; plaintiffs claimed that the district's failure to take corrective action violated the LAD. The record before the court demonstrated that the minor had been taunted with homosexual epithets like "gay," "homo," and "fag" since the fourth grade, and that the district had adopted a zero-tolerance discrimination policy, but had failed to enforce the policy. The offenders were often counseled by school officials after harassing the minor, but the minor missed many days of school and, in high school, was transferred to a different district. The court held that a cause of action against a school district, alleging student-on-student affectional or sexual orientation harassment that was not reasonably addressed by the school district, was cognizable under the LAD. The court noted that school districts were shielded from liability when their preventive and remedial actions were reasonable in light of the totality of the circumstances.

E. **Health Care**

New Jersey law gives a civil union partner the same rights and responsibilities as a spouse with regard to "laws relating to emergency and non-emergency medical care and treatment, hospital visitation and notification, and any rights guaranteed to a hospital patient."[43]

An adult may execute an advance directive giving his or her same-sex partner the authority to make medical decisions on their behalf. The advance directive must be signed and dated by, or at the direction of, the declarant in the presence of two subscribing adult witnesses.[44]

F. **Gender Identity**

New Jersey will issue an amended birth certificate upon receipt of a physician's affidavit and a certified copy of the name change.[45]

G. **Parenting**

New Jersey law permits any adult to petition to adopt.[46] The Department of Youth and Family Services is also specifically required to allow any adult to petition to adopt, regardless of sexual orientation.[47]

[42] §§ 18A:37-13-17.
[43] § 37:1-32(j).
[44] §§ 26: 2H-53 to 2H-91, § 26:2H-56 ("New Jersey Advanced Directives for Health Care Act").
[45] 26:8-40.12.
[46] § 9:3-43.
[47] N.J. ADMIN. CODE § 10:121C-2.6.

Courts typically will not consider a parent's sexual orientation in custody and visitation determinations unless it is shown to adversely affect or harm the child. State law does not permit the consideration of factors that do not affect the best interests of the child to be used in custody and visitation determinations. New Jersey courts will allow a former same-sex partner with no legal or biological relationship to the children to petition for visitation.[48]

In re H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

This case held that same-sex co-parents may adopt their partner's children.

In re J.M.G., 267 N.J. Super. 622 (1993).

This case held that the adoption of the biological child of lesbian partner was in the best interests of the child, and there were no legal barriers to prevent the adoption from proceeding.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In October of 2006, the New Jersey Supreme Court ruled that it is unconstitutional to deny same-sex couples the rights and responsibilities of marriage. The Court deferred to the New Jersey Legislature on the question of how to extend these rights and responsibilities to same-sex couples. In December of 2006, the Legislature passed a measure establishing civil unions for same-sex couples, which took effect on February 19, 2007.[49]

2. Benefits

New Jersey AB 873 extends six weeks of paid family leave to covered private and public employees who are caring for new children or family members with health problems. The bill applies to civil union partners and children of civil union partners. On April 7, 2008, the bill passed both houses. Governor Corzine signed the bill into law on May 2, 2008.[50]

Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442 (N.J. App. Div. 1997), cert. denied, 153 N.J. 48 (1998).

Appellant employees were denied health insurance coverage under the state health benefits plan for their same-sex domestic partners based on the failure to satisfy the

[48] N.J. STAT. ANN. § 9:2-4; *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 142 N.J. Super. 499 (App. Div. 1976); *A.B. v. S.E.W.* 818 A.2d 1270 (N.J. 2003); *A.F. v. D.L.P.*, 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 784 A.2d 721 (N.J. 2001); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).
[49] Human Rights Campaign, State Law Listings, New Jersey Marriage/Relationship Recognition Law, http://www.hrc.org/1548.htm (last visited Sept. 4, 2009).
[50] N.J. A.B. 873 (2008).

statutory definition of "dependents" as spouses under New Jersey law. Appellants and their union sought review of the decision. The court held that the decision to deny same-sex domestic partners health insurance benefits did not violate the LAD because a statutory exception to the LAD intended to place programs such as the one appellants are under, outside the scope of the LAD. The court further held there was not a violation of Equal Protection because the statute was facially neutral and appellants could not show a discriminatory intent behind the marital status classification. The court also held that there was no violation of the executive order that prohibited executive branch agencies from discriminating on the basis of sexual orientation because the state health benefits plan referred to marital status, not sexual orientation

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **New Mexico – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

In 2003, the New Mexico legislature amended its Human Rights Act (the "Act"), originally adopted in 1978, to prohibit discrimination on the basis of sexual orientation and gender identity in the areas of employment, housing, public accommodations and consumer credit.[1] The legislation passed thirteen years after its introduction and was adamantly opposed by several legislators and citizen groups, who launched a campaign to overturn it by referendum.

Since 2003, thirteen complaints of discrimination based upon sexual orientation have been filed against public employers with the New Mexico Human Rights Commission, the agency charged with enforcing the Act.

Documented examples of employment discrimination based upon sexual orientation or gender identity discrimination by state or local governments include:

- In 2008, a gay employee of a state university was constructively discharged due to his sexual orientation.[2]

- In 2007, the *Santa Fe New Mexican* featured a story about Thomas Williams, a school counselor in Santa Fe who had filed a lawsuit against the New Mexico Public Education Department in state court. Williams claimed that he was discriminated against by two female supervisors because he is was gay. In his complaint, Williams alleged that before he "came out," one supervisor said that "[g]ays would be better off if they stayed in the closet. . .[C]oming out only makes life more difficult." Another supervisor commented that it would be hard for her to work with a gay counselor because "they are a negative example for kids." After Williams came out, he noticed that his supervisors became "openly hostile," deriding him with epithets like "you're nothing but a sick faggot," and "gays should go to hell because they are sinful." One supervisor also told Williams, "I can't stand working with men, especially gay men like you." In May of 2006, supervisors told Williams that his contract would not be renewed because of "performance concerns" even though his most recent evaluation

[1] N.M. STAT. ANN. § 28-1-7.

[2] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

indicated that he met or exceeded expectations in 31 out of 32 performance categories.[3] The case is currently pending.

- On November 16, 2006, a state of New Mexico employee filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that he had been discriminated against on the basis of his sexual orientation.[4] The employee had been continuously employed by the state from 1994 through the filing date. His supervisor failed to promote him in favor of a less qualified candidate six months after a colleague disclosed to the Office of the Secretary that the employee was gay.[5] The State of New Mexico settled with the employee, granting him a ten percent pay increase and requiring diversity training for management and line staff in exchange for a promise not to sue.[6]

- On March 2, 2006, a state of New Mexico employee filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that she had been discriminated against on the basis of her sexual orientation. The woman, who had been an employee of the state for six years at the time of filing, reported that she had been harassed at work because she was a lesbian. She was put on administrative leave following an unsubstantiated charge that she had assaulted a co-worker.[7] The state of New Mexico settled with the employee, agreeing to allow her to remain in the position she held before the administrative leave was imposed, to change a rating on an employee evaluation form, and to reissue 68 hours of administrative leave that she was denied while on medical leave, in exchange for a promise not to sue.[8]

- On January 31, 2006, a manager at the State of New Mexico Taxation & Revenue Department filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that she had been discriminated against on the basis of her sexual orientation. At the time of filing, the manager had been employed by the Taxation & Revenue Department for thirteen years and was passed over for the position of Bureau Chief on numerous occasions because she was a lesbian. She filed a complaint after a male candidate was promoted despite the fact that she and another female (who later declined the interview)

[3] Tom Sharpe, *School Counselor Sues, Says He Was Fired For Being Gay*, SANTA FE NEW MEXICAN, Dec. 29, 2007, at C1; *see also Williams v. N.M. Public Educ. Dep't* (D. N.M. Dec. 21, 2007).
[4] In a second complaint submitted to the agency, the employee alleged that he had also been discriminated against because of his race (white), sex (male), and age (58). Charge of Discrimination, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, Charge No. 06-10-16-0579 (Nov. 16, 2006).
[5] Charge of Discrimination, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, Charge No. 06-10-16-0579 (Nov. 16, 2006).
[6] Settlement Agreement, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, HRD No. 06-10-16-0579 (Jan. 1, 2007).
[7] Charge of Discrimination, [Redacted] v. State of New Mexico Department of Motor Vehicles, New Mexico Department of Labor, Human Rights Division, Charge No. 06-03-02-0103 (Mar. 2, 2006).
[8] Settlement Agreement, [Redacted] v. State of New Mexico Department of Motor Vehicles, New Mexico Department of Labor, Human Rights Division, HRD Nos. 06-03-02-0103 & 06-04-13-0177 (June 22, 2006).

were the only candidates chosen for interviews based on their qualifications.[9] On August 20, 2006, the Human Rights Division determined, based on its own investigation, that the there was probable cause to support the woman's charge. The Division determined that she was the most qualified candidate, had received excellent marks on her employee evaluations, and that, although the Department had set forth non-discriminatory reasons for choosing the male candidate, she should have been promoted before he was.[10]

- On July 18, 2005, a patrolman and canine handler with the State Police Division filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor, alleging that he had been discriminated against based on his sexual orientation. When the employee transferred to a new location after five years with the department, his new training supervisor began to harass him by making insinuations about his personal life. The employee, after being taunted for seven months, told the supervisor he was gay. The supervisor did not speak to the employee for a month after the revelation, and the employee was undeservedly disciplined at work on several occasions. The supervisor encouraged a Police Lieutenant to file false charges against him regarding a traffic stop he had made, in which the Police Lieutenant claimed that the employee had accused the traffic offender of being a drug smuggler. Another false charge was filed against the employee, stating that he had failed to respond to a call. The employee believed these actions were taken in an effort to set him up for termination.[11] The state of New Mexico settled with the employee, agreeing to transfer him to a precinct not under the control of the offending supervisor, training as the employee requests and as feasible, and $400.00, in exchange for a promise not to sue.[12]

- An employee of the New Mexico Juvenile Justice Division alleged that she was continually harassed, especially by her supervisor, after it became known that she was a lesbian. The employee alleged that she was falsely accused of misconduct, profanity and insubordination. She was also known in the workplace as a "dyke bitch," was accused of "carpet munching in the control room," and co-her supervisor commented about how she "didn't know if she was a man or a woman." In July of 2004, the employee was placed on administrative leave, pending an investigation of the supervisor's alleged conduct. On August 30,

[9] Charge of Discrimination, [Redacted] v. State of New Mexico Taxation & Revenue, New Mexico Department of Labor, Human Rights Division, Charge No. 06-02-01-0055 (Jan. 31, 2006).
[10] Determination of Probable Cause, [Redacted] v. State of New Mexico Taxation & Revenue Department, New Mexico Department of Labor, Human Rights Division, HRD No. 06-02-01-0055 (Aug. 30, 2006).
[11] Charge of Discrimination, [Redacted] v. State of New Mexico Department of Public Safety- State Police Division, New Mexico Department of Labor, Human Rights Division, Charge No. 05-07-28-0434 (July 18, 2005).
[12] Settlement Agreement, [Redacted] v. State of New Mexico Department of Public Safety- State Police Division, New Mexico Department of Labor, Human Rights Division, HRD No. 05-07-28-0434 (Nov. 12, 2005).

2004, she received notice that her employment had been terminated. She requested a waiver of her right to an administrative hearing.[13]

- In 2006, the ACLU of New Mexico reported that it was representing an employee of the Bernalillo County Assessor's office who was subjected to threatening comments by coworkers and other discriminatory work conditions related to his sexual orientation. In April of 2005, the employee filed an internal complaint; in retaliation, the Assessor's office discharged him. The affiliate sent a demand letter seeking reinstatement of the employee and back pay.[14]

Regarding non-employment-related issues, the record is mixed. On the same day that the legislature passed the sexual orientation and gender identity bill, it also passed a hate crime bill imposing more stringent penalties for crimes motivated by a victim's sexual orientation or gender identity. Shortly thereafter, Governor Richardson issued an executive order offering domestic partnership benefits to state employees.[15] However, the ACLU recently filed a lawsuit against the state for denying health benefits to same sex partners of state retirees.

Unlike many other states, New Mexico law permits an individual to make decisions for an incapacitated same-sex partner[16] and courts have held that sexual orientation may not be considered in custody and visitation determinations unless it is shown to adversely harm the children.[17]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[13] Charge of Discrimination, [Redacted] v. State of New Mexico Juvenile Justice Division, New Mexico Department of Labor, Human Rights Division, HRD No. 04-09-22-0519 (Sept. 17, 2004).
[14] *Docket: Discrimination*, ANNUAL UPDATE 50, 54(ACLU 2006).
[15] N.M. Exec. Order 2003-010 (Apr. 9, 2003) (Gov. Bill Richardson).
[16] N.M. STAT. ANN. § 24-7A-5.
[17] *See State ex rel. Human Servs. Dep't*, 107 N.M. 769 (N.M. Ct. App. 1988).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

On April 8, 2003, the New Mexico legislature amended its Human Rights Act to prohibit discrimination based on sexual orientation and gender identity in employment, housing, public accommodations and consumer credit.[18] Before 2003, the Human Rights Act already provided protection based on race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition and spousal affiliation.[19] According to the legislature, "sexual orientation means heterosexuality, homosexuality or bisexuality, whether real or perceived."[20] The legislature defined gender identity as "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth."[21]

The Human Rights Act, which covers public and private employers, as well as employment agencies and labor organizations, makes it unlawful for "an employer . . . to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of … [sexual orientation or gender identity]". [22] While the statute prohibits intentional discrimination, it does not address facially neutral policies or practices that have a disparate impact on the basis of a particular protected category.[23] Additionally, the bill explicitly prohibits all persons, employers or organizations from implementing quotas based on sexual orientation or gender identity.[24] The statutory prohibition on quotas applies only to sexual orientation and gender identity, reflecting the legislature's reservations about protecting these categories.

There are several exemptions in the Human Rights Act. First, the Act prohibits employers from discriminating on the basis of sexual orientation or gender identity only if they have fifteen or more employees.[25] In contrast, the Act bars employers with as few as four or more employees from discriminating against most other protected groups.[26] Thus, the Act extends greater protection to these other groups than to employees who experience sexual orientation or gender identity discrimination. Second, public and

[18] N.M. STAT. ANN. § 28-1-7.
[19] *Id.* Language barring discrimination based on "serious medical condition" applies to HIV status. Karen Mendenhall, an attorney in Santa Fe has filed at least two cases claiming discrimination based on HIV status under the New Mexico Human Rights Act.
[20] N.M. STAT. ANN. § 28-1-2(P).
[21] § 28-1-2(Q).
[22] § 28-1-7(A).
[23] § 28-1-7.
[24] § 28-1-7.2.
[25] § 28-1-7 (A)(2).
[26] §§ 28-1-2 (B); 28-1-7. Only employers with fifty or more employees are prohibited from discriminating on the basis of spousal affiliation.

private employers may defend against a discrimination claim by arguing that a "bona fide occupational qualification" for the particular position is that it be held by someone who is not a member of a protected group.[27] Third, the Act does not bar religious institutions or organizations from discriminating in employment or renting practices based on sexual orientation or gender identity.[28] Fourth, the Act does not apply to owner-occupied dwellings containing four families or less, nor does it apply to single family dwellings sold, leased, subleased or rented by owners where no discriminatory advertisement has been communicated.[29] Finally, the Act does not prohibit discrimination in any "public restrooms, public showers, public dressing facilities or sleeping quarters in public institutions, where the preference or limitation is based on sex...."[30]

2. Enforcement & Remedies

Individuals alleging discrimination on the basis of sexual orientation or gender identity must file a complaint with the New Mexico Human Rights Commission ("NMHRC") within 300 days after the act was committed.[31] Once an individual files a complaint, the director of the NMHRC is required to investigate the matter to determine if there is probable cause to believe that unlawful discrimination has occurred.[32] If the director finds probable cause, then he or she must first attempt to settle the matter through a process of "persuasion and conciliation."[33] Where conciliation fails, or if the director believes that informal methods of resolution are futile, then the NMHRC may issue a written complaint in its own name against the respondent and order a formal hearing.[34] If the Commission finds that unlawful discrimination has occurred, then it may require the offending party to pay actual damages and, in certain circumstances, reasonable attorneys' fees.[35]

Within sixty days of receiving a probable cause determination by the Director, a complainant may request a waiver of their right to a hearing before the NMHRC. In lieu of a hearing, the complainant may request a trial in New Mexico state court within ninety days of the Director's service of the waiver.[36]

In asserting a claim of unlawful discrimination under the Human Rights Act, an employee bears the initial burden of establishing a *prima facie* case. The employer must

[27] § 28-1-7 (A)-(E). The bona fide occupational qualification exception applies to all protected categories under the New Mexico Human Rights Act.
[28] § 28-1-9 (C). However, these institutions and organizations may only discriminate in their *religious* activities, and not in their *for-profit* or *nonprofit* activities.
[29] §§ 28-1-9 (A),(D).
[30] §§ 28-1-9 (E).
[31] § 28-1-10 (A).
[32] § 28-1-10 (B).
[33] § 28-1-10 (C).
[34] § 28-1-10 (J).
[35] § 28-1-10 (E).
[36] § 28-1-10 (J).

then produce evidence of a legitimate, nondiscriminatory reason for its action, which the employee may rebut as "pretext."[37]

B. Attempts to Enact State Legislation

Prior to the enactment in 2003 of Senate Bill 28 prohibiting both sexual orientation and gender identity discrimination in employment,[38] advocates had fought for more than a decade to secure passage of various versions of the legislation. Indeed, bills prohibiting sexual orientation discrimination were introduced and ultimately thwarted by opponents in 1991, 1993, 1997, 1999, and 2001.[39] The sexual orientation bill did not make it to a full house vote until 1999, when it was defeated on a 35 to 27 vote.[40]

While no transcripts or tapes are available for New Mexico's legislative sessions, press reports have captured the spirit of the debate. In the early to mid-1990s, efforts to pass the bill were stymied by a number of members of the House, as well as Governor Gary Johnson, who opposed it.[41] One opponent of the legislation in the House, Rep. Jerry Alwin, argued that: "[g]ays get fair housing right now if they don't flaunt their sexual orientation."[42] In 1994, anti-gay animus was further manifested when legislators in both the House and Senate made several requests that the State not spend revenue "to enforce or administer any ordinance, regulation, rule or policy that provides protected status or preferential treatment to individuals on the basis of sexual orientation."[43]

Opposition in the legislature remained trenchant in 1999. Rep. Daniel Foley argued that the bill would protect people who are gay because they choose to be – a lifestyle that he said is "wrong." Foley invoked a 1995 Sixth Circuit case holding that sexual orientation is not an "identifiable class" and also insisted that the bill was unnecessary because "gays are among the most prosperous citizens."[44] In 2001, House Minority Whip Earlene Roberts echoed Foley's concerns, arguing that "another protected classification of people" would "divide our nation even more" and lead to a "proliferation of lawsuits."[45] In 2003, the year the bill finally passed, the Senate rejected a series of amendments, including an attempt to remove gender identity from the bill and another to exempt nonprofit spinoffs of religious institutions. One Senator, Leonard Rawson, asked: "Should sexual preference trump religious beliefs and doctrines, or should the integrity of the doctrines be preserved?"[46] Another Senator, Rod Adair, described the bill as "radical legislation" that would force a social value on the people of New Mexico that they do not embrace.[47] To attract support for their position, some members of the Senate conjured

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[37] *See Garcia-Montoya v. State Treasurer's Office*, 130 N.M. 25 (N.M.2001).
[38] S.B. 28 (N.M. 2003).
[39] *See* S.B. 91 (1991); N.M. H.B. (1993); H.B. 277 (N.M. 1999); H.B. 360 (N.M. 2001).
[40] K.C. Mason, *Coalition Sets Legislative Goals*, ALBUQUERQUE J., Dec. 11 2000, at 1.
[41] Thom Cole, *Gay-Rights Bill May Be Shelved*, ALBUQUERQUE J., Jan 14, 1995, at D3.
[42] *Id*.
[43] *See* H.M. 1 (N.M. 1994); S.M. 4 (1994); S.M. 9 (1994); S.M. 93 (1994); S.J.M. 60 (N.M. 1995).
[44] Deborah Baker, *House Kills Gay Rights Bill*, A.P., Mar. 8, 1999.
[45] Mark Hummels, *Gay Discrimination Legislation Voted Down in House*, SANTA FE NEW MEXICAN, Feb. 16, 2001.
[46] Deborah Baker, *Senate Endorses Gay Rights Legislation*, A.P., Feb. 26, 2003.
[47] *Id*.

scenarios of: "state prisons having to pay for sex-change operations for inmates, bearded transvestites in dresses teaching school children and religious bookstores forced to hire gay clerks."[48] The specter of pedophilia also haunted the debate. At one point, Senator Tim Jennings attempted to amend the bill to exempt the New Mexico Military Institute, stating that his constituents feared that students could be molested by gay teachers.[49]

To secure passage of the bill, legislators ultimately settled on a compromise whereby only employers with fifteen or more employees would be prohibited from discriminating based on sexual orientation or gender identity.[50] In contrast, employers with just four or more employees may not discriminate on the basis of the other protected categories.[51] Linda Siegle, a lobbyist for the Coalition for Equality, argued that the law creates a "two-tiered system – one for gays, lesbians and transgendered and one for everybody else" in violation of equal protection.[52] Attempting to rectify this disparity, the House passed a bill in 2004 prohibiting all employers with four or more employees from discriminating against gay and transgender individuals. A Senate Committee ultimately defeated the House bill, opting to stick with the provision limiting coverage to employers with fifteen or more workers.[53]

Shortly after the 2003 bill passed the House and Senate, conservative activists launched a statewide petition drive to force a referendum on the bill led by Pam Wolfe.[54] Wolfe galvanized support for the cause by insisting that the bill would prohibit employers from making comments like: "George, you're doing a great job, but the dress and high heels don't cut it for my company."[55] In 2004, Representative Earlene Roberts reported that opponents had given up their petition drive after the Attorney General ruled that the bill fell within the state's valid police powers and thus, was not subject to a referendum under New Mexico's constitution.[56]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

There are two executive orders relating to sexual orientation and gender identity in New Mexico. The first order, issued in 1985 by Governor Toney Anaya, bans discrimination by any state agency, department or government contractor on the basis of

[48] Steve Terrell, *Gay-Rights Bill Passes Senate*, SANTA FE NEW MEXICAN, Feb. 27, 2003, at A1.
[49] Kate Nelson, *Stop-and-Go Senate Slogs Through Gay Rights Bills*, ALBUQUERQUE TRIB., Feb. 27, 2003, at A7.
[50] Elizabeth Gettelman, *Rights Change Makes Claims Tougher*, SANTA FE NEW MEXICAN, Jun. 18, 2003, at B1.
[51] N.M. STAT. ANN. § 28-1-7 (A). *See also* Sue Major Holmes, *Gay Rights Activists Calling for Equal Treatment*, A.P., Feb. 14, 2004.
[52] Kate Nash, *Richardson Signs Sex-Discrimination Bill*, ALBUQUERQUE J., Mar.11, 2004, at D3.
[53] Holmes, *supra* note 51.
[54] Shea Andersen, *GOP Petition Aims to Halt Gay-Rights Bill*, ALBUQUERQUE TRIB., June 6, 2003, at A2.
[55] Anderson, *supra* note 54.
[56] Holmes, *supra* note 51.

"sexual preference."[57] This order does not specify any procedures or remedies available to state employees who have been discriminated against because of their sexual orientation. The second order, issued by Governor Bill Richardson in 2003, extends domestic partnership benefits to all state employees, provided that they have been in a relationship for a year or more and can show that they share financial obligations with their partners.[58]

2. State Government Personnel Regulations

Title 9 of the New Mexico Administrative Code sets forth the rules and regulations governing the operation of the NMHRC. These rules and regulations lay out the procedures that all parties must follow throughout the complaint, investigation, and adjudication phases of the action.[59]

In addition to the protections offered by the Human Rights Act, which covers both public and private employers at the state and local level, the New Mexico Administrative Code also specifies that sexual orientation shall not be a factor in recruitment for state agencies.[60] The State Personnel Act, however, contains no language prohibiting sexual orientation or gender identity discrimination.[61]

3. Attorney General Opinions

As noted above, opponents of the bill prohibiting sexual orientation discrimination launched a petition drive to overturn it by referendum. In 2004, however, Attorney General Patricia Madrid ruled that the bill was a valid exercise of the state's police power, and thus not subject to referendum under the New Mexico Constitution.[62]

D. Local Legislation

No cities or towns in New Mexico currently have comprehensive ordinances prohibiting sexual orientation or gender identity discrimination.[63] Albuquerque and Santa Fe, however, have adopted policies prohibiting sexual orientation discrimination in the public sector, and other jurisdictions have enacted personnel regulations offering some degree of protection from sexual orientation discrimination.

1. City of Albuquerque

In 1997, Albuquerque's mayor, Jim Baca, issued Executive Instruction No. 6 affirming that "the City prohibits discrimination in the operation of government on the

[57] N.M. Exec. Order No. 15 (1985) (Gov. Toney Anaya).
[58] N.M. Exec. Order No. 10 (2003) (Gov. Bill Richardson).
[59] *See* NM ADMIN. CODE § 9.1.1.1 – 9.1.1.18.
[60] N.M. ADMIN. CODE § 1.7.5.9. (Recruitment).
[61] N.M. STAT. ANN. § 10-9-1.
[62] N.M. Att'y Gen. Op. No. 3 (2004).
[63] Albuquerque's human rights ordinance covers race, color, religion, sex, national origin, age, and physical disability but not sexual orientation or gender identity. Albuquerque Official City Website, Human Rights Office General Information, http://bit.ly/4RWEQ (last visited Sept. 6, 2009).

basis of … sexual orientation…."[64] Six years later, the City formally authorized the Albuquerque Human Rights Board to investigate complaints of gender identity or sexual orientation discrimination by City employees.[65]

In 1999, the Campaign for Human Rights, a local citizen group, proposed that the Albuquerque City Charter be amended to prohibit discrimination based on sexual orientation, but the amendment was ultimately defeated by the City Council. A similar proposal, which seeks to amend the City Charter to prohibit sexual orientation and gender identity discrimination has been approved by the Charter Review Task Force and is under consideration by the City Council."[66]

2. City of Santa Fe

In a policy statement, the City of Santa Fe affirms that "no city ordinance, resolution or policy shall be enacted or adopted nor shall any action be condoned which discriminates on the basis of … gender [or] sexual orientation…."[67] The City does not, however, have a special agency charged with processing sexual orientation or gender identity discrimination complaints. Rather, claims made by City employees are handled by the EEO Compliance Officer.

3. City of Tucumcari

The Municipal code of Tumcumcari states that "[t]he city provides equal employment opportunity … and will not discriminate on the basis of … sex (gender, sexual orientation and pregnancy)…."[68]

4. City of Hobbs

The City of Hobbs personnel manual states that "[a]ll employees of the City shall be hired, promoted, discharged and compensated on the basis of merit and without regard to … sexual orientation…."[69]

5. City of Alamogordo

The City of Alamogordo has an ordinance declaring that "the City prohibits discrimination and/or harassment that is … related to anyone's … sexual orientation … or any other protected status."[70]

6. City of Portales

[64] City of Albuquerque Exec. Instruction No. 6 (1997) (Mayor Jim Baca).
[65] Memorandum of Understanding between City of Albuquerque and Albuquerque Hum. Rts. Bd. (2003).
[66] Summary Minutes, City of Albuquerque, Charter Rev. Task Force (Oct. 16, 2008).
[67] SANTA FE CODE OF ORD., Art. II (Policy Statements) § 2.02 (Human and Civil Rights).
[68] TUCUMCARI MUNI. CODE §2.64(1).
[69] HOBBS PERSONNEL MANUAL § 2.56.020.
[70] ALAMOGORDO CODE OF ORD., Part 8, § 8.320.

The City of Portales Code of Ordinances states that "It has been and will continue to be fundamental policy of the city not to unfairly discriminate against individuals on the basis of … sexual orientation … with respect to recruitment, hiring, training, promotion, and other terms and conditions of employment."[71]

7. Rio Arriba County

In 1997, the Democratic Party in Rio Arriba County passed a resolution calling for the state Democratic Party to oppose abortion and the rights of gay people. The resolution equated homosexuality with pedophilia and opposed "the establishment of 'protected class' status for homosexuals." It stated, "Where the word homosexuality or homosexuals is used in this writing, the term will also be used to mean bisexuals, transsexuals, homosexuals and any other deviant lifestyle other than heterosexual."[72]

E. Occupational Licensing Requirements

Almost all occupational licenses in New Mexico require that the applicant be of "good moral character."[73]

[71] PORTALES CODE OF ORD. § 19-11(a).
[72] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 89 (1997 ed.).
[73] New Mexico Regulation & Licensing Department Website, http://www.rld.state.nm.us (last visited Sept. 6, 2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

No sexual orientation or gender identity discrimination cases brought under the Human Rights Act have been adjudicated in New Mexico state or federal court.

1. State & Local Government Employees

Williams v. N.M. Pub. Educ. Dep't, (D. N.M. Dec. 21, 2007).

In 2007, the *Santa Fe New Mexican* featured a story about Thomas Williams, a school counselor in Santa Fe, who filed a lawsuit against the New Mexico Public Education Department in state court claiming that he was discriminated against by two female supervisors because he was gay. In his complaint, Williams alleged that before he came out, one supervisor said that "[g]ays would be better off if they stayed in the closet … coming out only makes life more difficult." Another supervisor also commented that it would be hard for her to work with a gay counselor because "they are a negative example for kids." After Williams "came out," he noticed that his supervisors became "openly hostile," deriding him with epithets like "you're nothing but a sick faggot," and "gays should go to hell because they are sinful." One supervisor also told Williams, "I can't stand working with men, especially gay men like you." In May of 2006, Williams was told his contract would not be renewed because of "performance concerns" despite his superior performance in all but one performance category.[74] This case is currently pending.

Medina v. Income Support Div., 413 F.3d 1131 (10th Cir. 2005).

The plaintiff filed a suit under Title VII, claiming sex discrimination by her lesbian supervisor. The plaintiff argued that she was punished for not acting like a "stereotypical woman at ISD –which, according to her, was a lesbian." Both the district court and the 10th Circuit rejected the plaintiff's claim, holding that Title VII does not cover harassment due to a person's "sexuality."[75]

2. Private Employers

None.

B. Administrative Complaints

State of New Mexico Human Services Department

On November 16, 2006, a state of New Mexico employee filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor,

[74] Tom Sharpe, *School Counselor Sues, Says He Was Fired For Being Gay*, SANTA FE NEW MEXICAN, Dec. 29, 2007, at C1; *see also Williams v. N.M. Public Educ. Dep't* (D. N.M. Dec. 21, 2007).
[75] *See Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005).

alleging that he had been discriminated against on the basis of his sexual orientation.[76] The employee had been continuously employed by the state from 1994 through the date he filed the complaint. His supervisor failed to promote him in favor of a less qualified candidate six months after a colleague disclosed to the Office of the Secretary that the employee was gay.[77] The state of New Mexico settled with the employee, granting him a 10% pay increase and diversity training for management and line staff in exchange for a promise not to sue.[78]

State of New Mexico Department of Motor Vehicles

On March 2, 2006, a state of New Mexico employee filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that she had been discriminated against on the basis of her sexual orientation. The woman, who had been an employee of the state for six years at the time of filing, reported that she had been harassed at work because she was a lesbian. She was put on administrative leave following an unsubstantiated charge that she had assaulted a co-worker.[79] The state of New Mexico settled with the employee, agreeing to allow her to remain in the position she held before the administrative leave was imposed, to change a rating on an employee evaluation form, and to reissue 68 hours of administrative leave that she was denied while on medical leave in exchange for a promise not to sue.[80]

State of New Mexico Taxation & Revenue Department

On January 31, 2006, a manager at the State of New Mexico Taxation & Revenue Department filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that she had been discriminated against on the basis of her sexual orientation. At the time of filing, the manager had been employed by the Taxation & Revenue Department for thirteen years and was passed over for the position Bureau Chief on numerous occasions because she was a lesbian. She filed a complaint after a male candidate was promoted despite the fact that she and another female (who later declined the interview) were the only candidates chosen for interviews based on their qualifications.[81] On August 20, 2006, the Human Rights Division determined, based on its own investigation, that the there was probable cause to support

[76] In a second complaint submitted to the agency, the employee alleged that he had also been discriminated against because of his race (white), sex (male), and age (58). Charge of Discrimination, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, Charge No. 06-10-16-0579 (Nov. 16, 2006).
[77] Charge of Discrimination, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, Charge No. 06-10-16-0579 (Nov. 16, 2006).
[78] Settlement Agreement, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, HRD No. 06-10-16-0579 (Jan. 1, 2007).
[79] Charge of Discrimination, [Redacted] v. State of New Mexico Department of Motor Vehicles, New Mexico Department of Labor, Human Rights Division, Charge No. 06-03-02-0103 (Mar. 2, 2006).
[80] Settlement Agreement, [Redacted] v. State of New Mexico Department of Motor Vehicles, New Mexico Department of Labor, Human Rights Division, HRD Nos. 06-03-02-0103 & 06-04-13-0177 (June 22, 2006).
[81] Charge of Discrimination, [Redacted] v. State of New Mexico Taxation & Revenue, New Mexico Department of Labor, Human Rights Division, Charge No. 06-02-01-0055 (Jan. 31, 2006).

the woman's charge. The Division determined that she was the most qualified candidate, had received excellent marks on her employee evaluations, and that, although the Department had set forth non-discriminatory reasons for choosing the male candidate, she should have been promoted before he was.[82]

State of New Mexico Department of Public Safety- State Police Division

On July 18, 2005, a patrolman and canine handler with the State Police Division filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that he had been discriminated against based on his sexual orientation. When the employee transferred to a new location after five years with the department, his new training supervisor began to harass him by insulting him about his personal life. The employee, after being taunted for seven months, told the supervisor he was gay. The supervisor did not speak to the employee for a month after the revelation and the employee was undeservedly disciplined at work on several occasions. The supervisor encouraged a Police Lieutenant to file false charges against him regarding a traffic stop he had made, in which the Police Lieutenant claimed that the employee had accused the traffic offender of being a drug smuggler. Another false charge was filed against the employee, stating that he had failed to respond to a call. The employee believed these actions were taken in an effort to set him up for termination.[83] The state of New Mexico settled with the employee, agreeing to transfer him to a precinct not under the control of the offending supervisor, training as the employee requests and as feasible, and $400.00 in exchange for a promise not to sue.[84]

New Mexico Juvenile Justice Division

An employee alleged that she was continually harassed, especially by her supervisor, after it became known that she is a lesbian. She alleged that she was falsely accused of misconduct, profanity and insubordination. She was also known in the workplace as a "dyke bitch," accused of "carpet munching in the control room," and comments were made about how she "didn't know if she was a man or a woman." In July 2004, she was placed on administrative leave pending an investigation of her supervisor's harassment of her. On August 30, 2004, plaintiff got notice that she was being dismissed. Plaintiff requested a waiver of her right of hearing.[85]

C. **Other Documented Examples of Discrimination**

[82] Determination of Probable Cause, [Redacted] v. State of New Mexico Taxation & Revenue Department, New Mexico Department of Labor, Human Rights Division, HRD No. 06-02-01-0055 (Aug. 30, 2006).
[83] Charge of Discrimination, [Redacted] v. State of New Mexico Department of Public Safety- State Police Division, New Mexico Department of Labor, Human Rights Division, Charge No. 05-07-28-0434 (July 18, 2005).
[84] Settlement Agreement, [Redacted] v. State of New Mexico Department of Public Safety- State Police Division, New Mexico Department of Labor, Human Rights Division, HRD No. 05-07-28-0434 (Nov. 12, 2005).

[85] Charge of Discrimination, [Redacted] v. State of New Mexico Juvenile Justice Division, New Mexico Department of Labor, Human Rights Division, HRD No. 04-09-22-0519 (Sept. 17, 2004).

A New Mexico State University

In 2008, a gay employee of a state university was constructively discharged due to his sexual orientation.[86]

Bernalillo County Assessor's Office

In 2006, the ACLU of New Mexico reported that it was representing an employee of the Bernalillo County Assessor's office who had been subjected to threatening comments by coworkers and other discriminatory work conditions related to his sexual orientation. In April 2005, the employee filed an internal complaint; in retaliation, the Assessor's office discharged him. The affiliate sent a demand letter seeking reinstatement of the employee, and back pay.[87]

[86] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[87] *Docket: Discrimination*, ANNUAL UPDATE 50, 54(ACLU 2006).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Hate Crimes

In 2003, concurrent with the anti-discrimination bill, the legislature also passed a bill imposing more stringent penalties for hate crimes committed because of a victim's sexual orientation or gender identity. Similar to the anti-discrimination legislation, this bill was met with significant resistance, passing by a single vote in the Senate.[88] Earlier versions of the bill, which covered sexual orientation but not gender identity, squeaked through both houses in 1995 and 1999 but were vetoed by Governor Gary Johnson, who insisted that the gay community should not be given special protection, stating that "every crime is a hate crime."[89]

Both Albuquerque and Santa Fe have local hate crime ordinances covering crimes motivated by "gender" and "sexual orientation."[90] In addition, Santa Fe prohibits discrimination in housing based on gender, sexual orientation, and familial status.[91]

B. Education

The New Mexico Administrative Code sets forth standards of professional conduct prohibiting educators from both practicing and condoning sexual orientation discrimination in the schools.[92]

C. Health Care

New Mexico law permits an individual to make decisions for an incapacitated same-sex partner so long as the individual demonstrates "an actual commitment to the patient similar to the commitment of a spouse" and the individual and patient "consider themselves to be responsible for each other's well-being."[93]

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[88] Lou Chibbaro, *Richardson Claims Best Record on Gay Issues*, WASH. BLADE, Dec. 21, 2007.
[89] *See* John Robertson, *Homosexual Rights Bills Have Faltered In New Mexico*, ALBUQUERQUE J., May 21, 1996, at A5; Kate Nash, *Senate-Passed Measure Bans Bias Against Gays*, ALBUQUERQUE J., Feb. 27, 2003, at A1.
[90] *See* ALBUQUERQUE CODE OF ORD. § 12-2-27; SANTA FE CODE OF ORD. § 16-4.1.
[91] *See* SANTA FE CODE OF ORD. § 26-4.2.
[92] *See* N.M. ADMIN. CODE § 6.60.9.9 (B)(2).
[93] N.M. STAT. ANN. § 24-7A-5.

The New Mexico Administrative Code prohibits discrimination based on sexual orientation by health care insurers and hospitals.[94]

D. Parenting

Courts in New Mexico have held that sexual orientation, considered alone, is not a permissible basis for the denial of custody or visitation of a minor child. In *In re Jacinta M.*, the Children's Court of Curry County declined to place a child in her brother's custody because of his homosexuality, even after he received a positive review from the Department of Human Services. The Court of Appeals later vacated the decision by the Children's Court, holding that a person's sexual conduct is not relevant in custody determinations unless there is "compelling evidence that such conduct has significant bearing on the best interests of the child."[95]

Under New Mexico law, any individual or married couple may petition to adopt.[96] No state court has yet heard the issue of whether same-sex couples may jointly petition to adopt.

E. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Currently, New Mexico has no comprehensive domestic partnership bill. In 2007, Governor Richardson called on the legislature to pass a law prohibiting discrimination based on domestic partner status and granting domestic partners all the rights, protections, and responsibilities available to married couples in the state.[97] The proposed bill passed the House but fell one vote short of passing the Senate. The bill was reintroduced in 2008 and again passed the House by a narrow margin of 33 to 31. The Senate, however, declined to take action on the bill.[98]

2. Benefits

In December of 2007, the ACLU filed a complaint in state court on behalf of three same-sex couples, alleging that New Mexico unfairly denies same sex partners of state employees post-retirement health insurance benefits in violation of the New Mexico constitution's equal protection provision, and substantive due process.[99] By executive order, same-sex partners of state employees receive health insurance benefits during their

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[94] *See* N.M. ADMIN. CODE § 7.7.2.19 (A)(1)(a); N.M. ADMIN. CODE § 13.10.13.22 (A)(2).
[95] *See State ex rel. Human Servs. Dep't*, 107 N.M. at 772; *see also A.C. v. C.B.*, 113 N.M. 581 (N.M. Ct. App. 1992) (reversing the judgment of the district court holding that former domestic partner had no standing or enforceable right to seek custody of a minor child and holding that sexual orientation, by itself, was not a permissible basis for the denial of shared custody or visitation).
[96] N.M. STAT. ANN. § 32A-5-11.
[97] Chibbaro, *supra* note 88.
[98] H.B. 9 (N.M. 2008); *see* Human Rights Campaign, Laws: New Mexico HB 9, http://bit.ly/a3tJZ (last visited Sept. 6, 2009).
[99] *See Levitt v. N.M. Retiree Health Auth.*, CV-2007-01048 (Pl. Complaint filed Dec.10, 2007).

partner's employment, but these benefits terminate upon retirement.[100] Under the New Mexico Retiree Health Care Act, only *spouses* of state employees continue to get health benefits post-retirement.[101]

[100] *See Levitt v. N.M. Retiree Health Auth.*, CV-2007-01048 (Pl. Complaint filed Dec.10, 2007).
[101] *See id.*

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **New York – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Under New York law, sexual orientation discrimination in the workplace is prohibited. Sexual orientation non-discrimination legislation was first introduced in New York in the early 1970s.

As of January 16, 2003, the term "sexual orientation" became a protected status when the governor signed Chapter 2 of the Laws of 2002, referred to as the Sexual Orientation Non-Discrimination Act ("SONDA"). SONDA amended the N.Y.S. Human Rights Law, Civil Rights Law, and the Education Law to include sexual orientation as a protected class. [1] Under SONDA, discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodations, education, credit, and the exercise of civil rights is prohibited. [2]

During the 1970s and 1980s local municipalities throughout the state began passing their own local ordinances outlawing anti-gay discrimination.[3]

Documented examples of discrimination on the basis of sexual orientation and gender identity in New York by state and local governments include:

- The Associated Press ran a story on July 16, 2009 of a transgender woman who had been fired from her job as a mailroom clerk with the New York City Department of Parks and Recreation because she had transitioned. The 27-year-old Harlem resident was also made fun of and called vulgar names by co-workers because of her gender change. At the time of press, she had filed a discrimination suit in Manhattan.[4]

- An employee of the New York State courts settled his claim of sexual orientation discrimination in the promotion process. He later challenged the validity of a

[1] *See* N.Y. EXEC. LAW § 296 (2005); N.Y. CIV. RIGHTS. LAW § 40-C; N.Y. EDUC. LAW § 313.
[2] N.Y. EXEC. LAW § 296 (2005).
[3] The Village of Alfred, N.Y. (population 1,000) passed their own local ordinance outlawing anti-gay discrimination in 1974.
[4] Associated Press, *Transsexual Sues NYC Parks Department over Firing*, July 16, 2009, *available at* http://www.silive.com/news/index.ssf/2009/07/transsexual_sues_new_york_city.html (last visited Sept. 8, 2009).

verbal settlement of his case. The court held that the verbal agreement was binding.[5] Aguiar v. State, 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).

- A lesbian corrections officer employed by the New York State Department of Correctional Services alleged discrimination based both on her gender and sexual orientation. The Division of Human Rights found that her supervisor had engaged in unlawful discrimination and retaliation against her. The woman was subjected to a fellow officer's obscene language and offensive conduct. The co-worker persistently and relentlessly demeaned the woman, scrawled sexually explicit graffiti in her workplace, and filed a baseless internal complaint against her. While the Department promptly processed the co-workers claim against the woman, even though they admitted it was "bogus," they failed to take any steps towards remedying her grievances. Despite her numerous complaints, the Department did not discipline the co-worker and instead retaliated against the woman for complaining. Due to the harassment, the woman suffered from increased stress, sleeping and eating difficulties, nosebleeds, and she was diagnosed with "adjustment disorder with depressive features." A unanimous five-judge panel of the New York Appellate Division affirmed, but reduced her damages from $850,000 to $200,000, finding them disproportionate compared to awards based on similar claims.[6] New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights, 2008 WL 2682073 (July 10, 2008).

- In 2008, two lesbian police officers were subjected to hostile work environments because of their sexual orientation.[7]

- An NYPD police officer brought an action against the City of New York claiming he was discriminated against based on his perceived sexual orientation.[8] He was denied his application to transfer to the NYPD Office of Community Affairs' Youth Services Section ("YSS") because he was incorrectly perceived to be a child molester because of his perceived sexual orientation, and was retaliated against after filing an internal complaint against a police officer with the NYPD's Office of Equal Employment Opportunity.[9] The jury's verdict was in favor of plaintiff finding that CITY/NYPD had discriminated against him based upon his "perceived sexual orientation and CITY/NYPD employees retaliated against him for engaging in protected activity resulting in emotional damages."[10] The court determined the jury was "able to assess the long term effects of [defendant's] harmful stereotyping of [plaintiff] and discriminatory denial of [plaintiff's] career opportunity with YSS has had on his mental and emotional state and which was

[5] *Aguiar v. State of N.Y.*, 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).
[6] *New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights*, 2008 WL 2682073 (July 10, 2008).
[7] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[8] *Sorrenti v. City of N.Y.*, 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 at *1 (N.Y. Sup. 2007).
[9] *Id.* at *1.
[10] *Id.* at *7.

compounded by CITY/NYPD employees' ongoing retaliatory acts of 'abuse, intimidation and humiliation'"[11] Sorrenti v. City of N.Y., 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 (N.Y. Sup. 2007).

- A railroad ticket agent sued the Long Island Railroad and one of its managers for constitutional and statutory sexual orientation harassment. The court denied the Defendant's summary judgment motion, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans,*[12] and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.[13] The harassment began in 1996 when the ticket agent's supervisor began making derogatory comments related to his sexual orientation. The ticket agent reported the harassment to his manager, and though the manager decided to send the supervisor to sensitivity training classes, she never followed through. Later, the same supervisor continued to harass him in retaliation, and the ticket agent's complaints about the supervisor's conduct were never addressed. The ticket agent was also referred to by several people in the office as a "fucking faggot" and "a queer." Pugliese v. Long Island R. R. Co., 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).

- In 2005, Plaintiff, a bisexual man, sued the Suffolk County Police Department alleging that he was subjected to harassment based on sexual orientation. A federal jury awarded Plaintiff $260,000 in damages. Post-verdict, an attorney for the Department indicated that its policies had been under review since the election of Suffolk County Executive Steve Levy, a Democrat whose predecessor had a much less supportive record on lesbian and gay rights. The attorney said that the goal of the "review" was to "avoid any of these lawsuits in the future." She also noted that the jury verdict related solely to workplace harassment, and did not find that Plaintiff was discharged because of his sexual orientation or as retaliation for complaining about the harassment.[14]

- On August 23, 2005, an employee of the Department of Correctional Services filed an administrative complaint with the State Division of Human Rights alleging that he had been harassed because of his sexual orientation. The employee was a Head Cook at a state correctional facility where, at the time of filing, he had been employed for seven years. The employee's co-workers began to harass him because of his sexual orientation approximately one year before the complaint was filed. They posted pictures in the Department that had been altered to make it look as though the employee was engaging in sexual intercourse with the inmates. Comments such as, "No more head cooks in the pc unit ha-ha how do you like that fag boy," were written on the employee bathroom walls and co-workers made lewd comments in the presence of other employees and inmates about the employee's sexual activity, including an accusation "that [the

[11] *Id.* at *8.
[12] 517 U.S. 620 (1996).
[13] *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).
[14] Lesbian & Gay L. Notes (Mar. 2005).

employee] was screwing [a female co-worker] because she was tighter than his boyfriend." The employee reported the harassment to two supervisors, but no corrective action was taken and the harassment continued. Thereafter, the employee had to take medical leave due to the effects of the harassment.[15] The Division investigated the matter and determined that there was probable cause to support the employee's charge. The state of New York settled the matter privately with the employee in exchange for discontinuing the proceeding.[16]

- On March 5, 2007, the employee described above filed a second complaint with the State Division of Human Rights alleging that he had been retaliated against based on his complaint of August 23, 2005. After the settlement was reached in that matter, he was passed over for overtime and was made to perform tasks outside of his job description, and was unfairly issued notices of discipline on multiple occasions.[17] Again, the Division's investigation revealed probable cause to support the employee's charge. Again, the parties entered into a private settlement.[18]

- A former art teacher who brought an action against a school district based on allegations that she was subjected to a hostile work environment because of her sexual orientation.[19] She also alleged the school district retaliated against her for speaking out against such discrimination.[20] She alleged a number of incidents involving students harassing her on the basis of her sexual orientation.[21] One student told her she was "disgusting" another asked her if she was a "dyke." A third student, when reprimanded by Lovell, called her a racist and a man-hater. The teacher's complaints to the school administration were not addressed. The teacher also found graffiti in her classroom that read, "Lovell is a stupid dyke." As a result, she had to request a catastrophic leave after a psychiatric evaluation determined that her condition was of a "mixed anxiety and depressed mood."[22] The court held that the school teacher successfully alleged sexual orientation discrimination, thereby defeating defendant's summary judgment motion arguing that the principal and other school officials had acted reasonably under the circumstances. The court determined that a jury could find defendant condoned and enabled a "continuous campaign of harassment by some students against [Lovell] on the basis of her sexual orientation."[23] Further, the court determined that "even if [defendant] did not know in 2001 that he had to protect [Lovell]

[15] Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Aug. 23, 2005).
[16] Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Jan. 28, 2008).
[17] Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Mar. 5, 2007).
[18] Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Jan. 28, 2008).
[19] *Lovell v. Comsewogue Sch. Dist*., 2005 WL 1398102 at *1 (E.D.N.Y. 2005).
[20] *Id.* at *1.
[21] *Id.* at *1-3.
[22] *Id.* at *4.
[23] *Id.* at *9.

against the students' discrimination, he is presumed to have known of his obligation not to engage in such discrimination himself."[24] Lovell v. Comsewogue Sch. Dist., 2005 WL 1398102 (E.D.N.Y. 2005).

- A white Jewish gay male and a former administrative law judge for the State Department of Motor Vehicles brought an action claming racial, religious and sexual orientation discrimination. The court found he could proceed with his hostile environment claim, mainly based on the anti-Semitic comments that he was subjected to in the workplace repeatedly. Since the N.Y.S. Human Rights Law also prohibited sexual orientation discrimination he was allowed to include anti-gay harassment in his hostile environment claim, as well as racist harassment. He contended that hostile attitudes toward homosexual persons pervaded the office—that the words "fag" or "faggot" were used in his presence at least three times, that he was advised not to be "openly gay," and that another employee made at least three hostile references to his sexual orientation. In addition, he alleged that after he was terminated, he learned that a clerk referred to him as "that faggot judge" in the public area of the office.[25] Feingold v. N.Y., 366 F.3d 138 (2d Cir. 2004).

- In 2002, an openly-gay highway employee was suspended from work for three and a half days for wearing a baseball hat embroidered with a symbol of a half-red, half-rainbow-colored ribbon symbolizing the fight against AIDS. The *Rochester Democrat and Chronicle* reported that the employee's foreman had asked the gay man three years earlier not to wear a cap with a rainbow pride flag logo, which the employee said he had agreed not to wear. The suspension was rescinded after the employee's union argued that town rules make no mention of hats whatsoever. The man was reimbursed for lost wages and the suspension was removed from his personnel file. The man also received an apology from the town, a promise of no future retribution, and a monetary settlement to assist with lawyer fees.[26]

- A police officer employed by the Port Authority of New York alleged that harassment by co-workers due to his perceived homosexuality or failure to conform to "traditional male stereotypes" eventually led superiors to terminate his employment in violation of the Equal Protection Clause. The court denied the Port Authority's summary judgment motion, holding that sexual orientation is a viable basis for an equal protection claim, even if the police officer himself was not a homosexual. Specifically, the officer alleged that his co-workers disseminated "computer-altered pictures" of his face on figures posed in a variety "of homosexual and/or deviant sexual practices" and put them in his locker. In addition, co-workers affixed a pair of women's panties and a condom to his locker. Plaintiff also discovered a "Pee-Wee Herman" doll, representing him, "in a sexually provocative pose." Upon complaining to a superior, the superior joked

[24] *Id.* at *10.
[25] *Feingold v. State*, 366 F.3d 138, 150 (2d Cir. 2004).
[26] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 198-99 (2002 ed).

about the incidents before an audience of Plaintiff's co-workers.[27] Emblen v. Port Auth. of N.Y./N.J., 2002 WL 498634 (S.D.N.Y. 2002).

- A principal at a public school in New York sued the school district and teachers' union upon termination of her employment and denial of her tenure appointment, claiming sexual orientation discrimination and discrimination on the basis of sex under Title VII. She settled her claims with the school district for an undisclosed amount. The court granted summary judgment in favor of the teacher's union holding, in part, that Title VII does not provide protection against discrimination on the basis of sexual orientation.[28] Byars v. Jamestown Teachers Assoc., 195 F. Supp. 2d 401 (W.D.N.Y. 2002).

- A correctional officer for the New York State Department of Correctional Services alleged his fellow employees routinely called him names such as "'faggot, pervert, homo, queer, fucking faggot, cock-sucker, fudge-packer, and you gay bastard.'" They also left sexually explicit photos at the officer's work area, on restroom walls, and in his mailbox. One co-worker grabbed his own nipple, remarking to the officer, "like what you see?" He also alleged that he experienced physical assaults by co-workers and reported incidents to supervisors and the union, who failed to properly address the issue.[29] He brought a sex stereotyping claim under 42 U.S.C. § 1985, Title VII, and the N.Y.S. Human Rights Law.[30] The court found that the officer failed to assert evidence that he was discriminated against based on his perceived lack of masculinity, and that he was seeking to "bootstrap" a claim of discrimination based on sexual orientation under Title VII (which is not cognizable) to a sexual stereotyping claim (which is cognizable). However, as to his union which ignored his complaints, the court found that it is possible for an employee to state a retaliation claim based on the union's reaction to his complaints, even if Title VII would not cover the underlying discrimination claims."[31] The court determined that he failed to establish a prima facie case for the 42 U.S.C. § 1985 claim, since homosexuality did not fall under a suspect classification such as race, national origin, or sex.[32] Martin v. N.Y. State Dep't of Corr. Servs., 115 F.Supp.2d 307 (N.D.N.Y. 2000). Later in the case, a court granted summary judgment in favor of the defendants. Martin v. New York State Dep't of Corr. Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002).

- In 2001, after she had been employed as a planner with the City of Buffalo for 14 years, a transgender woman was forced to resign because of hostile workplace treatment that began immediately after she began to transition. By 2001, she had a distinguished career and received a county-wide civic award for her improvement of a Federal program that sought to reduce homelessness among

[27] *Emblen v. Port Auth. of N.Y/N.J.*, 2002 WL 498634 (S.D.N.Y. 2002).
[28] *Byars v. Jamestown Teachers Assoc.*, 195 F. Supp. 2d 401 (W.D.N.Y. 2002).
[29] *Martin v. New York State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002).
[30] *Martin v. New York State Dep't of Corr. Servs.*, 115 F.Supp.2d 307 (N.D.N.Y. 2000).
[31] *Id.* at 315-16..
[32] *Id.* at 316.

people living with HIV/AIDS. In 2001, she informed the Mayor of Buffalo that she would be transitioning from male to female. After she transitioned she was demoted. Though she had an unblemished record when she presented as a man, she received unwarranted criticism and faced workplace hostility immediately after she transitioned. One "casual Friday" she wore a gay pride t-shirt to work. When she refused to change after she was told that the shirt made a co-worker uncomfortable, she was charged with insubordination and harassment. She was required to attend an informal hearing as a result of the charge, where she was told that the charges would be dropped if she agreed not to sue for any past grievances. She refused to sign and the harassment and hostility increased. She was unable to sleep and was diagnosed with depression. Eventually, worn down by stress and mistreatment, she resigned.[33]

- A lesbian police officer brought an action against the NYPD alleging claims of employment discrimination, hostile work environment, and retaliation on the basis of her sexual orientation under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and the N.Y.C. Human Rights Law.[34] She alleged fellow employees made derogatory comments concerning her sexual orientation.[35] The court concluded defendants were motivated by their "invidious and discriminatory animus towards homosexuals," and that they conspired to discriminate against the plaintiff solely on the basis of her sexual orientation.[36] The court also concluded that the defendants permitted the practice of discrimination to continue for a long enough period of time so as to warrant the application of the continuing violation doctrine.[37] Salgado v. City of N.Y., 2001 WL 290051 (S.D.N.Y. 2001).

- An employee of the New York Transit Authority alleged that he had been discriminated against based on his sexual orientation. The court granted Defendants' summary judgment motion, finding that his suit appeared to be based largely on offensive comments made to him by a co-worker, which the court characterized as isolated and not actionable, and that his claim for sexual orientation discrimination under Title VII was not cognizable because the statute does not prohibit discrimination on that basis.[38] Trigg v. New York City Transit Auth., 2001 WL 868336 (E.D.N.Y. July 26, 2001).

- In 2000, two years after he was hired, an English teacher at a New York public school was forced to resign. During his tenure, he intentionally disclosed his sexual orientation to only a few colleagues, but believed that the school principal knew he was gay. In April 2000, he was called into a meeting with the assistant principal. The assistant principal commended him for his hard work and conscientiousness, but told him that he would not be returning to work the

[33] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[34] *Salgado v. City of N.Y.*, 2001 WL 290051, at *1 (S.D.N.Y. 2001).
[35] *Id.*
[36] *Id.* at *4.
[37] *Id.* at *7.
[38] *Trigg v. New York City Transit Auth.*, 2001 WL 868336 (E.D.N.Y. July 26, 2001).

following year because of "classroom management issues." The assistant principal told the teacher that he would "do [him] a favor" and let him resign. If he did not agree to resign, he was told that he would receive and unfavorable evaluation. His union rep. discouraged him from taking up his grievance. Two days after the meeting, his class room was vandalized and the word "faggot" was written across the chalkboard. Fearing that he would be terminated, he felt he had no option other than to resign.[39]

- In 2000, a corrections officer with the Nassau County Sheriff's Department brought equal protection and Section 1983 claims based on anti-gay harassment in the workplace. A federal jury awarded him $1.5 million, finding the harassment at the county jail so widespread that it constituted a "custom and practice" to discriminate against gay men. He presented evidence demonstrating that he encountered almost daily harassment from his co-workers for almost four years, including being called offensive names and the display of pornographic images depicting him as a pedophile, a transsexual and someone who engaged in bestiality. Plaintiff repeatedly complained to his superiors about the harassment, but they ignored him. Ultimately, a fellow corrections officer attacked him with a chair and injured his knee. The officer left work and later went on disability leave. A doctor certified that he suffered from post-traumatic stress disorder.[40]

- In 1999, a Saratoga Springs police officer, who alleges he was derided and harassed because he was perceived to be gay, sued the city and several fellow officers for slander and sexual harassment. The officer, an eight-year veteran of the Saratoga Springs force, asserted that he became the target of anti-gay harassment by his colleagues after he was honored for his involvement in a robbery investigation in 1992. According to the officer, harassment consisted of references to him as "queenie," and to his friends as his "boyfriends." Other officers allegedly ridiculed him by blowing kisses to him derisively over the police radio, stalking him, and telling members of the community that he was gay. He claims that the harassment irreparably tarnished his reputation in the community and caused him 'enormous emotional distress.' He also asserts that a city employee told a youth organization with which he was involved that he was "light in the loafers" and therefore "should not be considered as a chaperone for a camping trip the organization was having."[41]

- A lesbian police officer sued the NYPD for harassment based on her sexual orientation for over two years. She ultimately settled the case for $50,000 and was permitted to resign. She alleged that the harassment began after her same-sex marriage ceremony in Central Park to a fellow officer. She claimed that obscene

[39] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[40] Human Rights Campaign, *Documenting Discrimination: A special report from the Human Rights Campaign Featuring Cases of Discrimination Based on Sexual Orientation in America's Workplaces* (2001), *available at* http://www.hrc.org/documents/documentingdiscrimination.pdf.
[41] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 183-84 (1999 ed.).

pictures of women with her face pasted on them were hung in her Bronx precinct house, that other officers refused to ride with her on patrols, and that she was assigned to cleaning duties in the precinct. She also claimed that one co-worker assaulted her and that officers repeatedly taunted her with derogatory names. "When I complained, everyone turned their backs on me," she said, adding that her commanding officer told her, "No one wants to ride with a dyke." She maintained that the abuse, which continued for over a year, worsened after it was reported, and that the police department had not taken proper action to address the harassment and unequal treatment.[42] She was also reassigned to another location. Bryant v. City of N.Y., 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).

- A former Nassau County police officer claimed that his fellow officers and supervisors "embarked on a vicious campaign of harassment against him because of his sexual orientation." In 1999, a jury awarded him $380,000. The jury found that members and supervisors committed discriminatory acts demonstrating an ongoing policy or practice of sexual orientation discrimination against him; that such acts were condoned by his supervisors; that in the Nassau County Police Department there was a custom, policy or decision to permit sexual orientation harassment; and that the unwelcome harassment against Plaintiff was severe or pervasive. The court upheld the jury award and denied the dismissal motions to all but one defendant. It was demonstrated in the trial that Plaintiff initially kept his sexual orientation hidden from his colleagues, but it eventually was revealed when an arrestee told officers that he was gay. This began nine years of harassment. Fellow police officers hung pornographic pictures and doctored records on the stationhouse bulletin board, portraying the police officer as a child molester and a sadomasochist. At least 19 of the pictures were produced at trial. They hid his uniform, put rocks in his hubcaps and once placed a nightstick—labeled "P.O. Quinn's Dildo"—in his squad car. His supervisor admitted to seeing the posted pictures and, according to another sergeant in the precinct, engaged in the harassment by referring to him as "dick smoker." The precinct Lieutenant admitted at trial that he had seen pictures depicting him unfavorably, but not those presented at trial. He stated, though, that had he seen them, he would not have felt obligated to remove them because he did not view them as offensive.[43] Quinn v. Nassau Police Dep't, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).

- In 1999, two New York police officers filed a lawsuit for sexual harassment and violations of their civil rights. One of the officers, a thirteen-year veteran, had joined East Harlem's 23rd Precinct in 1989 and was allegedly the target of relentless harassment because he is gay. He asserts that he was the victim of verbal anti-gay harassment and that he was repeatedly forced in to his own locker. In addition, he asserts that on two occasions he was handcuffed and hung from a coat rack in the precinct lunchroom where he was subject to the ridicule of his co-workers and other officers once tried to physically force him to simulate an oral

[42] *Bryant v. City of N.Y.*, 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).
[43] *Quinn v. Nassau Police Dep't*, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).

sex act with another officer. The second officer, who is not gay, asserts that he was nonetheless the victim of sexual harassment by other officers simply because he was willing to work with the first officer. According to the second officer, other officers called him "Camacho homo" drew pictures depicting him engaged in sex acts with the first officer on precinct walls, and wrote graffiti on police station walls that read, "Camacho is a butt pirate."[44]

- A gay physician and former intern at Coney Island Hospital, brought suit alleging sexual orientation discrimination. The court, ruling on cross summary judgment motions ruled that he was entitled to pursue his sexual orientation discrimination against his employe pursuant to New York City's human rights law. He had not disclosed his sexual orientation when he was hired as an intern under a one-year contract. Midway through the contract, he received an offer of employment at another hospital. In seeking permission from his supervisor to terminate his internship early in order to take the other position, he disclosed his sexual orientation and asserted that in the other hospital, he would be able to be more open about being gay. The supervisor's response was allegedly to characterize him as "ungrateful" and deny his request. The physician attributed the various faults in his subsequent performance, to the extent they existed, to depression over having lost the opportunity with the other hospital, and alleges that the change in his evaluations and his treatment by his supervisor all post-dated his revealing his sexual orientation. Within a few months, his performance so deteriorated that he was pressured to quit or be fired and was subsequently terminated in a hospital proceeding.[45] Sussman v. N.Y.C. Health & Hosps. Corp., 1997 WL 334964 (S.D.N.Y. June 16, 1997).

- A former police officer alleged that he was constructively discharged by the New York City Police Department because he is gay. The harassment included the marking of his locker with graffiti, the placement of garbage cans in front of his locker, and the protest of a fellow officer to his sleeping in the officers' lounge area between shifts, even though such practice was customary. He reported the harassment to his supervisor who did nothing. Following his complaint, he arrived at work to find his locker broken into and a handwritten note left for him which read "Testa Blood Guts" and depicted skull and crossbones. Again, his reports of harasment went unanswered. After disparaging graffiti about Plaintiff was found on the bathroom wall, he was involuntarily transferred to another precinct where the harassment still continued. His new locker was broken and the words "coward" and "fag" were written on it. He eventually told his captain that he did not want to resign, but was under enormous stress and fear due to the harassment. As a result, he was demoted to an unarmed position. In denying the police department's motion to dismiss in part, the court held that there was an issue of fact as to whether the police department maintained a policy of discrimination against homosexuals; noting that, as alleged, Plaintiff's working

[44] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 179 (1999 ed.).
[45] *Sussman v. N.Y.C. Health & Hosps. Corp*, 1997 WL 334964 (S.D.N.Y. June 16, 1997).

conditions, which were imposed on the basis of his sexual orientation, were made so unpleasant as to effectively force Plaintiff to resign.[46] Tester v. City of N.Y., 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).

- In 1996, the Public Employees Federation, a union representing employees of the State Law Department, filed an unfair practice charge against the Department, asserting that a change in policy, which omitted "sexual orientation" from the executive order governing discrimination law in the Department, violated the Department's duty to bargain over changes in terms of employment. The change was made after Dennis C. Vacco was elected Attorney General of the State of New York in 1994 in a campaign where some of his supporters attacked his opponent, Karen Burstein, because she was a lesbian. Shortly after taking office, Vacco replaced his predecessor's executive order governing discrimination policy. Subsequently several openly lesbian or gay employees of the Department were fired in the course of a purported reorganization of the Department that generally downgraded civil rights enforcement functions.[47]Two women, a lieutenant and a detective in the New York City Police Department, have filed a $5 million lawsuit against the city, the Police Department, Police Chief Raymond Abruzzi and Commissioner William Bratton, charging their male coworkers with sexist and homophobic harassment. The officers in their Queens precinct allegedly hung a sign that said 'NLA' for 'No Lesbians Allowed,' spread rumors that the two women were lovers, referred to the Police Women's Endowment Association as 'Lesbians R Us' and called the lieutenant's phone 'the lesbian hotline.' Both the lieutenant, who commanded the precinct detective squad for nearly two years, and the detective were transferred by Chief Abruzzi after several male officers asked to be transferred because of the women.[48]

- In 1995, Justice Sotomayor, while a judge for the Southern Disctrict of New York, denied a motion to dimiss a case where the plaintiff had been fired from his job as a prison kitchen worker because he was gay. Criticizing the defendants' argument that removing the plaintiff was rationally related to preserving mess hall security, the court stated that a "person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security." Justice Sotomayor denied Defendants' motion to dismiss stating that the pro se Plaintiff could use the services of a lawyer "to explore fully the substantial questions raised by this case" and that the Supreme Court's then-pending decision in *Romer v. Evans*[49] would provide further guidance on the scope of equal protection rights afforded to lesbians and gay men. The court also rejected Defendants'qualified immunity defense, stating that the "The constitutional right not to be discriminated against for any reason, including sexual orientation, without a

[46] *Tester v. City of New York*, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).
[47] *Public Employees Fed'n v. State of N.Y.*, PERB Case No. U-16702 (1996).
[48] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 83 (1995 ed.).

[49] 517 U.S. 620 (1996).

rational basis is an established proposition of law."[50] Holmes v. Artuz, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[50] *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

Under New York law, sexual orientation discrimination in the workplace is prohibited. As of January 16, 2003, "sexual orientation" became a protected status when the governor signed Chapter 2 of the Laws of 2002, referred to as the Sexual Orientation Non-Discrimination Act ("SONDA"). SONDA amended the N.Y.S. Human Rights Law, Civil Rights Law, and the Education Law to include sexual orientation as a protected class. [51] Under SONDA, discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodations, education, credit, and the exercise of civil rights is strictly prohibited. [52] SONDA defines sexual orientation as "heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived."[53]

2. Enforcement and Remedies

Enforcement of SONDA requires the claimant to either file a charge of discrimination with the N.Y.S. Division of Human Rights ("State Division"), or a local human rights agency within one year of the most recent act of discrimination.[54] Alternatively, a claimant may file a complaint directly in state court within three years of the most recent act of discrimination.[55] Additionally, all claimants have the option to also file a complaint with the N.Y.S. Attorney General's Civil Right Bureau.[56] If the individual chooses to file with the State Division, it will first investigate the charge and can then conduct a hearing before an administrative law judge who can provide relief.[57]

If the claimant successfully proves their sexual orientation discrimination claim, they may be entitled to recover compensatory damages for pain and suffering, lost wages, and benefits.[58] However, neither punitive damages nor attorneys' fees are available under SONDA.[59] In contrast, many municipalities in New York allow for damages not available under state law.[60] For example, the New York City Human Rights Law allows for both punitive damages and attorneys' fees in addition to relief under SONDA upon a showing of actual or perceived discrimination.[61]

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[51] *See* N.Y. EXEC. LAW § 296 (2005); N.Y. CIV. RIGHTS. LAW § 40-C; N.Y. EDUC. LAW § 313.
[52] N.Y. EXEC. LAW § 296 (2005).
[53] N.Y. EXEC. LAW § 292(27) (2005).
[54] Office of the Attorney General of New York, Civil Rights Division, *The Sexual Orientation Non-Discrimination Act ("SONDA")* (2008), http://www.oag.state.ny.us/bureaus/civil_rights/sonda_brochure.html (last visited Sept. 8, 2009).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] N.Y.C. ADMIN. CODE § 8-107.

B. Attempts to Enact State Legislation

In connection with New York A05710 and S 2406 (2009), legislation that would in relevant part, prohibit discrimination based on gender identity or expression in employment, the legislature makes the following statement regarding legislative intent in §1 of the bill. "The legislature further finds that many residents of this state have encountered prejudice on account of their gender identity or expression, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to live in a gender identity or expression which is different from that traditionally associated with the sex assigned to that person at birth."[62]

The bill's sponsor memo for A05710 states as the "justification" for the legislation that: "The transgender community is still not protected from discrimination under the law. Transgender people whose gender identity, appearance, behavior, or expression differs from their genetic sex at birth face discrimination in housing, employment, public accommodations and many other areas of life, and they are particularly vulnerable to hate crimes."[63]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

Mario M. Cuomo stated the following when issuing the first executive order to forbid employment discrimination on the basis of sexual orientation in New York on November 18, 1983: "As Secretary of State, I was required to issue special regulations to prohibit discrimination against individuals seeking licenses for certain occupations or corporate privileges. Up to that time such licenses were denied on the basis of sexual orientation or even presumed sexual orientation. There is no reason to believe that the discrimination apparent in that part of government was confined there. No one argued then against my change in the State's regulations. No one was heard to say that government had no place in fighting unfair discrimination. In fact, in recognition of this, a personnel directive against discrimination in hiring was issued during the prior administration."[64]

2. State Government Personnel Regulations

On his first full day in office, New York State's new attorney general, Eliot L. Spitzer, issued an order banning discrimination on the basis of sexual orientation in the New York State Law Department. The first such order in the department was issued by

[62] A05710, 2009 Assem., Reg Sess. (N.Y. 2009);. S. 2406, 2009 Sen., Reg. Sess. (N.Y. 2009).
[63] 2009 Legis. Bill Hist. N.Y. A05710, http://assembly.state.ny.us/leg/?bn=A05710.
[64] Mario M. Cuomo, Nov. 18, 1983, Executive Order 28: Establishing a Task Force on Sexual Orientation Discrimination, N.Y. COMP. CODE R. & REGS. tit. 9, § 4.28 (1983).

former Attorney General Robert Abrams, in 1980, but Spitzer's immediate predecessor, Dennis C. Vacco, removed sexual orientation from the department's non-discrimination policy immediately upon assuming office four years ago. Several of the department's openly lesbian and gay attorneys were then discharged as part of a very large internal lay off of career attorneys in the department.[65]

3. Attorney General Opinions

1987 N.Y. Op. Atty. Gen (Inf.) 111, 1987 WL 273443 (N.Y.A.G Jun. 17, 1987).

An assistant from the New York City Corporation Counsel inquired as to whether State Law preempted the enactment of local law prohibiting discrimination against individuals based on their sexual orientation. The Attorney General cited the State Human Rights Law, which prohibited discrimination on the basis of age, race, creed, color, national origin, sex, disability or marital status.[66] The opinion stated that because there was no prohibition of discrimination on the basis of sexual orientation under State Law, the enactment of local law prohibiting such discrimination "would in effect be prohibiting behavior not expressly covered under State law," and therefore would be permitted.[67] Thus, going forward, local municipalities could expand the jurisdiction of their human rights commissions to allow them to consider allegations of discrimination on the basis of sexual orientation.[68]

D. Local Legislation

The following chart contains data compiled for Empire State Pride Agenda prior to the enactment of SONDA.[69] The information cited therein covers local ordinances up to the year 2001 pertaining to discrimination on the basis of sexual orientation – some of the jurisdictions that also include protection from employment discrimination on the basis of gender identity have been updated in the footnotes to the SONDA table.

Jurisdiction	Law (Year enacted)	Public employment	Private employment
County of Albany	Local Law No. 1 (1996)	Yes	Yes
City of Albany	Ordinance No. 97.112.92 (1992)	Yes	Yes
Village of Alfred	Village Ordinance, Art. II, § 1(1974)	Yes	Yes

[65] PrideAgenda.org, Press Release: Empire State Pride Agenda Endorses Eliot Spitzer for Governor of New York State (June 25, 2006), http://www.prideagenda.org/tabid/304/default.aspx?c=186.
[66] N.Y. EXEC. LAW § 296.
[67] N.Y. Op. Atty. Gen (Inf.) 111, 1987 WL 273443 (N.Y.A.G Jun. 17, 1987).at *2.
[68] *Id.* at *4.
[69] *See* MILBANK, TWEED, HADLEY & MCCLOY, LLP, LOCAL ANTI-DISCRIMINATION LAWS: AN UNEVEN AND INADEQUATE ALTERNATIVE TO STATEWIDE PROTECTIONS FOR GAY AND LESBIAN NEW YORKERS 6-7 (Jun. 12, 2001) [hereinafter MILBANK, LOCAL ANTI-DISCRIMINATION LAWS].

Jurisdiction	Law (Year enacted)	Public employment	Private employment
Town of Brighton	Town Employment Policy (1992)	Yes	No
City of Buffalo[70]	City Code § 35-12 (1984)	Yes	No
Town of East Hampton	EEO Policy (1995)	Yes	No
City of Ithaca	Municip. Code Ch. 28-29 (1994)	Yes	Yes
County of Nassau	Local Law No. 38-2000 (2000)	Yes	Yes
City of New York[71]	Admin. Code §§ 8-102.20/8-102.1 (1986)	Yes	Yes
County of Onandaga	1998-B (1998)	Yes	Yes
City of Peekskill[72]	City Code Ch. 44	No	No
City of Plattsburgh	Policy Res. (1992)	Yes	No
City of Rochester[73]	Ordinance 45; Ch. 63 MUN. CODE (1983)	Yes	Yes
Town of Southampton	Policy Res. (1995)	Yes	No
County of Suffolk[74]	County Code § 89-1 et seq.	Yes	Yes

[70] The City of Buffalo also forbids public employers from discriminating on the basis of gender identity. *See* BUFFALO CITY CODE § 35-12 (2002).

[71] New York City's law explicitly protects transgender employees. *See* N.Y.C. ADMIN. CODE §8-102(23) (2002).

[72] The authors of the original document write that "The law in . . . Peekskill . . . does not explicitly bar any discriminatory act based on sexual orientation, but merely empowers the Peekskill Commission on Human Relations to 'foster mutual respect and understanding, . . . inquire into incidents of tension' and 'conduct and recommend educational programs' related to acts of disctimination based on, *inter alia*, sexual orientation." MILBANK, LOCAL ANTI-DISCRIMINATION LAWS 5-6 n.41 (citing PEEKSKILL, N.Y., CODE § 44-6 (2001)).

[73] The City of Rochester forbids both public and private employers from discriminating against transgender employees. *See* ROCHESTER MUN. CODE Ch. 63.

[74] Section 89-13 of Suffolk County's Local Law No. 14-2001 governs unlawful discriminatory practices in employment. It states that it is an unlawful discriminatory practice "[f]or an employer to refuse to hire or employ or to bar or to discharge from employment or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment, because of the group identity of any such individual." Under the law, "group identity" is defined to include both "sexual orientation" and "gender," and "gender" is in turn defined to include "both the biological and social characteristics of being female or male." The law also forbids employer retaliation against an employee for filing a discrimination complaint. Suffolk County Local Law 14-2001, §§ 89-13(A)(1), 89-13(A)(5), 89-2(G), 89-2(H). *See also* Suffolk County Resolution No. 802-2001, *available at* http://legis.suffolkcountyny.gov/resos2001/i1508-01.htm.

Jurisdiction	Law (Year enacted)	Public employment	Private employment
City of Syracuse	Loc. Law No. 17-1990 (1990)	Yes	Yes
County of Tompkins	Loc. Law No. 6-1991 (1991)	Yes	Yes
City of Troy[75]	Aff. Action Plan 2-20 (1979)	Yes	No
City of Watertown	City Resolution (1988)	Yes	No
County of Westchester	Loc. Law Intro 17-1999 (1999)	Yes	Yes

In *Under 21 v. City of New York*, the court held that the order from the Mayor of the City of New York, which prohibits discrimination in employment based on sexual orientation, is constitutional and valid in light of due process and equal protection.[76]

E. Occupational Licensing Requirements

There are several state licensing requirements that reference "good moral character" that could include sexual orientation or gender identity. After checking all occupations for which the state issues a license, the occupational boards with such licensing requirements are listed below, which all contain the same reference to "good moral character as determined by [their respective departments]."[77]

1. **Acupuncture** - N.Y. EDUC. LAW § 8214.
2. **Architecture** - N.Y. EDUC. LAW § 7304.
3. **Speech-Language Pathology and Audiology** - N.Y. EDUC. LAW § 8206.
4. **Certified Shorthand Reporting** - N.Y. EDUC. LAW §7504.
5. **Chiropractic** - N.Y. EDUC. LAW § 6554.
6. **Clinical Laboratory Technology Practice Act** - N.Y. EDUC. LAW § 8605.

[75] Troy's Policy against discrimination states that "It is the official policy of the City of Troy to comply with all laws, rules and regulations protecting against discrimination. All departments, offices, boards and commissions, officers, employees, representatives and agents of City government shall in the performance of their duties comply with federal, state and local laws, rules, regulations and policies regarding discrimination of any kind related to . . . sexual orientation." TROY CITY CODE § 2-5 (1998). "Gender Identity" is not included in the list of protected characteristics.
[76] *Under 21 v. City of New York*, 108 A.D.2d 250 (N.Y. App. Div.1st Dep't 1985).
[77] *See* New York State Educ. Dep't, Office of the Professions (2009), http://www.op.nysed.gov.

7. **Dentistry and Dental Hygiene** - N.Y. EDUC. LAW § 6604.

8. **Professional Engineering and Land Surveying** - N.Y. EDUC. LAW § 7206.

9. **Interior Design** - N.Y. EDUC. LAW § 8305.

10. **Landscape Architecture** - N.Y. EDUC. LAW § 7324.

11. **Massage Therapy** - N.Y. EDUC. LAW § 7804.

12. **Medicine** - N.Y. EDUC. LAW § 6524.

13. **Mental Health Practitioners** - N.Y. EDUC. LAW § 8402.

14. **Midwifery** - N.Y. EDUC. LAW § 6955.

15. **Nursing** - N.Y. EDUC. LAW § 6905.

16. **Occupational Therapy** - N.Y. EDUC. LAW § 7904.

17. **Ophthalmic Dispensing** - N.Y. EDUC. LAW § 7124.

18. **Optometry** - N.Y. EDUC. LAW § 7104.

19. **Pharmacy** - N.Y. EDUC. LAW § 6805.

20. **Physical Therapy and Physical Therapist Assistants** - N.Y. EDUC. LAW § 6734.

21. **Podiatry** - N.Y. EDUC. LAW § 7004.

22. **Psychology** - N.Y. EDUC. LAW § 7603.

23. **Public Accountancy** - N.Y. EDUC. LAW § 7404.

24. **Respiratory Therapy** - N.Y. EDUC. LAW § 8504.

25. **Social Work** - N.Y. EDUC. LAW § 7704.

26. **Speech-Language Pathology and Audiology** - N.Y. EDUC. LAW § 8206.

27. **Veterinary Medicine and Animal Health Technology** - N.Y. EDUC. LAW § 6704.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Aguiar v. State, 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).

Plaintiff, an employee of the New York State courts, challenged the validity of a verbal settlement agreement of his case claiming sexual orientation discrimination in the promotion process. The court held that the verbal agreement was binding. The parties had reached a verbal agreement after a lengthy negotiation session, the notes of which were read into the record in the presence of the judge. The judge decided that this agreement should be binding, despite Aguiar's insistence that the case go forward as a result of the failure to reach a written agreement. The judge found that there had not been any agreement between the parties that a settlement was contingent on reducing the agreement to written terms.[78]

New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights, 2008 WL 2682073 (July 10, 2008).

Plaintiff, a lesbian corrections officer, alleged discrimination based both on her gender and sexual orientation. The woman was subjected to a fellow officer's obscene language and offensive conduct. The co-worker persistently and relentlessly demeaned the woman, scrawled sexually explicit graffiti in her workplace, and filed a baseless internal complaint against her. While the Department promptly processed the co-workers claim against the woman, even though they admitted it was "bogus," they failed to take any steps towards remedying her grievances. Despite her numerous complaints, the Department did not discipline the co-worker and instead retaliated against the woman for complaining. Due to the harassment, the woman suffered from increased stress, sleeping and eating difficulties, nosebleeds, and she was diagnosed with "adjustment disorder with depressive features." Although a unanimous five-judge panel of the New York Appellate Division ruled that the Division of Human Rights did not err in finding unlawful discrimination and retaliation against Plaintiff by her supervisor, the court reduced Plaintiff's damages from $850,000 to $200,000, finding that the damages were disproportionate compared to other awards based on similar claims.[79]

Sorrenti v. City of N.Y., 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 (N.Y. Sup. 2007).

Plaintiff, an NYPD police officer, brought an action against the City of New York claiming that defendants discriminated against him based on his perceived sexual

[78] *Aguiar v. State of N.Y.*, 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).
[79] *New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights*, 2008 WL 2682073 (July 10, 2008).

orientation.[80] Plaintiff was denied his application to transfer to the NYPD Office of Community Affairs' Youth Services Section ("YSS") because he was incorrectly thought to be a child molester based on his perceived sexual orientation and was retaliated against after filing an internal complaint against a police officer with the NYPD's Office of Equal Employment Opportunity.[81] The jury's verdict was in favor of Plaintiff, finding that defendant had discriminated against him based upon his "perceived sexual orientation and CITY/NYPD employees retaliated against him for engaging in protected activity resulting in emotional damages."[82] The court determined the jury was "able to assess the long term effects of [defendant's] harmful stereotyping of [plaintiff] and discriminatory denial of [plaintiff's] career opportunity with YSS has had on his mental and emotional state and which was compounded by CITY/NYPD employees' ongoing retaliatory acts of 'abuse, intimidation and humiliation'"[83]

Pugliese v. Long Island R. R. Co., 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).

Plaintiff, a railroad ticket agent, sued the Long Island Railroad and one of its managers for constitutional and statutory sexual orientation harassment. The court denied the Defendant's summary judgment motion, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans*, and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.[84] The harassment began in 1996 when the ticket agent's supervisor began making derogatory comments related to his sexual orientation. The ticket agent reported the harassment to his manager, and though the manager decided to send the supervisor to sensitivity training classes, she never followed through. Later, the same supervisor continued to harass him in retaliation, and the ticket agent's complaints about the supervisor's conduct were never addressed. The ticket agent was also referred to by several people in the office as a "fucking faggot" and "a queer."

Lovell v. Comsewogue Sch. Dist., 2005 WL 1398102 (E.D.N.Y. 2005).

Plaintiff was a former art teacher who brought an action against a school district based on allegations that she was subjected to a hostile work environment because of her sexual orientation.[85] Plaintiff also alleged the school district retaliated against her for speaking out against such discrimination in violation of 42 U.S.C. § 1983.[86] Plaintiff alleged incidents involving various students harassing her on the basis of her sexual orientation.[87] One student told her she was "disgusting" another asked her if she was a "dyke." A third student, when reprimanded by Lovell, called her a racist and a man-hater. The teacher's complaints to the school administration were not addressed. The

[80] *Sorrenti v. City of N.Y.*, 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 at *1 (N.Y. Sup. 2007).
[81] *Id.*
[82] *Id.* at *7.
[83] *Id.* at *8.
[84] *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).
[85] *Lovell v. Comsewogue Sch. Dist*., 2005 WL 1398102 at *1 (E.D.N.Y. 2005).
[86] *Id.*
[87] *Id.* at *1-3.

teacher also found graffiti in her classroom that read, "Lovell is a stupid dyke." Subsequently, plaintiff had to request for a catastrophic leave after a psychiatric evaluation determined plaintiff's condition was of a "mixed anxiety and depressed mood."[88] Plaintiff's claims where predicated on three grounds: (1) plaintiff was treated differently compared to other teachers on account of her sexual orientation; (2) plaintiff was subjected to a hostile work environment because there was no investigation that resulted from her complaints to the school district; and (3) plaintiff was retaliated against by delay of a request to extend her catastrophic leave, which caused a reduction in plaintiff's pay and pension benefits.[89]

Equal Protection Clause: The court referred to the equal protection clause of the 14th amendment to determine whether or not plaintiff's situation was similar to others who were harassed by students and whether defendant's handling of the situation was sufficiently different relative to other situations.[90] After review, the court determined these were all issues for a rational jury to resolve.[91]

Hostile Work Environment: The court referred to *Dawson v. County of Westchester*[92] to determine whether defendant created a hostile work environment for plaintiff.[93] The court stated the "ultimate determination of whether an environment is hostile or abusive must be made 'looking at all the circumstances,' which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance—no single factor is required or dispositive."[94] Consequently, the court determined there was a possibility that a rational jury might find defendant condoned and enabled a "continuous campaign of harassment by some students against [plaintiff] on the basis of her sexual orientation," and therefore defendant's motion for summary judgment on that ground was denied.[95]

Qualified Immunity: The court analyzed whether the doctrine of qualified immunity applied to the school official and whether the official may be found to be personally liable for failing to protect plaintiff from workplace discrimination on the basis of her sexual orientation.[96] The court determined that "even if [defendant] did not know in 2001 that he had to protect [plaintiff] against the students' discrimination, he is presumed to have known of his obligation not to engage in such discrimination himself."[97]

Feingold v. N.Y., 366 F.3d 138 (2d Cir. 2004).

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[88] *Id.* at *4 (E.D.N.Y. 2005).
[89] *Id.* at *5.
[90] *Id.* at *8 (E.D.N.Y. 2005).
[91] *Id.*
[92] 373 F.3d 265, 273 (2d Cir. 2004)
[93] *Lovell*, 2005 WL 1398102, at *9.
[94] *Id.* at *9 (E.D.N.Y. 2005). (*citing Harris v. Forklift Sys., Inc*., 510 U.S. 17, 22, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993)).
[95] *Lovell*, 2005 WL 1398102, at *9.
[96] *Id.* at *10.
[97] *Id.*

Plaintiff was a white Jewish gay male and a former administrative law judge for the State Department of Motor Vehicles who brought an action claming racial, religious and gender discrimination in violation of 42 U.S.C. § 1983 and the N.Y.S. Human Rights Law.[98]

The court dismissed the § 1983 claim as being barred by the 11th amendment due to the fact that the defendant was a state agency.[99] However, the court found plaintiff "offered sufficient evidence to permit a fact-finder to conclude that he suffered from a hostile work environment predicated on religious animosity, and that such hostility may have been exacerbated by race-based animus."[100] The court also concluded plaintiff offered sufficient evidence to support his hostile environment and retaliation claims under the N.Y.S. Human Rights Law.[101]

Emblen v. Port Auth. of N.Y./N.J., 2002 WL 498634 (S.D.N.Y. 2002).

Plaintiff, a police officer employed by the Port Authority of New York, alleged that harassment by co-workers due to his perceived homosexuality or failure to conform to "traditional male stereotypes" eventually led superiors to terminate his employment in violation of the Equal Protection Clause. The court denied Defendants' summary judgment motion, holding that sexual orientation is a viable basis for an equal protection claim, even if Plaintiff himself was not a homosexual. The court also found that pursuant claims, filed under 42 U.S.C. §1983, were only cognizable against officers who engaged in the pranks, and not their supervisors or government-agency employer. Specifically, Plaintiff alleged that his co-workers disseminated "computer-altered pictures" of Plaintiff's face on figures posed in a variety "of homosexual and/or deviant sexual practices." Such pictures were inserted into Plaintiff's locker, and ten to fifteen were found in an unoccupied locker. In addition, co-workers affixed a pair of women's panties and a condom to his locker. Plaintiff also discovered a "Pee-Wee Herman" doll, representing him, "in a sexually provocative pose." Upon complaining to a superior, the superior joked about the incidents before an audience of Plaintiff's co-workers.[102]

Byars v. Jamestown Teachers Assoc., 195 F. Supp. 2d 401 (W.D.N.Y. 2002).

Plaintiff, a principal at a public school in New York, sued the school district and teachers' union upon termination of her employment and denial of her tenure appointment, claiming sexual orientation discrimination and discrimination on the basis of sex under Title VII. While Plaintiff settled her claims with the school district for an undisclosed amount, the court granted summary judgment in favor of the teacher's union. As to the sexual orientation discrimination claim, the court held that Title VII does not provide protection against discrimination on the basis of sexual orientation. As for the sex discrimination claim, the court found that Plaintiff failed to raise a genuine issue of

[98] *Feingold v. State*, 366 F.3d 138, 143 (2d Cir. 2004).
[99] *Id.* at 149.
[100] *Id.* at 150.
[101] *Id.* at 159.
[102] *Emblen v. Port Auth. of N.Y./N.J.*, 2002 WL 498634 (S.D.N.Y. 2002).

material fact as to whether the union had caused or attempted to cause the district to discriminate against Plaintiff.[103]

Martin v. New York State Dep't of Corr. Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002).

Plaintiff was a homosexual correctional officer who brought an action claiming sexual discrimination (based on sexual stereotyping), retaliation, conspiracy to discriminate, and breach of duty of fair representation under 42 U.S.C. § 1985, Title VII, and the N.Y.S. Human Rights Law. The court granted summary judgment in favor of the State, but allowed Plaintiff's retaliation claims against the union to proceed. As to the State, the court found that Plaintiff failed to advance evidence that he was discriminated against based on his perceived lack of masculinity, and that he was seeking to "bootstrap" a claim of discrimination based on sexual orientation under Title VII (which is not cognizable) to a sexual stereotyping claim (which is cognizable). As for the union, the court found that it is possible for an employee to state a retaliation claim based on the union's reaction to his complaints, even if Title VII would not cover his underlying discrimination claims. Plaintiff claimed that his co-workers routinely harassed him, calling him "pervert," "fucking faggot," "cock-sucker," "fudge-packer," and "you gay bastard." They also left sexually explicit photos at Plaintiff's work area, on restroom walls, and in his mailbox. One co-worker grabbed his own nipple, remarking to Plaintiff, "like what you see?" Plaintiff also alleged that he experienced physical assaults by co-workers and reported incidents to supervisors and the union, who failed to properly address the issue.[104]

Salgado v. City of N.Y., 2001 WL 290051 (S.D.N.Y. 2001).

Plaintiff was a lesbian police officer who brought an action against the NYPD alleging claims of employment discrimination, hostile work environment, and retaliation on the basis of her sexual orientation under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and the N.Y.C. Human Rights Law.[105] Plaintiff also alleged fellow employees made derogatory comments concerning her sexual orientation.[106]

The court concluded defendants were motivated by their "invidious and discriminatory animus towards homosexuals," and that they conspired to discriminate against plaintiff solely on the basis of her sexual orientation.[107] The court concluded that the defendants permitted the practice of discrimination to continue for a long enough period of time so as to warrant the application of the continuing violation doctrine.[108] However, the court determined plaintiff had failed to state a claim for conspiracy under

[103] *Byars v. Jamestown Teachers Assoc.*, 195 F. Supp. 2d 401 (W.D.N.Y. 2002).
[104] *Martin v. New York State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002).
[105] *Salgado v. City of N.Y.*, 2001 WL 290051, at *1 (S.D.N.Y. 2001).
[106] *Id.*
[107] *Id.* at *4.
[108] *Id.* at *7.

42 U.S.C. § 1983 and §1985 due to the fact that plaintiff had only alleged individual prejudice by the defendants rather than additional abusive behavior.[109]

Trigg v. New York City Transit Auth., 2001 WL 868336 (E.D.N.Y. July 26, 2001).

Plaintiff brought an action alleging sexual orientation discrimination. The court granted Defendants' summary judgment motion, finding that Plaintiff's suit appeared to be based largely on offensive comments to him by a co-worker, which the court characterized as isolated and not actionable under either a respondeat superior or co-employee theory, and that Plaintiff's claim for sexual orientation discrimination under Title VII was not cognizable because the statute does not prohibit discrimination on that basis.[110]

Bryant v. City of N.Y., 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).

Plaintiff, a lesbian police officer, sued the City of New York and its Police Department for discrimination based on her sexual orientation. Plaintiff ultimately settled the case for $50,000 and was permitted to resign. Plaintiff alleged that the harassment began after her same-sex marriage ceremony in Central Park to a fellow officer. Bryant claims that obscene pictures of women with her face pasted on them were hung in her Bronx precinct house, that other officers refused to ride with her on patrols, and that she was assigned to cleaning duties in the precinct. She also claimed that one co-worker assaulted her and that officers repeatedly taunted her with derogatory names. "When I complained, everyone turned their backs on me," she said, adding that her commanding officer told her, "No one wants to ride with a dyke." Bryant maintained that the abuse, which continued for over a year, worsened after it was reported, and that the police department had not taken proper action to address the harassment and unequal treatment.[111]

Martin v. N.Y. State Dep't of Corr. Serv., 115 F.Supp.2d 307 (N.D.N.Y. 2000).

Plaintiff was a homosexual correctional officer who brought an action claiming sexual discrimination, retaliation, conspiracy to discriminate, and breach of duty of fair representation under 42 U.S.C. § 1985, Title VII, and the N.Y.S. Human Rights Law.[112] Plaintiff alleged fellow employees routinely called him names such as "'faggot, pervert, homo, and queer,'" and defendant failed to act on plaintiff's complaints of a pattern of abusive treatment.[113]

The court first addressed plaintiff's Title VII and N.Y.S. Human Rights Law claims, which plaintiff attempted to bring under evidence of sexual stereotyping.[114]

[109] *Id.* at *9.
[110] *Trigg v. New York City Transit Auth.*, 2001 WL 868336 (E.D.N.Y. July 26, 2001).
[111] *Bryant v. City of N.Y.*, 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).
[112] *Martin v. N.Y. State Dep't of Corr. Serv.*, 115 F.Supp.2d 307, 310 (N.D.N.Y. 2000).
[113] *Id.* at 311.
[114] *Id.* at 312.

Plaintiff's claim of sexual stereotyping was based on plaintiff's assertion that he did not meet certain stereotypes associated with his gender.[115] The court concluded that based on that allegation alone, plaintiff failed to satisfy the burden of proof of gender discrimination.[116] However, the court found plaintiff established a prima facie case of retaliation based on plaintiff's belief that he was being discriminated against on the basis of his sexual orientation.[117] Finally, the court determined plaintiff failed to establish a prima facie case for the 42 U.S.C. § 1985 claim, since homosexuality did not fall under a quasi-suspect classification such as race, national origin, or sex.[118]

Quinn v. Nassau Police Dep't, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).

Plaintiff, a homosexual man and former Nassau County police officer, claimed that his fellow officers and supervisors "embarked on a vicious campaign of harassment against him because of his sexual orientation." The jury returned a special verdict in favor of Plaintiff, awarding $380,000. Among the jury's findings were that members and supervisors committed discriminatory acts demonstrating an ongoing policy or practice of sexual orientation discrimination against Quinn; that such acts were condoned by the supervisors; that in the Nassau County Police Department there was a custom, policy or decision to permit sexual orientation harassment; and that the unwelcome harassment against Plaintiff was severe or pervasive. The court upheld the jury award and denied the dismissal motions to all but one defendant. It was demonstrated at trial that Plaintiff initially kept his sexual orientation hidden from his colleagues, but it eventually was revealed when officers arrested an assistant district attorney for engaging in homosexual sex in public, and the attorney told the officers that Plaintiff was gay. This began a nine-year campaign of ridicule, abuse, and harassment. Fellow police officers hung pornographic pictures and doctored records on the stationhouse bulletin board, portraying Plaintiff as a child molester and a sadomasochist. At least 19 of the pictures were produced at trial. They hid his uniform, put rocks in his hubcaps and once placed a nightstick—labeled "P.O. Quinn's Dildo"—in his squad car. Defendant supervisor admitted to seeing the posted pictures and, according to another sergeant in the precinct, engaged in the harassment by referring to Plaintiff as "dick smoker." The precinct Lieutenant admitted at trial that he had seen pictures depicting Quinn unfavorably, but not those presented at trial. He stated, though, that had he seen them, he would not have felt obligated to remove them because he did not view them as offensive. Plaintiff complained to the Precinct Commander and wrote a letter to the Police Commissioner, complaining of the unfair treatment and harassment. The complaints to his supervisors were ignored.[119]

Sussman v. NYC Health & Hospitals Corp, 1997 WL 334964 (S.D.N.Y. June 16, 1997).

[115] *Id.*
[116] *Id.* at 313.
[117] *Id.* at 315-16.
[118] *Id.* at 316.
[119] *Quinn v. Nassau Police Dep't*, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).

Plaintiff, a gay physician and former intern at Coney Island Hospital, brought suit alleging sexual orientation discrimination. The court, ruling on cross summary judgment motions ruled that Plaintiff was entitled to pursue various claims against his former employer, including sexual orientation discrimination pursuant to New York City's Human Rights Law. Plaintiff had not disclosed his sexual orientation when he was hired as an intern under a one-year contract. Midway through the contract, Plaintiff received an offer of employment at another hospital. In seeking permission from his supervisor to terminate his internship early in order to take the other position, Plaintiff disclosed his sexual orientation and asserted that in the other hospital, he would be able to be more open about being gay. The supervisor's response was allegedly to characterize Plaintiff as "ungrateful." Ultimately, the supervisor denied Plaintiff's request. Plaintiff attributes the various faults in his subsequent performance, to the extent they existed, to depression over having lost the opportunity with the other hospital, and alleges that the change in his evaluations and his treatment by his supervisor all post-dated his revealing his sexual orientation. Within a few months, Plaintiff's performance so deteriorated that he was pressured to quit or be fired and was subsequently terminated in a hospital proceeding.[120]

Tester v. City of New York, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).

Plaintiff, a former police officer who alleges that he was constructively discharged by the New York City Police Department because he is gay, brought several claims alleging sexual orientation discrimination. The court denied in part and granted in part Defendants' motion to dismiss, holding that there was an issue of fact as to whether the police department maintained a policy of discrimination against homosexuals, and noting that, as alleged, Plaintiff's working conditions, which were imposed on the basis of his sexual orientation, were made so unpleasant as to effectively force Plaintiff to resign. During the early months of Plaintiff's first assignment, the harassment included the marking of his locker with graffiti, the placement of a floor fan and garbage cans in front of his locker, and the protest of a fellow officer to Plaintiff's sleeping in the officers' lounge area between shifts, even though such practice was customary. Plaintiff reported the harassment and unfair treatment to his supervisor after other officers accused him of failing to act while on duty. His supervisor was deliberately indifferent to his concerns and took no investigative or remedial action to correct the situation. Following his report to the supervisor, the discrimination intensified. He arrived to work to find the lock on his locker broken, his personal property damaged, and his paperwork strewn about. A handwritten note was placed on top of the broken locker, which read "Testa Blood Guts" and depicted skull and crossbones. Again, his reports of discrimination went unanswered. After disparaging graffiti about Plaintiff was found on the bathroom wall, he was involuntarily transferred to another precinct where the harassment continued. His new locker was broken and the words "coward" and "fag" were written on it. He eventually told his Captain that he did not want to resign, but was under enormous stress and fear due to the harassment. He was relegated to an unarmed, disfavored position.[121]

[120] *Sussman v. N.Y.C. Health & Hosps. Corp.*, 1997 WL 334964 (S.D.N.Y. June 16, 1997).
[121] *Tester v. City of N.Y.*, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).

Holmes v. Artuz, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

Plaintiff, a prisoner filed a Section 1983 action, claiming he was removed from his prison food service job solely because he was a homosexual. Then District Court Judge Sotomayor denied Defendants' motion to dismiss with leave to amend in six months in order to give the court's pro bono office time to locate a lawyer for the Plaintiff. The court felt the pro se Plaintiff could use the services of a lawyer "to explore fully the substantial questions raised by this case." The court also wanted to await the U.S. Supreme Court's decision in *Romer v. Evans*[122] for further guidance on the scope of equal protection rights afforded to lesbians and gay men. Criticizing the Defendants' argument that removing the Plaintiff from that job was rationally related to the legitimate state interest of preserving mess hall security, the court stated that a "person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security." Defendant would have to prove that "real threats" to security existed and that an exclusionary policy was a rational response to those threats. The court also rejected Defendants' qualified immunity defense, noting that qualified immunity shields government officials only if their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. "The constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law."[123]

In re Kimball, 301 N.E.2d 436 (N.Y. 1973).

Plaintiff, a lawyer who had previously been licensed in Florida and then had his license revoked based on his sodomy conviction under the Florida sodomy law, brought suit against the New York State Bar for denying his bar application on the basis that his homosexuality per se made him unfit. The court held that a bar applicant may not be rejected as "unfit" or "lacking in character" because of homosexuality per se, and ordered the State Bar to reconsider the application, thereby overruling the trial court.[124]

Brass v. Hoberman, 295 F. Supp. 358 (S.D.N.Y. 1968).

Plaintiffs, two gay caseworkers that applied for jobs with the New York City Department of Social Services, filed a motion seeking a preliminary injunction to restrain the city from declaring them ineligible for civil service employment based on their sexual orientation. Though the court declined to issue a preliminary injunction, it ordered a trial on the merits. The Plaintiffs were found "not qualified" for the positions on the basis of the City's policy excluding LGBT persons from city employment. Plaintiff Brass was denied employment by the Department following a mandatory medical exam by a psychiatrist who found Brass unfit for the position "because of a history of homosexuality." The City Personnel Director wrote to Brass, in response to Brass's inquiry after he was not selected for the position, "[i]t is our policy to disqualify homosexuals for employment as Case Workers, Hospital Care Investigators, and Children's Counselors." Plaintiff Teper had a similar experience with the Department.

[122] 517 U.S. 620 (1996).
[123] *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).
[124] *In re Kimball*, 301 N.E.2d 436 (N.Y. 1973).

The Department argued that the policy was not unconstitutional when restricted to a few selected positions because, with respect to such positions, it had a reasonable basis in denying employment to homosexuals based on recognized and accepted medical and psychiatric opinions regarding homosexuality.[125]

2. Private Employers

Murray v. Visiting Nurse Servs. of N.Y., 528 F.Supp.2d 257 (S.D.N.Y. 2007).

Plaintiff, a heterosexual male employed at a nursing center, brought an action against his former employer alleging sexual orientation discrimination in violation of the N.Y.C. and N.Y.S. Human Rights Laws and Title VII.[126] Plaintiff specifically alleged that male coworkers made comments to other male employees stating "you're a bitch," "he's on the rag today," "when are you going to come out of the closet," and "are you ladies going to the parade?"[127] Additionally, plaintiff alleged that another coworker drew a picture of a penis beneath President George W. Bush's mouth from a newspaper clipping that headlined "President Bans Gay Marriage."[128]

The court dismissed plaintiff's claims relating to his sexual orientation under Title VII since it was "well-settled in [the Second Circuit] and in all other to have reached the question that…Title VII does not prohibit harassment or discrimination because of sexual orientation.[129] Because the court had dismissed plaintiff's federal claims, the court also decided to use its discretion and declined to assert federal jurisdiction over the remaining state claims relating to the alleged violations of the N.Y.C. and N.Y.S Human Rights Laws.[130]

Lederer v. BP Prods. N. Am., 2006 WL 3486787 (S.D.N.Y. 2006).

Plaintiff was a former employee of BP Products North America who brought an action alleging he was subjected to a hostile work environment in violation of the ADA, Title VII, and the N.Y.S. and N.Y.C. Human Rights Laws.[131] Plaintiff alleged fellow employees made various derogatory comments to him regarding his sexual orientation.[132] Plaintiff did not reveal his sexual orientation to anyone. However, plaintiff claimed his supervisor understood him to be gay.[133]

The court denied defendant's motion for summary judgment on plaintiff's ADA claim based on evidence in the records from which a reasonable factfinder might have concluded an ADA violation existed.[134] The court dismissed plaintiff's Title VII claim

[125] *Brass v. Hoberman*, 295 F. Supp. 358 (S.D.N.Y. 1968).
[126] *Murray v. Visiting Nurse Servs. of N.Y.*, 528 F.Supp.2d 257, 260 (S.D.N.Y. 2007).
[127] *Id.* at 261.
[128] *Id.*
[129] *Id.* at 266 (*quoting Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)).
[130] *Murray*, 528 F.Supp.2d at 257.
[131] *Lederer v. BP Prods. N. Am.*, 2006 WL 3486787 at *1 (S.D.N.Y. 2006).
[132] *Id.*
[133] *Id.* at *2.
[134] *Id.* at *7.

on the basis that Title VII did not cover sexual orientation discrimination.[135] With regard to the state and city claims, defendants attempted to argue they were not in violation of the Human Rights Law because they lacked knowledge of plaintiff's sexual orientation as a homosexual male.[136] The court stated "it [would] seem inconsistent with the purpose of the civil right laws to allow such an employer to escape liability merely because its employees made abusive comments only when they believed that member of the protected class were out of earshot."[137] Accordingly, the court denied defendant's motion for summary judgment on the state and city claims.[138]

Dawson v. Bumble & Bumble, 398 F.3d 211 (2d. Cir. 2005).

Plaintiff was a former hair stylist employed at defendant's hair salon.[139] Plaintiff alleged discrimination on the basis of her sexual orientation as a lesbian that was in violation of federal, state, and municipal law.[140] There was a sharp disagreement between her and defendant as to the quality of plaintiff's work as a hair assistant and a participant in defendant's hair training program.[141] Further, plaintiff alleged that her failure to advance through the training program was a result of "discriminatory animus."[142] Plaintiff claimed "she was subject to a hostile work environment in that she was constantly harassed about her appearance, that she did not conform to the image of women, and that she should act in a manner less like a man a more like a women."[143] Plaintiff also alleged a Title VII violation, arguing that she was faced with adverse employment actions as a result of defendant's animus toward plaintiff's "exhibition of behavior considered to be stereotypically inappropriate for a female."[144]

The court addressed plaintiff's stereotyping argument and referred to other court decisions, which stated "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'"[145] The court went on further and stated "district courts in [the Second Circuit] have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes."[146] Ultimately, the court determined plaintiff's record contained insufficient allegations to show plaintiff was subjected to any adverse employment consequences as a result of her sexual orientation.[147]

Logan v. Salvation Army, 10 Misc.3d 756, 809 N.Y.S.2d 846 (N.Y. Sup. 2005).

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[135] *Id.* at *8.
[136] *Id.* at *9.
[137] *Id.* at *9.
[138] *Id.* at *10.
[139] *Dawson v. Bumble & Bumble*, 398 F.3d 211, 213 (2d. Cir. 2005).
[140] *Id.*
[141] *Id.* at 214.
[142] *Id.*
[143] *Id.* at 215.
[144] *Id.* at 218.
[145] *Id.* (*citing Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).
[146] *Dawson*, 398 F.3d, at 219.
[147] *Id.* at 225.

Plaintiff was a gay Jewish male employed as a senior caseworker for the World Trade Center Disaster Relief project who filed a complaint based on religious and sexual orientation discrimination.[148] Plaintiff alleged that his supervisor stated: "I wonder how the officer would feel if they knew they had a Jewish fag working for them."[149] After this statement, Plaintiff reported the harassing behavior to HR, but the harassment continued thereafter.[150] After meeting with HR again, Plaintiff was reprimanded and soon thereafter was terminated.[151] After Plaintiff's termination, the supervisor made a comment to her colleagues about the Plaintiff stating she hoped he "did not play the gay card."[152] After Plaintiff commenced suit, defendant sought dismissal.

The court determined Plaintiff pled sufficiently based on his first two causes of action that the defendant discriminated against him due to his sexual orientation pursuant to N.Y.S and N.Y.C. Human Rights Laws.[153]

Viruet v. Citizen Advice Bureau, 2002 WL 1880731 (S.D.N.Y. 2002).

Plaintiff was a homosexual male employee who brought an action against his former employer alleging defamation, sexual orientation discrimination, and retaliation claims under the N.Y.C. Human Rights Law and Title VII.[154] Plaintiff also alleged that due to his sexual orientation he was refused a pay raise and a promotion, asked to perform duties outside his job description, harassed, and ultimately terminated.[155] Further, Plaintiff alleged several instances of verbal harassment based on his homosexuality by both fellow employees and clients that came into the workplace.[156]

The court determined that Plaintiff did not meet minimal requirements to bring a Title VII claim because "as a homosexual male [plaintiff] is not a member of a Title VII protected class. 'The law is well-settled in [the Second Circuit] and in all others to have reached the question that…Title VII does not prohibit harassment or discrimination because of sexual orientation.'"[157] The court also decided plaintiff had not submitted any evidence supporting a hostile work environment or disparate treatment based on his sexual orientation to warrant a claim under the N.Y.C. Human Rights Law.[158] Finally, the court determined defendant could not be held liable for "disparaging remarks by it clients."[159]

Lane v. Collins & Aikman Floorcoverings, Inc., 2002 WL 1870283 (S.D.N.Y. 2002).

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[148] *Logan v. Salvation Army*, 10 Misc.3d 756, 757, 809 N.Y.S.2d 846, 847 (N.Y. Sup. Ct. 2005).
[149] *Id.* at 848.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Viruet v. Citizen Advice Bureau*, 2002 WL 1880731 at *1 (S.D.N.Y. 2002).
[155] *Id.*
[156] *Id.* at *2.
[157] *Id.* at *14 (*citing Simonton v. Runyon*, 232 F.3d 33, 35-36 (2d Cir. 2000)).
[158] *Viruet*, 2002 WL 1880731 at *21.
[159] *Id.* at *17.

Plaintiff brought an action against his former employer alleging defendants placed him on probation and subsequently terminated him on the basis of his sexual orientation in violation of the N.Y.C. Human Rights Law.[160] The defendant argued that plaintiff was terminated due to "poor sales performance in his Region under his stewardship."[161] The court determined the trial transcript reflected sufficient evidence from which reasonable jurors could have concluded plaintiff was placed on probation and fired due to his sexual orientation.[162]

Acosta v. Loews Corp., 276 A.D.2d 214, 717 N.Y.S.2d 47 (1st Dep't 2000).

Plaintiff who was a former employee of the Regency hotel brought an action alleging sexual orientation discrimination in violation of the N.Y.C. and N.Y.S. Human Rights Laws.[163] Plaintiff alleged he was constantly called names such as "homo," "faggot," and "marricone."[164] Plaintiff also alleged other co-workers exposed their genitalia to plaintiff and on one occasion had his pants forcefully pulled down while another co-worker exposed their genitalia to plaintiff.[165] Plaintiff alleged the managerial personnel were fully aware of the incidents, but failed to step in to reprimand any of the co-workers.[166] The court determined the plaintiff set forth sufficient allegations to establish that the managerial personnel were fully aware of the co-worker's harassment and abuse, and therefore required a jury trial to determine a factual review of the allegations.[167]

Parry v. Tompkins County, 689 N.Y.S.2d 296 (N.Y.App. Div. 1999).

Nadine Parry was reassigned different duties as a youth counselor in December of 1995 after two female clients claimed they felt uncomfortable with alleged physical contact by her. Parry believed her reassignment was unlawfully motivated by sexual orientation discrimination, and filed a grievance with her union as well as a complaint of violation of the local ordinance. The union and Parry nrgotiated a settlement agreement on April 18, 1996, under which she was to return to work and the employer was to remove adverse documents from her files, but this agreement fell apart, and Parry resigned and moved out of state. She filed a notice of claim against the county in December 1996, but didn't file her lawsuit until Dec. 31, 1997. The county's motion to dismiss as untimely was granted. The court found that a one-year statute of limitations set by the ordinance had been exceeded, since Parry didn't file her lawsuit until more than a year after the settlement fell apart.[168]

B. **Administrative Complaints**

[160] *Lane v. Collins & Aikman Floorcoverings, Inc.*, 2002 WL 1870283, at *1 (S.D.N.Y. 2002).
[161] *Id.*
[162] *Id.* at *2.
[163] *Acosta v. Loews Corp*., 276 A.D.2d 214, 216, 717 N.Y.S.2d 47, 49 (1st Dep't 2000).
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Parry v. Tompkins County*, 689 N.Y.S.2d 296 (N.Y. App. Div. 1999).

New York State Department of Correctional Services

On August 23, 2005, an employee of the Department of Correctional Services filed an administrative complaint with the State Division of Human Rights alleging that he had been harassed because of his sexual orientation. The employee was a Head Cook at a state correctional facility where, at the time of filing, he had been employed for seven years. The employee's co-workers began to harass him because of his sexual orientation approximately one year before the complaint was filed. They posted pictures in the Department that had been altered to make it look as though the employee was engaging in sexual intercourse with the employees. Comments such as, "no more head cooks in the pc unit ha-ha how do you like that fag boy," were written on the employee bathroom walls and co-workers made lewd comments in the presence of the employee and inmates about the employee's sexual activity, including an accusation "that [the employee] was screwing [a female co-worker] because she was tighter than his boyfriend." The employee reported the harassment to two supervisors, but no corrective action was taken and the harassment continued. Thereafter, the employee had to take medical leave due to the effects of the harassment.[169] The Division investigated the matter and determined that there was probable cause to support the employee's charge. The state of New York settled the matter privately with the employee in exchange for discontinuing the proceeding.[170]

On March 5, 2007, the employee filed a second complaint with the State Division of Human Rights alleging that he had been retaliated against based on his complaint of August 23, 2005. After the settlement was reached in that matter, he was passed over for overtime and was made to perform tasks outside of his job description, and was unfairly issued notices of discipline on multiple occasions.[171] Again, the Division's investigation revealed probable cause to support the employee's charge. Again, the parties entered into a private settlement.[172]

C. **Other Documented Examples of Discrimination**

New York City Department of Parks and Recreation

The Associated Press ran a story on July 16, 2009 of a transgender woman who had been fired from her job as a mailroom clerk with the New York City Department of Parks and Recreation because she had transitioned. Birden, a 27-year-old Harlem

[169] Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Aug. 23, 2005).
[170] Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Jan. 28, 2008).
[171] Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Mar. 5, 2007).
[172] Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Jan. 28, 2008).

resident, was also made fun of and called vulgar names by co-workers because of her gender change. At the time of press, she had filed a discrimination suit in Manhattan.[173]

Suffolk County Police Department

In 2005, plaintiff, a bisexual man, sued the Suffolk County Police Department alleging that he was subjected to harassment based on sexual orientation. A federal jury awarded Plaintiff $260,000 in damages. Post-verdict, an attorney for the Department indicated that its policies had been under review since the election of Suffolk County Executive Steve Levy, a Democrat whose predecessor had a much less supportive record on lesbian and gay rights. The attorney said that the goal of the "review" was to "avoid any of these lawsuits in the future." She also noted that the jury verdict related solely to workplace harassment, and did not find that Plaintiff was discharged because of his sexual orientation or as retaliation for complaining about the harassment.[174]

Chili Highway Department

In 2002, an openly-gay highway employee was suspended from work for three and a half days for wearing a baseball hat embroidered with a symbol of a half-red, half-rainbow-colored ribbon symbolizing the fight against AIDS. The *Rochester Democrat and Chronicle* reported that the employee's foreman had asked the gay man three years earlier not to wear a cap with a rainbow pride flag logo, which the employee said he had agreed not to wear. The suspension was rescinded after the employee's union argued that town rules make no mention of hats whatsoever. The man was reimbursed for lost wages and the suspension was removed from his personnel file. The man also received an apology from the town, a promise of no future retribution, and a monetary settlement to assist with lawyer fees.[175]

City of Buffalo Mayor's Office

In 2001, after she had been employed as a planner with the City of Buffalo for 14 years, a transgender woman was forced to resign because of hostile workplace treatment that began immediately after she began to transition. By 2001, she had a distinguished career and received a county-wide civic award for her improvement of a Federal program that sought to reduce homelessness among people living with HIV/AIDS. In 2001, she informed the Mayor of Buffalo that she would be transitioning from male to female. After she transitioned she was demoted, which included reassigning her away from the Federal program she had helped to develop. Though she had an unblemished record when she presented as a man, she received unwarranted criticism and faced workplace hostility immediately after she transitioned.

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[173] Associated Press, *Transsexual Sues NYC Parks Department over Firing*, July 16, 2009, *available at* http://www.silive.com/news/index.ssf/2009/07/transsexual_sues_new_york_city.html (last visited Sept. 8, 2009).
[174] Lesbian & Gay L. Notes (Mar. 2005).
[175] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 198-99(2002 ed).

One "casual Friday" she wore a gay pride t-shirt to work. She was told that someone in the department was offended by the shirt. When she refused to change, she was charged with insubordination and harassment. She was required to attend an informal hearing as a result of the charge, where she was told that the charges would be dropped if she agreed not to sue for any past grievances. She refused to sign and the harassment and hostility increased. She was unable to sleep and was diagnosed with depression. Eventually, worn down by stress and mistreatment, she resigned. She filed complaints with the City of Buffalo, the State of New York, and the EEOC but, because gender identity discrimination was not prohibited, her claims went nowhere.[176]

Nassau County Sheriff's Department

In 2000, James Manning, a corrections officer with the Nassau County Sheriff's Department, brought equal protection and 42 U.S.C. § 1983 claims based on anti-gay harassment in the workplace. A federal jury awarded him $1.5 million, finding the harassment at the county jail was so widespread that it constituted a "custom and practice" to discriminate against gay men. The Plaintiff presented evidence demonstrating that he encountered almost daily harassment from his co-workers for almost four years, including being called offensive names and the display of pornographic images depicting him as a pedophile, a transsexual and someone who engaged in bestiality. Plaintiff repeatedly complained to his superiors about the harassment, but they ignored him. Ultimately, a fellow corrections officer attacked him with a chair and injured his knee. Plaintiff left work and later went on disability leave. A doctor certified that he suffered from post-traumatic stress disorder.[177]

New York Police Department

In 1999, two New York police officers filed a lawsuit for sexual harassment and violations of their civil rights. Thirteen-year veteran Joseph Baratto had joined East Harlem's 23rd Precinct in 1989 and was allegedly the target of relentless harassment because he is gay. Baratto asserts that he was the victim of verbal anti-gay harassment and that he was repeatedly forced into his own locker. In addition, he asserts that on two occasions he was handcuffed and hung from a coat rack in the precinct lunchroom where he was subject to the ridicule of his co-workers and other officers once tried to physically force him to simulate an oral sex act with another officer. Steven Camacho, who is not gay, asserts that he was nonetheless the victim of sexual harassment by other officers simply because he was willing to work with Baratto. According to Camacho, other officers called him "Camacho the homo" drew pictures depicting Camacho engaged in

[176] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[177] Human Rights Campaign, *Documenting Discrimination: A special report from the Human Rights Campaign Featuring Cases of Discrimination Based on Sexual Orientation in America's Workplaces* (2001), *available at* http://www.hrc.org/documents/documentingdiscrimination.pdf.

sex acts with Baratto on precinct walls, and wrote graffiti on police station walls that read, "Camacho is a butt pirate."[178]

Saratoga Springs Police Department

In 1999, a Saratoga Springs police officer, who alleges he was derided and harassed because he was perceived to be gay, sued the city and several fellow officers for $20.6 million for slander and sexual harassment. Robert C. Dennis, an eight-year veteran of the Saratoga Springs force, asserts that he became the target of anti-gay harassment by his colleagues after he was honored for his involvement in a robbery investigation in 1992. According to Dennis, harassment consisted of references to Dennis as "queenie," and to his friends as his "boyfriends." Other officers allegedly ridiculed him by blowing kisses to him derisively over the police radio, stalking him, and telling members of the community that he was gay. Dennis claims that the harassment irreparably tarnished his reputation in the community and caused him 'enormous emotional distress.' He also asserts that a city employee told a youth organization with which Dennis was involved that he was "light in the loafers" and therefore "should not be considered as a chaperone for a camping trip the organization was having."[179]

A New York Public School

In 2000, two years after he was hired, an English teacher at a New York public school was forced to resign. During his tenure, he intentionally disclosed his sexual orientation to only a few colleagues, but believed that the school principal knew he was gay. In April 2000, he was called into a meeting with the assistant principal. The assistant principal commended him for his hard work and conscientiousness, but told him that he would not be returning to work the following year because of "classroom management issues." The assistant principal told the teacher that he would "do [him] a favor" and let him resign. If he did not agree to resign, he was told that he would receive and unfavorable evaluation. His union rep. discouraged him from taking up his grievance. Two days after the meeting, his classroom was vandalized and the word "faggot" was written across the chalkboard. Fearing that he would be terminated, he felt he had no option other than to resign.[180]

New York State Law Department

In 1996, the Public Employees Federation, a union representing employees of the State Law Department, filed an unfair practice charge against the Department, asserting that a change in policy, which omitted "sexual orientation" from the executive order governing discrimination law in the Department, violated the Department's duty to bargain over changes in terms of employment. The change was made after Dennis C. Vacco was elected Attorney General of the State of New York in 1994 in a campaign

[178] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 179 (1999 ed.).
[179] *Id.* at 183-84.
[180] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

where some of his supporters attacked his opponent, Karen Burstein, because she was a lesbian. Shortly after taking office, Vacco replaced his predecessor's executive order governing discrimination policy. Subsequently several openly lesbian or gay employees of the Department were fired in the course of a purported reorganization of the Department that generally downgraded civil rights enforcement functions.[181]

New York City Police Department

Two women, a lieutenant and a detective in the New York City Police Department, have filed a $5 million lawsuit against the city, the Police Department, Police Chief Raymond Abruzzi and Commissioner William Bratton, charging their male coworkers with sexist and homophobic harassment. The officers in their Queens precinct allegedly hung a sign that said 'NLA' for 'No Lesbians Allowed,' spread rumors that the two women were lovers, referred to the Police Women's Endowment Association as 'Lesbians R Us' and called the lieutenant's phone 'the lesbian hotline.' Both the lieutenant, who commanded the precinct detective squad for nearly two years, and the detective were transferred by Chief Abruzzi after several male officers asked to be transferred because of the women.[182]

[181] *Public Employees Fed'n v. State of N.Y.*, PERB Case No. U-16702 (1996).
[182] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 83 (1995 ed.).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Prior to 1980, sodomy was illegal in New York. In the case of *People v. Onefre*,[183] the New York Court of Appeals struck down that law concluding it was an unconstitutional invasion of privacy. However, the sodomy law remained on the law books for the next twenty years until governor George Pataki signed the Sexual Assault Reform Act in 2000.[184]

B. Housing & Public Accommodations Discrimination

Matter of Thomas, 2005 WL 5632053 (N.Y.C. Com. Hum. Rts. July 2005)

Petitioner who was a transsexual filed a complaint alleging that while in the process of retaining respondent's services in locating an apartment share, respondent questioned petitioner's gender and told her that he did not do business with transsexuals.[185] Respondent countered the allegation by simply denying the incident had occurred.[186] The commission concluded there was ample evidence of respondent's guilt based on the fact that respondent destroyed video evidence of the alleged incident in addition to having a history of discriminatory practices, which led to the loss of respondent's real estate license.[187] Thus, based on respondent's lack of credibility, the commission ordered respondent to pay a fine to the city, pay petitioner for compensatory damages, and attend sensitivity training.[188]

C. Recognition of Same-Sex Couples

New York does not allow same-sex couples to marry in the state[189] nor does it provide domestic partnership benefits. However, New York does respect same-sex marriages entered into outside New York.

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[183] *People v. Onefre*, 415 N.E.2d 936 (N.Y. 1980).
[184] *See* New York Prosecutor's Training Inst. & N.Y. District Att'y Ass'n Sexual Offense Sub-Comm. , Know the Law: Sexual Assault Reform Act NYPTI Manual, http://bit.ly/GGfRh (last visited Sept. 8, 2009).
[185] *Matter of Thomas*, 2005 WL 5632053, at *1 (N.Y.C. Com. Hum. Rts. July 2005).
[186] *Id.*
[187] *Id.*
[188] *Id.* at *2.
[189] *Martinez v. County of Monroe*, 50 A.D.3d 189, 193, 850 N.Y.S.2d 740, 743 (4th Dep't 2008).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **North Carolina – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

North Carolina law provides virtually no protection for public employees against job discrimination on the basis of gender identity or sexual orientation. No state-wide statute has been enacted in North Carolina to prohibit discrimination in employment on the basis of sexual orientation or gender identity. Also, little judicial or administrative action surrounding discrimination on the basis of sexual orientation or gender identity in the employment context or otherwise appears to exist.[1]

In the last five years, several attempts have been made by the North Carolina state legislature to amend the State Personnel Act to include prohibitions of discrimination on the basis of sexual orientation and gender identity or expression for state employees. These bills have never made it out of committee. Similar bills that would have added these protections for only employees of the North Carolina General Assembly have also stalled in committee.

In 2007, when the State Personnel Commission approved a new EEO policy that included sexual orientation, the new policy was quickly rejected by the state Rules Review Commission. According to an April 2008 article in the Citizen-Times, "North Carolina does not ban discrimination based on sexual orientation in hiring, discipline and pay of state employees. The State Personnel Commission's attempt to change that was rejected in January by the state Rules Review Commission as overstepping the other appointed board's authority."[2] Aside from the actions in the state legislature and agencies, several North Carolina universities and municipalities have enacted non-discrimination policies.

Documented examples of sexual orientation or gender identity discrimination by state or local government include:

- In *Hensley v. Johnston*, a case pending before the United States District Court for the Eastern District of North Carolina, a public school teacher brought suit against the Johnston County Board of Education after she was transferred from her position following complaints by a student's parents regarding her perceived "antagonism toward a Christian belief system, her 'alternative life views'" and her

[1] *See* Parts II and III, *infra*.

[2] *Ban on Anti-Gay Discrimination Taken Off State Personnel Website*, ASHEVILLE CITIZEN-TIMES, Apr. 15, 2008, at B1.

perceived sexual orientation.[3] The teacher alleges that "she was the 'target' of discriminatory animus because she 'did not deny that her religious beliefs did not include a view that homosexuality was a sin.'"[4] This case is believed to be currently undecided; no subsequent reporting of the case appears in Westlaw.[5]

- Anne Marie Clukey had worked for the City of Charlotte at a maintenance facility for two years before she was fired in December 2006. Clukey, who was born a male and underwent gender reassignment surgery in May 2001, claims that she was fired "because she did not conform to her supervisor's 'gender stereotype'."[6] City Attorney Mac McCarley stated that "transgendered individuals do not have any rights under federal employment discrimination laws."[7]

- John Peter Bradley, who described himself as a whistle-blower who reported official corruption while working for law enforcement in various capacities, claimed that one government official had written a letter identifying Bradley as a bisexual, and that ultimately the letter was used to harm him when he became police chief of Woodfin, North Carolina. Ruling on motions to dismiss by various defendants, the court ruled that Bradley could pursue his constitutional claims against certain named government officials sued in their individual capacities, despite Eleventh Amendment immunity, since he was seeking prospective injunctive relief. However, his claims for compensation would be barred by immunity.[8]

- In 1991, a gay North Carolina county deputy planning director was fired because of his sexual orientation.[9]

Other North Carolina state actions have deterred LGBT people from seeking public employment. For example, North Carolina criminalized private, consensual same-sex sexual behavior between adults until the law was invalidated by the Supreme Court's decision in *Lawrence v. Texas*[10]. Also, in a non-employment case, *Pulliam v. Smith*, the Supreme Court of North Carolina granted modification of the existing custody arrangement under which the father previously had primary physical custody of the two

[3] *Hensley v. Johnston County Bd. of Educ*., 2007 WL 4717527, Trial Motion, Memorandum and Affidavit (E.D.N.C. Aug. 21, 2007).

[4] *Hensley v. Johnston County Bd. of Educ*., 2007 WL 4717526, Trial Motion, Memorandum and Affidavit (E.D.N.C. Jul. 30, 2007).

[5] Based on a review of the docket for case number 5:07CV00231, the Motion to Stay All Discovery pending decision on the Motion to Dismiss was granted on September 12, 2007. The only subsequent action in the case was the filing of a Notice of Subsequently Decided Authority in support of the Motion to Dismiss on June 17, 2008.

[6] Franco Ordonez & Maria David, *Ex-City Worker Says She Was Fired for Sex Change*, CHARLOTTE OBS., Feb. 12, 2009, *available at*: http://bit.ly/rEfNo.

[7] Matt Comer, *Transgender Worker Sues Charlotte for Job Discrimination*, Q-NOTES, Feb. 12, 2009, http://bit.ly/Oe2jA.

[8] *Bradley v. North Carolina Dept. of Transp.*, 286 F. Supp. 2D 697 (W.D.N.C. 2003).

[9] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

[10] 539 U.S. 558 (2003).

children, based on the father's "active homosexuality."[11] The Court considered that "activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct" and having "a party for homosexuals at the home," among other findings, support the trial court's finding that "the active homosexuality of [Smith]… is detrimental to the best interest and welfare of the two minor children."[12]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[11] *Pulliam v. Smith*, 501 S.E.2d 898, 899 (N.C. 1998).
[12] *Id.* at 901-02, 904.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of North Carolina has not enacted laws to protect sexual orientation and gender identity from employment discrimination.

B. Attempts to Enact State Legislation

S.B. 843 was filed on March 24, 2009 and referred the next day to the Committee on the Judiciary, where no further action has been taken to date. The bill would amend the nondiscrimination and equal opportunity provisions of the State Personnel Act[13] to cover "sexual orientation," which is defined as "actual or perceived heterosexuality, homosexuality, or bisexuality, or a person's gender-related identity or expression."[14]

The bill would establish each of the following actions by State employers on account of the employee's sexual orientation as an "unlawful State employment practice": (i) denial of promotion, transfer, or training; (ii) demotion, reduction in force, or termination of an employee in retaliation for the employee's opposition to an alleged discrimination; and (iii) harassment in the workplace. The bill defined "sexual orientation" to mean "actual or perceived heterosexuality, homosexuality, or bisexuality, or gender-related identity or expression." Pursuant to the bill's definition of sexual orientation, the administrative grievance procedures of the State Personnel Act would have been made applicable to denial of equal opportunity on the basis of both sexual orientation and gender identity.

Several substantially similar bills were filed in other North Carolina legislative sessions, including S.B. 1007[15] in 2003, H.B. 1203[16] in 2005, S.B. 1534[17] in 2007, and H.B. 1789[18] also in 2007. These bills were referred to various committees where no further action was taken.

H.B. 924[19] was introduced on April 7, 2003; the bill was referred to the Committee on State Government, but the committee defeated the bill by one vote.[20] The bill would have amended the State Personnel Act to include sexual orientation, gender

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[13] N.C. GEN. STAT. ANN. § 126-16 (2008).

[14] S.B. 843, 2009-2010 Gen. Assem., Reg. Sess. (N.C. 2009).

[15] S.B. 1007, 2003-2004 Gen. Assem., Reg. Sess. (N.C. 2003) (this version left the term "sexual orientation" undefined).

[16] H.B. 1203, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

[17] S.B. 1534, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007) (this version also included provisions clarifying the General Assembly's personnel policies as described *infra*).

[18] H.B. 1789, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007) (this version also included provisions clarifying the General Assembly's personnel policies as described *infra*).

[19] H.B. 924. (N.C. 2003).

[20] Press Release, N.C. Family Policy Council, House Committee Defeats "Sexual Orientation" Bill (Apr. 30, 2003), *available at* http://bit.ly/167OkR.

identity, and gender expression in the list of classifications expressly covered by the equal employment opportunity provisions.[21]

S.B. 1113[22] was filed in 2005 was and subsequently referred to the Committee on State and Local Government, but no further action was taken. The bill would have established that "The General Assembly shall not discriminate in any of its personnel policies, practices or benefits on the basis of race, religion, color, national origin, age, sex, sexual orientation, or disability." The bill did not define 'sexual orientation'.

S.B. 1534[23] and H.B. 1789[24] were both introduced in 2007; these bills would have amended the General Assembly's personnel policy prohibiting discrimination to include 'sexual orientation' as a protected class, and amended state nondiscrimination end equal employment opportunity provisions of the State Personnel Act to include protection for 'sexual orientation' at the same time. Both bills defined 'sexual orientation' to include gender-related identity and expression. The bills were referred to the Committee on the Judiciary and the Committee on State Personnel, respectively, but no further action was taken.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

The Governor's website provides access to all executive orders issued by the current governor. Based on a review of the executive orders available on the Governor's website as of December 2008, none protect against discrimination on the basis of sexual orientation or gender identity. Although Executive Order 5 established an Equal Employment Opportunity policy, the policy does not protect sexual orientation or gender identity.[25]

2. State Government Personnel Regulations

State Personnel Commission

On June 22, 2007, the State Personnel Commission approved an Equal Employment Opportunity Policy which would have expanded the factors covered by the existing equal employment opportunity policy to include sexual orientation. According to the Minutes of the June 22, 2007 meeting of the State Personnel Commission, "Sexual orientation is currently included in most university EEO plans and some agency EEO plans. By including sexual orientation in this rule, the EEO planning process will be

[21] H.B. 924, 2003-2004 Gen. Assem., Reg. Sess. (N.C. 2003).
[22] S.B. 1113, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).
[23] S.B. 1534, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).
[24] H.B. 1789, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).
[25] Archive of N.C. Exec. Orders, http://bit.ly/PueG09 (last visited Sept. 6. 2009).

standardized allowing for common factors between all agencies and universities."[26] However, it was also acknowledged that this new policy would only expand the opportunity for internal agency grievances, but would not provide a right for such claims to proceed to the Office of Administrative Hearings and the State Personnel Commission, as would other claims of discrimination pursuant to employee grievance procedures, because such a right could only be established by legislative action.

This attempt to revise the equal opportunity employment policy, however, was later rejected by the state Rules Review Commission. According to an article on April 15, 2008 in the Citizen-Times, "North Carolina does not ban discrimination based on sexual orientation in hiring, discipline and pay of state employees. The State Personnel Commission's attempt to change that was rejected in January by the state Rules Review Commission as overstepping the other appointed board's authority."[27] Therefore, the Equal Employment Opportunity Policy, as currently stated on the Office of State Personnel website, provides that the policy applies only to "race, color, religion, sex, national origin, age or disability."[28]

North Carolina Housing Finance Agency

The North Carolina Housing Finance Agency has a policy which provides "all employees and applicants for employment with equal employment opportunities, without regard to race, color, religion, creed, gender, sexual orientation, national origin, age, disability, political affiliation, or any other protected status."[29] Please note that the details of this policy were not readily available, but this statement can be found on the agency's website.

University Policies

The University of North Carolina at Chapel Hill (a public university) established a policy on non-discrimination which provides that "The University of North Carolina at Chapel Hill does not discriminate in offering equal access to its education programs and activities or with respect to employment terms and conditions on the basis of an individual's race, color, gender, national origin, age, religion, creed, disability, veteran's status, sexual orientation, gender identity or gender expression."[30] This policy applies to all students and employees, including faculty, post doctoral scholars and student-employees. The policy prohibits the following actions in the employment context on the basis of any protected status mentioned above: (i) failing or refusing to hire or

[26] Minutes of State Personnel Commission Teleconference Meeting (June 22, 2007), http://bit.ly/g4S4u (last visited Sept. 6, 2009).
[27] *Ban on Anti-Gay Discrimination Taken Off State Personnel Website*, ASHEVILLE CITIZEN-TIMES, Apr. 15, 2008, at B1.
[28] *See* North Carolina Office of State Personnel, Equal Opportunity Employment Policy, http://bit.ly/H4zw6 (last visited Sept. 6, 2009).
[29] *See* North Carolina Housing & Finance Agency Website, http://bit.ly/3FZ1y (last visited Sept. 6, 2009).
[30] The University of North Carolina at Chapel Hill Policy Statement on Non-Discrimination (2007) http://bit.ly/4wEhJL (last visited Sept. 6, 2009). There is no indication as to when "sexual orientation" was added to this policy.

discharging any individual, or otherwise discriminating against any individual with respect to compensation, terms, conditions or privileges of employment; and (ii) limiting, segregating, or classifying employees or applicants for employment in any way which would deprive them of employment opportunities or otherwise adversely affect their employment status.

The University of North Carolina at Charlotte (a public university) established a policy on January 25, 1991 which provides that "The University of North Carolina at Charlotte believes that educational and employment decisions should be based on the abilities and qualifications of individuals and should not be based on irrelevant factors, including personal characteristics, that have no connection with academic abilities or job performance. Among the traditional factors which are generally 'irrelevant' are race, sex, religion, disability, and national origin. It is the policy of The University of North Carolina at Charlotte that the sexual orientation of an individual be treated in the same manner."[31]

The University of North Carolina at Greensboro (a public university) established a policy of non-discrimination on the basis of sexual orientation, effective November 1, 1996, which provides, "The University of North Carolina at Greensboro regards discrimination on the basis of sexual orientation to be inconsistent with its goal of providing an atmosphere in which students, faculty and staff may learn, work and live. The University of North Carolina at Greensboro values the benefits of cultural diversity and pledges to students, prospective students, faculty, staff and the public that it will defend pluralism in the academic community and welcomes all men and women of good will without regard to sexual orientation."[32]

The University of North Carolina at Asheville (a public university) established a policy of equal employment opportunity which provides that "UNC Asheville will not discriminate against students, applicants, or employees on the basis of race, color, religion, sex, sexual orientation, national origin, age, disability, political affiliation, or any other legally protected status with respect to all terms, conditions or privileges of University-sponsored activities, employment, and the use of University facilities."[33]

North Carolina State University (a public university) established a policy of non-discrimination with regard to sexual orientation which provides that "an individual's sexual orientation is another factor which is not relevant to educational and employment decisions."[34]

3. **Attorney General Opinions**

[31] University of North Carolina, Charlotte, Policy Statement #98 Sexual Orientation, http://bit.ly/12hffg (last visited Sept. 6, 2009).
[32] University of North Carolina, Greensboro, Statement of Nondiscrimination on the Basis of Sexual Orientation, http://bit.ly/xQm4b (last visited Sept. 6, 2009).
[33] University of North Carolina, Asheville, Human Resources Website, http://www.unca.edu/hr/jobs.html (last visited Sept. 6, 2009).
[34] North Carolina State University, Sexual Orientation Policy Statement, Reg. 04.29.03, http://bit.ly/2lwj6B (last visited Sept. 6, 2009).

Based on non-exhaustive research, no attorney general opinions were issued in relation to employment discrimination on the basis of sexual orientation or gender identity.

D. Local Legislation

The ordinances for every county/municipality in North Carolina are available in an online database.[35] Although an exhaustive search of every local ordinance available through this resource was not conducted, according to a press release by Equality NC Project, as of December 3, 2001, the cities of Raleigh, High Point, Chapel Hill, Carrboro, and Durham[36] had non-discrimination policies covering municipal employees that included sexual orientation.[37]

1. City of Raleigh

The Code of Ordinances for the City of Raleigh provides for the establishment of the Human Relations Commission to conduct "those activities which promote human dignity, equal opportunity and harmony among the many different citizens who make up the population of the City . . . without regard to race, color, creed, gender, age, sexual orientation, or national origin.[38] The Code of Ordinances for the City of Raleigh also establishes a policy of non-discrimination which provides that "The policy of the City of Raleigh is and shall be to oppose any discrimination on account of age, handicap, sex, race, color, creed, sexual orientation, or national origin in any aspect of modern life."[39] It further states that "The City Manager is directed to establish such policies as will insure that there is no discrimination in any function or area of City government."

2. Town of Chapel Hill

The Code of Ordinances for the Town of Chapel Hill establishes an employment policy providing that "The policy of the town is to foster, maintain, and promote equal employment opportunity. The town shall select employees on the basis of applicant's qualifications for the job . . . without regard to age, sex, race, color, religion, non-job-related disability, national origin, sexual orientation, gender identity, gender expression, or marital status."[40] According to an Equality N.C. press release, on Monday, May 10, 2004 Chapel Hill Town Council became the "first in [the] state to protect [the]

[35] Online Archive of Municipal Codes, http://bit.ly/g4u1l (last visited Sept. 6, 2009).
[36] Note that although the City of Durham was included in the press release, based on a search of the current ordinances for the City of Durham, there is no such ordinance currently in place.
[37] Jo Wyrick, *New Poll: N.C. Opposes Discrimination on Sexual Orientation*, EQUALITY NC, Dec. 3, 2001, http://www.tgender.net/taw/misc/ncpoll.html (last visited Sept. 6, 2009).
[38] RALEIGH CODE § 4-3002 (2008).
[39] RALEIGH CODE § 4-1004 (2008).
[40] CHAPEL HILL CODE § 14-28 (2007).

transgender community from discrimination . . . [having] voted unanimously to add gender identity and gender expression to its non-discrimination policies."[41]

E. **Occupational Licensing Requirements**

None.

[41] Press Release, Nat'l Gay & Lesbian Task Force, Equality NC Celebrates Historic Change in Chapel Hill Policy (May 12, 2004), *available at* http://bit.ly/ItdrW.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Hensley v. Johnston County Bd. of Educ., 2007 WL 4717527 (E.D.N.C. Aug. 21, 2007).

In *Hensley v. Johnston County Board of Education*, Pamela Hensley brought suit in the United States District Court for the Middle District against the Johnston County Board of Education (the "Board of Education"), based on First Amendment freedom of speech and Fourteenth Amendment equal protection violations, following the Board of Education's decision to transfer Hensley to another teaching position.[42] According to the Plaintiff's Memorandum of Law Opposing Defendants' Motion to Dismiss, the decision to transfer Hensley was based in part on her perceived sexual orientation. The decision to transfer Hensley came after a student's parents complained to the school principal and Board of Education about what they perceived to be Hensley's "antagonism toward a Christian belief system, her 'alternative life views', and her perceived 'shortcomings' associated with her [visual] disability." These complaints arose after Hensley taught evolution to her class based on materials obtained from a curriculum seminar focused on teaching the topic of evolution in science classes which had been approved by the school's principal. The parents claimed that their child's grades had been lowered arbitrarily because the child voiced religious opposition to the evolution material.

According to Defendant's Memorandum of Law in Support of Motion to Dismiss, "Hensley alleges that she was the 'target' of discriminatory animus because she 'did not deny that her religious beliefs did not include a view that homosexuality was a sin.'"[43] Following the parents' complaints, the school conducted an investigation and found no evidence to support their allegations regarding their child's grades. However, the principal of the school inquired as to Hensley's sexual orientation and the Board of Education subsequently transferred Hensley to a newly established position teaching remedial classes. This case is currently undecided, the Court having ordered a stay of discovery on September 12, 2007 pending decision on defendant's motion to dismiss.[44]

Barbagallo & Yost v. Potter, 2005 WL 2460725 (M.D.N.C. 2005).

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[42] *Hensley v. Johnston County Bd. of Educ.*, 2007 WL 4717527, Trial Motion, Memorandum and Affidavit (E.D.N.C. Aug. 21, 2007).

[43] *Hensley v. Johnston County Bd. of Educ.*, 2007 WL 4717526, Trial Motion, Memorandum and Affidavit (E.D.N.C. Jul. 30, 2007).

[44] Based on a review of the docket for case number 5:07CV00231, the Motion to Stay All Discovery Pending Decision on the Motion to Dismiss was granted on September 12, 2007. The only subsequent action in the case was the filing of a Notice of Subsequently Decided Authority in support of the Motion to Dismiss on June 17, 2008.

In *Barbagallo & Yost v. Potter*, Judith Barbagallo and Nancy Yost ("Plaintiffs") brought suit against John Potter, the Postmaster General for the U.S. Postal Service (Eastern Area) (the "Postmaster") based on claims of unlawful hostile work environment and retaliation for Equal Employment Opportunity ("EEO") actions in violation of Title VII of the Civil Rights Act of 1964 ("Title VII").[45] Plaintiffs claimed that they had been harassed on the basis of their perceived sexual orientation and retaliated against based on their EEO actions. According to Plaintiffs' Response to Defendant's Motion to Dismiss, Plaintiffs had been taunted day after day, being consistently referred to as "lesbians" and "queers" because they did not conform to female gender stereotypes.[46] They filed EEO claims leading to administrative hearings based on charges of sexual harassment, arguing that comments about their sexual preference were based on gender-based stereotypes. After exhausting the administrative process, Plaintiffs brought suit in the United States District Court for the Middle District of North Carolina. However, the case was dismissed because the statute of limitations had run, as the complaint was filed 91 days after receiving the "right to sue" letter following the administrative appeal process, rather than within the requisite 90 days.[47]

Bradley v. North Carolina Dep't of Transp., 286 F. Supp. 2D 697 (W.D.N.C. 2003).

John Peter Bradley, who described himself as a whistle-blower who reported official corruption while working for law enforcement in various capacities, claimed that one government official had written a letter identifying Bradley as a bisexual, and that ultimately the letter was used to harm him when he became police chief in Woodfin, North Carolina. Ruling on motions to dismiss by various defendants, the court ruled that Bradley may pursue his constitutional claims against certain named government officials sued in their individual capacities, despite Eleventh Amendment immunity, since he was seeking prospective injunctive relief. However, his claims for compensation would be barred by immunity.[48]

2. Private Employees

None.

B. Administrative Complaints

Section 126-34 of the North Carolina General Statutes establishes the grievance appeal procedures for career State employees.[49] According to that Section, "any career State employee having a grievance arising out of or due to the employee's employment . . . shall submit a written complaint to the employee's department or agency." Following such complaint, the department or agency is provided 60 days to take "appropriate

[45] *Barbagallo v. Potter*, 2005 WL 2460725, at *1 (M.D.N.C. 2005).
[46] *Barbagallo v. Potter*, 2004 WL 2236268, Trial Motion, Memorandum and Affidavit, (W.D.N.C. Sept. 3, 2004).
[47] *Barbagallo*, 2005 WL 2460725, at *3.
[48] *Bradley v. North Carolina Dep't. of Transp.*, 286 F. Supp. 2d 697 (W.D.N.C. 2003).
[49] N.C. GEN. STAT. ANN. § 126-34 (2008).

remedial action." If the employee is not satisfied with the department or agency's response, that employee has the right to appeal directly to the State Personnel Commission.

Pursuant to Section 126-37 of the North Carolina General Statutes, "appeals involving disciplinary action, alleged discrimination or harassment… shall be conducted in the Office of Administrative Hearings."[50] The Administrative Law Judge shall make a recommendation and the State Personnel Commission shall then render a final decision which is subject to judicial review.

Note that, although sexual orientation and gender identity are not included in the State's non-discrimination policy, this grievance procedure would still apply to any attempts to raise grievances on those bases. Also, note that, based on a review of the State Personnel Commission's website, records of employee grievance proceedings do not appear to be available online.

C. **Other Documented Examples of Discrimination**

City of Charlotte

In 2009, Anne Marie Clukey filed a claim against the City of Charlotte for employment discrimination on the basis of sexual orientation and gender identity. Clukey, now 60 years old, was born a male and had gender reassignment surgery in May 2001. In December 2006, Clukey was fired from her position as a city operations assistant at a City maintenance facility. According to one account of the court papers, Clukey claims that her supervisor became "hostile" with her after finding out that she was transgender and had passed her over for a promotion despite Clukey's three years of prior managerial experience and over 40 years of automotive maintenance experience. When Clukey reported to management that she believed her supervisor had overlooked her qualifications, her supervisor retaliated by writing her up on "unsupported reprimands." She claims she was fired because she had had gender reassignment surgery. Clukey, who previously lived in Portland, Maine, noted that she had "never had a problem like this before in other places I've lived." [51]

Although the City has not yet filed a formal response to Clukey's claim, City Attorney Mac McCarley has spoken to the press, indicating that the City intends to deny liability.

County Department

[50] N.C. GEN. STAT. ANN. § 126-37 (2008).
[51] Franco Ordonez & Maria David, *Ex-City Worker Says She Was Fired for Sex Change*, CHARLOTTE OBS., Feb. 12, 2009, *available at*: http://bit.ly/rEfNo.

In 1991, a gay North Carolina county deputy planning director was fired because of his sexual orientation.[52]

[52] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

North Carolina General Statutes Section 14-177 provides that the commission of "the crime against nature, with mankind or beast" is punishable as a felony.[53] However, this law was no longer valid after the U.S. Supreme Court decision in *Lawrence v. Texas*. Prior to this decision in 2003, the ACLU estimated that nearly 400 people were prosecuted under the law in the year 2000.[54] S.B. 560 was introduced before the 2005 Session of the North Carolina General Assembly on March 15, 2005. The bill would have amended the crime against nature law with regard to sodomy, in order to comply with the decision in *Lawrence*, but this bill was not passed.[55]

B. Housing & Public Accommodations Discrimination

Based on non-exhaustive research, no housing regulations have been enacted regarding sexual orientation or gender identity discrimination.

C. Hate Crimes

House Bill No. 1322 was filed in the 2005 Session of the North Carolina General Assembly on April 19, 2005.[56] The bill was referred to the Committee on Rules, Calendar, and Operations of the House, but no further action was taken. The bill would have established stronger punishment for offenses committed "with animosity based upon ethnicity, gender, age, sexual orientation, or disability." This enhanced punishment would have included crimes "committed because of the victim's real or perceived race, color, religion, nationality, gender, sexual orientation, disability, age, or country of origin." The bill would have defined "sexual orientation" as "actual or perceived heterosexuality, homosexuality, or bisexuality, or a person's gender-related identity or expression."

Several substantially similar bills were also filed in previous sessions of the North Carolina General Assembly, including H.B. 1631[57] in 2007, S.B. 485[58] in 2005, S.B.

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[53] N.C. GEN. STAT. ANN. § 14-177 (2001).
[54] Press Release, ACLU, Bill Would Repeal North Carolina Sodomy Law (Mar. 14, 2001), *available at* http://bit.ly/1NDb2I.
[55] S.B. 560, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).
[56] H.B. 1322, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).
[57] H.B. 1631, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).
[58] H.B. 485, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

736[59] in 2003, S.B. 392[60] in 2001, and H.B. 1085[61] in 1997. Each was referred to the appropriate committee, but no further action was taken.

D. Education

On June 30, 2009, the Governor of North Carolina signed the School Violence Prevention Act, S. 526, requiring each local school administrative unit to adopt a policy preventing bullying or harassing behavior by December 31, 2009. The act defines bullying or harassing behavior as including "acts reasonably perceived as being motivated by any actual or perceived differentiating characteristic, such as . . . gender, . . . gender identity, . . . sexual orientations, . . . or by association with a person who has or is perceived to have one or more of these characteristics." The act requires that each local policy include a "definition of bullying or harassing behavior no less inclusive than that set forth in this Article."[62]

A previous attempt to pass this legislation was H.B. 1366, filed in the 2007 Session of the General Assembly.[63] The bill reached various stages in the committee review process, eventually ending up in the Conference Committee on July 18, 2008, but no further action was taken. The bill would have enacted the School Violence Prevention Act to require that each "local school administrative unit" adopt a policy prohibiting bullying or harassing behavior in order to provide "a safe and civil environment in school." According to the bill,

> Bullying or harassing behavior includes, but is not limited to, acts reasonably perceived as being motivated by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, gender identity or expression, physical appearance, sexual orientation, or mental, physical, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics.[64]

The bill would have required that policies adopted by the administrative units must prohibit such behavior and establish appropriate remedial actions and consequences for a person committing acts of bullying or harassment.

Notwithstanding this prior unsuccessful attempt by the General Assembly to enact anti-bullying legislation, approximately 20 per cent of school districts had adopted strong anti-bullying policies that protect students from harassment on the basis of sexual orientation and/or gender identity. According to Equality North Carolina's survey of

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[59] S.B. 736, 2003-2004 Gen. Assem., Reg. Sess. (N.C. 2003).
[60] S.B. 392, 2001-2002 Gen. Assem., Reg. Sess. (N.C. 2001).
[61] H.B. 1085, 1997-1998 Gen. Assem., Reg. Sess. (N.C. 1997).
[62] The act was written to add the School Violence Prevention Act as a new article 29B to subchapter 6 of the education code at N.C. GEN. STAT. ANN. § 115C-407.5 *et seq*.
[63] H.B. 1366, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).
[64] *Id.*

North Carolina public school system policies, 24 of North Carolina's 115 public school systems have implemented such policies with regard to sexual orientation, eight of which also protect students on the basis of gender identity or expression.[65] The list of particular school systems is available in the news article describing the Equality North Carolina survey.

E. **Health Care**

H.B. 1223 was filed in the 1997 Session of the General Assembly.[66] The bill was referred to the Committee on Insurance - Subcommittee on Health, but no further action was taken. The bill would have established the North Carolina Family Health Care Act to provide comprehensive health care for all residents of North Carolina. The program would have allowed residents to receive services from health care providers through enrollment in the State plan or in a private Accountable Health Plan, with such private providers being subject to certain conditions of participation. According to the bill, "as a condition of participation in the Program, no Accountable Health Plan may refuse to enroll or serve any eligible individual because of that individual's economic status, health history, preexisting health condition, age, sex, race, national origin, ancestry, sexual orientation, disability, ethnicity, or religion."

A substantially similar bill was filed as H.B. 572 in 1993.[67] The bill failed in the House and was postponed indefinitely on July 5, 1994.

H.B. 4 was filed in the 1993 Session of the General Assembly on January 28, 1993.[68] The bill would have enacted the Health Care Access and Cost Control Act, providing that "appropriate health services should be available within an integrated system, to all residents of the State, regardless of health condition, age, sex, sexual orientation, race, geographic location, employment, or economic status." The bill failed in the House and was postponed indefinitely on July 5, 1994.

A substantially similar bill was filed as H.B. 1458 in the 1991 Session of the General Assembly on June 2, 1992.[69] The bill failed in the House and was postponed indefinitely on July 24, 1992.

The Ethical Principals of Conduct for Substance Abuse Professionals licensed in North Carolina provides that "The substance abuse professional shall consider the issue of discrimination against clients or professionals based on race, religion, age, sex, handicaps, national ancestry, sexual orientation or economic condition, but in all cases the professional shall not discriminate on any basis prohibited by federal or state law."[70]

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[65] Equality North Carolina, *ENC Survey: Most NC Students Lack Effective Protection from Bullying* (Jul. 20, 2007), http://www.equalitync.org/news1/20070720 (last visited Sept. 6, 2009).
[66] H.B. 1223, 1997-1998 Gen. Assem., Reg. Sess. (N.C. 1997).
[67] H.B. 572, 1993-1994 Gen. Assem., Reg. Sess. (N.C. 1993).
[68] H.B. 4, 1993-1994 Gen. Assem., Reg. Sess. (N.C. 1993).
[69] H.B. 1458, 1991-1992 Gen. Assem., Reg. Sess. (N.C. 1991).
[70] 21 N.C. ADMIN. CODE § 68.0502 (2008).

F. **Parenting**

In *Pulliam v. Smith*, former wife Pulliam filed an action seeking modification of the existing custody arrangement under which father Smith had primary physical custody of their two minor children. The Supreme Court of North Carolina granted exclusive custody of the two minor children to the mother based on the father's homosexual relationship and "active homosexuality."[71] The following findings of fact were considered by the Court: (i) Smith was in a homosexual relationship with Tom Tipton, who lived in Smith's home; (ii) they often held hands and kissed on the cheek and on the lips in front of the children; (iii) they had engaged in oral sex while the children were present in the home; (iv) the bedroom of the two children was directly across the hall from Tipton and Smith's bedroom; (v) they had a "party for homosexuals at the home" to celebrate their one-year anniversary; (vi) they have gone on several occasions to "an establishment that caters to homosexuals;" (vii) Tipton keeps pictures in his bedroom of "drag queens" which are "not under a lock, and it is possible for the children to gain access to the pictures;" and (viii) the children had observed Tipton and Smith sleeping in the same bed.[72]

Based on its assessment of these facts, the trial court found that "the activity of [Smith] will likely create emotional difficulties for the two minor children." Moreover, the trial court concluded that these facts indicated "improper influences" and that "the active homosexuality of [Smith] and his involvement with [Tipton]… is detrimental to the best interest and welfare of the two minor children."[73] The trial court ordered that primary physical custody be granted to the mother. In affirming the lower court, the Supreme Court of North Carolina concluded that

> activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct while acknowledging this conduct to them, allowing the children to see unmarried persons known by the children to be sexual partners in bed together, keeping admittedly improper sexual material in the home… support the trial court's findings of "improper influences" which are "detrimental to the best interest and welfare of the two minor children.[74]

Accordingly, the Court affirmed the grant of exclusive custody to the mother.

The dissenting opinion of Justice Webb stated that "the district court found only that [Smith] is a practicing homosexual and this creates an unfit and improper environment for the children."[75] According to the dissent, there was not substantial

[71] *Pulliam v. Smith*, 501 S.E.2d 898, 899 (N.C. 1998).
[72] *Id.* at 901.
[73] *Id.* at 902.
[74] *Id.* at 904.
[75] *Id.* at 905.

evidence to support such a conclusion. Rather, the dissent argued that there had been virtually no showing that Smith's actions had adversely affected the children. The dissent stated, "I believe the evidence shows only that [Smith] is a practicing homosexual without showing any harm has been inflicted on the children by this practice."

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Section 51-1.2 of the North Carolina General Statutes, effective June 20, 1996, provides that "Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina."[76] With regard to Section 51-1 of the North Carolina General Statutes, which states "A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry,"[77] the Attorney General released an opinion that North Carolina can refuse to recognize same-sex marriages performed in other states.[78] In a separate opinion, the Attorney General indicated that the full faith and credit clause of the U.S. Constitution would not require North Carolina to recognize same-sex marriages that are performed legally in other states.[79]

H. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

The Ethical Guidelines for Social Workers licensed in North Carolina provides that "Social workers shall not practice, facilitate, or collaborate with any form of discrimination on the basis of race, sex, sexual orientation, age, religion, socioeconomic status, or national origin."[80]

[76] N.C. GEN. STAT. ANN. § 51-1.2 (2008).
[77] N.C. GEN. STAT. ANN. § 51-1 (2008).
[78] N.C. Att'y Gen. Op. 1996 WL 925102 (1996).
[79] N.C. Att'y Gen. Op. 1996 WL 925099 (1996).
[80] 21 N.C. ADMIN. CODE § 63.0503 (2008).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **North Dakota – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

The North Dakota Human Rights Act (the "Act") does not prohibit sexual discrimination on the basis of sexual orientation, gender identity or expression in the employment context. In 2009, the North Dakota Senate introduced and passed a bill that would have added these categories to the Act, but the bill was defeated in the North Dakota House of Representatives.

In 2003, two students in Kindred, North Dakota were verbally harassed by a school employee and other students due to their perceived homosexuality.[1] According to their complaint, the school principal failed to adequately investigate the matter and take their reports of harassment seriously. As a result, the former students filed a federal complaint, whereupon school officials then addressed their concerns.[2] The students stated that the purpose of their lawsuit was not financial gain; rather, they sought an admission of fault from school officials and an assurance that the same thing wouldn't happen to other students in the future.[3] .

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[1] Testimony of Equality North Dakota in Support of S.B. 2216, House Education Committee, Mar. 4, 2003, *available at* http://bit.ly/2gXGvY.
[2] *Id.*
[3] *Id.*

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

None. Currently the state of North Dakota has not enacted laws to protect against discrimination based upon sexual orientation and gender identity in the employment context.[4] While "pregnancy, childbirth, and disabilities related to pregnancy or childbirth" are included in the definition of "sex" with respect to discrimination in the workplace, sexual orientation is not.[5]

The North Dakota Human Rights Act provides that it is the policy of the state to prohibit discrimination in employment on the basis of "participation in lawful activity off the employer's premises during nonworking hours." The Act prohibits such discrimination by employers within North Dakota who employ one or more individuals.[6] The Act further provides an exception to this prohibition "if that participation is contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer."[7]

The Act's reach is broad, declaring it unlawful for an employer to discriminate based upon an employees' "participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer."[8] Indeed, the broad provisions precluding employer discrimination for lawful activity off the employer's premises during non-working hours were initially enacted in 1991 to expand the law prohibiting employment discrimination

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[4] *See* N.D. CENT. CODE § 14-02.4-01 (2007); *see also* N.D. CENT. CODE § 14-02.4-03 (2007) (stating that

> "[i]t is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.").

While the North Dakota Constitution contains protections for North Dakota citizens with respect to employment, it neither expressly prohibits discrimination on the basis of sexual orientation or gender identity nor names any other bases for which discrimination is prohibited. The Constitution provides, in pertinent part, that

> "[e]very citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person shall be deemed guilty of a misdemeanor". N.D. Const. Art. I, § 7.

[5] § 14-02.4-02.
[6] §§ 14-02.4-01 and 14-02.4-03.
[7] § 14-02.4-08.
[8] § 14-02.4-03.

and preclude employers from inquiring into an employee's non-work conduct, including an employee's weight and smoking, marital, or sexual habits.[9]

B. Attempts to Enact State Legislation

Legislation was introduced on January 19, 2009 by Senators Fiebiger, Bakke and Warner, and Representatives Hawken, Johnson and Mock, to amend North Dakota's current employment discrimination provision to prohibit discrimination based on "sexual orientation" by state and government agencies in the granting privileges or conditions of employment.[10]

On February 18, 2009, the North Dakota Senate voted 27-19 to pass S.B. 2278 as amended. On February 26, 2009, the bill was introduced to the North Dakota House of Representatives and assigned to the Human Services Committee. SB 2278 was voted down by the North Dakota House of Representatives on April 3, 2009.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.[11]

2. State Government Personnel Regulations

In a proposed state employee benefits program for Public Employees Retirement System ("PERS"),[12] members would be allowed to choose a non-spouse beneficiary to receive their retirement benefits as a joint annuitant for the joint and survivor benefit option. The Executive Director of PERS, Mr. Sparb Collins, stated that the proposed provision would not be limited to family members. In a response to a question concerning individuals involved in GLBT relationships, Mr. Collins stated that the only restriction under the proposal would be that the non-spouse beneficiary selected for the joint and survivor benefit option would be required to be within ten years of the age of the member.[13]

The University of North Dakota ("UND"), a publicly-funded state university, has adopted an equal employment opportunity/affirmative action statement, which declares that the university

> "practices a policy of nondiscrimination in recruiting, hiring, and promoting of all of its employees … without

[9] *Hougum v. Valley Memorial Homes*, 574 N.W.2d 812, 821 (N.D. 1998).
[10] S.B. 2278 (N.D. 2009). *See supra* Section I.
[11] *See* N.D. Archive of Exec. Orders, http://governor.state.nd.us/exec/ (last visited Sept. 6, 2009).
[12] *See* N.D. Empl. Benefits Programs Comm. Bill 111.
[13] *See* North Dakota Legislative Council, Minutes of the N.D. Leg. Council Empl. Benefits Programs Comm. (July 29, 2008) *available at* http://bit.ly/3b6aI1.

> regard to race, color, creed, national origin, religion, sex, sexual orientation, age, veterans' status, marital status, political affiliation or physical, mental or medical disability unrelated to the ability to engage in activities involved with the job."[14]

A similar policy exists with respect to equal opportunity and access to all UND educational programs, activities and facilities. Such policy explicitly prohibits discrimination based on sexual orientation.[15] UND has also established a reporting procedure for any member of the UND community who is a victim of discrimination or harassment.[16]

According to UND School of Law admission requirements, the educational opportunities in the UND School of Law are available to all qualified applicants regardless of race, creed, color, national origin, sexual orientation, handicap, or sex. Furthermore, the UND School of Law is committed, as a state-supported institution, to achieving a diverse student body in terms of race, color, religion, sexual orientation, national origin, sex and age as a means to enhance the quality of educational experiences provided to all of its students.[17] In August of 2008, the Dean of the UND School of Law issued a statement reaffirming that "the University and the School of Law are welcoming and inclusive educational communities." This message arrived on the heels of a local uproar concerning the school's Law Review, which had featured a "future of the family" symposium.[18] Five of the six articles in the Review's symposium edition featured authors affiliated with church-based law schools or organizations that oppose gay marriage.[19]

North Dakota State University ("NDSU"), a publicly-funded state university, has a similar equal opportunity and non-discrimination policy. Pursuant to its policy, NDSU proffers that it

> "is fully committed to equal opportunity in employment decisions and educational programs and activities … for all individuals without regard to race, color, national origin, religion, sex (gender), disability, age, Vietnam Era Veterans status, sexual orientation, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking

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[14] *See* University of North Dakota, Human Resources, Equal Employment Opportunity/Affirmative Action Statement, http://humanresources.und.edu/html/eeo-aa.htm (last visited Sept. 6, 2009).
[15] *Id.*
[16] *See* UNIVERSITY OF NORTH DAKOTA HUMAN RESOURCES PROCEDURE FOR COMPLAINTS OF DISCRIMINATION OR HARASSMENT (2005) *available at* http://bit.ly/152dv0.
[17] *See* University of North Dakota School of Law, Admission Requirements, *available at* http://bit.ly/Mn9rX (last visited Sept. 6, 2009).
[18] Open Letter from Paul LeBel, Dean of the University of North Dakota School of Law (July 30, 2008), *available at* http://bit.ly/4pqaML.
[19] Janell Cole, *Attorneys in Uproar over Law Review*, JAMESTOWN SUN, July 31, 2008.

> hours which is not in direct conflict with the essential business-related interests of the employer."[20]

NDSU provides students, faculty, staff and alumni with a web-based form for reporting acts of bias, bigotry or hate that occur on campus.[21]

3. Attorney General Opinions

None.[22]

D. Local Legislation

None.

E. Occupational Licensing Requirements

None.

[20] *See* NORTH DAKOTA STATE UNIVERSITY SBHE POLICY MANUAL § 603.2 (2007), *available at* http://bit.ly/2IFOt.
[21] *See* NDSU Bias Reporting System, http://bit.ly/EUY8B (last visited Sept. 6, 2009).
[22] *See* N.D. Archive of Att'y Gen. Opinions, http://bit.ly/17aaT7 (last visited Sept. 6, 2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

None.

2. Private Employees

Hougum v. Valley Memorial Homes, 574 N.W.2d 812 (N.D. 1998).

In *Hougum v. Valley Memorial Homes,*[23] Mr. Hougum brought an action against his employer for wrongful termination of his employment in violation of the North Dakota Human Rights Act. A department store employee observed Mr. Hougum masturbating in an enclosed toilet stall in a men's public restroom at a Sears store in Grand Forks. The department store employee called the police and executed a citizen's arrest form. The police then entered the restroom and arrested Mr. Hougum for disorderly conduct. At the time of the incident, Mr. Hougum was an ordained minister employed by Valley Memorial Homes ("VMH") as a staff chaplain. According to VMH, it was concerned about the effect the Sears incident might have on his pastoral relationship with VMH residents. VMH also expressed concern about Mr. Hougum's work performance and his commitment to his duties as a chaplain. VMH placed Mr. Hougum on a leave of absence, and he agreed to undergo an evaluation. Approximately one month later, VMH formally terminated Mr. Hougum's employment. According to Mr. Hougum, a VMH manager told him the termination was due to the Sears incident.

Mr. Hougum subsequently sued VMH for violation of the North Dakota Human Rights Act and wrongful termination, among other things. Mr. Hougum requested that the Supreme Court of North Dakota extend the definition of "sex" to include sexual preference or orientation; he argued that VMH violated the Human Rights Act by discharging him because of his perceived homosexuality. While Mr. Hougum contended that he was not homosexual, he argued that VMH's concerns about the "conservative" attitude of many of its residents made clear that VMH considered him to be a homosexual, and further, that homosexuality would not be tolerated.

The court held that

> "[w]e need not decide whether "sex" means sexual preference or orientation under the Act, because, assuming it does, Hougum has presented no evidence, other than his unsupported conclusory assertion, VMH held any beliefs regarding Hougum's sexual preference or orientation."

[23] 574 N.W.2d 812 (N.D. 1998).

The court concluded that Hougum failed to present a *prima facie* case of "sex" discrimination.[24]

B. Administrative Complaints

The North Dakota Administrative Code provides that a complaint or charge of discrimination alleging discriminatory practice in regard to employment based on any of the enumerated factors[25] may be filed with the North Dakota Department of Labor by any aggrieved person or the person's duly authorized representative.[26] Because "sexual orientation" is not included among the enumerated factors, state employees who have been subjected to sexual orientation-based discrimination have no legal recourse under this provision of the code.

C. Other Documented Examples of Discrimination

None.

[24] *Id.* at 812.

[25] The enumerated factors are: wage payment, child labor, minimum wage, maximum hours, employment agencies, equal pay for equal work, discrimination because of age, race, color, religion, sex, or national origin, the presence of any mental or physical disability, or status with regard to marriage or public assistance, or participation in a lawful activity off the employer's business premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer and labor disputes. *See* N.D. ADMIN. CODE § 46-01-01 (1996), *available at* http://bit.ly/10CVgg; N.D. ADMIN. CODE § 46-04-01 (2008), *available at* http://bit.ly/10CVgg.

[26] *See id.*

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

In 1973, the North Dakota legislature adopted a comprehensive revision to its criminal code that functioned to repeal the state's consensual sodomy law. The revision took effect in 1975.

B. Housing & Public Accommodations Discrimination

None.[27]

C. Education

There are no laws that specifically protect the safety of LGBT youth in schools.[28] As of 2003, North Dakota was the only state in the country without a single high school gay-straight student alliance.[29] Additionally, no detailed statistics are available for LGBT students in North Dakota because student surveys have not included questions regarding sexual orientation.[30]

In 2003, two students in Kindred, North Dakota were verbally harassed by a school employee and other students due to their perceived homosexuality.[31] According to their complaint, the school principal failed to adequately investigate the matter and take their reports of harassment seriously. As a result, the former students filed a federal complaint, whereupon school officials then addressed their concerns.[32] The purpose of the lawsuit was not financial gain; rather, the students sought an admission of fault from school officials and an assurance that the same thing wouldn't happen to other students in the future.[33] The legislation introduced in the 2009 session of the North Dakota

[27] However, proposed legislation introduced in the 2009 session of the North Dakota legislature discussed above would amend North Dakota's fair housing and public accommodations laws to prohibit discrimination based on "sexual orientation." *See supra* Section I; Section 2.B.
[28] *See* Testimony of Equality North Dakota in Support of Senate Bill 2216, House Education Committee, Mar. 4, 2003, *available at* http://bit.ly/2gXGvY.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

legislature would not extend the scope of existing state law to prohibit discrimination based on "sexual orientation" by any educational institution in the state.[34]

The North Dakota Code of Professional Conduct for Educators governs all members of the teaching profession. The Code states that North Dakota educators

> "shall not harass, discriminate against, or grant a discriminatory advantage to a student on the grounds of race, color, creed, sex, national origin, marital status, political or religious beliefs, physical or mental conditions, family, social, or cultural background, or sexual orientation; shall make reasonable effort to assure that a student is protected from harassment or discrimination on these grounds; and may not engage in a course of conduct that would encourage a reasonable student to develop a prejudice on these grounds."[35]

In addition, in fulfilling their obligations to the profession, the Code mandates that North Dakota educators

> "[s]hall not, on the basis of race, color, creed, sex, national origin, marital status, political beliefs, physical condition, family, social or cultural background, or sexual orientation, deny to a colleague a professional benefit, advantage, or participation in any professional organization, nor discriminate in employment practice, assignment, or evaluation of personnel."[36]

D. **Health Care**

North Dakota code governs who may make medical decisions for incapacitated persons and minors, according to a prioritized list.[37] Individual with durable power of attorney (i.e., the authority to make medical decisions) are considered first, followed by family members who "have maintained significant contacts with the incapacitated person." Close relatives or friends with "significant contacts with the incapacitated person" are then considered.

Accordingly, a same sex partner would be able to make medical decisions if that person has been given a durable power of attorney, or if he or she qualifies as a "close relative or friend" subsection. However, another close relative or spouse with significant contacts to the incapacitated person could contest this. Importantly, if a person with

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[34] *See* S.B. 2278 (N.D. 2009); *supra* Section I.

[35] N.D. CODE OF PROF'L CONDUCT FOR EDUCATORS § 67.1-03-01-02 (2002) (emphasis added), *available at* http://bit.ly/Qu7Pv.

[36] § 67.1-03-01-03 (emphasis added).

[37] N.D. CENT. CODE § 23-12-13 (2007).

"higher status," according to this prioritized list, refuses to give informed consent, all others of "lower status" are barred from giving consent.[38]

E. Gender Identity

The North Dakota Department of Health will amend the birth certificate of an individual as a result of a gender identity change. According to the North Dakota Administrative Code,

> "the birth certificate of a person born in this state who has undergone a sex conversion operation may be amended as follows: (a) [u]pon written request of the person who has undergone the operation; and (b) [a]n affidavit by a physician that the physician has performed an operation on the person, and that by reason of the operation, the sex designation of such person's birth certificate should be changed; and (c) an order of a court of competent jurisdiction decreeing a legal change in name."[39]

F. Parenting

North Dakota courts have used sexual orientation as a basis to deny custody in child custody hearings.[40] However, the Supreme Court of North Dakota overturned this practice in *Damron v. Damron*.[41]

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[38] § 23-12-1(2).

[39] N.D. ADMIN. CODE § 33-04-12-02 (2008). The North Dakota Department of Motor Vehicles ("NDDMV") permits a licensed driver to change his or her gender on their driver's license. To have a driver's license issued with the proposed gender change, the individual must present to the NDDMV medical papers signed by a physician that the physician has performed an operation on the person that changed the sex designation of that individual and that the gender reassignment procedure has been completed. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 826 n.428 (2008).

[40] *See Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981) (stating that

> "[i]t is not inconceivable that one day our society will accept homosexuality as "normal." . . . We are not prepared to conclude, however, that it is not a significant factor to be considered in determining custody of children, at least in the context of the facts of this particular case. . . . [I]t is the conceded fact that after the divorce [the mother and her female lover] would establish a relationship in which they would be living together which gives us concern. . . . Our statutes do not prohibit sexual relations between adult persons who are not married to other persons. Although [the N.D.C.C.] makes it a crime for a person to live openly and notoriously with a person of the opposite sex as a married couple without being married to the other person, the statutes contain no such provision with regard to persons of the same sex. The reason is obvious - neither North Dakota or [sic] any other State in this nation, insofar as we can determine, recognizes a legal sexual relationship between two persons of the same sex. Thus, despite the fact that the trial court determined the relationship between [the mother and her female lover] to be a 'positive one,' it is a relationship which, under the existing law of the state, never can be a legal relationship. . . . Furthermore, we cannot lightly dismiss the fact that living in the same house with their mother and her lover may well cause the children to 'suffer from

In *Damron*, a father attempted to overturn a custody ruling rendered two years prior by claiming that the Court's prior ruling in the *Jacobson* case "effectively created a presumption of harm to children living in a lesbian household and eliminated any requirement for evidence of actual or potential harm to the children."[42] The court, basing its decision on North Dakota Custody Code Section 14-09-06.6(5)(b),[43] held that "[t]o the extent *Jacobson* can be read as creating such a presumption, it is overruled."[44] The Court continued, stating that

> "a custodial parent's homosexual household is not grounds for modifying custody within two years of a prior custody order in the absence of evidence that environment endangers or potentially endangers the children's physical or emotional health or impairs their emotional development."[45]

North Dakota law is silent regarding adoption by homosexuals. According to the North Dakota Revised Uniform Adoption Act, the following individuals may adopt: (1) a husband and wife together although one or both are minors, (2) an unmarried adult, (3) the unmarried father or mother of the individual to be adopted, and (4) a married individual without the other spouse joining as a petitioner, if the individual to be adopted is not the adopting person's spouse, and if certain other conditions are met.[46]

Although there are no specific statutory prohibitions on homosexuals or real or perceived gender nonconforming individuals with regard to adoption, it remains unclear as to whether North Dakota would permit a same-sex couple to jointly petition to adopt. It also remains unclear whether North Dakota would permit a same-sex partner of a biological parent to petition to adopt the partner's child.[47]

> the slings and arrows of a disapproving society' to a much greater extent than would an arrangement wherein the children were placed in the custody of their father with visitation rights in the mother. Although we agree with the trial court that the children will be required to deal with the problem regardless of which parent has custody, it is apparent to us that requiring the children to live, day-to-day, in the same residence with the mother and her lover means that the children will have to confront the problem to a significantly greater degree than they would if living with their father. . . . [W]e believe that because of today's society, because [the mother] is engaged in a homosexual relationship in the home in which she resides with the children, and because of the lack of legal recognition of the status of a homosexual relationship, the best interests of the children will be better served by placing custody of the children with [the father].").

[41] 670 N.W.2d 871 (N.D. 2003)

[42] *Id.* at 875.

[43] N.D. CUSTODY CODE § 14-09-06.6(5)(b) (providing that the court should award custody based on the best interests and welfare of the child).

[44] *Damron*, 670 N.W.2d at 875

[45] *Id.* at 876.

[46] N.D. CENT. CODE § 14-15-03 (2007).

[47] Human Rights Campaign, State Law Listings: North Dakota Adoption Law, http://bit.ly/z9NwK (last visited Sept. 6, 2009).

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The North Dakota Constitution includes the following provision: "Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."[48]

H. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Domestic Violence Policy

The North Dakota Model Law Enforcement Domestic Violence Policy, promulgated in October 2005 and endorsed by the North Dakota Attorney General's Office, includes "sexual orientation" as a factor that should not be considered in making an arrest.[49]

Judicial Conduct

The North Dakota Supreme Court has adopted the North Dakota Code of Judicial Conduct (the "Judicial Code"), which states that

> "[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, *sexual orientation* or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge shall refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control."[50]

The Judicial Code also states that

> "[a] judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national

[48] N.D. CONST. Art. 11 § 28 (emphasis added).
[49] *See* NORTH DAKOTA MODEL LAW ENFORCEMENT DOMESTIC VIOLENCE POLICY (2005), *available at* http://bit.ly/16GB6U.
[50] N.D. CODE OF JUD. CONDUCT Canon 3B(5) (1998) (emphasis added), *available at* http://bit.ly/197Ehl.

> origin, disability, age, *sexual orientation*, or socioeconomic status, against parties, witnesses, counsel or others."[51]

With respect to the conduct of state judges, the Judicial Code mandates that a judge may engage in extrajudicial activities, except as prohibited by law or the Judicial Code. However, a judge must conduct all extrajudicial activities so that they do not "(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties."[52] A comment to the explains that

> "[e]xpressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, *sexual orientation* or socioeconomic status."[53]

Commission on Legal Council

The North Dakota Commission on Legal Counsel, an agency of the Executive Branch primarily responsible for the delivery of indigent legal services, has issued a similar policy. Such policy states that employees "shall perform duties without bias or prejudice, and shall not manifest, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."[54]

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[51] N.D. CODE OF JUD. CONDUCT Canon 3B(6) (emphasis added).
[52] N.D. CODE OF JUD. CONDUCT Canon 4A.
[53] N.D. CODE OF JUD. CONDUCT Canon 4A, cmts. (emphasis added).
[54] N.D. COMM'N ON LEGAL COUNSEL FOR INDIGENTS BUS. CODE OF ETHICS (2008), *available at* http://bit.ly/tPt2b.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Ohio – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Ohio has no state-wide law prohibiting discrimination based on sexual orientation or gender identity.

Several localities have enacted LGBT-related laws, including one designed to permit discrimination. Cincinnati passed a charter amendment in 1993 aimed at negating previous city legislation protecting gay, lesbian, bisexual persons from discrimination, and further prohibiting the city council from passing similar protections in the future. (*See* Section IV *infra*). In 2007, the governor issued an executive order prohibiting sexual orientation or gender identity discrimination in state government. (*See* Section II (C) *infra*.) Individuals who believe they have been discriminated against in violation of the executive order are permitted to file a complaint with the Equal Opportunity Division/Equal Employment Opportunity Section of the Ohio Department of Administrative Services, and violators are subject to the same sanctions that would be applied to illegal discriminatory conduct under Ohio state law. In addition, public universities have internal policies that bar such discrimination.

Documented examples of discrimination based on sexual orientation and gender identity by state and local government employers include:

- In 2008, a lesbian employee of a state department reported that she faced daily harassment including threats and intimidation because of her sexual orientation.[1]

- In 2006, a transgender electrician was not hired by an Ohio state university because of her gender identity.[2]

- A lesbian teacher was fired after she had preliminarily decided to include materials related to anti-gay bias in the readings for a unit on civil rights, despite the fact that she had shown them in advance to the principal and withdrew them from her teaching plans after he objected.[3]

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[1] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

[2] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

[3] *Beall v. London City School District Board of Education*, No. 2:04-cv-290, 2006 WL 1582447 (S.D. Ohio June 8, 2006).

- A gay male teacher was fired because of a false rumor that he was holding hands with another man at a holiday party.[4] He sued in federal court and won an award of over $70,000 for back pay and damages.[5]

- A court ruled that a Cincinnati police officer had a viable claim of sex stereotype discrimination based on the harassment she suffered after telling supervisors that she was transgender and would soon be transitioning. She was fired on the ground that she "lacked command presence."[6] A jury awarded the officer $320,511 on his discrimination and harassment claims. Further, the court awarded the officer $527,888 in attorneys fees and $25,837 in costs.[7]

- Likewise, a firefigher in Salem, Ohio, sued on the ground of sex discrimination for sex stereotype discrimination after he informed his supervisors that he was a pre-operative transsexual. As a result, he was forced to undergo multiple psychological examinations. A federal court ruled that he could sue based on sex stereotype discrimination.[8]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[4] *Glover v. Williamsburg Local School District Board of Education*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998).
[5] HOSTILE CLIMATE 188 (1999).
[6] *Barnes v. City of Cincinnati, 401 F.3d* 729 (Mar. 22, 2005).
[7] *Id*. at 733.
[8] *Smith v. City of Salem*, 378 F.3d 566 (Aug. 5, 2004).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently the state of Ohio has not enacted laws to protect sexual orientation and gender identity from employment discrimination. [9]

B. Attempts to Enact State Legislation

On May 12, 2009 Rep. Dan Stewart introduced House Bill 176 on the floor of the Ohio State House of Representatives, which would add sexual orientation and gender identity and expression to the covered characteristics that can serve as the basis for a claim of unlawful discriminatory practices under the prohibitions of the existing Ohio Civil Rights Commission Law (the "OCRC Law").[10]

The OCRC Law protects against discrimination in housing, employment and public accommodations on the basis of several protected classes. The bill defines "sexual orientation" as heterosexuality, homosexuality, or bisexuality whether actual or perceived and "gender identity and expression" as the gender-related identity, appearance, or expression of an individual regardless of the individual's assigned sex at birth, and would afford largely the same protection against discrimination in housing, employment and public accommodations on the basis sexual orientation and gender identity. The bill includes an exemption for religious institutions.

In the Fiscal Note & Local Impact Statement, the Ohio Civil Rights Commission (the "Commission") estimates that the bill may result in around 300-350 new case filings annually based on allegations of sexual orientation and/or gender identity discrimination, and accordingly recommended the hiring of four additional full-time investigators.[11]

The Commission's most recent annual report indicates that it received 6,144 complaints in 2007, the vast majority of which (85.51%) were related to employment. Among the complaints received in 2007, 44.58% were related to race/color and 27.00% were related to gender/pregnancy.[12]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In May 2007, Ohio Governor Strickland issued executive order 2007-10S prohibiting discrimination in public employment based on sexual orientation and/or gender identity.[13] The Executive Order states that, "[i]nformation compiled by the Ohio Civil Rights Commission documents ongoing and past discrimination on the basis of

[9] OHIO REV. CODE ANN. § 4112.02 (2009).
[10] OHIO REV. CODE ANN. § 4112.02 (2009).
[11] Fiscal Note and Local Impact Statement for H.B. 176 (Ohio 2009).
[12] OHIO CIVIL RTS. COMM'N ANNUAL REPORT (2007), *available at* http://bit.ly/9rW1v.
[13] Ohio Exec. Order No. 2007-10S (2007), *available at* http://bit.ly/9IiWZ.

sexual orientation and/or gender identity in employment-related decisions by personnel at Ohio agencies, boards and commissions."[14]

The Executive Order defines "sexual orientation" as "a person's actual or perceived homosexuality; or heterosexuality, by orientation or practice, by and between adults who have the ability to give consent." The Executive Order defines "gender identity" as "the gender a person associates with him or herself, regardless of the gender others might attribute to that person."

2. State Government Personnel Regulations

Ohio State University prohibits discrimination against faculty, staff, student employees and employment applicants "based upon protected status, which is defined as age, color, disability, gender identity or expression, nation origin, race, religion, sex, sexual orientation, or veteran status."[15] The same protected classes are included in OSU's anti-harassment provision. OSU's non-discrimination policy extends to student organizations as well, although exceptions are granted in cases where a student organization's religious beliefs conflict with the contours of the University's non-discrimination policy.[16]

Other public Ohio colleges and universities with anti-discrimination provisions that include sexual orientation and gender identity/expression include: Miami University;[17] Ohio University;[18] University of Toledo;[19] Wright State University;[20] and Youngstown State University.[21]

3. Attorney General Opinions

None.[22]

D. Local Legislation

1. City of Cincinnati

In 1993, Cincinnati enacted an ordinance declaring that the city may not "enact, adopt, enforce, or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes,

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[14] The referenced information compiled by the Ohio Civil Rights Commission could not be found publicly.
[15] *See* Ohio State University Non-Discrimination Policy, http://bit.ly/1tu90u (last visited Sept. 7, 2009).
[16] *See* Press Release, Ohio State University, University Revises Guidelines for Student Groups (Oct. 1, 2004), *available at* http://bit.ly/RK9gy.
[17] *See* Miami University of Ohio Non-Discrimination Policy, http://bit.ly/nOKCE (last visited Sept. 6, 2009).
[18] *See* Ohio University Non-Discrimination Policy, http://bit.ly/9WtPu (last visited Sept. 6, 2009).
[19] Ohio University Non-Discrimination Policy, http://bit.ly/9WtPu (last visited Sept. 6, 2009).
[20] *See* Wright State University Non-Discrimination Policy, http://bit.ly/NmbDd (last visited Sept. 6, 2009).
[21] *See* Youngstown State University Non-Discrimination Policy, http://bit.ly/ddbyU (last visited Sept. 6, 2009).
[22] *See* Archive of Ohio Attorney General Opinions, http://www.ag.state.oh.us (last visited Sept. 6, 2009).

entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment." *See* Section IV *infra* for a discussion of the legal battle over Cincinnati's ordinance.

2. **City of Columbus**

In December 2008, Columbus passed an ordinance providing employment protections to LGBT persons. The Columbus ordinance states: "'Discriminate and discrimination' includes segregate or separate and any difference in treatment based on race, sex, sexual orientation, color, religion, ancestry, national origin or place of birth." The definition of discrimination applies to the employment context, as well as housing and public accommodations.[23] *See* Section III(A) *infra* for discussion of a claim brought under the Columbus ordinance.

E. **Occupational Licensing Requirements**

None.

[23] COLUMBUS CODE § 2331 (2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Frontera v. City of Columbus, 2008 WL 203026 (S.D. Ohio Jan. 22, 2008).

In *Frontera v. City of Columbus*, a police officer brought various claims, including a claim under the 14th Amendment's Equal Protection clause, for sexual orientation discrimination when he was dismissed from his role as Advisor for the Columbus Division of Police Law Enforcement Explorer Posts, a program for adolescents who are interested in future careers in law enforcement.[24] The program is run by a subsidiary of the Boy Scouts of America. Plaintiff's supervisors were contacted regarding Plaintiff's inappropriate behavior during Explorer functions, most notably, that Plaintiff invited an 18 year old male he met at an Explorers meeting to stay the night at his home. An internal investigation by the Internal Affairs Bureau found the complaint against him to be largely without merit.

During the investigation, Plaintiff asserted that he was asked probing questions about his homosexuality and personal life and was temporarily suspended from his police post, to which he was later reinstated. At its conclusion, Plaintiff was commanded to cut off all contact with the Explorers group. The court granted Defendant's motion to dismiss with respect to claims against individuals in their personal capacities, but denied the motion with respect to claims against the City of Columbus and against his supervisors in their official capacities. The court subsequently granted Defendant's motion for summary judgment dismissing Plaintiff's remaining claims, finding that Plaintiff was not deprived of his First Amendment speech rights or his rights under the Equal Protection Clause, as he was never terminated or disciplined in his job as police officer, and had no positive right to be involved with the Explorers program.[25]

Beall v. London City School District Board of Education, 2006 WL 1582447 (S.D. Ohio June 8, 2006).

The plaintiff in *Beall v. London City School District Board of Education* was a high school teacher who was open about her homosexuality at school functions, but never discussed her sexual orientation or private life with her students.[26] Plaintiff was promised by her supervisor that she would be recommended for a contract renewal, since Plaintiff had very positive performance evaluations. Thereafter, Plaintiff began planning a civics unit on civil rights/civil liberties, where one of the subtopics presented and discussed was discrimination against homosexuals. Plaintiff alerted her principal of the new classroom topic before beginning class instruction. Plaintiff's principal did not approve of the message of the new topic, equating it with "teaching religion." Plaintiff

[24] No. C2-06-1046, 2008 WL 203026 (S.D. Ohio Jan. 22, 2008).
[25] No. C2-06-1046, 2008 WL 5377960 (S.D. Ohio Dec. 23, 2008).
[26] No. 2:04-cv-290, 2006 WL 1582447 (S.D. Ohio June 8, 2006).

decided not to present the new classroom topic to her students based on the principal's objection. However, the principal subsequently recommended to the Board that Plaintiff's employment contract not be renewed. On a motion for summary judgment, the court held that Plaintiff had made a sufficient *prima facie* showing to sustain equal protection and discrimination claims, as well as an academic freedom claim (under First Amendment principles). This litigation has no further direct history available.

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).

In *Barnes v. City of Cincinnati*, a police officer brought a Title VII action against the city, alleging he was demoted due to sex discrimination.[27] Plaintiff was a pre-operative male-to-female transsexual who lived as a male during working hours but as a woman off-duty. Plaintiff had a reputation in the police department for being a homosexual, bisexual, and/or cross-dresser. According to the record, Plaintiff "had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions."[28] Also according to the record, the Cincinnati vice squad took pictures of Plaintiff at night out of sheer curiosity. After his commander complained that he had not been performing to expectations, Plaintiff was placed in a probationary "Sergeant Field Training Program" which required his superiors to evaluate him on a daily basis over a three month period. Further, Plaintiff was instructed not to go into the field alone, was required to wear a microphone at all times, and forced to ride in a car with a video camera during the final weeks of his probation. After failing his training program, Plaintiff was demoted. The reason provided to him was that he was performing under expectations. However, Plaintiff was informally told he failed training because he did not act masculine enough and "lacked command presence." Plaintiff was the only officer in his department to be placed in a Sergeant Field Training Program, and the only one to fail probation, between 1993 and 2000.

The City of Cincinnati argued that a legitimate reason -- poor performance -- justified Plaintiff's demotion. A jury awarded the officer $320,511 on his discrimination and harassment claims. Further, the court awarded the officer $527,888 in attorneys fees and $25,837 in costs.[29] On appeal, the Sixth Circuit, in affirming the jury's verdict in favor of Plaintiff at the trial court level, held that even if transsexuality is not specifically covered by Title VII, accusations that an employee has failed to conform to sex stereotypes is covered under Title VII, and thus Plaintiff had made a sufficient *prima facie* claim by alleging he was demoted for failure to be "masculine enough."

Smith v. City of Salem, 378 F.3d 566 (Aug. 5, 2004).

The plaintiff in *Smith v. City of Salem, Ohio* was a Lieutenant in the Salem Fire Department who was born male, but later diagnosed as having gender identity disorder.[30] Upon being diagnosed, Plaintiff began expressing "a more feminine appearance on a full-

[27] 401 F.3d 729 (6th Cir. 2005).
[28] *Barnes, 401 F.3d* at 734.
[29] *Id*. at 733.
[30] 378 F.3d 566 (6th Cir. 2004).

time basis."[31] Plaintiff confided his diagnosis results with his immediate supervisor, and also told him about his intent to eventually undergo surgery to become female. The supervisor divulged the information up the chain of command. Plaintiff's supervisors attempted to force Plaintiff to undergo multiple psychological evaluations with doctors of the City's choosing, apparently hoping Plaintiff would refuse to comply and thus give the department grounds for dismissal. Plaintiff retained legal counsel, who informed the City of the legal ramifications of subjecting Plaintiff to unnecessary psychological evaluations. The City suspended Plaintiff, who filed suit with the EEOC.

The trial court granted Defendant's motion to dismiss on the grounds that Plaintiff had not stated a legal claim under Title VII. The Sixth Circuit reversed the trial court, ruling that although transgender persons or transsexuals are not covered under Title VII, Plaintiff had pled a *prima facie* case of discrimination by alleging he was retaliated against for failure to hold up to sexual stereotypes -- in essence, for failure to be masculine enough.

Das v. Ohio State University, 115 F. Supp. 2d 885 (S.D. Ohio 2000).

In *Das v. Ohio State University*, Plaintiff, a native of India, brought a Title VII discrimination claim (and a claim under the Ohio state analog) against Ohio State University because she was allegedly forced to resign from her position as Clinical Quality Engineer.[32] Plaintiff largely based her discrimination claim on comments made by her co-workers and supervisors regarding her national origin. However, the Court did consider Plaintiff's additional claim that she was terminated because of her sexual orientation in contravention of Columbus City Code 2331.03, which, unlike the Ohio Code, does prohibit discrimination on the basis of sexual orientation. The Court agreed that "a claim of sexual orientation discrimination may be brought by an aggrieved plaintiff under Ohio's public policy exception based on Columbus City Code section 2331.03"[33] but found that, for purposes of summary judgment, Plaintiff had not put forth sufficient proof to sustain a claim in this instance. In a footnote, the Court noted, "In so finding, the Court does not turn a blind eye to the fact that persons of gay, lesbian, and bisexual orientation are often discriminated against in the workplace with no legal recourse."[34]

Glover v. Williamsburg Local School District Board of Education, 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

In *Glover v. Williamsburg Local School District Board of Education,* a public school teacher alleged that the school district's decision not to renew his teaching contract was discriminatory, based on his sexual orientation, his gender, and the race of his partner.[35] After a bench trial, the court concluded that Plaintiff had established his equal protection claim based on sexual orientation discrimination, using the standards of

[31] *Smith*, 378 F.3d at 568.
[32] 115 F. Supp. 2d 885 (S.D. Ohio 2000).
[33] *Das*, 115 F. Supp. 2d at 892.
[34] *Das*, 115 F. Supp. 2d at 893.
[35] 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

proof from Title VII. The court held that upon review of Plaintiff's work record, the Board's proffered reasons were mere pretext for discrimination on the basis of sexual orientation. The court held the school had demonstrated no rational basis for the discrimination, and ordered reinstatement and compensatory damages.

Weaver v. Ohio State University, 1997 WL 1159680 (S.D. Ohio June 4, 1997).

The Plaintiff in *Weaver v. Ohio State University* was the head coach for the Ohio State University women's field hockey team for nine years before her employment was terminated, allegedly because of her gender and sexual orientation (plaintiff was a lesbian).[36] In considering Defendant's motion to dismiss each of the claims against the state, the court held that the state may not be sued in federal court for an alleged violation of Columbus City Code 2331.03 absent its express consent, due to the 11th Amendment. The court permitted Plaintiff to move forward with her Title VII and Title IX claims. However, Plaintiff's remaining claims did not survive Defendants' subsequent summary judgment motion.[37]

Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 1993 WL 492181 (Nov. 19, 1993).

Cincinnati Voter Referendum, Issue 3, would have amended Cincinnati's charter to make unenforceable the provisions of the city's civil rights ordinance to the extent that the ordinance protects lesbian, gay and bisexual people, and prevented any future enactments or policies that might treat gays or bisexuals as a protected class. It was passed decisively in the November 1993 election. A district court judge, using the same reasoning as the Colorado Supreme Court in *Evans v. Romer*, held that strict scrutiny must be applied to Issue 3 because it infringes the rights of political participation of an identifiable group, and therefore issued an injunction barring its enforcement. After a detailed summary of the U.S. Supreme Court precedents on electoral rights, the court asserted,

> "[we] conclude that there is a strong likelihood that under the Issue 3 Amendment, all citizens, with the express exception of gay, lesbian and bisexual citizens, have the right to appeal directly to the members of city council for legislation, while only members of the Plaintiffs identifiable group must proceed via the exceptionally arduous and costly route of amending the city charter before they may obtain any legislation bearing on their sexual orientation. Thus, there is a substantial likelihood that the Issue 3 Amendment 'fences out' an identifiable group of citizens -- gay, lesbian and bisexuals -- from the political process by imposing upon them an added and significant burden on their quest for favorable legislation,

[36] No. C2-96-1199, 1997 WL 1159680 (S.D. Ohio June 4, 1997).
[37] 71 F. Supp. 2d 789 (S.D. Ohio 1998).

> regulation and policy from the City Council and city administration."

The court also found that Issue 3 places a significant burden on advocacy rights of the Plaintiffs, because "their advocacy may expose them to discrimination for which they will have no recourse even remotely comparable to that of other groups, to obtain protection, thereby increasing the risks of, and consequently chilling, such expression." The court found it to be "especially significant" that Issue 3 does not remove "sexual orientation" from the human rights ordinance, but rather prohibits using that provision to protect gays while leaving it to protect heterosexuals. "This only reinforces our conclusion that the Defendants have proffered no compelling justification to single out gay, lesbian and bisexual citizens for the additional and substantial burdens. . ." Spiegel found the necessary irreparable harm to support preliminary relief, given the likelihood that fundamental rights would be abridged by allowing Issue 3 to go into effect, and concluded that "maintaining the status quo under the existing City Human Rights Ordinance and EEO Ordinance is the far more prudent course of action in light of the nature of the threat faced by the Plaintiffs in, among other things, their employment and housing situations."[38]

Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).

Plaintiff, a bisexual guidance counselor, sued her employer, the Mad River Local School District, which, upon learning of her bisexuality, asked her to resign and suspended her when she refused, ultimately failing to renew her contract when it expired. Although the district court found in favor of the Plaintiff, the Sixth Circuit reversed. The school learned of Plaintiff's bisexuality because she told a secretary and other co-workers who were personal friends that she was bisexual and had a female lover. She also told the secretary that she was advising two homosexual students. The Sixth Circuit reasoned that the Plaintiff committed a "breach of confidentiality" by telling the secretary she was advising two homosexual students, and concluded that there was no evidence that heterosexual employees who communicated their sexual preferences would be treated any differently than heterosexual employees who communicated their sexual preference. Under the court's reasoning, the communication of sexual preference, no matter what the preference was, was the improper action deserving of termination. Plaintiff appealed the Circuit's holding to the United States Supreme Court. The petition for writ of certiorari was denied. However, Justice Brennan and Justice Marshall dissented to the denial of the petition for writ of certiorari, explaining that this case raises "important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences." Justices Brennan and Marshall explained that Rowland was discharged merely because she was bisexual and revealed that fact to acquaintances at her workplace.[39]

B. **Other Documented Examples of Discrimination**

[38] *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 1993 WL 492181 (Nov. 19, 1993).
[39] *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984).

Ohio State Agency

In 2008, a lesbian employee of a state department reported that she faced daily harassment including threats and intimidation because of her sexual orientation.[40]

An Ohio State University

In 2006, a transgender electrician was not hired by an Ohio state university because of her gender identity.[41]

[40] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

[41] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Ohio's sodomy law[42] was repealed by the General Assembly effective January 1, 1974.[43]

B. Housing & Public Accommodations Discrimination

Ohio housing law prohibits discrimination based on race, color, religion, sex and familial status, but not sexual orientation or gender identity.[44]

Ohio public accommodations law prohibits discrimination based on race, color, religion, sex, national origin, disability, age or ancestry, but not sexual orientation or gender identity.

C. Education

Ohio has no positive law specifically affording protections to gay, lesbian, bisexual, or transgender students.

In *Schroeder v. Maumee Board of Education*, the plaintiff high school student brought an action against his principal, assistant principal, and the board of education, alleging violations of his First Amendment rights, Equal Protection rights, and violations of Title IX.[45] Plaintiff was an open advocate for gay rights since becoming aware of his brother's homosexuality. Plaintiff claims Defendants did nothing to stop the verbal and physical harassment suffered by Plaintiff on account of his advocacy, even though administrators were well aware of why Plaintiff was being targeted by other students. The court sustained Plaintiff's actions for equal protection (against the principal and assistant principal) and Title IX violations against Defendants' motion for summary judgment.[46]

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[42] OHIO REV. CODE ANN. § 2905.44 (repealed January 1, 1974).
[43] *See State v. Phipps*, 389 N.E.2d 1128, 1132 (Ohio 1979).
[44] OHIO REV. CODE ANN. § 4112.01 (2009).
[45] 296 F. Supp. 2d 869 (N.D. Ohio 2003).
[46] *See also Weaver v. Ohio State Univ.*, *supra* at Section II.5. (regarding Title IX) and *Beall v. London City School Dist. Bd. of Educ.*, *supra* at Section II.5. (regarding academic freedom).

Ohio State University's student code provides that misconduct based on gender identity or sexual orientation may be considered "aggravated" for purposes of sanctioning.[47]

D. Health Care

By statute, Ohio forbids individuals from making medical decisions on behalf of their same-sex partners unless there is a written directive, such as a durable power of attorney.[48] An adult may designate his or her partner as health care agent through the durable power of attorney for health care.[49]

E. Gender Identity

Ohio law generally permits its citizens to amend their birth certificates.[50] However, under Ohio law,[51] such amendments are permitted only to correct errors such as the spelling of names, dates, race, and sex, if in fact the original entry was in error. The Court in *In re Declaratory Relief for Ladrach*,[52] the court held that the petitioner, a male-to-female transsexual, had no right to change the sex information on her birth certificate because the original sex assignment on petitioner's birth certificate was not in error, even though petitioner had undergone sex-reassignment surgery. Thus, petitioner could not obtain a marriage license to marry a man.

Ohio also does not honor amendments to birth certificates made out of state. In 2003, a post-operative transgender male applied for a marriage license to wed a female, and was denied because he failed to disclose his prior marriage. While applicant's appeal was being considered, he filed a second application that revealed he was previously married and divorced. The court considered the fact that transgender male had his birth certificate from Massachusetts changed to reflect his new status as "male," but then held that an out-of-state birth certificate is not conclusive proof of a marriage applicant's gender. The court subsequently denied plaintiff a marriage license because Ohio public policy forbids female-to-male transgenders from marrying females.[53]

F. Parenting

1. Adoption

Unmarried adults may adopt children.[54] Individual gay men and lesbians may adopt children if that is found to be in best interest of child.[55] The Ohio Supreme Court

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[47] OHIO STATE UNIVERSITY CODE OF STUDENT CONDUCT § 3335-23-17 (General Guidelines for Sanctions).
[48] OHIO REV. CODE ANN. §§ 2133.01-2133.26 (2009).
[49] OHIO REV. CODE ANN. §§ 1337.11-1337.20 (2009).
[50] OHIO REV. CODE ANN. § 3705.15 (2009).
[51] OHIO REV. CODE ANN. § 3705.20 (2009).
[52] 513 N.E.2d 828 (Ohio Misc. 1987).
[53] *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio App. Dec. 31, 2003).
[54] OHIO REV. CODE ANN. § 3107.03 (2009).

found that there was no abuse its discretion in allowing a gay man to adopt because the lower court's ruling was not "unreasonable, arbitrary, or unconscionable."[56]

However, Ohio law does not permit a same-sex partner to petition to adopt his or her partner's child. [57] Heterosexual couples may adopt, usually when the spouse joins the petition of his or her partner.[58] Ohio state courts have not addressed the issue of whether a homosexual couple may jointly petition to adopt.

2. Child Custody & Visitation

Under Ohio case law, a parent's sexual orientation can be treated as a negative factor in a dispute over child custody and/or visitation, but such rights should not be denied to a parent solely because he or she is homosexual.

The appeals court upheld the denial of custody to a mother who was involved in a lesbian affair, but held that a trial court could treat a parent's homosexual relationship as only one of many factors to be considered in establishing the best interest of the child.[59] The appeals court has also held that a parent's sexual orientation may be considered as part of determining parental rights and obligations only if that sexual orientation has a direct negative impact on the child.[60]

The Ohio Supreme Court has found that gay and lesbian couples can enter into enforceable custody-sharing agreements for their children.[61]

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The Ohio Constitution provides that "[o]nly a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."[62] Marriage between same-sex couples is also prohibited by statute.[63]

In *Gajovski v. Gajovski*, the court found that a homosexual partner does not constitute a "concubine" for purposes of terminating an alimony agreement, since state

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[55] *In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990); *see also* Judith A. Lintz, Casenote, The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children - In Re Adoption of Charles B., 50 Ohio St.3d 88, 552 N.E.2d 884 (1990), 16 U. Dayton L. Rev. 471 (1991).

[56] 552 N.E.2d at 890.

[57] *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio App. 1998).

[58] OHIO REV. CODE ANN. § 3107.03 (2009).

[59] *Mohrman v. Mohrman*, 565 N.E.2d 1283 (Ohio App. 1989).

[60] *See e.g., Inscoe v. Inscoe*, 700 N.E.2d 70 (Ohio App. 1997).

[61] *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002).

[62] OHIO CONST. art. XV, § 11.

[63] OHIO REV. CODE ANN. § 1301.01 (2009).

law does not permit marriage between members of the same sex.[64] The alimony agreement entered by the court stated weekly alimony was to be paid until the wife "dies, remarries or lives in a state of concubinage, which shall first occur."

In *City of Cleveland Heights v. City of Cleveland Heights*, the court upheld a domestic-partner-registry ordinance, established by a voter referendum, on the grounds that the ordinance only affected the municipality and thus was properly within a sphere of local self-government.[65]

H. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Ohio has a sexual solicitation law that provides: "No person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard."[66] In *State v. Philipps*, the Supreme Court of Ohio held that the statute is neither constitutionally overbroad nor vague, although to be constitutional as applied, it must be construed to apply only to situations where the solicitation amounts to "fighting words."[67] In *State of Ohio Metroparks v. Lasher*, Plaintiff challenged his conviction under the statute.[68] The Court maintained the *stare decisis* power of *Philipps* by refusing Plaintiff's equal protection challenge, but reversed the conviction because the record was insufficient to show that Plaintiff's solicitation constituted "fighting words" under *R.A.V.* In *Cleveland v. Maistros*, the Ohio Court of Appeals reversed course, finding that the Ohio solicitation statute violated the equal protection guarantees of the United States and Ohio Constitutions because there was no rational basis in differentiating homosexual solicitations from heterosexual solicitations.[69]

Professional Codes of Ethics

The Ohio Code of Judicial Conduct states that

> "[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and other subject to the judge's direction and control to do so."[70]

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[64] 610 N.E.2d 431 (Ohio App. 1991).
[65] 832 N.E.2d 1275 (Ohio App. 2005).
[66] OHIO REV. CODE ANN. § 2907.07(B) (2009).
[67] 58 Ohio St.2d 271 (1979).
[68] No. 73085, 1999 WL 13971 (Ohio App. Jan. 14, 1999).
[69] 762 N.E.2d 1065 (Ohio App. 2001).
[70] OHIO CODE OF JUD. CONDUCT, Canon 3(B)(5).

The Code continues:

> "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel or others. Division (B)(6) of this canon does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding."[71]

In the judicial campaign communications context, the Code states that

> "[a] judicial candidate…shall not knowingly or with reckless disregard…[m]anifest bias or prejudice toward an opponent based on race, sex, religion, national origin, disability, sexual orientation, or socioeconomic status or permit members of his or her campaign committee or others subject to his or her direction or control to do so."[72]

The Ohio Code of Professional Responsibility also states that

> "[a] lawyer shall not engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability. This prohibition does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made."[73]

The Licensure Code of Professional Conduct for Ohio Educators states that

> "[c]onduct unbecoming to the profession includes… [d]isparaging a colleague, peer or other school personnel while working in a professional setting (e.g. teaching, coaching, supervising, or conferencing) on the basis of race or ethnicity, socioeconomic status, gender, national origin, sexual orientation, political and religion affiliation, physical characteristics, age, disability, or English language proficiency,"[74] or "disparaging a student on the basis of

[71] OHIO CODE OF JUD. CONDUCT Canon 3(B)(6).
[72] OHIO CODE OF JUD. CONDUCT Canon 7(E).
[73] OHIO CODE OF PROF. CONDUCT DR 1-102.
[74] LICENSURE CODE OF PROF'L CONDUCT FOR OHIO EDUCATORS (1)(c).

> race or ethnicity, socioeconomic status, gender, national origin, sexual orientation, political or religion affiliation, physical characteristics, academic or athletic performance, disability or English language proficiency."[75]

I. Other Evidence of Animus towards LGBT Individuals

On November 2, 1993 the people of Cincinnati passed "Article XII" to the City Charter, an initiative petition aimed at negating previous legislation protecting gay, lesbian, and bisexual persons from discrimination, and further prohibiting the city council from passing similar protections in the future. Article XII states that "No special class status may be granted based upon sexual orientation, conduct or relationships." It further explains that:

> "[t]he City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce, or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void, of no force or effect."[76]

Article XII was a response to two major employment initiatives passed in Cincinnati in previous years. In 1991, Cincinnati passed the Equal Employment Opportunity Ordinance ("EEO") prohibiting discrimination in city employment and appointments to city commissions and boards on the basis of sexual orientation. In 1992, these protections were expanded through the Human Rights Ordinance ("HRO") to prohibit discrimination based on sexual orientation in private employment, public accommodations, and housing. Article XII was an attempt to nullify the EEO and HRO on the issue of discrimination on the basis of sexual orientation, and to prevent similar legislation in the future.

The legislation was challenged in federal district court on constitutional grounds.[77] The district court found the Charter Amendment unconstitutional and permanently enjoined the implementation and enforcement of the Charter Amendment.

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[75] LICENSURE CODE OF PROF'L CONDUCT FOR OHIO EDUCATORS (2)(D).

[76] *See generally* Robert F. Bodi, *Note, Democracy At Work: The Sixth Circuit Upholds the Right of the People of Cincinnati to Choose Their Own Morality in Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 32 AKRON L. REV. 667, 1999.

[77] *Equal. Found. Of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993).

However, the Sixth Circuit reversed the district court.[78] Plaintiffs appealed to the Supreme Court, which remanded to the Sixth Circuit for further consideration under *Romer v. Evans*.[79] The Sixth Circuit distinguished the Cincinnati Charter Amendment from the legislation held unconstitutional in *Romer* by arguing (a) the Cincinnati Amendment was rationally related to the city's valid interest in conserving public costs accruing from investigation and adjudication of sexual orientation discrimination claims; and (b) the *Romer* holding was specific to *state* governments not being structured to burden the ability of gays to participate in political life, whereas the Cincinnati ordinance "merely reflects the kind of social and political experimentation that is such a common characteristic of *city* government."[80]

[78] *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995).
[79] *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).
[80] Order, *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, No. 94-3855, 94-3973, 94-4280, 1998 WL 101701, *2 (6th. Cir. Feb. 5, 1998) (emphasis added), *cert. denied*, 525 U.S. 943 (1998); *see also Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Oklahoma – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Oklahoma has no state legislation that prohibits employment discrimination on the basis of sexual orientation or gender identity. As late as 1990, Oklahoma laws included a statute prohibiting employment of openly gay teachers in public schools. One state agency and one county in Oklahoma have instituted policies prohibiting employment discrimination on the basis of sexual orientation: the state Attorney General's office and Oklahoma County. In 2005, a bill was introduced in the Oklahoma legislature to rescind both of these policies. Although the bill failed, Oklahoma County removed sexual orientation from its published employment non-discrimination policy.

Documented examples of employment discrimination based on sexual orientation and gender identity by state and local governments include:

- Oklahoma enacted a law that, by prohibiting "homosexual conduct" and defining that phrase to include advocacy of gay rights, barred openly gay teachers from Oklahoma schools. Most portions of the law were struck down by federal courts,[1] and the remainder of the law was repealed, effective in 1990.

- In 2004, Oklahoma City reached a settlement with a transgender police officer who was harassed and fired because of her gender identity. The officer, a decorated army veteran, was fired even though she had received an award from the Department of Justice for her service as a police officer. In *Schonauer v. City of Oklahoma, ex. rel. Oklahoma City Police Department*,[2] the plaintiff sued the Oklahoma Police Department and the City of Oklahoma, her employer of more than ten (10) years, for gender discrimination, hostile work environment and disparate treatment, based on gender.[3] When Ms. Schonauer was first hired by the police department in 1992, she was male; in 2001, she underwent gender reassignment surgery.[4] After the surgery, she faced constant harassment from her co-workers, which she alleges interfered with her ability to do her job.[5] However, she continued performing her job and even improved relations between the police

[1] *Nat'l Gay & Lesbian Task Force v. Bd. of Ed. of the City of Okla. City*, 729 F.2d 1270 (10th Cir. 1984).
[2] Case No. CIV-05-104-W (W.D. Okla. 2005).
[3] Memorandum from the City of Oklahoma City Office of the Municipal Counselor to Mayor and Council (Sept. 27, 2005), http://bit.ly/3IVVNk (last visited Sept. 6, 2009).
[4] Richard Green, *Transgender Officer Sues Police in OKC*, TULSA WORLD, Dec. 29, 2004, at A15.
[5] Reuters, *Sex-Change Oklahoma Officer Files Harassment Suit*, EXP. INDIA, Dec. 29, 2004, http://bit.ly/aW3mM (last visited Sept. 6, 2009).

department and the Asian, Hispanic, and gay and lesbian communities.[6] Despite this achievement, and her exceptional performance prior to 2001,[7] the police department removed her from patrol duties, gave her an interim clerical position, and then placed her on paid administrative leave.[8]

- In *Lankford v. City of Hobart*,[9] two female dispatchers for the Hobart City police station in Oklahoma brought suit against the City and their supervisor, the former police chief, alleging that the police chief had violated their privacy rights and created a hostile and abusive work environment by sexually harassing them.[10] One of the plaintiffs alleged that after she spurned the supervisor's advances, he became angry and spread rumors that she was a lesbian.[11] He then used his position as police chief to gain access to her medical records in order to verify his claim.[12]

- In 2008, a municipal police officer transitioned from male to female while on the job. Thereafter, she experienced severe harassment based on her gender identity. After her transition, the police department also insisted that she undergo psychological evaluations. They transferred her to an unfavorable position.[13]

- In 2007, a gay electronics technician who worked out of a city firehouse reported, after another employee learned that he was gay, that he began to experience harassment from co-workers. He was called a "cocksucker," was whistled at, was told that "[q]ueers are just shit; people like you float," was lectured about same-sex attraction being "against the Bible," and was told that gay people are "an abomination to god." When a new employee complained about having to clean the showers at the firehouse, the technician commented that they were so filthy that he wouldn't take a shower there. The new employee replied that, according to what he had heard from others, he had thought that "you'd like that [implying a shower with other men]." One coworker repeatedly screamed at the technician, physically intimidated him, and twice threatened to kill him. When the individual complained, his shift was changed against his wishes so that he would not work the same time as that co-worker. The department administrator refused to give

[6] Oklahoma Office of Personnel Management Affirmative Action Plan, http://bit.ly/sKEIp (last visited Sept. 6, 2009).
[7] *See* Chad Graham, *Gays in the Red States*, ADVOCATE, Feb. 15, 2005, *available at* http://bit.ly/NFRP1 (stating that Ms. Schonauer received an award from the Department of Justice for her performance as an Oklahoma police officer).
[8] Oklahoma Office of Personnel Management Affirmative Action, *supra* note 6.
[9] 27 F.3d 477 (10th Cir. 1994).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

him a copy of the employer's policy vis-à-vis sexual harassment and nondiscrimination.[14]

- In 2004, a librarian, employed at the Oklahoma City Branch of Langston University—Oklahoma's only historically black college and university—for approximately three years, began the process of transitioning from male to female. After she returned from a professional conference, she discovered that a student had circulated over 100 copies of a hate-filled petition calling for her removal from campus and had posted flyers to the same effect around the campus. Every reason cited in support of the librarian's removal was related to her gender identity. When the librarian confronted the library director about the situation, he told the librarian that the student had a right to freedom of speech and that he would not do anything. When other students complained to the library director about the flyers, he supported the student who had passed them out. The student then printed a second flyer stating that "God wished [her] dead" and that he hoped she would die. When she confronted administrators about the second flyer, she was told her concerns were unwarranted and she was the one creating problems. The following semester, her schedule was changed so that she would have to leave the building at 10:00PM—long after other staff and faculty had gone home. Fearing that she would be unsafe on campus at that hour, she had no choice but to resign.

Oklahoma continued to criminalize same-sex sexual behavior until its law was invalidated by the United States Supreme Court in 2003 in *Lawrence v.Texas*. Despite that decision, the state still has a sodomy statute on the books. Before it was struck down, the statute was used to justify the state law prohibiting gay teachers from teaching in public schools, as well as to support specific terminations of public employees, including the professor at Oklahoma State University, both mentioned above.

Oklahoma City removed language from the student handbook that was designed to protect gay students in public schools from bullying and discrimination, claiming that current policies already provided sufficient protection for these students, a claim vehemently rejected by some on the faculty.[15] Oklahoma officials have repeatedly denied gays their First Amendment rights to speech and association.[16] Oklahoma police have refused to protect gays in the same way as heterosexuals.[17] And, Oklahoma public servants have, on several occasions, publicly spoken out against gays and gay rights. For example, in March of 2008, Oklahoma State Representative Sally Kern of the Oklahoma Legislature made headlines after an audio clip of her comments berating the gay

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[14] *Id*.

[15] *OC Teacher Criticizes Removal from Handbook of Language Protecting Gays*, A.P., Oct. 21, 2006 (discussing Oklahoma City Public Schools' removal of language from the student handbook that would protect gay students from bullying and discrimination). To date, Oklahoma City has not replaced this protective language. OKLAHOMA CITY STUDENT HANDBOOK, http://bit.ly/yjjG8 (last visited Sept. 6, 2009).

[16] *Cimarron Alliance Foundation v. City of Oklahoma City*, 290 F. Supp. 2d 1252 (W.D. Okla. 2002) (denial of parade banners); *Norma Kristie, Inc. v. Oklahoma City* (denial of use of city convention center).

[17] *Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008) (sheriff's refusal to enforce protective order in case involving two women).

community was released on YouTube. Aside from claiming that homosexuality is a lifestyle choice unsupported by God, Kern also said the homosexual agenda is destroying the nation and poses a bigger threat to the U.S. than terrorism or Islam.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently the state of Oklahoma has not enacted laws to protect sexual orientation and gender identity from employment discrimination. Oklahoma did, however, have an anti-gay employment statute in effect until as late as 1990. Section 6-103.15(B) of Title 70 of the Oklahoma Statutes provided in part that

> "a teacher, student teacher or teacher's aide may be refused employment or reemployment, dismissed, or suspended after a finding that the teacher or teacher's aide has: (i) engaged in public homosexual conduct or activity; and (2) has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teacher's aide."[18]

The statute defined "public homosexual activity" as "the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes[19] [Oklahoma's sodomy laws], if such act is: (a) committed with a person of the same sex, and (b) indiscreet and not practiced in private."[20] It defined "homosexual conduct" broadly to include "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." [21] In effect, the statute effectively barred openly gay teachers from employment in the Oklahoma public school system. In 1982, the National Gay and Lesbian Task Force challenged the constitutionality of the statute.[22] The U.S. District Court for the Western District of Oklahoma upheld the statute's constitutionality.[23] On appeal, the Tenth Circuit Court of Appeals upheld the statute with respect to the ban on public homosexual activity, but struck the statute with respect to the ban on public homosexual conduct as unconstitutionally vague.[24] In 1989, the statute was repealed, and this repeal became effective in 1990.

B. Attempts to Enact State Legislation

In 2005, Oklahoma state congressmen Daniel Sullivan and Randy Brogdon proposed House Bill 1746, which provided that "any nondiscriminatory policy based on sexual preference developed and implemented by an agency or governmental entity is

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[18] OKLA. STAT 70, § 6-103.5 (repealed in 1989) (statutory text available in Nat'l Gay Task Force v. Bd. of Ed. of the City of Okla. City, 729 F. 2d 1270 (10th Cir. 1984)).
[19] *See infra* Section III.C.
[20] *Id.*
[21] *Id.*
[22] *Nat'l Gay & Lesbian Task Force*, 729 F.2d at 1270.
[23] *Id.* at 1272.
[24] *Id.* at 1270.
[24] *Id.* at 1272.

null and void."[25] Effectively the measure would have eliminated protective language provided by the Attorney General of Oklahoma's office and Oklahoma County, the only state and local agencies that had policies of non-discrimination against gays at the time.[26] The measure failed fifty-eight (58) to thirty-eight (38) to receive the requisite two-thirds vote to be advanced to a third reading.[27]

In 1999, the Oklahoma House of Representatives passed SB 1394, a bill to bar "known homosexuals" from working in schools. The bill had originated in the Senate as a measure prohibiting sex offenders from working in the public school system, and was amended in the House by Rep. Bill Graves to include gay men and lesbians as well. Graves claimed that homosexuals were sexual criminals guilty of "consensual sodomy," which was prohibited by state law. He also said that many homosexuals are pedophiles who use schools as a "breeding ground" to "recruit young people" to become gay or lesbian. Graves told a local newspaper that his goal was to "drive [gays] back into the closet like the way they were."[28]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

Oklahoma state and local agencies do not generally have employment non-discrimination policies that include sexual orientation and gender identity.[29] The Oklahoma Office of Personnel Management ("OPM"), which provides comprehensive human resource services and guidelines to all state agencies (including law enforcement and teachers through the high school level), has an affirmative action policy, but this policy does not include LGBT people.[30] Moreover, it seems that some Oklahoma state

[25] *Week in Review*, OKLA. SENATE, Mar. 7-10, 2005, http://bit.ly/uk4Z1 (last visited Sept. 6, 2009).

[26] Oklahoma Office of the Attorney General, Employment Opportunities, http://bit.ly/25wyxw (last visited Sept. 6, 2009); *see* Julie E. Bisbee, *Policy Prompts Debate at State and Local Level*, A.P., Mar. 9, 2005. Both the Attorney General's office is the only state agency that still has a published policy of non-discrimination against gays. The current Oklahoma County policy as available on the internet does not include sexual orientation as a protected class. Oklahoma County Employment Policy, http://bit.ly/IQER9 (last visited Sept. 6, 2009). The Oklahoma County Employment Policy as it appears in the Oklahoma County Handbook does include sexual orientation as a protected class. OKLAHOMA COUNTY EMPLOYEE HANDBOOK 36 (2008).

[27] *Week in Review*, *supra* note 25.

[28] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 190-191 (1999 ed.).

[29] *See, e.g.*, Oklahomans for Equality, *FAQ: LGBT in Tulsa*, http://www.okeq.org/faq.cfm (last visited Sept. 6, 2009) (summarizing City of Tulsa employment policies); University of Oklahoma Employment Policy, http://bit.ly/eZT0g (last visited Sept. 6, 2009); Oklahoma Department of Human Services Non-Discrimination statement, http://bit.ly/lFgXj (last visited Sept. 6, 2009).

[30] Oklahoma Office of Personnel Management Affirmative Action Plan, http://bit.ly/sKEIp (last visited Sept. 6, 2009).

and local actors have backed away from their positions protecting gays. Oklahoma County, for example, implemented an employment policy in 2004 including sexual orientation as a protected class in employment decisions. However, the current non-discrimination policy excludes sexual orientation.[31] Oklahoma City removed language from the student handbook that would protect gay students in public schools from bullying and discrimination, claiming that current policies already provided sufficient protection for these students, a claim vehemently rejected by some on the faculty.[32]

A few state actors have implemented protective language in their policies. The state Attorney General's office[33] and the Oklahoma Commissioners and Budget Board[34], for example, have implemented non-discrimination policies that include sexual orientation. In addition, a few of Oklahoma's state universities have implemented non-discrimination policies that protect students based on sexual orientation in student enrollment and activities.[35]

3. Attorney General Opinions

None.

D. Local Legislation

None.

E. Occupational Licensing Requirements

There is no evidence that state or local agencies expressly discriminate against potential employees based on sexual orientation or gender identity. Some Oklahoma state and local licenses require candidates to be "of good moral character," but no evidence exists that this standard has been used to eliminate potential employees based on gender identity or sexual orientation. The Oklahoma City Police Department, for example, requires that applicants are "of good moral character.[36] The application, however, does not define this term, nor does it include any questions relating to sexual orientation or gender identity.[37] Similarly, under the Oklahoma Child Care Facilities

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[31]Oklahoma Office of the Attorney General, Employment Opportunities, http://bit.ly/25wyxw (last visited Sept. 6, 2009); *see* Julie E. Bisbee, *Policy Prompts Debate at State and Local Level*, A.P., Mar. 9, 2005.
[32]*OC Teacher Criticizes Removal from Handbook of Language Protecting Gays*, A.P., Oct. 21, 2006 (discussing Oklahoma City Public Schools' removal of language from the student handbook that would protect gay students from bullying and discrimination). To date, Oklahoma City has not replaced this protective language. OKLAHOMA CITY STUDENT HANDBOOK, http://bit.ly/yjjG8 (last visited Sept. 6, 2009).
[33]Oklahoma Office of the Attorney General, Employment Opportunities, http://bit.ly/25wyxw (last visited Sept. 6, 2009); *see* Julie E. Bisbee, *Policy Prompts Debate at State and Local Level*, A.P., Mar. 9, 2005.
[34] LESBIAN & GAY L. NOTES (Feb. 2005), *available at* http://www.qrd.org/qrd/www/legal/lgln/02.2005.pdf.
[35]*See, e.g.*, Southern Oklahoma Technology Center's Enrollment Application, http://www.sotc.org/enroll (last visited Sept. 6, 2009); *Oklahomans for Equality*, ENEWS, http://bit.ly/RdhKC (noting that Tulsa Community College amended its student by-laws to include sexual orientation and gender preference as a protected classes).
[36]Application for Oklahoma City Police Department, http://bit.ly/3HIfEf (last visited Sept. 6, 2009).
[37]*Id.*

Licensing Act, the Oklahoma State Department of Human Services has the power to establish licensing requirements for all private facilities that provide services to children.[38] The requirements promulgated under this statute require that all employees of these facilities be "of good moral character."[39] Again, however, the requirements do not define this term nor include any reference to the sexual orientation or gender identity of potential employees.

[38]OKLA. STAT. ANN. 10, §410 (West 2008).

[39]*See, e.g.*, Licensing Requirements for Child Care Centers, http://bit.ly/SW4ul (last visited Sept. 6, 2009); Licensing Requirements for Residential Child Placing Agencies, http://bit.ly/1Cjxv6 (last visited Sept. 6, 2009); Licensing Requirements for Family Child Care Homes, available at http://bit.ly/LMR4W (last visited Sept. 6, 2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Schonauer v. City of Okla., ex. rel. Okla. City Police Dep't, Case No. CIV-05-104-W (W.D. Okla. 2005).

In *Schonauer v. City of Oklahoma, ex. rel. Oklahoma City Police Department*,[40]Ms. Paula Schonauer, a transsexual police officer, sued the Oklahoma Police Department and the City of Oklahoma, her employer of more than ten (10) years, for gender discrimination, hostile work environment and disparate treatment based on gender.[41] When Ms. Schonauer was first hired by the police department in 1992, she was male and a decorated army veteran named Paul Schonauer.[42] In 2001, she underwent gender transformation surgery.[43] After the surgery, she faced constant harassment from her co-workers, which she alleges interfered with her ability to do her job.[44] However, she continued performing her job duties, allegedly even improving relations between the police department and the Asian, Hispanic, and gay and lesbian communities.[45] Despite this, and her exceptional performance prior to 2001,[46] the police department removed her from patrol duties, gave her an interim clerical position, and placed her on paid administrative leave.[47] Ms. Schonauer sued in 2005, seeking reinstatement of her patrol duties and an end to the harassment. The City settled the claims with Ms. Schonauer in exchange for $4000.00 and eighty (80) hours of reinstated sick leave.[48]

Lankford v. City of Hobart, 27 F.3d 477 (10th Cir. 1994).

Lankford v. City of Hobart[49] involved two female dispatchers for the Hobart City police station in Oklahoma who brought suit against the City and their supervisor, the former police chief, alleging that the police chief had violated their privacy rights and

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[40]Case No. CIV-05-104-W (W.D. Okla. 2005).

[41]Memorandum from the City of Oklahoma City Office of the Municipal Counselor to Mayor and Council (Sept. 27, 2005), http://bit.ly/3IVVNk (last visited Sept. 6, 2009).

[42]Richard Green, *Transgender Officer Sues Police in OKC*, TULSA WORLD, Dec. 29, 2004, at A15.

[43]*Id.*

[44]Reuters, *Sex-Change Oklahoma Officer Files Harassment Suit*, EXP. INDIA, Dec. 29, 2004, http://bit.ly/aW3mM (last visited Sept. 6, 2009).

[45]Oklahoma Office of Personnel Management Affirmative Action Plan, http://bit.ly/sKEIp (last visited Sept. 6, 2009).

[46]*See* Chad Graham, *Gays in the Red States*, ADVOCATE, Feb. 15, 2005, *available at* http://bit.ly/NFRP1 (stating that Ms. Schonauer received an award from the Department of Justice for her performance as an Oklahoma police officer).

[47]Oklahoma Office of Personnel Management Affirmative Action Plan, http://bit.ly/sKEIp (last visited Sept. 6, 2009).

[48]PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 190-191 (1999 ed.)..

[49]27 F.3d 477 (10th Cir. 1994).

created a hostile and abusive work environment by sexually harassing them.[50] One of the plaintiffs alleged that after she spurned the supervisor's advances, he became angry and spread rumors that she was a lesbian.[51] He then used his position as police chief to gain access to her medical records in order to verify this claim.[52] The District Court dismissed all of plaintiffs' claims against the city and defendant police chief except for the invasion of privacy claim.[53] The Tenth Circuit Court of Appeals ruled that the plaintiff's case survived defendant's motion for summary judgment because she had stated a legitimate cause of action for invasion of privacy.[54] On remand, the district court dismissed the case in favor of the defendant.[55]

Nat'l Gay & Lesbian Task Force v. Bd. of Educ., 729 F.2d 1270 (10th Cir. 1984).

In this case, the Plaintiff sought a declaration that an Oklahoma law that permitted public school teachers to be fired for public homosexual "activity" or "conduct," was unconstitutional. Under the law, "activity" was defined as specific acts committed with a person of the same sex that is "indiscreet and not practiced in private," and "conduct" was defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employers." The court struck down the "conduct" clause as overbroad and violative of the First Amendment, reasoning that it could apply to conduct that did not encourage "imminent lawless action." However, the court upheld the "activity" clause with minimal analysis.[56]

2. **Private Employees**

Two notable Oklahoma cases, *Saladin v. Turner* and *Joffe v. Vaughn*, involving discrimination against gays in the private sector, have also arisen during the past few years.

Saladin v. Turner, 936 F. Supp. 1571 (N.D. Okla. 1996).

In *Saladin v. Turner*, plaintiff, a waiter at a high-end Oklahoma restaurant, sued his employer, the restaurant owner, for discrimination under the Americans with Disabilities Act.[57] Plaintiff was one of the restaurant's most well-respected waiters and was liked by both patrons and co-workers.[58] Plaintiff was openly gay and involved with a long term partner who was infected with HIV.[59] Many regular patrons would inquire

[50] *Id.* at 478.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 478-80.
[55] 73 F.3d. 283 (10th Cir. 1996).
[56] *Nat'l Gay & Lesbian Task Force*,729 F.2d at 1270.
[57] 936 F. Supp. 1571 (N.D. Okla. 1996).
[58] *Id*. at 1575.
[59] *Id*.

about plaintiff's partner and plaintiff's charitable activities in the HIV/AIDS community.[60] When the restaurant manager learned of this, she requested that plaintiff refrain from these conversations because other customers had allegedly complained.[61] Defendant, the restaurant owner, did not think this solution was sufficient and decided to suspend plaintiff for one month without pay, the longest suspension ever imposed in the restaurant's history.[62] During the suspension, defendant terminated plaintiff, alleging that another employee had told the manager that plaintiff had quit.[63] Plaintiff subsequently applied for unemployment benefits, but was initially denied because defendant claimed he had been insubordinate.[64] Plaintiff then filed a discrimination complaint with the EEOC.[65] Defendant tried to re-offer plaintiff his job, but plaintiff refused for fear of retaliation.[66] The district court held in favor of plaintiff finding that defendant had suspended and subsequently terminated plaintiff solely because of his association with his partner, who had AIDS.[67]

Joffe v. Vaughn, 873 P.2d 299 (Okla. Civ. App. 1993).

In *Joffe v. Vaughn*, plaintiff sued his former employer for wrongful termination, slander and intentional infliction of emotional distress.[68] Plaintiff was a news anchor at a local television station.[69] Plaintiff's co-anchor told the station's news director that plaintiff had engaged in a homosexual liaison with his hair dresser, specifically claiming that plaintiff had frequented a well-known "gay bar," picked up a stranger and took him back to his apartment for sex.[70] Within a month of the allegation and without any investigation or substantiated evidence, defendant told plaintiff that he must either resign or suffer termination.[71] Plaintiff refused to resign and was fired without cause under the termination provision of his employment contract.[72] Plaintiff quickly became the subject of negative rumors and speculation throughout Tulsa, despite his recent marriage to his long-time fiancée.[73] After his own investigation into the allegations, plaintiff discovered the name of his accuser and filed suit against both his co-anchor and the station. The emotional strain of the incident, however, proved to be too much, and plaintiff took his own life before completion of the case.[74] At trial, the jury found in favor of the plaintiff on the theory of intentional infliction of emotional distress and awarded $2 million.[75]

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 1578.
[64] *Id.* at 1576.
[65] *Id.*
[66] *Id.* at 1579.
[67] *Id.* at 1581.
[68] 873 P.2d 299 (Okla. Civ. App. 1993).
[69] *Id.* at 301.
[70] *Id.* at 302, 306.
[71] *Id.* at 302.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* All other claims were dismissed by the trial court. *Id.*

The appellate court upheld the award, in part, because it did not find the unsubstantiated allegations about plaintiff to be credible.[76]

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

Municipal Police Department

In 2008, a police officer transitioned from male to female while on the force. Thereafter, she experienced severe harassment based on her gender identity. After her transition, the police department insisted that she undergo psychological evaluations. Superiors also transferred her to an unfavorable position.[77]

Municipal Fire Department

In 2007, a gay electronics technician who worked out of a city firehouse reported that, after another employee learned that he was gay, he began to experience harassment from coworkers. He was called a "cocksucker," was whistled at, was told that "[q]ueers are just shit; people like you float," was lectured about same-sex attraction being "against the Bible," and was told that gay people are "an abomination to god." When a new employee complained about having to clean the showers at the firehouse, the technician commented that they were so filthy that he wouldn't take a shower there. The new employee replied that, according to what he had heard from others, he had thought that "you'd like that [implying a shower with other men]." One coworker repeatedly screamed at the technician, physically intimidated him, and twice threatened to kill him. When the individual complained, his shift was changed against his wishes so that he would not work the same time as that coworker. The department administrator refused to give him a copy of the employee policies on sexual harassment and nondiscrimination.[78]

Langston University- Oklahoma City Branch

In 2004, a librarian employed at the Oklahoma City Branch of Langston University, Oklahoma's only HBCU (Historically Black College and University) for approximately three years, began the process of transitioning from male to female. After she returned from a professional conference, she discovered that a student had circulated over 100 copies of a hate-filled petition calling for her removal from campus and had posted flyers to the same effect around the campus. Every reason cited in support of the librarian's removal was related to her gender identity. When the librarian confronted the library director about the situation, he told the librarian that the student had a right to freedom of speech and that he would not do anything. When other students complained

[76]*Id.* at 304, 306.
[77]E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).
[78]*Id.*

to the library director about the flyers, he supported the student who had passed them out. The student then printed a second flyer stating that "God wished [her] dead" and that he hoped she would die. When she confronted administrators about the second flyer, she was told her concerns were unwarranted and she was the one creating problems. The following semester, her schedule was changed so that she would have to leave the building at 10 pm—long after other staff and faculty had gone home. Fearing that she would be unsafe on campus at that hour, she had no choice but to resign.[79]

[79] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Although struck down in 2003 by *Lawrence v. Texas*[80] as applied to consensual homosexual acts, Oklahoma still has a sodomy statute on the books.[81] Before *Lawrence*, the sodomy statute was used to bar employment of openly gay teachers in Oklahoma public schools.[82] It was also used to justify denial of gay activist groups their First Amendment right to associate.[83]

B. Hate Crimes

To date, Oklahoma has no hate crime bills protecting the gay community.[84] Evidence also exists that the Oklahoma police ignore issues of sexual orientation and gender identity when investigating crimes, and that they refuse to report crimes as hate crimes if the crimes appear to be based on sexual orientation.[85] For example, in the summer of 2008, a gay couple in Tulsa was targeted twice at the couple's home with anti-gay messages, such as "Gays Must Go," spray painted on the property.[86] The couple alleged that they were victims of a hate crime, but the police disagreed saying that the messages were mere acts of vandalism and mischief.[87]

C. Parenting

Oklahoma prohibits adoption by same sex couples,[88] and until 2007, Oklahoma did not recognize foreign adoptions by same sex couples (*i.e.*, adoptions in which the

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[80] 539 U.S. 558 (2003).

[81] OKLA. STAT ANN. 21, §886, *et. seq*. (West 2008) ("Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the custody of the Department of Corrections not exceeding ten (10) years.").

[82] *See supra* Section II.A.

[83] *Id*.

[84] *See,* Richard Ogden, *Oklahoma Hate Crimes*, OKLAHOMANS FOR EQUALITY, http://bit.ly/SJnlu (last visited Sept. 6, 2009) (collecting legislative proposals).

[85] David Schulte, *By Law, Not a Hate Crime*, TULSA WORLD, July 18, 2008 at A1 (noting that the Oklahoma State Bureau of Investigation, which develops standards for state law enforcement agencies in collecting hate crime records, has stated that the Oklahoma police refuse to report crimes based on sexual orientation as hate crimes).

[86] *Id*.

[87] *Id*.

[88] OKLA. STAT ANN. 10, §7503-1.1 (West 2008).

same sex couple adopted in another state and subsequently moved to Oklahoma).[89] When the foreign adoption ban was put before the Oklahoma legislature, only five state senators voted against it. The leader of the Oklahoma Senate, James Williamson said that "[a] key component of the radical homosexual agenda is to take away the right of states to regulate and define adoptions, just as they are trying to redefine marriage across the nation."[90]

In *M.J.P. v. J.G.P.*, the Supreme Court of Oklahoma upheld an award of custody to the child's heterosexual father, in part, because an expert witness psychologist speculated that the child would eventually have to make a choice between what society considers "moral" and defending his mother's homosexuality.[91] However, in *Fox v. Fox*, the Supreme Court of Oklahoma denied a change in custody from the lesbian mother to the heterosexual father.[92] The court held in part that more evidence existed at the time of the custody dispute in *M.J.P.* warranting a change in custody.[93]

D. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The Oklahoma constitution bans same sex marriage. [94]

E. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Outside of the employment context, Oklahoma has demonstrated an animus towards the gay community through repeated suppression of its First Amendment right to speech and association. This section discusses four examples: (i) *Cimarron Alliance Foundation v. City of Oklahoma City*, (ii) *Norma Kristie, Inc. v. City of Oklahoma City*, (iii) *Gay Activists Alliance v. Bd. of Regents of Univ. of Okla.* and (iv) the Gay Straight Alliance Club at Oklahoma's Jenks High School in which the state denied gay groups their First Amendment rights because of the content of their messages.

Freedom of Speech

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[89] OKLA. STAT. 10, §7502-1.4(A) (struck down in *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), as a violation of the full faith and credit clause of the Constitution).

[90] Graham, *supra* note 7.

[91] 640 P.2d 966, 969 (Okla. 1982) (stating that the

> "[expert] agreed that one of the manifestations of defending his mother's homosexuality would be to indicate that there is nothing wrong with it, that there is nothing immoral with it, and that there sometimes occurs a time in the life of such a child where society's morals collide with what he thought was right at home. Ultimately, J. will have to make a "choice between his mother and society and somehow reconcile it with himself.").

See also infra Section IV.E (Bill Graves' comments).

[92] 904 P.2d 66 (Okla. 1995).

[93] *Id.* at 70.

[94] Graham, *supra* note 7.

In *Cimarron Alliance Foundation v. City of Oklahoma City*, Cimarron Alliance Foundation ("CAF") sued the City of Oklahoma for violation of its First Amendment rights on two separate occasions.[95] In the spring of 2001, CAF hosted a gay pride parade in Oklahoma City.[96] With the city's permission, CAF posted banners along the parade route that were scheduled to remain displayed during the parade and for several months thereafter.[97] Shortly after the banners went up, Oklahoma officials began receiving complaints from the general public about their presence.[98] Consequently, immediately after the parade, city officials removed the banners, contrary to the permitted time period.[99] CAF threatened litigation if the banners were not replaced, and the city subsequently complied.[100] Several months after the parade, at the mayor's prompting, the City Council adopted a new banner ordinance, which in part prohibited banners that promoted "social advocacy."[101] When CAF applied for banner space again in 2002 for that year's parade, the city denied the application on the grounds that the banners promoted social advocacy.[102] CAF brought suit in federal district court claiming violation of its First Amendment rights for both the removal of banners in 2001 and the denial of its application in 2002.

With respect to CAF's claim on the banner removal, the court held that a genuine issue of material fact existed as to whether defendant removed the banners due to criticism of what they stated and represented.[103] With respect to the banner ordinance, the court held that the ordinance gave city officials too much discretion as to determine which banners qualify as "social advocacy."[104] The court also held that the city denied CAF's application based on CAF's beliefs and advocacy.[105] Therefore, the court granted CAF injunctive relief, prohibiting the city from imposing, exercising or otherwise using the ordinance.[106] Following the case, the Oklahoma City Council accepted a settlement allowing gay pride banners to fly over city streets.[107]

Similarly, in *Norma Kristie, Inc. v. City of Oklahoma City*, Norma Kristie, Inc., a group that hosts the annual female impersonators contest, "Miss Gay America Pageant" sued Oklahoma City for denial of its First Amendment rights.[108] Plaintiff applied for a permit to use the Oklahoma Myriad Convention Center for the pageant, which showcases

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[95] 290 F. Supp. 2d 1252 (W.D. Okla. 2002).
[96] *Id* at 1255.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1255-56.
[102] *Id.* at 1255-56.
[103] *Id.* at 1261.
[104] *Id.* at 1262.
[105] *Id.* at 1263.
[106] *Id.* at 1263.
[107] Human Rights Campaign Foundation, Recent Developments in Sexual Orientation and Gender Identity Laws, LAW Briefs, Dec. 2002, *available at* http://bit.ly/2AfBmg (last visited Sept. 6, 2009).
[108] 572 F. Supp. 88 (W.D. Okla. 1983).

men dressed in female clothing.[109] A city official, however, denied plaintiff's application because he believed the message of the pageant to be "homosexual"[110] and immoral.[111] The court ruled in favor of plaintiff and ordered defendant to permit the pageant.[112] The court held that defendant denied plaintiff's application solely because of his belief about the pageant's message.[113]

Freedom of Association

In *Gay Activists Alliance v. Bd. of Regents of Univ. of Okla.*, the Gay Activists Alliance, a student association at the University of Oklahoma, sued the University for denying its application for recognition as a student organization.[114] The group had complied with all of the requirements to obtain recognition (such as a membership of at least ten (10) students and a faculty advisor), and thus alleged that it was denied this status solely on the basis of the content of its message.[115] The University argued that it denied recognition to the club because the behavior sponsored by the organization violated Oklahoma law contrary to the University's duty to act for the benefit of the health, welfare and morals of the students. [116] The Supreme Court of Oklahoma held in favor of plaintiffs because the University did not overcome its heavy burden in proving that the group would incite imminent lawless action.[117] Today, the Gay Activists Alliance does not exist, however, the University of Oklahoma does have a student organization entitled Gay Lesbian Bisexual, Transgendered and Friends.[118]

Similarly, in 2001, students at one of Oklahoma's public high schools, Jenks High School, attempted to form a Gay-Straight Alliance club.[119] The purpose of the club was

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[109]*Id*. at 90.
[110]*Id*.
[111]*Id*.
[112]*Id*. at 92.
[113]*Id*. (stating that

> "[p]articularly disturbing to this Court is Defendants' conduct in dealing with Plaintiff's application. Defendants made no effort to follow clear dictates of the U.S. Supreme Court…Defendant Johnson unilaterally rejected the application without investigation and based solely on his own opinion.").

[114] 638 P.2d 1116 (Okla. 1981).
[115]*Id.* at 1119.
[116]*Id.* at 1121-22.
[117]*Id.* at 1122 (stating that

> "[w]here the denial of recognition is based on mere suspicion, unpopularity and fear of what might occur and is achieved by state action which burdens associational rights resulting in the lessening of an organization's ability to effectuate legal purposes, guaranteed freedoms have been violated.").

[118]Gay, Lesbian, Bisexual, Transgendered, and Friends Website, http://www.ou.edu/glbtf (last visited Sept. 6, 2009).
[119]David Schulte, *JHS Gay-Straight Alliance Continuing to Promote Tolerance*, TULSA WORLD, Mar. 23, 2005, at ZS1.

to provide a safe place for students to discuss sexual orientation issues, which the club's founders felt were oftentimes left unaddressed by the school.[120] The school's principal fought the formation of the club.[121] Despite the principal's efforts, the students found a faculty moderator and began holding regular meetings of both gay and straight students.[122] The school district, however, refused to call the club "a student organization" because it did not want to imply that the school sponsored the group.[123] Today, the Gay Straight Alliance still exists at Jenks High School, but it is still a non-school sponsored group and its activities are still non-school sanctioned.[124]

Police Treatment of GLBT Individuals

Evidence also exists that the Oklahoma police have refused to administer protection equally among gay and heterosexual citizens. In *Price-Cornelison v. Brooks*, for example, plaintiff sued the Undersheriff of Garvin County, Oklahoma for failing to enforce an emergency protective order and a permanent protective order.[125] After an unpleasant split with her partner, plaintiff received a state court emergency protective order, which instructed her ex-partner to leave plaintiff's property.[126] Plaintiff soon learned that her ex-partner was repeatedly returning to the property in violation of the order and was removing items without permission.[127] Plaintiff called the sheriff's office several times informing the staff of the situation and requesting intervention or a police report on the incident.[128] Despite the protective order, defendant refused to get involved in the dispute, which he characterized as "one of those lesbian relationships," and even told plaintiff that if she returned to the property, she herself would be arrested.[129] Defendant also informed his staff that if anyone called the office regarding the matter, the staff should take a message.[130] Even after the state court issued a permanent protective order, defendant still refused to get involved in the dispute, claiming that the office was too "busy."[131] On advice from the local prosecutor, plaintiff went to defendant's office in person and requested that the second protective order be enforced.[132] In response, defendant denied her request and replied in part: "everyone in the courthouse [is] laughing at you."[133] Plaintiff sued for violations of both her Fourth Amendment right to

[120] *Id*. (quoting one of the group's student founders as saying that "[i]t is not an overtly homophobic atmosphere, but it is something that people don't talk about, and I think that is more harmful in some ways").
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *See* Nora Froeschle, *Silent Protest Aimed at Anti-Gay Acts*, TULSA WORLD, Apr. 25, 2008, *available at* http://bit.ly/kBZEa.
[125] 524 F.3d 1103 (10th Cir. 2008).
[126] *Id.* at 1106.
[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] *Id.* at 1107.
[131] *Id*.
[132] *Id*.
[133] *Id*.

unreasonable search and seizure and her Fourteenth Amendment right to equal protection. She alleged that the sheriff's office had a policy of discrimination against lesbian victims of domestic violence. Defendant claimed qualified immunity on both issues. The district court agreed that she had presented enough evidence on this issue to withstand defendant's summary judgment motion.[134] On appeal, the Tenth Circuit Court of Appeals held in favor of plaintiff with respect to the permanent protective order and the Fourth Amendment claims, denying defendant qualified immunity, but dismissed the claim with respect to the emergency protective order.[135] Although remanded for trial, the case was dismissed on August 5, 2008 because plaintiff was unwilling to pursue the case further. [136] Of note is that the county was completely unwilling to settle or admit any wrongdoing on its part.[137]

Apart from the case law discussed above, Oklahoma state officials and public servants have demonstrated other animus towards gays. In March of 2008, for example, Representative Sally Kern of the Oklahoma Legislature made headlines after an audio clip of her comments berating the gay community was released on YouTube.[138] Aside from claiming that homosexuality is a lifestyle choice unsupported by God, Kern also said the homosexual agenda is destroying the nation and poses a bigger threat to the U.S. than terrorism or Islam.[139] In defense of her statements, Kern claims that she was targeting the homosexual agenda, not individuals who have "made this lifestyle choice."[140] Of particular concern to her was the effect the "homosexual agenda" would have on Oklahoma's children.[141] Three years prior in March of 2005, Kern had asked the Metropolitan Library System to move gay-themed children's books to the adult section because she wanted to restrict children's access to this content.[142] Subsequently, the Oklahoma House passed Resolution 1039, which required libraries to "confine homosexually themed books and other age-inappropriate material to areas exclusively for

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[134] *Id.* at 1110.

[135] *Id.* at 1119.

[136] Telephone Interview with Valerie A. Williford, Plaintiff's Counsel, Oklahoma City, Okla. (Jan. 20, 2009).

[137] *Id.*

[138] Tim Talley, *Oklahoma Legislator's Anti-Gay Comments Stir Hostile Reaction*, TULSA WORLD, Mar. 10, 2008, *available at* http://bit.ly/1KOAXQ.

[139] *Id.*

[140] *Id.* (quoting Kern as saying, "I was talking about an agenda. I was not talking about individuals… They have the right to choose that lifestyle. They do not have the right to force it down our throat.").

[141] *Id.* (quoting Kern as saying,

> "We have the gay-straight alliance coming into our schools. Kids are getting involved in these groups; their lives are being ruined… They are going after our young children, as young as two (2) years of age, to try to teach them that the homosexual lifestyle is an acceptable lifestyle. This stuff is deadly and it's spreading, and it will destroy our young people; it will destroy this nation.")

[142] Chad Previch & Carrie Coppernoll, *Libraries Haven't Pulled Gay-Themed Kids' Books; Metro-Area Commission May Act on Shelving at Its Thursday Meeting*, OKLAHOMAN, May 13, 2005, at 20A.

adult access and distribution."[143] The Bill also required that no public funds be used in "the distribution of such materials to children."[144] The Oklahoma Senate allowed the bill to lapse in April of 2006.[145]

In July of 2008, State House candidate Jay K. Ramey told local papers that one of his main reasons for running for office was to ensure a prohibition in Oklahoma on same sex marriage, civil unions, and domestic partnership.[146] His campaign website stated that

> "I am opposed to gay marriage... It seems to me much more rational and normal to legalize polygamous marriage or marriage between first cousins before we even thinking of legalizing marriage between two people of the same sex. More importantly, Oklahoma should never recognize or be forced to recognize gay marriages performed in other states."[147]

Other evidence exists that the Oklahoma bench and bar has used sexual orientation negatively to determine a case's outcome. In April of 2008, for example, state district court judge Bill Graves wrote a letter to the Oklahoma Bar Association members criticizing their proposal to add greater protections for gays into the state's Code of Judicial Conduct. [148] Prior to the proposal, the Code of Judicial Conduct prohibited a judge from manifesting prejudice or bias on the basis of sexual orientation.[149] The OBA proposal provided more protections for gays by: (i) including sexual orientation in a newly developed definition of harassment and (ii) including sexual orientation in a newly developed prohibition on discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official capacity.[150] In his letter, Judge Graves argued that these protections were too expansive and would prohibit him from using sexual orientation as a factor in child custody and adoption cases, which he argued would be detrimental to children.[151]

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[143]Hope Marie Cook, *History of Censorship in Children's Literature and New Censorship Challenges*, TEACHING EXCELLENCE SEMINAR 13 (Spring 2006), *available at* http://bit.ly/sizym (hereinafter "Seminar").

[144]*Id*.

[145]*Id*. at 14.

[146]*House-District 66*, OKLAHOMAN, July 20, 2008, at 29.

[147] Jay K. Ramey Website, http://www.jayramey.com (last visited Sept. 6, 2009).

[148] Jay F. Marks, *"Sexual Orientation Clause" Draws Judge's Ire*, NEW OK, June 4, 2008, *available at* http://bit.ly/OkF8o.

[149] *In re OBA*, 2006 OK 2 (Okla. 2006).

[150] OKLA. CODE OF JUD. CONDUCT 52, 90 (final draft proposal Nov. 10, 2008), *available at* http://bit.ly/3QNL30.

[151]*See generally supra* Section IV.C.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Oregon – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Efforts to enact a law banning workplace discrimination against gay men and lesbians in Oregon began in 1973, and such legislation was introduced in every one of the 17 regular legislative sessions between 1973 and 2007.[1] In 2005, the Senate passed an omnibus anti-discrimination bill, but the bill died in the House.[2] Finally, in 2007, a comprehensive anti-discrimination law was enacted. The new law, which defines sexual orientation to include gender identity, took effect January 1, 2008. Oregon Ballot Measure 145, which was meant to overturn the Oregon Equality Act, was withdrawn before November 2008. Its proponents stated they would not have enough time to gather the signatures required by the deadline.[3] It was the most recent of dozens of attempts to repeal or prevent anti-discrimination laws to protect LGBT people in Oregon.

Prior to 2008, some state government employees had been protected from discrimination based on sexual orientation for a brief period, but that protection was rescinded. On October 15, 1987, then-Governor Goldschmidt issued Executive Order 87-20, which prohibited discrimination on the basis of sexual orientation in the Executive Branch of state government.[4] In the 1988 general election, however, Oregon voters adopted Ballot Measure 8, which repealed Executive Order 87-20.[5] Ballot Measure 8 was codified as ORS 236.380 (effective Dec. 28, 1988), and provided: "No state official shall forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee." In 1992, the Oregon Court of Appeals ruled that Ballot Measure 8 was unconstitutional.[6]

In 1993, the legislature enacted ORS 659.870 (formerly ORS 659.165, renumbered in 2001), which states that a "political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charter provision, ordinance, resolution or policy that

[1] Basic Rights Oregon, "Our History," http://www.basicrights.org/?page_id=34 (last visited Sept. 7, 2009) (hereinafter "Basic Rights").
[2] S.B. 1000 (Or. 2005), S.B. 1000 (Or. 2005) (legislative history).
[3] Press Release, Basic Rights Oregon, Initiatives Filed to Repeal Oregon's Domestic Partnership and Anti-Discrimination Laws (Mar. 3, 2008), *available at* http://bit.ly/lHPPZ.
[4] *Merrick v. Board of Higher Educ.*, 116 Ore. App. 258, 261 (1992).
[5] *See Merrick* ,116 Ore. App. at 261.
[6] *See Merrick* ,116 Ore. App. at 265; OR. REV. STAT. § 236.380 was formally repealed by the Oregon Equality Act, Senate Bill 2 (2007), which has the effect of reinstating the Executive Order, as discrimination on the basis of sexual orientation or gender identity is no longer allowed.

singles out citizens or groups of citizens on account of sexual orientation."[7] Limiting the scope of this statute, the Oregon Court of Appeal interpreted "singles out" to mean singling out for discrimination; and it interpreted the "granting special rights" language to mean that preferential treatment was prohibited.[8] According to Basic Rights Oregon, Oregon has for the past two decades been a testing ground for anti-LGBT policies. Five statewide and more than 25 local anti-LGBT ballot measures have been voted on in Oregon. Since the first ballot measure in 1988, more than $8 million has been spent on statewide ballot measures alone.[9]

Documented cases of employment discrimination by state and local governments on the basis of sexual orientation and gender identity in Oregon include:

- A housing and nuisance inspector for the Bureau of Development Services of Portland whose suit based on sexual orientation and sex stereotyping harassment settled for $150,000 after her Title VII claim survived summary judgment in a U.S. District Court.[10] The inspector's co-workers were aware she was a lesbian because she had disclosed that she had a female domestic partner. At work, she did not wear makeup, had short hair and wore men's clothing. Her supervisors made remarks such as that her shirt looked "like something her father would wear" and "are you tired of people treating you like a bull dyke[?]" On another occasion her supervisor stated: "I'm a man, you are a woman. I'm the man. I don't have to listen to anything you say. You are a woman. You don't know anything." She also alleged her co-workers harassed her, calling her a "bitch," saying loudly that they were "surrounded by all these fags at work," that she "just needed to get some dick and she wouldn't be gay anymore," and asking her "would a woman wear a man's shoes?" In holding for the inspector, the court noted that, for the purpose of Title VII analysis, it was irrelevant whether or not the harassers were motivated by Plaintiff's sexual orientation, as sexual orientation, alone, is not actionable under Title VII. However, the court held that gender stereotyping "constitutes actionable harassment."[11] Fischer v. City of Portland, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).

- A firefighter was harassed for incorrectly being presumed to be gay. In 2003, Senator Ted Kennedy, when speaking about ENDA in the Senate, recounted the discrimination and harassment faced by this firefighter because of his perceived sexual orientation: "His co-workers saw him on the local news protesting an antigay initiative, and incorrectly assumed he was gay himself. He began to lose workplace responsibilities and was the victim of harassment, including hate mail. After a long administrative proceeding, the trumped-up charges were removed from his record, and he was transferred to another fire station."[12]

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[7] OR. REV. STAT § 659.870.
[8] *DeParrie v. City of Portland*, 138 Ore. App. 105 (1995).
[9] Basic Rights, *supra* note 1.
[10] LESBIAN & GAY L. NOTES (Dec. 2004), *available at* http://www.qrd.org/qrd/usa/legal/lgln/12.04.
[11] *Fischer v. City of Portland*, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).
[12] Statements by U.S. Sen. Ted Kennedy, 149 CONG REC. §§ 12377, 12382 (Oct. 2, 2003).

- From 1980 to 1996, a transgender woman worked for the Josephine County Sheriff's Office in Grant's Pass, Oregon. She received numerous commendations for her work—including praise for rescuing a person from a burning vehicle and delivering a baby on the side of the road. During a leave following an on-duty injury, her storage unit was broken into and several items of women's clothing were stolen. Within a week of the break in, her supervisor called her into the Sheriff's Office for a meeting. She was taken to an interrogation room where she was informed that her stolen clothes, along with identifying photographs, had been discovered alongside the railroad tracks. At that point, her supervisor told her that the sheriff believed she would no longer be able to perform her duties because she dressed as a woman. She was told that it would be "a big mistake to return to work." When she attempted to return to work, she was forced to undergo a psychiatric examination. She appeared in front of a panel of doctors selected by the Sheriff's Office who determined that she was unfit for duty. She was told that the Office attorney was in the process of putting together a settlement package in exchange for her resignation.[13]

- A police captain who filed a federal lawsuit against the City of Portland, claiming that the mayor and police chief discriminated against him because he was gay. Prior to his demotion, the officer, a 21-year decorated veteran of the Portland police force was put on leave and investigated on charges that he had solicited male prostitutes. In August 1996, a Multnomah County grand jury refused to indict him on the charges. He was then permitted to work, but he was demoted in early 1997. According to the officer, his police chief forbade him to call the chief at home because the officer was gay, and the chief told the officer he was not his 'special friend.' He also alleged that during an internal affairs investigation the officer was interrogated, 'in a manner calculated to greatly embarrass and humiliate' him, about his sex life, including his sexual positions and the names of his partners. He also alleged that his safety was jeopardized when he was issued a squad car lacking a police radio, emergency lights and a siren, and that he was publicly humiliated by the police chief.[14]

- A coordinator of Umatilla County's commission on children and families who was terminated after being asked if he was gay. The coordinator was hired on a temporary basis in January 1993 by the Umatilla County Board of Commissioners to coordinate the county's commission on children and families. In June 1993, after securing additional grant money to fund the commission, the board interviewed him again before granting him the position on a permanent basis. After official questioning had finished, one of the commissioners asked him if he was gay. Presuming the question to be illegal, an attorney interceded to block the coordinator's response. The board rehired him fulltime. Over the next several months, he worked to improve the quality of services and the integrity of the

[13] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[14] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 194 (1999 ed.).

commission's grant-making process, and won praise from around the state, including from the commission's executive director. In March 1994, he received a pay raise. In May, at the insistence of one of the commissioners, the board ordered an evaluation of his performance. In the review, he received ratings from satisfactory to excellent. In no category was his work rated "unacceptable." Despite this positive review, the board fired him 10 days later.[15]

- A high school teacher who was terminated by her school board for being a lesbian pursuant to a state statute that allowed teachers to be terminated for "immorality." The "immorality" was the teacher's identification as a lesbian. A court held that the state statute was unconstitutionally vague because "immorality" was left undefined and could carry a variety of meanings for different people. The court awarded damages but refused to order reinstatement to the teaching position.[16] Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254 (D. Or. 1973), aff'd, 512 F.2d 850 (9th Cir. 1975), cert. denied, 423 U.S. 839 (1975).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[15] Human Rights Campaign, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), http://bit.ly/kThbS (last visited Sept. 6, 2009).
[16] *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 353 F. Supp. 254 (D. Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

The Oregon Equality Act is a result of the Governor's Task Force on Equality in Oregon, which was established in February 2006 by Executive Order No. 06-03. The Governor charged the Task Force with studying whether changes to Oregon law were necessary to guarantee that Oregonians are protected from discrimination in employment, housing, public accommodations and other opportunities, regardless of sexual orientation or gender identity. The Task Force held public meetings throughout Oregon and issued a report on December 15, 2006. The report notes, among other things that: (1) courts have determined that homosexuals are a "suspect class" under the Oregon Constitution; (2) discrimination based on sexual orientation exists in Oregon; and (3) laws and ordinances that prohibit discrimination based on sexual orientation have not had a negative impact on businesses. The Task Force recommended several changes to Oregon anti-discrimination law, many of which are part of SB 2.[17]

In May 2007, Governor Kulongoski signed into law the Oregon Equality Act, banning discrimination based on sexual orientation and gender identity in employment,[18] housing and public accommodations.[19] The law took effect on January 1, 2008. Opposition groups, who attempted to force a referendum on these two bills, failed to gather the necessary signatures to do so.[20] The bill makes the following changes:

(a) Adds Sexual Orientation: Already a protected characteristic under Oregon's hate crime statutes - to several statutes that prohibit discrimination based on religion, age, race, color, sex, national origin, and martial status.

(b) Defines Sexual Orientation: Defined to mean an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth. [21]

(c) Establishes Scope of Protection: States that a person may not discriminate based on an individual's sexual orientation with regard to employment, housing, public accommodations, public services, public education, adult foster homes and foster parenting, among other things.

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[17] Or. S.B. 2 (2007) (legislative history).
[18] Or. Rev. Stat. §§ 240.306, 659.850, 659A.003, 659A.006, 659A.030, 659A.403, 659A.406, 659A.409, 659A.421, 659A.424, 659A.805, 659A.815, 659A.885, 660.139 are the Labor and Employment/Unlawful Discrimination laws that have been amended by Or. S.B. 2 (2007) to include protection for sexual orientation. There are a number of other Or. Rev. Stat. sections that do not relate to Labor and Employment that are discussed below in Section III.
[19] 2007 OR S.B. 2 (2007); 2007 ORE. ALS 100 (2007).
[20] *See* Press Release, Basic Rights Oregon, Initiatives Filed to Repeal Oregon's Domestic Partnership and Anti-Discrimination Laws (Mar. 3, 2008), *available at* http://bit.ly/lHPPZ.
[21] OR. REV. STAT. § 174.100.

(d) Establishes Civil Rights: Declares that the opportunity to obtain employment, housing and use public accommodations, free of discrimination based on sexual orientation, religion, age, race, color, sex, national origin, or marital status, is a civil right.

(e) Exempts Some Religious Institutions: Permits churches or other religious institutions to take actions based on sexual orientation with respect to employment, housing or the use of public accommodations if the institution (1) has a "bona fide" religious belief about sexual orientation, and (2) the employment, housing or use of facilities in question is closely connected with, or related to, the primary purposes of the church or institution, and is not connected with a commercial or business activity that has no necessary relationship to the institution or the institution's primary purpose.

(f) Provides for Dress Codes: Allows employers to enforce valid dress codes and policies if the employer provides reasonable accommodations when necessitated by the health and safety needs of the individual.

(g) Repeals ORS 236.380: This statute prohibited state officials from forbidding the taking of personnel action against any state employee based on sexual orientation.

This legislation had the effect of updating and amending more than 30 provisions in previously existing statutes to make the anti-discrimination laws apply to sexual orientation as well. However, it did not modify Oregon's disability or affirmative action laws.

ORS 659A.130 provides that "[h]omosexuality and bisexuality are not physical or mental impairments. A person who is homosexual or bisexual is not a person with a disability." This provision was unaffected by the Oregon Equality Act.

ORS 243.305 is Oregon's statute regarding the "policy of affirmative action and fair and equal employment opportunities and advancement." The statute provides that:

> "[i]t is declared to be the public policy of Oregon that all branches of state government shall be leaders among employing entities within the state in providing to its citizens and employees, through a program of affirmative action, fair and equal opportunities for employment and advancement in programs and services and in awarding of contracts.

The statute defines "Affirmative Action" to mean "a method of eliminating the effects of past and present discrimination, intended or unintended, on the basis of race, religion, national origin, age, sex, marital status or physical and mental disabilities." Affirmative action law was one area that was not amended by the Oregon Equality Act,

and Oregon's policy of affirmative action does not apply to discrimination on the basis of sexual orientation or gender identity.[22]

2. Enforcement and Remedies

Under the Oregon Equality Act, an aggrieved employee is not required to exhaust administrative procedures before filing a civil action—he or she may choose to file either with the Bureau of Labor and Industries ("the Bureau") or directly in court.[23] If the employee chooses to file an administrative complaint, he or she must do so within one year of the alleged unlawful practice.[24]

The Bureau has the power to receive complaints and conduct investigations where a violation of the Oregon Equality Act is alleged.[25] If the Attorney General or the Commissioner of the Bureau has reason to believe that an unlawful practice was committed in violation of the Oregon Equality Act, he or she may file a complaint with the Bureau.[26] The Bureau may attempt to resolve the matter through conciliation, and if conciliation is unsuccessful, may hold a hearing on the matter.[27] If the Attorney General or the Commissioner has filed the complaint, he or she may elect to have the matter heard in circuit court.[28]

A successful complainant in an administrative hearing under the Oregon Equality Act is limited to recovery of actual damages and equitable relief, but a successful plaintiff in a civil action can be awarded compensatory damages, punitive damages, and attorney's fees.[29] There are no caps on damages under the Oregon Equality Act.[30]

B. Attempts to Enact State Legislation

The campaign to pass a law comprehensively banning discrimination against gays and lesbians began in 1973. Similar legislation has been introduced in every one of the 17 regular legislative sessions over the past 34 years.[31] In 2005, with the support of the Governor, the Senate passed an omnibus anti-discrimination and relationship rights bill, which a procedural maneuver by opponents in the House derailed.[32] The Oregon Equality Act was finally passed in 2007.

Oregon Ballot Measure 145 (Removes Sexual Orientation From Statutes Listing Impermissible Discrimination Grounds; Deletes Other Sexual-Orientation-Related Provisions), which was meant to overturn the Oregon Equality act, was withdrawn before

[22] OR. REV. STAT. § 243.305.
[23] OR. REV. STAT. § 659A.820.
[24] OR. REV. STAT. § 659A.820.
[25] OR. REV. STAT. §§ 659A.820(1), 659A.830(1).
[26] OR. REV. STAT. § 659A.825(1).
[27] OR. REV. STAT. § 659A.845(1).
[28] OR. REV. STAT. § 659A.870(4)(c).
[29] OR. REV. STAT. §§ 659A.850, 659A.885(1), (3)(a), (7).
[30] *Id.*
[31] Basic Rights, *supra* note 1.
[32] S.B. 1000 (Or. 2005) (legislative history).

November 2008. The proposed initiative would have removed sexual orientation as a protected characteristic from a long list of anti-discrimination statutes in which sexual orientation was added in 2007, including a number of statutes relating to nondiscrimination in employment. Its proponents stated they would not have enough time to gather the signatures required by the deadline.[33] A number of such initiatives have been introduced in Oregon designed to limit LGBT rights. [34]

In *Boytano v Fritz*, 1995 WL 505431 (Or. Aug. 24, 1995), the Oregon Supreme Court held that neither the state's constitution nor ORS 659.165(1) prevented the people of Klamath Falls City from voting on an antigay initiative. The plaintiff sought to enjoin the City from placing on the ballot an initiative to amend its charter, contending that Oregon law removed the issue from the initiative process. The proposed amendment would forbid the City or its officials from passing or enforcing "any ordinance, rule, regulation, policy or resolution that extends minority status, affirmative action, quotas, special class status, or any similar concepts based on homosexuality or which establishes any categorical provision such as `sexual orientation,' `sexual preference,' or any similar provision." Expressly excepted from the initiative's scope was the adoption of "provisions prohibiting employment decisions based on factors not directly related to employment." One of those factors is an individual's "lawful private sexual behavior," knowledge of it, or an individual's expression of it. The initiative would also prevent the City from spending any money "promot[ing] homosexuality." The Plaintiff contended that by voting on the measure, the people would be enacting it in violation of ORS 659.165(1). The statute provides, in part, that "[a] political subdivision of the state many not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charter provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation." The Court conceded in a footnote that the initiative did indeed "single out" people on the basis of sexual orientation. ORS 659.165(1)'s use of the word “enact,” however, saved a place on the ballot for the initiative.[35]

In *DeParrie v. City of Portland*, 138 Ore. App. 105 (1995), an appellate court interpreted “singles out” in ORS § 659.165 (now 659.870) to mean singling out for discrimination. Therefore, the statute requires even-handed treatment of gays and lesbians, and does not allow for either preferential or discriminatory treatment. Plaintiff had claimed that a political subdivision of the state was taking “pro-homosexual” actions, based on ORS § 659.165.

[33] Press Release, Basic Rights Oregon, Initiatives Filed to Repeal Oregon’s Domestic Partnership AND Anti-Discrimination Laws (Mar. 3, 2008), *available at* http://bit.ly/lHPPZ.
[34] See Frazzini v. Myers, 344 Ore. 662 (2008); *ACLU of Oregon v. Roberts*, 305 Ore. 522 (1988); *Lewis v. Keisling*, 320 Ore. 13 (1994); *Boytano v. Fritz*, 131 Ore. App. 466 (1994); *Lowe v. Keisling*, 130 Ore. App. 1 (1994).
[35] *Boytano v Fritz*, 1995 WL 505431 (Aug. 24, 1995).

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

On October 15, 1987, then-Governor Goldschmidt issued Executive Order 87-20, which prohibited discrimination on the basis of sexual orientation in the Executive Branch of state government.[36] In the 1988 general election, Oregon voters adopted Ballot Measure 8, which repealed Executive Order 87-20.[37] Ballot Measure 8 was codified as ORS 236.380 (effective on Dec. 28, 1988), and provides: "No state official shall forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee." In other words, the statute enacted by the ballot measure allowed state officials to take personnel actions based on sexual orientation. This statute was held to be unconstitutional by the court of appeals in 1992 because it violated constitutional free speech rights. The court reasoned that sexual orientation is something that will seldom become known unless an employee has chosen to express it. Because speech and sexual orientation are "inextricably intertwined," the statute violated the freedom of speech and expression guaranteed in the Oregon Constitution.[38]

2. State Government Personnel Regulations

None.

3. Attorney General Opinions

None.

D. Local Legislation

More localities in Oregon have passed laws preventing anti-discrimination ordinances to protect LGBT people than have passed laws to protect them from employment discrimination. Voters in a number of Oregon cities and counties have approved ballot measures forbidding the municipalities from enacting protective ordinances. Notably, in 1994 alone voters in 10 cities and counties approved such measures to join 10 other municipalities that had previously passed similar measures.[39] The localities passed these laws in 1994 despite the fact that in 1993, the legislature enacted ORS 659.870 (formerly ORS 659.165, renumbered in 2001), which states that a "political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any

[36] *Merrick*, 116 Ore. App. at 261.
[37] *id.*
[38] *id.* at 265; OR. REV. STAT. § 236.380 was formally repealed by the Oregon Equality Act, Senate Bill 2 (2007), which has the effect of reinstating the Executive Order, as discrimination on the basis of sexual orientation or gender identity is no longer allowed.
[39] LESBIAN & GAY L. NOTES (Apr. 1994), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1994/04.94 (Albany, Junction City, Marion County, Turner, Cottage Grove, Oakridge, Venetta, Roseburg). LESBIAN & GAY L. NOTES (Dec. 1994), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1994/12.94 (two rural southern Oregon counties).

citizen or group of citizens on account of sexual orientation, or enact or enforce any charter provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation."[40]

The Oregon Court of Appeal interprets "singles out" to mean singling out for discrimination; and it interpreted the "granting special rights" language to mean that preferential treatment was prohibited.[41] When the Jackson County measure was challenged legally in 1993, the court issued an injunction blocking its effectuation on the grounds that it violated a state statute.[42]

On the other hand, there have been at least 13 anti-discrimination ordinances passed in municipalities around the state.[43] Two noteworthy local ordinances are Portland's ordinance, which was enacted on Jan. 15, 2001,[44] and Multnomah County's ordinance, which was adopted on Dec. 20, 1984.[45] In *Sims v. Besaw's Café*, 165 Ore. App. 180 (2000), an appellate court held that Portland did not exceed its authority by prohibiting discrimination by Portland employers on the basis of sexual orientation and by giving individuals harmed by the prohibited conduct a claim for relief. PCC § 23.01.080E was therefore held valid.

[40] OR. REV. STAT § 659.870.
[41] *DeParrie v. City of Portland*, 138 Ore. App. 105 (1995).
[42] LESBIAN & GAY L. NOTES (Jan. 1994), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1994/01.94.
[43] Basic Rights, About Basic Rights Oregon, Building a Movement, Creating Real Change, http://www.basicrights.org/?page_id=6 (last visited Sept. 6, 2009).
[44] PORTLAND CODE 23.01.050-080.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Fischer v. City of Portland, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).

In *Fischer*, the Plaintiff, a housing and nuisance inspector for the Bureau of Development Services of Portland, Oregon, brought suit under Title VII based on harassment due to her gender non-conformity. The court ruled that the City was not entitled to summary judgment based upon Plaintiff's claim of sex discrimination. Co-workers were aware that the inspector was a lesbian because she had disclosed that she had a female domestic partner. At work, she wore "men's clothing…, d[id] not wear makeup, and ha[d] a short masculine hairstyle." On one occasion, her supervisor made kissing and humping motions. Other supervisors also made remarks such as that her shirt looked "like something her father would wear" and "are you tired of people treating you like a bull dyke[?]" On one occasion her superior stated: "I'm a man, you are a woman. I'm the man. I don't have to listen to anything you say. You are a woman. You don't know anything." Plaintiff also alleged that co-workers participated in the harassment. She heard a co-worker saying loudly over the phone that she was "surrounded by all these fags at work." One employee employee referred to her as a "bitch." Another remarked that she "just needed to get some dick and she wouldn't be gay anymore." Another raised his arm in a Nazi salute when Plaintiff spoke. Another commented in a negative way about Plaintiff's work boots, stating: "Would a woman wear a man's shoes?" In holding for the Plaintiff, the court noted that, for the purpose of Title VII analysis, it was irrelevant whether or not the harassers were motivated by Plaintiff's sexual orientation, as sexual orientation, alone, is not actionable under Title VII. However, the court held that gender stereotyping "constitutes actionable harassment."[46] The case later settled for $150,000.[47]

Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254 (D. Or. 1973), aff'd, 512 F.2d 850 (9th Cir. 1975), cert. denied, 423 U.S. 839 (1975).

In *Burton*, Plaintiff, a high school teacher, brought suit under section 1983 after the school board terminated her pursuant to a state statute permitting dismissal of teachers for immorality. The "immorality" cited by the school board was Burton's identification as a lesbian. The court held that the statute was unconstitutionally vague because "immorality" was left undefined and could carry a variety of meanings for different people. The court awarded damages but refused to order reinstatement to the teaching position.[48]

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[46] *Fischer v. City of Portland*, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).
[47] LESBIAN & GAY L. NOTES (Dec. 2004), *available at* http://www.qrd.org/qrd/usa/legal/lgln/12.04.
[48] *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 353 F. Supp. 254 (D. Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).

2. **Private Employers**

Wilmoth v. Ann Sacks Tile & Stone, Inc., 2008 Ore. App. LEXIS 1736 (2008).

In *Wilmoth*, an employee claimed that a former employer discriminated against plaintiff on the basis of her sexual orientation and terminated plaintiff's employment in retaliation for her complaints about unlawful discrimination against plaintiff's co-worker. Trial and appellate courts ruled in favor of plaintiff, and agreed that plaintiff was singled out for termination as a result of her complaints about the discriminatory treatment toward plaintiff's co-worker.

Harris v. Pameco Corp., 170 Ore. App. 164 (2000).

A male heterosexual employee sued a gay employer for making sexual advances, remarks and propositions. The appellate court reversed the trial court's directed verdicts for the defendant, finding colorable claims for battery and emotional distress and sexual harassment, which may occur between two males.

Wheeler v. Marathon Printing, 157 Ore. App. 290 (1998).

An employee sued his former employer after enduring severe harassment from a co-worker that caused depression and eventually caused him to leave his job. He was called a "zit nosed faggot" and "a crazy lunatic faggot" and was repeatedly "flipped off." He was also asked to give co-worker a "blow-job." Because of plaintiff's history of sexual abuse as a child, and the malicious behavior of the co-worker, punitive damages were warranted.[49]

Whelan v. Albertsons, 129 Ore. App. 501 (1994).

In *Whelan v. Albertsons*, the employee was repeatedly referred to as "queer" and by other vulgar labels (e.g. "fucking queer asshole") by a manager and another employee. He sued for intentional infliction of emotional distress, among other claims. The appellate court reversed the lower court's dismissal of the IIED claim, and one other claim, based on the repeated verbal harassment.

B. **Administrative Complaints**

None.

C. **Other Documented Examples of Discrimination**

Municipal Fire Department

[49] According to the law in Oregon, the employer is liable if he or she "knew or should have known that plaintiff's work environment was hostile and failed to take appropriate corrective action to end the harassment." *Wheeler v. Marathon Printing*, 157 Ore. App 290, 304 (1998).

In 2003, Senator Ted Kennedy recounted the discrimination and harassment faced by Steve Morrison, a firefighter in Oregon, because of his perceived sexual orientation:

> "Steve Morrison is a firefighter in Oregon. His co-workers saw him on the local news protesting an anti-gay initiative, and incorrectly assumed he was gay himself. He began to lose workplace responsibilities and was the victim of harassment, including hate mail. After a long administrative proceeding, the trumped-up charges were removed from his record, and he was transferred to another fire station."[50]

Josephine County Sheriff's Office

From 1980 to 1996, a transgender woman worked for the Josephine County Sheriff's Office in Grant's Pass, Oregon. She received numerous commendations for her work—including praise for rescuing a person from a burning vehicle and delivering a baby on the side of the road. During a leave following an on-duty injury, her storage unit was broken into and several items of women's clothing were stolen. Within a week of the break in, her supervisor called her into the Sheriff's Office for a meeting. She was taken to an interrogation room where she was informed that her stolen clothes, along with identifying photographs, had been discovered alongside the railroad tracks. At that point, her supervisor told her that the sheriff believed she would no longer be able to perform her duties because she dressed as a woman. She was told that it would be "a big mistake to return to work." When she attempted to return to work, she was forced to undergo a psychiatric examination. She appeared in front of a panel of doctors selected by the Sheriff's Office who determined that she was unfit for duty. She was told that the Office attorney was in the process of putting together a settlement package in exchange for her resignation.[51]

Portland Police Department

In 1999, police captain Mike Garvey filed a federal lawsuit against the City of Portland, claiming that the mayor and police chief discriminated against him because he was gay. Prior to his demotion, Garvey, a 21-year decorated veteran of the Portland force was put on leave and investigated on charges that he had solicited male prostitutes. In August 1996, a Multnomah County grand jury refused to indict Garvey on the charges. He was then permitted to work, but he was demoted in early 1997. According to Garvey, Police Chief Moose allegedly forbade him to call him at home because Garvey was gay, and told Garvey he was not his 'special friend.' The suit also charges that during an internal affairs investigation Garvey was interrogated, 'in a manner calculated to greatly embarrass and humiliate' him, about his sex life, including his sexual positions and the names of his partners. Garvey also charges that his safety was jeopardized when he was

[50] Statements by U.S. Sen. Ted Kennedy, 149 CONG REC. §§ 12377, 12382 (Oct. 2, 2003).

[51] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

issued a squad car lacking a police radio, emergency lights and a siren, and that he was publicly humiliated by Moose.[52]

Umatilla County Board of Commissioners

"K.L." was hired on a temporary basis in January 1993 by the Umatilla County Board of Commissioners to coordinate the county's commission on children and families. In June 1993, after securing additional grant money to fund the commission, the board interviewed K.L. again before granting him the position on a permanent basis. After official questioning had finished, one of the commissioners asked him if he was gay. Presuming the question to be illegal, an attorney interceded to block K.L.'s response. The board rehired K.L. fulltime. Over the next several months, K.L. worked to improve the quality of services and the integrity of the commission's grant-making process, and won praise from around the state, including from the commission's executive director. In March 1994, K.L. received a pay raise. In May, at the insistence of one of the commissioners, the board ordered an evaluation of K.L.'s performance. In the review, K.L. received ratings from satisfactory to excellent. In no category was his work rated "unacceptable." Despite this positive review, the board fired K.L. 10 days later.[53]

[52] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 194 (1999 ed.).
[53] Human Rights Campaign, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), http://bit.ly/kThbS (last visited Sept. 6, 2009).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Housing & Public Accommodations Discrimination

The Oregon Equality Act, passed in 2007, dealt with sexual orientation and gender identity discrimination in both employment, and non-employment contexts. It establishes that a person may not discriminate based on an individual's sexual orientation with regard to housing and public accommodations.[54]

B. Education

The Oregon Equality Act, passed in 2007, dealt with sexual orientation and gender identity discrimination in both employment, and non-employment contexts. It establishes that a person may not discriminate based on an individual's sexual orientation with regard to public education.[55]

C. Parenting

The Oregon Equality Act, passed in 2007, dealt with sexual orientation and gender identity discrimination in both employment, and non-employment contexts. It establishes that a person may not discriminate based on an individual's sexual orientation with regard to adult foster homes and foster parenting.[56]

In 2002, in one Oregon case involving a custody battle following a divorce, the father disapproved of mother's gay lifestyle and same-sex companion. The court held

[54] OR. REV. STAT. §§ 10.030, 20.107, 30.860, 93.270, 109.035, 166.155, 166.165, 174.100, 179.750, 192.630, 338.125, 353.100, 418.648, 418.925, 421.352, 430.550, 443.739, 458.505, 744.353 are the non-employment related laws that have been amended by Senate Bill 2 (2007) to include protection for sexual orientation. These laws pertain to areas including public health and safety, public accommodation, insurance, and civil procedure.

[55] OR. REV. STAT. §§ 10.030, 20.107, 30.860, 93.270, 109.035, 166.155, 166.165, 174.100, 179.750, 192.630, 338.125, 353.100, 418.648, 418.925, 421.352, 430.550, 443.739, 458.505, 744.353 are the non-employment related laws that have been amended by Senate Bill 2 (2007) to include protection for sexual orientation. These laws pertain to areas including public health and safety, public accommodation, insurance, and civil procedure.

[56] OR. REV. STAT. §§ 10.030, 20.107, 30.860, 93.270, 109.035, 166.155, 166.165, 174.100, 179.750, 192.630, 338.125, 353.100, 418.648, 418.925, 421.352, 430.550, 443.739, 458.505, 744.353 are the non-employment related laws that have been amended by Senate Bill 2 (2007) to include protection for sexual orientation. These laws pertain to areas including public health and safety, public accommodation, insurance, and civil procedure.

that that factor was not and could not be considered by the appellate court to be significant.[57]

D. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 2002, Measure 36 amended the Oregon Constitution to define marriage as between one man and one woman. [58]

In 2007, the Oregon state legislature passed a domestic partnership law called the Oregon Family Fairness Act in 2007. The Oregon Family Fairness Act grants a limited set of rights, responsibilities, and protections to same-sex couples.[59]

Oregon Ballot Measure 144, which was meant to overturn the domestic partnership statute passed in 2007, was withdrawn for not gathering enough valid signatures before the November 2008 election.[60]

2. Benefits

In *Tanner v. Oregon Health Sciences Univ.*,[61] the trial court determined that an Oregon university violated Or. Rev. Stat. 659.030(1)(b) and Oregon Constitution Article I, Section 20 by not providing insurance benefits to same-sex partners of employees. The Oregon Court of Appeals determined that the university remained a governmental entity subject to the prohibitions of the Oregon constitution, and that its denial of insurance benefits to the unmarried domestic partners of its gay and lesbian employees was in violation of the state constitution. The court expressly found that gay men and lesbianss are a "suspect class" under the Oregon Constitution.

E. Law Enforcement

In 1991, during an investigation regarding an "unauthorized use of a motor vehicle" the District Attorney discovered that Plaintiff was gay. He then alerted the media that Plaintiff was gay, had AIDS, and had recklessly endangered others by inducing sex without protection while concealing he had AIDS. Aside from Plaintiff's homosexuality, all statements made by the district attorney were false. The appellate court reversed the lower court's dismissal of infliction of emotional distress and other claims.[62]

[57] *Collins v. Collins*, 183 Ore. App. 354 (2002).
[58] Or. Const. Art. XV § 5a (2007).
[59] Basic Rights, *supra* note 1; Or. Family Fairness Act (2007).
[60] Basic Rights, *supra* note 1.
[61] 157 Ore. App. 502 (1998).
[62] *Beason v. Hacerload*, 105 Ore. App. 376 (1991).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Pennsylvania – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Pennsylvania has no statute that prohibits employment discrimination based on sexual orientation or gender identity. There have been several attempts to amend the Human Relations Act to include prohibitions on sexual orientation and gender identity-based discrimination. To date, all have failed. There is currently an executive order that prohibits discrimination based on sexual orientation and gender identity or expression.[1]

On the local level, 14 jurisdictions in Pennsylvania ban sexual orientation and/or gender identity discrimination in employment, housing, and public accommodations by local ordinance. Some of these ordinances have been attacked, with some success (for example, in Allegheny County).

Documented examples of employment discrimination based on sexual orientation or gender identity by the State or local governments include:

- In *Bianchi v. City of Philadelphia I*, a male firefighter brought a § 1983 action against the city asserting claims under Title VII, the Pennsylvania Human Rights Act ("PHRA"), and the state and federal constitutions.[2] Bianchi had been subjected to a pattern of gross and abusive harassment (including used condoms in his desk, urine or feces in his gear, and threatening letters), which he alleged was rooted in a belief that he was homosexual. While the Court recognized that the actions taken against Bianchi "constituted harassment," the court held that the conduct was not actionable as sex discrimination under Title VII or the PHRA. However, the due process and First Amendment claims survived summary judgment and furnished the basis for an award of more than $1 million in damages, which was upheld by the U.S. Court of Appeals for the Third Circuit in *Bianchi v. City of Philadelphia II*.[3] Bianchi v. City of Philadelphia, 183 F.Supp.2d 726 (2002); Bianchi v. City of Philadelphia, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).

- In *Taylor v. City of Philadelphia*,[4] an employee of the City of Philadelphia Free Library alleged discrimination based on his sexual orientation. The District Court dismissed intentional infliction of emotional distress and punitive damages claims

[1] Pa. Exec. Order 2003-10 (July 28, 2003).
[2] *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002).
[3] *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).
[4] *Taylor v. City of Philadelphia*, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).

against the City. However, it is unclear from the opinion whether other claims were allowed to go forward, and no further opinions or rulings were available online. Before bringing suit, the plaintiff had filed a complaint in 1999 with the Philadelphia Human Relations Commission alleging that he had been discriminated against on the basis of his sexual orientation. The Commission determined that there was probable cause to support the charge.[5] In 2000, the employee filed a second complaint against the Free Library of Philadelphia for discrimination on the basis of sexual orientation and for retaliation in response to his previous filing. Again, the Commission determined that there was probable cause to support the charge.[6] Taylor v. City of Philadelphia, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).

- Plaintiff filed suit alleging that he was denied a proper pre-termination hearing on the same-sex sexual harassment charges filed against him. A jury awarded Plaintiff reinstatement of his tenured teaching position and $134,081 back pay, but denied relief on his claims of emotional and reputational harm. Plaintiff filed a motion for a new trial, pointing to defense counsel's summation, which included statements that he actually may have committed the sexual harassment for which he was terminated. The court denied the motion, ruling that these statements did not require a new trial since they were not materially prejudicial as they were part of the evidence and were somewhat relevant.[7]

- Plaintiff, a high school art teacher and male-to-female transsexual, was fired without a hearing after returning to school for the new school year as a woman, having undergone a "sex-change" operation. The school cited "immorality" and other similar reasons for Plaintiff's termination. The district court held that the lack of a hearing prior to Plaintiff's dismissal was a violation of procedural due process, and ordered reinstatement to suspended status with pay pending the outcome of the hearing.[8]

- In 2006, an employee of the Philadelphia Police Department filed a complaint with the City of Philadelphia alleging that he had been discriminated against on the basis of his sexual orientation.[9] The city settled with the employee.[10]

- On January 31, 2003, an employee of the Free Library of Philadelphia filed a complaint with the Pennsylvania Human Rights Commission alleging that she had been discriminated against on the basis of gender identity. The employee was

[5] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

[6] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

[7] *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

[8] *Ashlie v. Chester-Upland Sch. Dist.*, 1979 U.S. Dist. LEXIS 12516 (E.D. Pa. 1979).

[9] Complaint, [Redacted] v. Philadelphia Police Department, Philadelphia Human Relations Commission, Complaint No. SGEN-6NQLXT (Apr. 10, 2006).

[10] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

harassed after she began to transition from male to female and was involuntarily transferred to an undesirable worksite.[11] The Commission found probable cause to support the charge.[12] On July 8, 2003, the employee filed a second complaint against the Free Library of Philadelphia alleging that that the library continued to discriminate against her and her co-workers continued to harass her, despite her previous complaint. She also alleged that the library was treating her badly in retaliation for filing the previous complaint.[13] Again, the Commission found that there was probable cause to support the charge.[14] On May 7, 2004, the employee filed a third complaint against the Free Library of Philadelphia alleging continued discrimination on the basis of sexual orientation and further retaliation based on her previous complaints.[15] For the third time, the Commission determined that there was probable cause to support her charge.[16]

- In 2008, a transgender applicant for a state agency database analyst position was not hired because of his gender identity.[17]

- Plaintiff, a former policeman for the town of Walnutport, alleged that borough officials violated his free speech rights by retaliating against him when he complained about attempts to pry into his sexual orientation and off-duty conduct in response to a demand by a city council member. The claim was settled for $5,000.[18]

- In 1996, a gay nurse at an adult health services center was subjected to a hostile work environment because of his sexual orientation.[19]

- Although not involving the state as an employer, in 1995 a state appellate court ruled that it was not against the public policy of the state for a private sector

[11] Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. PWIS-5JBKJJ (Jan. 31, 2003).

[12] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

[13] Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5P8LUH (July 8, 2003).

[14] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

[15] Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5YMHDX (May 7, 2004).

[16] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

[17] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

[18] Lesbian & Gay L. Notes (Feb. 2005), *available at* http://www.qrd.org/qrd/www/legal/lgln/02.2005.pdf.

[19] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

employer to specify in its employment contract that homosexuality was a ground for termination of employment.[20]

In terms of non-employment rights for LGBT people in the state, several local jurisdictions provide domestic partner registration systems. However, the Pennsylvania Fair Educational Opportunities Act[21] includes no protection for discrimination based on sexual orientation, gender and/or gender identity. Pennsylvania's high court struck down the state anti-sodomy law in 1995, and several court cases permit name changes based on sex-changes and same-sex partnerships.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[20] *DeMuth v. Miller*, 438 Pa. Super. 437 (1995).

[21] Pennsylvania Fair Educational Opportunities Act, Act of July 17, 1961, P.L. 776, as amended.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

None. Currently, the state of Pennsylvania has not enacted laws to protect sexual orientation and gender identity from discrimination.[22]

B. Attempts to Enact State Legislation

Over the last six years, several bills intended to amend the Pennsylvania Human Relations Act[23] to include language regarding sexual orientation and gender identity were introduced. While each successive bill garnered increasing support among members, legislation has yet to be passed.

On April 24, 2003 four Pennsylvania senators introduced Senate Bill 608 to amend the Pennsylvania Human Relations Act to include prohibitions on discrimination because of sexual orientation or gender identity. Senate Bill 608 was referred to the Labor and Industry Committee and died without hearings.

On June 17, 2003, another bill, Senate Bill 706, was introduced in the Senate, this time with 18 sponsors. Senate Bill 706 was also designed to amend the Pennsylvania Human Relations Act to include prohibitions on discrimination because of sexual orientation or gender identity, but died after being referred to the Judiciary Committee.

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[22] Although there is no statewide legislation that prohibits discrimination on the basis of sexual orientation or gender identity, in 2002 Pennsylvania amended its Ethnic Intimidation and Institutional Vandalism Act to include protection from intimidation based on sexual orientation and gender identity. *See* 18 PA. STAT. § 2710. Subsequently, however, this protection was ruled unconstitutional by the Pennsylvania Supreme Court in *Marcavage v. Rendell*, 936 A.2d 188 (Pa. Cmwlth. 2007). The court based its decision on the ground that the Act amending the section changed its original purpose in violation of Art. III, section 1 of the state constitution, which prohibits changing the original purpose of a bill. The history of the bill at issue in *Marcavage* was as follows. The Pennsylvania House passed a bill in 2001 making crop destruction a crime under certain circumstances. When the bill went to the Senate, it was approved by the Agricultural Committee and was on its way through the approval process when it was seized upon by proponents of a hate crimes law as a vehicle for their purposes. The proponents of the hate crime law used the same bill number and proposed an amendment to the crop destruction bill that changed the title of the bill and deleted the language passed in the House, replacing it with language expanding the scope of protection under the state's Ethnic Intimidation statute. The new bill passed the legislature and governor, and became law. However, the Commonwealth Court ultimately determined that the process of adopting the bill violated the constitutional requirement that a measure could not be passed if its purpose was changed in the course of legislative consideration. The original purpose of the bill was to deter and punish improper crop destruction, with the aforementioned revisions, its new purpose was to deter and punish ethnic intimidation.

[23] Act of 1955, Pa. Laws 744, No. 222, as amended June 25, 1997 by Act of 1997, 43 PA. STAT. §§ 951-963. The Pennsylvania Human Relations Act established the Pennsylvania Human Relations Commission (formerly the Pennsylvania Fair Employment Practice Commission). The Commission acquired its present name in 1961 when its jurisdiction was broadened to include a wide range of discrimination problems covered in the two laws it was authorized to administer: the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act. *See* Pennsylvania Human Relations Commission, *About the Commission: History*, http://sites.state.pa.us/PA_Exec/PHRC/commission/about_history.html (last visited Sept. 9, 2009).

In 2006, bills were introduced in both the House and Senate: House Bill 3000 (October 20, 2006), and Senate Bill 912 (March 16, 2006) to amend the Pennsylvania Human Relations Act to include prohibition on discrimination because of sexual orientation or gender identity. Senate Bill 912 had 17 sponsors; it died in the Judiciary Committee. House Bill 3000, with 57 sponsors, was referred to the State Government Committee, but was not enacted.

In 2007, 21 sponsors introduced Senate Bill 761, which again sought to amend the Pennsylvania Human Relations Act to include sexual orientation and gender identity language.[24] The bill was referred to the Judiciary Committee. On June 18, 2007, House Bill 1400 was introduced by 71 sponsors and was referred to the State Government Committee. The House State Government Committee held a series of public hearings throughout Pennsylvania in the Fall of 2007. Public hearings were held in Pittsburgh, Erie and Philadelphia on October 4, 5 and November 15, 2007, respectively.[25] The vast majority of the speakers testified on behalf of the Bill; only the Pennsylvania Catholic Conference[26] and Pennsylvania Family Institute[27] testified in opposition.[28]

On September 22, 2008, the State Government Committee voted to adopt the amendment by a vote of 18-8, with 3 non-votes.[29] A motion to table the bill was defeated by a vote of 13-13.[30]

In March of 2009, House Bill 300 (2009)[31] passed the General Assembly committee on state government. It would amend the Pennsylvania Human Relations Act to prohibit discrimination in employment, housing and public accommodation including the discrimination on the basis of sexual orientation and gender identity or expression.

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[24] *See* S.B. 761 (April 12, 2007).

[25] Written statements were also submitted in advance of the hearing. *See, e.g.*,Northwestern Pa. National Organization for Women, Statement for HB1400 hearings in Erie, Pa. (Oct. 5, 2007), *available at* http://www.legis.state.pa.us/cfdocs/legis/TR/transcripts/2007_0193_0007_TSTMNY.pdf.

[26] *See* Pennsylvania Catholic Conference Institute for Public Policy, Home Page, http://www.pacatholic.org (last visited Sept. 9, 2009).

[27] The Pennsylvania Family Institute is a conservative NGO whose professed mission is "to strengthen families by restoring to public life the traditional, foundational principles and values essential for the well-being of society." *See* Pennsylvania Family Institute, Home Page, http://www.pafamily.org/ (last visited Sept. 9, 2009).

[28] A non-exhaustive search for transcripts of the hearings was unsuccessful, though details of the hearings were provided in press releases and blogs. *See, e.g.*, Equality Advocates California, *LIVE BLOGGING the State Government Committee Hearing!*, http://bit.ly/PBdYa (last visited Sept. 9, 2009); Philadelphia Gay News, *Person of the Year: Cardinal Justin Rigali* (Dec. 31, 2008), http://bit.ly/M5Mfh (last visited Sept. 9, 2009); Mike Mahler, *Hearing in Erie about PA HB 1400*, ERIE GAY News, (n.d.), http://www.eriegaynews.com/news/article.php?recordid=200711hearing (last visited Sept. 9, 2009).

[29] *See* Pennsylvania House of Representatives, *House Committee Role Call Votes: HB 1400, Motion to Adopt* (Sept. 22, 2008), http://bit.ly/2bFijY.

[30] *See* Pennsylvania House of Representatives, *House Committee Role Call Votes: HB 1400, Motion to Table* (Sept. 22, 2008), http://bit.ly/BOGf7.

[31] HB 300 would amend the Pennsylvania Human Relations Act, P.L. 744, No. 222 (Oct. 27, 1955), protecting citizens from discrimination in employment, housing and public accommodations on the basis of sexual orientation and gender identity. *See* Pennsylvania General Assembly, *Regular Session 2009-2010: House Bill 300*, http://bit.ly/OObh8 (last visited Sept. 9, 2009).

On March 11, 2009, the House State Government Committee voted 12 to 11 in favor of the bill. The bill is now pending before the House.

C. Executive Orders, State Government Personnel Regulations, and Attorney General Opinions

1. Executive Orders

In 1975, Governor Milton J. Shapp promulgated Executive Order 1975-5, which began, "In furtherance of my commitment to provide leadership in the effort to obtain equal rights for all persons in Pennsylvania, I am committing this administration to work towards ending discrimination against persons solely because of their affectional or sexual preference." The order directed two agency heads in the Human Services and Community Advocate Unit of the state's Department of Justice to review and monitor the effort, and "work with state agencies and private groups to further define the problem and make recommendations for further actions." Further, the order instructed state departments and agencies to fully cooperate "in the effort to end this type of discrimination."

In 1976, Governor Shapp amended E.O. 1975-5 and established the Pennsylvania Council for Sexual Minorities. The order tasked the Council to study the problems of sexual minorities and to recommend policy and legislative changes to the Governor "needed to further the goal of obtaining equal rights for all persons." Among other things, the Council developed an annual report, and was authorized to receive complaints from persons claiming they had been discriminated against on the basis of "sexual or affectional preference." Governor's Executive Order 1975-5 "Commitment Toward Equal Rights as Amended September 19, 1978 eventually became 4 Pa. Code sections 5.91 *et seq*..

During Shapp's administration the Council identified a host of issues related to governmental services, including the insufficiencies in traditional governmental services such as children and youth, drug and alcohol, STI testing and treatment, mental health, and health education in serving people of all orientations and identities. The Council sought to protect state employees from discrimination, fund mental health centers, and train state workers and others (even distributing a booklet entitled "What is a sexual minority anyway?" by the Department of Education).[32] Governor Shapp left office in 1994. Subsequent governors curtailed the activities of the Council other than to develop AIDS policies. It is currently dormant.[33]

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[32] *See* PENNSYLVANIA DEPARTMENT OF EDUCATION, WHAT IS A SEXUAL MINORITY ANYWAY? (1977), *available at* http://www.publichealth.pitt.edu/docs/What_Is_A_Sexual_Minority.pdf (last visited Sept. 9, 2009).

[33] However, the University of Pittsburgh currently has a graduate center called the Center for Research on Health and Sexual Orientation, which states that it grew from Governor Shapp's Council. *See* University of Pittsburgh, Graduate School of Public Health, *Center for Research on Health and Sexual Orientation*, http://www.publichealth.pitt.edu/section.php?pageID=221 (last visited Sept. 9, 2009).

The current Governor, Edward Rendell, issued Executive Order 2003-10 (July 28, 2003), which prohibits discrimination by any agency under the jurisdiction of the Governor based on sexual orientation or gender identity and expression.

2. State Government Personnel Regulations

The Pennsylvania Code is the official publication of the Commonwealth of Pennsylvania. It contains regulations and other documents filed with the Legislative Reference Bureau under the Commonwealth Documents Law. It consists of 55 titles.[34] The following sections of the Pennsylvania Code prohibit discrimination on the basis of sexual orientation or gender identity in employment situations:[35]

- 4 PA. CODE § 1.161(a): "**An agency under the jurisdiction of the Governor may not discriminate** against an employee or applicant for employment because of race, color, religious creed, ancestry, union membership, age, gender, **sexual orientation, gender identity or expression**, national origin, AIDS or HIV status or disability."

- 4 PA. CODE § 5.91 [regarding the establishment of the Council on Sexual Minorities, described in detail in section II.F, *infra*]: "The council is established to work towards ending discrimination against persons because of their sexual or affectional orientation. There may be **no discrimination by any Commonwealth department, board, commission or other official entity under the Governor's jurisdiction, or any representative thereof, because of sexual or affectional orientation in hiring or employment,** housing, credit, contracting, provisions of services or other matters whatsoever. Nothing, however, in this subchapter may be construed to require a review or statistical analyses of the composition of the work force or other class of persons affected hereby."

- 4 PA. CODE § 5.93 [also regarding the establishment of the Council on Sexual Minorities, described in detail in section II.F, *infra*]: "(a) The Council shall study problems of sexual minorities and make recommendations to the Governor as to

[34] Act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1102, 1201—1208 and 1602) and 45 PA. CONS. STAT. chs. 5, 7 & 9. *See* Pennsylvania Code, About Page, http://www.pacode.com/about/about.html (last visited Sept. 9, 2009). The Code contains proclamations and executive orders of the Governor which are general and permanent in nature, administrative and gubernatorial regulations, statements of policy, home rule charters adopted under PA. CONST. art. IX § 2, rules of the Supreme Court of Pennsylvania, Rules of the Judicial Council of Pennsylvania and the Supreme and Commonwealth Courts, judicial documents that are general and permanent in nature, and documents which the Governor, the Joint Committee or the Bureau finds to be general and permanent in nature. *See* 1 PA. CODE § 3.1.

[35] Title 4 "is designed to provide comprehensive statements of policy and procedure on matters that affect agencies and employees under the Governor's jurisdiction." 4 PA. CODE § 1.1. Title 22 applies to the State Board of Education of the Commonwealth of Pennsylvania ("Board"); the Department of Education of the Commonwealth of Pennsylvania ("Department"); and the Secretary of the Department of Education of the Commonwealth of Pennsylvania ("Secretary"). Title 28 relates to Health and Safety. Title 37 relates to Law, including the State Police, the Board of Probation and Parole, and various state agencies and offices. Title 55 relates to the Department of Public Welfare of the Commonwealth of Pennsylvania. Title 201 contains the Rules of Judicial Administration for the Commonwealth of Pennsylvania.

policy, program, and legislative changes needed to further the goal of obtaining equal rights for all persons. (b) **The Council shall work with State agencies to end discrimination against Commonwealth employees, clients, the general public and employees of firms which contract with the Commonwealth solely on the basis of their affectional or sexual preference.** (c) The Council shall work to educate State personnel and the public in general concerning problems and issues affecting sexual minorities. The Council shall outline plans for educating state employees concerning the problems of sexual minorities, review these plans with appropriate agency officials, develop timetables for their implementation, provide qualified speakers for educational seminars it shall organize, and evaluate the results of its programs. (d) **The Council is authorized to receive complaints from persons claiming that they have been the victims of discrimination for their sexual or affectional orientation.** Where feasible, the complaints shall be referred to the appropriate agency for resolution. The Council shall compile a record of complaints received and their disposition. Agencies receiving the complaints directly will inform the Council of their nature and disposition."

- 28 PA. CODE § 709.30(2) [regarding general standards of **freestanding drug/alcohol treatment facilities**, specially as to client rights]: "The project director shall develop written policies and procedures on client rights and shall demonstrate efforts toward informing clients of the following: . . . The project **may not discriminate in the provision of services** on the basis of age, race, creed, sex, ethnicity, color, national origin, marital status, s**exual orientation**, handicap or religion."

- 37 PA. CODE § 200.1001(a)(5) [regarding standards governing the operation of the juvenile probation merit system]: "(a) J**uvenile probation office staff** shall be employed in conformance with the merit principles adopted under Title II of the Intergovernmental Personnel Act of 1970 (42 U.S.C.A. § § 4721—4727). These principles, which comprise the ''Standards for a Merit System of Personnel Administration'' (5 CFR 900.603 (relating to standards for a merit system of personnel administration)) include: . . . (5) Assuring **fair treatment of applicants and employees** in all aspects of personnel administration without regard to political affiliation, race, color, national origin, gender, **sexual orientation,** religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This 'fair treatment' principle includes compliance with the Federal equal employment opportunity and nondiscrimination laws."

- 201 PA. CODE Rule 201(c) [regarding **employment policies within the judicial system**]: "The Supreme Court of Pennsylvania is committed to the principles of equal employment opportunity to ensure legal and appropriate hiring and employment practices, and to promote public confidence in the fairness and integrity of the judicial system and the judicial process. It is, therefore, **the policy of the Supreme Court that there shall be no discrimination** because of race, color, sex, **sexual orientation**, national origin, age, disability or religion by any

Personnel of the System or Related Staff in any employment-related action (such as, hiring, promotion, terms or privileges of employment, and the like), or by any Personnel of the System, Related Staff or attorney in any court-related action."

- 201 PA. CODE Rule 202(a)(1) [regarding **employment policies within the judicial system]**: "**Discrimination and harassment** because of race, color, sex, **sexual orientation**, national origin, age, disability or religion are **prohibited**. The discrimination and harassment constitute an abuse of authority that will not be tolerated by the UJS. Further, the discrimination and harassment constitute misconduct, warranting appropriate disciplinary action. Judicial officers and managerial and supervisory Personnel of the System shall ensure adherence to, and compliance with, this Policy. (1) Under this Policy, discrimination includes actions by an individual or organization that cause an individual or a group of individuals to be denigrated or treated less favorably than another person or group because of one's race, color, sex, sexual orientation, national origin, age, disability or religion. The discriminatory conduct may include, but is not limited to, actions relating to the following: (i) Recruitment and hiring by Personnel of the System or Related Staff; or (ii) Provision of salary, benefits, or other terms or conditions of employment by Personnel of the System or Related Staff; or (iii) Provision of training and other education opportunities by Personnel of the System or Related Staff; or (iv) Promotions, transfers, discharge or other employment actions by Personnel of the System or Related Staff; or (v) Any matter relating to the judicial process by Personnel of the System, Related Staff or attorneys."

- Various provisions pursuant to the Home Rule Charter:[36]

    - 306 PA. CODE § 11.7-701: (City of Reading) "No individual shall be discriminated against with respect to any position or office because of age, gender, race, creed, handicap, color, religion, ancestry, veterans status, national origin, **sexual orientation**, political opinions or affiliations, or lawful activity in any employee organization. The City shall adopt adequate and reasonable affirmative action policies in accordance with Pennsylvania law."

    - 315 PA. CODE § 41.11-1102(1): (Borough of West Chester) "The following activities shall be prohibited in the operation of the government of the Borough: (1) No person shall, in his or her employment by the Borough in any capacity, or appointment to any board, authority, commission or agency, or removal there from, be favored or discriminated against because of age, race, gender, sexual **orientation,** disability, political or religious opinions or affiliations."

[36] Title 306 refers to the municipality of the Commonwealth of Pennsylvania known as the City of Reading. *See* 306 PA. CODE § 11.1-101. Title 315 refers to the Borough of West Chester, Chester County, Pennsylvania. *See* 315 PA. CODE § 41.1-101. Title 339 refers to the municipality of the Commonwealth of Pennsylvania known as the City of Allentown. *See* 339 PA. CODE § 11.1-101.

- 339 PA. CODE § 11.6-601: (City of Allentown) "No individual shall be discriminated against with respect to any position or office because of age, gender, race, creed, handicap, color, religion, ancestry, veterans status, national origin, **sexual orientation**, political opinions or affiliations or lawful activity in any employee organization."

3. **Attorney General Opinions**

None located.

D. **Local Legislation**

Currently, 14 local jurisdictions have ordinances or exeutive orders banning discrimination in employment, housing and public accommodations due to a person's sexual orientation and/or gender identity.[37] Several prohibit sexual orientation and/or gender identity or expression discrimination in public employment only.

- Cheltenham Township (sexual orientation only, not available online)[38]
- Lower Merion School District (sexual orientation only)[39]
- Oxford (sexual orientation only, not available online)[40]
- Reading City (sexual orientation only)[41]
- William Penn School District (sexual orientation only, not available online)[42]

1. City of Pittsburgh

In 1990, the City of Pittsburgh amended its Code of Ordinances to include protections from discrimination on the basis of sexual orientation in connection with employment, housing, and public accommodations.[43] "Sexual orientation" is defined as "male or female homosexuality, heterosexuality and bisexuality or perceived homosexuality, heterosexuality and bisexuality."[44] The ordinance allows for an exemption from the prohibition of discrimination in cases of a "bona fide occupational

[37] *See* 6 PITTSBURGH CODE OF ORDINANCES §§ 659.02-04, 07; Am. Ord. 2-1990, eff. 4-3-90.
[38] *See* Equality Advocates Pennsylvania, *LGBT Employment Rights: A Guide for Pennsylvania Employees* 2 (September 2, 2008), *available at* http://www.equalitypa.org/var/actionlink/file/87-employmentrts.pdf [hereinafter E.A.P., *LGBT Employment Rights*].
[39] Lower Merion School District Pol'y No. 104, Equal Opportunity Program for Employment Practices (revised May 16, 2005), *available at* http://bit.ly/ZH6n7.
[40] *See* E.A.P., *LGBT Employment Rights*, *supra* note 38, at 2.
[41] READING ADMIN. CODE § 1-204 (rev'd Apr. 22, 2002), *available at* http://bit.ly/1dqbY.
[42] *See* E.A.P., *LGBT Employment Rights*, *supra* note 38, at 2.
[43] *See* PENNSYLVANIA HUMAN RELATIONS COMMISSION, ANNUAL REPORT 2006-2007, at 3, *available at* http://sites.state.pa.us/PA_Exec/PHRC/publications/reports//0607%20Annual.pdf.
[44] 6 PITTSBURGH CODE OF ORDINANCES § 651.04(n).

exemption" certified by the City of Pittsburgh Human Relations Commission.[45] In order to receive such an exemption, the requesting party must prove to the Commission "that the occupation or position reasonably requires the employment of persons of a particular race, color, religion, ancestry, national origin, place of birth, sex, sexual orientation, age, handicap or disability or use of support animals because of the handicap or disability of the user, and that such certification is not sought as a means of circumventing the spirit and purpose of this Article."[46]

Complaints of discrimination are reviewed by the City of Pittsburgh Human Relations Commission.[47] Upon receiving a complaint, the Commission must investigate and attempt to resolve the issue. To that end, the Commission may seek injunctive relief,[48] hold public hearings and award damages, or assess civil penalties.[49] If the Commission is unable to enter into a conciliation agreement, the complainant has the right to "bring an action in the courts of Common Pleas of the Commonwealth based upon the right to freedom from discrimination granted by this Article."[50]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

2. City of Philadelphia

Chapter 9-1100 of The Philadelphia Code (also known as the Philadelphia Fair Practices Ordinance) addresses fair practices in employment, housing, and accommodations. In 1982, this Chapter was amended to include protections from discrimination based on "sexual orientation." "Sexual orientation" is defined as "male or female homosexuality, heterosexuality and bisexuality, by preference, practice or as perceived by others."[51] On February 3, 1987, Mayor W. Wilson Goode issued Executive Order 1-87 extending the prohibitions against discrimination to the provision of city services. On May 19, 1998, the Code was again amended by Bill No. 970750 by including "life partner" within the definition of "marital status."[52] In addition, "gender identity" was added to the Code through the passage of Bill No. 010719 on May 29, 2002. "Gender identity" is defined as "self-perception, or perception by others, as male or female, and shall include a person's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex, or sex assigned at birth; and shall include, but is not limited to, persons who are undergoing

[45] 6 PITTSBURGH CODE OF ORDINANCES § 659.02.
[46] 6 PITTSBURGH CODE OF ORDINANCES § 653.05(d).
[47] 6 PITTSBURGH CODE OF ORDINANCES §§ 653.02-04.
[48] 6 PITTSBURGH CODE OF ORDINANCES § 655.05.
[49] 6 PITTSBURGH CODE OF ORDINANCES § 655.06.
[50] 6 PITTSBURGH CODE OF ORDINANCES § 655.07.
[51] PHILADELPHIA CODE § 9-1102(y).
[52] Bill No. 970750 (May 19, 1998). From 1998 through 2007, 529 same-sex couples have registered with the Philadelphia Commission on Human Relations. *See* PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2007, at 5, *available at* http://www.phila.gov/humanrelations/pdfs/2007_Annual_Report.pdf.

or have completed sex reassignment."[53] The Pennsylvania Supreme Court upheld Bill Number 970750 (which became Philadelphia Code section 9-1102) in *Devlin v. City of Philadelphia*.[54]

The Philadelphia Commission on Human Relations ("PCHR") administers and enforces the protections detailed in Chapter 9-1100.[55] The PCHR was established in 1952, as mandated by the Home Rule Charter to enforce the Philadelphia Fair Practices Ordinance.[56] Upon receiving a complaint, or on its own initiative, the Commission will investigate allegations of unfair employment, housing, and accommodations practices.[57] After investigating a complaint, the Commission will attempt to persuade the violator to cease such practices. In the event that persuasion is unsuccessful, the Commission has several enforcement options, including civil penalties, as described in Sections 9-1106 to 9-1109 of the Code. Notwithstanding the provisions of Section 9-1106 to 9-1109, any person aggrieved by a violation has a right of action in a court of competent jurisdiction for damages.[58]

3. City of Allentown

In 1963, Bill No. 10193 established a Human Relations Commission for the City of Allentown, Pennsylvania.[59] Title 11 of the Codified Ordinance of the City of Allentown describes the city's anti-discrimination policy with respect to employment, housing, real estate practices and public accommodations, as well as the duties of the Commission. These ordinances were amended by Bill No. 13964 on April 4, 2002, to add prohibitions against discrimination based on sexual orientation and gender identity. "Sexual orientation" is defined as "male or female homosexuality, heterosexuality and bisexuality, by preference, practice or as perceived by others," and "gender identity" is defined as "self-perception, or perception by others, as male or female, including a

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[53] PHILADELPHIA CODE § 9-1102(h.1).

[54] 580 Pa. 564 (2004). In *Devlin,* several residents sought to have the ordinances addressing health benefits, discrimination, and realty transfer tax that provided for the status of "life partner" between members of the same sex declared invalid, and to permanently enjoin implementation of the "life partner" registry. In pertinent part, the court held that the city had not exceeded its home rule powers by enacting the ordinances, that it was entitled to extend employee benefits to employees' same-sex "life partners," and that the city was not authorized to prohibit discrimination based on an individual's status as a registered "life partner." The third ruling was because the provision invited individuals who neither lived nor worked in the city to register as "life partners" solely as a means to solidify their full rights to be free from discrimination on account of their "life partner" status when, if ever, they came into the city. The city could not exercise any powers or authority beyond its city limits, except those conferred by act of the General Assembly, which this was not. *Id.* at 587-588. In sum, the court invalidated the portions of Bill number 970750 that seek to provide anti-discrimination protections for "life partners," but it upheld the provisions that required designated employers to offer employees benefits to Life Partners on the same basis that they offer benefits to their employees' dependents. *Id.* at 593.

[55] PHILADELPHIA CODE. § 9-1106.

[56] http://www.phila.gov/phils/docs/Inventor/Graphics/agencies/A148.htm (last viewed 3/13/09).

[57] PHILADELPHIA CODE § 9-1107.

[58] PHILADELPHIA CODE § 9-1110.

[59] *See* Pennsylvania Human Relations Commission, *Codified Ordinances of the City of Allentown: Discrimination: Article 181: Human Relations Commission*, http://www.accessibilitypa.state.pa.us/law/L7-CityofAllentown.html.

person's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex, or sex assigned at birth."[60] On appeal, Bill No. 13964 was upheld in *Hartman v. City of Allentown*.[61]

Pursuant to Section 181.08, any person can file a complaint with the Human Relations Commission within 180 days of the alleged act of discrimination. Upon receipt of a complaint, the Commission must investigate and encourage a voluntary and informed settlement between the parties.[62] If the Commission determines that it is unable to eliminate any unlawful practice through persuasion, it must send written notice to the party named in the complaint and hold a hearing.[63] At the conclusion of the hearing, the Commission may issue findings and may award damages and/or levy civil penalties.[64] Where a complainant invokes the procedures set forth above, the complainant still maintains a private right of action.[65]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

4. Borough of West Chester

On September 20, 2006, the Borough of West Chester added Chapter 37A to its code of ordinances.[66] This section, which details West Chester's anti-discrimination policies, prohibits discrimination in housing, employment, and public accommodations on the basis of sexual orientation or gender identity or expression.[67] "Sexual orientation" is defined as "actual or perceived homosexuality, heterosexuality and/or bisexuality."[68] "Gender identity or expression" is defined as "self-perception, or perception by others, as male or female, and shall include an individual's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex, or sex assigned at birth, and shall include, but is not limited to, persons

[60] CODIFIED ORDINANCES OF ALLENTOWN § 181.02.
[61] 880 A.2d 737 (2005). The court held that the Pennsylvania Human Relations Act did not preempt the human rights ordinance enacted pursuant to the city's police powers, although the ordinance prohibited discrimination on the basis of sexual orientation and gender identity while PHRA did not; there was no inherent conflict between PHRA and the ordinance, the enforcement of PHRA was not impeded by the ordinance, and PHRA was not intended to be exclusive in the field of anti-discrimination. *Id.* at 751-752.
[62] CODIFIED ORDINANCES OF ALLENTOWN § 181.08.B.
[63] CODIFIED ORDINANCES OF ALLENTOWN § 181.08.D-F.
[64] CODIFIED ORDINANCES OF ALLENTOWN § 181.08.G.
[65] CODIFIED ORDINANCES OF ALLENTOWN § 181.99.C.
[66] Vote of 6-0. *See* NATIONAL GAY AND LESBIAN TASK FORCE, TRANSGENDER CIVIL RIGHTS PROJECT, 2006 YEAR IN REVIEW, [hereinafter NGLTF, TCRP, 2006] *available at* http://www.thetaskforce.org/downloads/reports/fact_sheets/transgender_year_in_review.pdf (last visited Sept. 9, 2009).
[67] CODE OF THE BOROUGH OF WEST CHESTER § 37A-3.
[68] CODE OF THE BOROUGH OF WEST CHESTER § 37A-2.

who are undergoing or have completed sex reassignment."[69] Chapter 37A contains an exception on the basis of religion.[70]

Chapter 37A grants the West Chester Human Relations Commission the power to administer and enforce the section.[71] Section 37A-6 defines the procedures by which the Commission investigates and enforces discriminatory practices.[72] In addition, Chapter 37A allows for a private right of action in the Chester Court of Common Pleas.[73]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

5. City of Easton

On July 12, 2006, the City of Easton passed Ordinance 4826, which added Title 11, Article 183 to its code of ordinances.[74] This section details Easton's anti-discrimination policies prohibiting discrimination in housing, employment, and public accommodations on the basis of sexual orientation or gender identity or expression.[75] "Sexual orientation" is defined as "actual or perceived homosexuality, heterosexuality and/or bisexuality."[76] "Gender identity or expression" is defined as "self-perception, or perception by others, as male or female, and shall include an individual's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex, or sex assigned at birth, and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment."[77] Article 183 contains an exception on the basis of religion.[78]

Article 183 grants the Easton Human Relations Commission the power to administer and enforce the section.[79] Section 183.06 defines the procedures by which the Commission investigates and enforces discriminatory practices.[80] In addition, Section 183.07 allows for a private right of action in the Northampton Court of Common Pleas.[81]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

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[69] CODE OF THE BOROUGH OF WEST CHESTER § 37A-2.
[70] CODE OF THE BOROUGH OF WEST CHESTER § 37A-4.
[71] CODE OF THE BOROUGH OF WEST CHESTER § 37A-5.
[72] CODE OF THE BOROUGH OF WEST CHESTER § 37A-6.
[73] CODE OF THE BOROUGH OF WEST CHESTER § 37A-7.
[74] Vote of 5-0. *See* NGLTF, TCRP, 2006, *supra* note 66.
[75] CODE OF ORDINANCES OF THE CITY OF EASTON, Art. 183.
[76] CODE OF ORDINANCES OF THE CITY OF EASTON § 183.02.
[77] CODE OF ORDINANCES OF THE CITY OF EASTON § 183.02.
[78] CODE OF ORDINANCES OF THE CITY OF EASTON § 183.04.
[79] CODE OF ORDINANCES OF THE CITY OF EASTON §§ 183.05-06.
[80] CODE OF ORDINANCES OF THE CITY OF EASTON. § 183.06.
[81] CODE OF ORDINANCES OF THE CITY OF EASTON § 183.07.

6. City of Harrisburg

The City of Harrisburg passed a nondiscrimination ordinance (Ordinance 17) in 1992. Chapter 4-101 prohibits discrimination in employment, housing, public accommodations, education and obtaining loans and extensions of credit on the basis of, among other things, sexual preference/orientation.[82] "Sexual preference/orientation" is defined as "male or female homosexuality, heterosexuality and bisexuality, by preference, practiced or as perceived by others."[83] In addition, "sex" is defined to include "those persons who are changing or have changed their sex."[84]

Chapter 4-103 establishes and describes the Harrisburg Human Relations Commission and Chapters 4-107 and 4-109 detail the process for investigating and enforcing discriminatory practices.

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

7. Lancaster City

Chapter 125 of the Code of the City of Lancaster outlines the city's anti-discrimination policies. It was amended on November 27, 2001 by Ordinance No. 10-2001 to include a prohibition against discrimination in employment, housing, real estate and public accommodations based on sexual orientation. "Sexual orientation" is defined as "male or female homosexuality, heterosexuality, bisexuality and any other gender identity, by practice or as perceived by others."[85]

Chapter 125 grants the Lancaster City Human Relations Commission the power to administer and enforce the section.[86] Sections 125-6 through 125-16 define the procedures by which allegations of discrimination are investigated and enforced.[87]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

8. Borough of Lansdowne

On March 15, 2006, the Borough of Lansdowne adopted Chapter 38 of the Lansdowne Borough Code by Ordinance No. 1215, which established a Human Relations Commission in and for the Borough of Lansdowne.[88] Chapter 38 also created broad

[82] HARRISBURG CITY CODE §§ 4-101.1 and 4-101.2.
[83] HARRISBURG CITY CODE § 4-101.6(dd).
[84] HARRISBURG CITY CODE § 4-101.6(cc).
[85] LANCASTER CITY CODE § 125-4.
[86] LANCASTER CITY CODE § 125-6.
[87] LANCASTER CITY CODE. §§ 125-6 to 125-16.
[88] Vote of 7-0. *See* NGLTF, TCRP, 2006, *supra* note 66.

protections against discrimination, including prohibiting discrimination on the basis of sexual orientation or gender identity and expression.[89] "Sexual orientation" is defined as "actual or perceived homosexuality, heterosexuality and bisexuality."[90] "Gender identity and expression" is defined as "self-perception, or perception by others, as male or female, and shall include an individual's appearance, behavior or physical characteristics that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex or sex assigned at birth, and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment."[91] Chapter 38 grants the Borough Human Relations Committee the power to administer and enforce the section.[92]

In 2007, the Borough of Lansdowne adopted a provision creating a registry for domestic partnerships.[93]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

9. Borough of New Hope

Chapter 129 of the New Hope Borough Code of Ordinances was adopted on September 10, 2002 by Ordinance No. 2002-4.[94] This Chapter provides New Hope's ordinances relating to nondiscrimination in employment, housing, and places of public accommodation.[95] Chapter 129 makes it unlawful to discriminate in employment, housing, and with regard to public accommodations on the basis of sexual orientation or gender identity.[96] "Sexual orientation" is defined as "actual or perceived homosexuality, heterosexuality and bisexuality."[97] "Gender identity" is defined as "self-perception, or perception by others, as male or female, and shall include a person's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex, or sex assigned at birth; and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment."[98] Complaints arising under this section are filed with, and investigated and enforced by the Borough Manager of New Hope.[99] A person must file a complaint within 60 days of the alleged act of discrimination.[100]

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[89] LANSDOWNE BOROUGH CODE § 38-3.
[90] LANSDOWNE BOROUGH CODE § 38-2.
[91] LANSDOWNE BOROUGH CODE § 38-2.
[92] LANSDOWNE BOROUGH CODE § 38-4.
[93] LANSDOWNE BOROUGH CODE. §§ 170-1 through 170-6. Adopted May 16, 2007, by Ord. No. 1226.
[94] Vote of 6-0. *See* NGLTF, TCRP, 2006, *supra* note 66.
[95] *See generally* NEW HOPE BOROUGH CODE OF ORDINANCES § 129.
[96] NEW HOPE BOROUGH CODE OF ORDINANCES §§ 129-2 through 129-4.
[97] NEW HOPE BOROUGH CODE OF ORDINANCES § 129-1.
[98] NEW HOPE BOROUGH CODE OF ORDINANCES § 129-1.
[99] NEW HOPE BOROUGH CODE OF ORDINANCES § 129-5.
[100] NEW HOPE BOROUGH CODE OF ORDINANCES § 129-5.

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

10. City of Scranton

On December 8, 2003, Chapter 296 was adopted by Ordinance No. 243-2003 as part of the General Code of the City of Scranton.[101] Chapter 296 prohibits discriminatory employment, housing, real estate, and public accommodations practices on the basis of sexual orientation or gender identity.[102] "Sexual orientation" is defined as "male or female homosexuality, heterosexuality and bisexuality, by preference, practice or as perceived by others."[103] "Gender identity" is defined as "self-perception, or perception by others, as male or female, including a person's appearance, behavior or physical characteristics, that may be in accord with, or opposed to, ones physical anatomy, chromosomal sex or sex assigned at birth."[104]

The Human Relations Commission of the City of Scranton enforces Chapter 296.[105] Sections 296-8 through 296-10 describe the procedures by which the Commission investigates and enforces discriminatory conduct.

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

11. Borough of Swarthmore

On March 13, 2006, the Borough of Swarthmore passed Ordinance No. 1000, which created the Borough of Swarthmore Human Relations Commission and codified prohibitions against discrimination in housing, employment and public accommodations.[106] Chapter 207 contains prohibitions against such discrimination on the basis of sexual orientation and gender identity and expression.[107] "Sexual orientation" is defined as "actual or perceived homosexuality, heterosexuality and bisexuality."[108] "Gender identity and expression" is defined as "self-perception, or perception by others, as male or female, and shall include an individual's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's

[101] Vote of 5-0. *See* NGLTF, TCRP, 2006, *supra* note 66.
[102] GENERAL CODE OF SCRANTON §§ 296-3 through 296-6.
[103] GENERAL CODE OF SCRANTON § 296-2.
[104] GENERAL CODE OF SCRANTON
[105] GENERAL CODE OF SCRANTON § 296-7.
[106] *See* SWARTHMORE CODE OF ORDINANCES Ch. 207. Vote of 7-0. *See* NGLTF, TCRP, 2006, *supra* note 66.
[107] SWARTHMORE CODE OF ORDINANCES § 207.03.
[108] SWARTHMORE CODE OF ORDINANCES § 207.01.

physical anatomy, chromosomal sex, or sex assigned at birth, and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment."[109]

The Borough of Swarthmore Human Relations Commission enforces complaints filed under Chapter 207 following "the procedures for filing and disposition of complaints as are set forth under the Pennsylvania Human Relations Act."[110]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

12. City of York

On September 15, 1998, the City of York passed the City of York Human Relations Ordinance (Ordinance No. 9-98) for the purpose of outlawing unfair and discriminatory housing, employment, and public accommodations practices.[111] Protection from discrimination on the basis of sexual orientation is included in Article 185. "Sexual orientation" is defined as "male or female heterosexuality, homosexuality, bisexuality, or any other gender identity or practice or as perceived by others."[112] York's anti-discrimination ordinances are extensive, comprising more than eleven pages of text.

The City of York Human Relations Commission enforces Article 185.[113] Sections 185.10 through 185.15 describe the procedures by which the Commission investigates and enforces discriminatory conduct. [114]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

13. Erie County

In 2007, the Erie County Council amended Ordinance 59 (2004) with respect to the Erie County Human Relations Commission.[115] Ordinance 39 protects against unlawful discriminatory practices in employment, housing and public accommodations. The Ordinance also describes the powers and duties of the Commission, as well as the procedures for filing, investigating and enforcing complaints of discrimination. Pursuant to the Ordinance, "sexual orientation" is defined as "male or female heterosexuality, homosexuality, bisexuality, or any other gender identity, excluding any activity of a

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[109] SWARTHMORE CODE OF ORDINANCES § 207.01.
[110] SWARTHMORE CODE OF ORDINANCES § 207.04.
[111] CODIFIED ORDINANCES OF YORK §§ 185.02-03. *See also,* CODIFIED ORDINANCES OF YORK Art. 183 (Fair Housing). Article 183 was amended by Ordinance 3-1993 on February 16, 1993 to include, among other things, protection from discrimination on the basis of sexual orientation.
[112] CODIFIED ORDINANCES OF YORK § 185.04(z).
[113] CODIFIED ORDINANCES OF YORK § 185.10.
[114] CODIFIED ORDINANCES OF YORK §§ 185.10 – 185.15.
[115] *See* Erie County Ordinance 39.

sexual nature prohibited by Title 18 of the Pennsylvania Consolidated Statutes or any other law of the Commonwealth of Pennsylvania."[116]

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

14. Borough of State College

On December 17, 2007, the Borough of State College unanimously passed its own anti-discrimination ordinance.[117] The ordinance, codified at Chapter V, Part I, prohibits discrimination in all matters involving employment.[118] In addition, the ordinance established the Human Relations Commission for the Borough of State College, which began operations in 2008.[119] Among the classes of discrimination prohibited in the ordinance are sexual orientation and gender identity or expression. "Sexual orientation" is defined as "actual or perceived homosexuality, heterosexuality and/or bisexuality."[120] "Gender identity or expression" is defined as "self-perception, or perception by others, as male or female, and shall include a person's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex, or sex assigned at birth, and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment."[121] Section 905 provides for a religious exception.[122] This ordinance was adopted in addition to the Borough's Fair Housing Ordinance, which was enacted March 9, 1993, and which also provides protection from discrimination on the basis of sexual orientation.[123]

The Human Relations Commission for the Borough of State College enforces Chapter V, Part I and the procedures by which it acts are described in Sections 906 through 911.

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

15. Allegheny County

On July 8, 2008, the County Council for Allegheny County proposed Bill No. 4201-08 to amend the Allegheny County Code of Ordinances and create a Human Relations Commission to establish a countywide nondiscrimination requirement in housing and employment on the basis of sexual orientation and gender identity or

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[116] Erie County Ordinance 39, Art. 4FF.
[117] Unanimous vote. *See* NGLTF, TCRP, 2006, *supra* note 66.
[118] STATE COLLEGE CODE OF ORDINANCES § 901.
[119] STATE COLLEGE CODE OF ORDINANCES § 906.
[120] STATE COLLEGE CODE OF ORDINANCES § 903.
[121] STATE COLLEGE CODE OF ORDINANCES § 903.
[122] STATE COLLEGE CODE OF ORDINANCES § 905.
[123] *See* STATE COLLEGE CODE OF ORDINANCES §§ 501 – 510.

expression.[124] Bill No. 4201-08 was sponsored by 12 of the 15 County Council members. The proposed ordinance was referred to the County Committee on Government Reform.

Following the January 15, 2009 public hearing on Bill No 4201-8 in which supporters and opponents of the Bill spoke, press reports described efforts mounted in opposition by the American Family Association of Pennsylvania.[125]

On July 1, 2009 the Allegheny County Council approved Bill 4201-8, and it was signed by the County's Chief Executive on July 6, 2009. It amends the Allegheny County Code of Ordinance, Division 2, Ch. 215, Art. V to prohibit discrimination on the basis of sexual orientation, gender identity, or gender expression and establishes a Human Rights Commission.

E. Occupational Licensing Requirements

Title 49 of the *Pennsylvania Code* provides professional and vocational standards for occupations requiring a state license. While several provisions relate to "moral character" and/or "sexual misconduct/impropriety," a non-exhaustive search of news articles and websites did not uncover any information concerning specific examples of the occupational licensing standards being applied to LGBT applicants.

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[124] Allegheny County Council Agenda Synopsis, July 8, 2008 at 3.

[125] *See, e.g.*, The Pittsburgh Channel, *Pittsburgh Lawmakers To County: Anti-Discrimination Bill No Brainer' Allegheny County Lawmakers Waver On Bill Addressing Sexual Orientation*, *supra* note 25. *See also* Pittsburgh Independent Media Center, *Proposed Allegheny County Non-Discrimination Ordinance Draws Support and Criticism* (Jan. 26, 2009), http://bit.ly/1Sd6B (last visited Sept. 9, 2009). An AFA press release asserted that "[t]his ordinance is an attempt to normalize a very dangerous lifestyle…" American Family Association of Pennsylvania, News Release, Allegheny County Trying to Force Homosexual/Bisexual/Transgender Lifestyle on Citizens (Jan. 15, 2009), *available at* http://www.afaofpa.org/news_release_allegheny_county_hr_ordinance_1.15.09.htm

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Bianchi v. City of Philadelphia I, 183 F.Supp.2d 726 (2002).

In *Bianchi v. City of Philadelphia I*, a male firefighter brought a § 1983 action against the city asserting claims under Title VII, the Pennsylvania Human Rights Act ("PHRA"), and the state and federal constitutions.[126] The substantive discrimination claims were based on sex-based discrimination allegations. Bianchi alleged that the sexual harassment was rooted in a belief that he was homosexual. Bianchi also alleged retaliation in connection with the sex-based claims. The constitutional claims alleged violations of Bianchi's due process and First Amendment rights during the course of the harassment and by his subsequent constructive termination. [127]

More specifically, Bianchi alleged that he: discovered several used condoms in his desk drawer; began finding explicit homosexual playing cards inside his desk, his uniform, and his running gear; received a postcard at the firehouse insinuating that he was homosexual; found envelopes with the return address from the Gay Firefighter's Association on his desk; found urine or feces on the sleeve of his running gear that he claimed to have caused a fungal infection around his mouth; and received threatening letters calling him a "queer."[128]

The Court held that Bianchi's allegations could not support the substantive claims brought under Title VII and the PHRA because he could not demonstrate that he was discriminated against because of his "sex." While the Court recognized that the actions taken against Bianchi "constituted harassment," the court held that the actions did not meet the burden for proving same-sex harassment.[129] More specifically, the Court held that Title VII or the PHRA did not bar the type of harassment suffered by Bianchi.

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[126] *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002).

[127] Bianchi also alleged that when he reported the harassment to his supervisors it was not addressed and that after filing a formal complaint he was removed from his lieutenant position, placed in an administrative position, and after taking medical leave on the advice of his doctor, was constructively terminated because the fire department refused to reinstate him. *Id.*

[128] 183 F.Supp.2d at 731-733.

[129] According to the Court, Bianchi could not prove the same-sex harassment fell within the bounds of any of the methods for proving same-sex harassment established in prior case law:

> "(1) demonstrating a scenario in which the harassment is motivated by the aggressor's sexual desire; (2) showing that [the] harasser display[ed] hostility towards the participation of a particular sex in the workplace or performing a particular function; or (3) illustrating that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender."

183 F.Supp.2d at 734-735 (citing *Bibby v. Philadelphia Coca Cola Bottling Company*, 260 F.3d 257 (3d. Cir. 2001)).

Therefore, the City of Philadelphia was granted summary judgment as to the substantive sexual harassment claims.

Despite the fact that the sex-based harassment claims were not allowed to go forward, the retaliation, due process and First Amendment claims survived summary judgment. In *Bianchi v. City of Philadelphia II*, the Third Circuit Court of Appeals found no abuse of discretion by the trial judge and affirmed a $1,237,500 damages award based on the retaliation and due process claims.[130]

Taylor v. City of Philadelphia, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).

In *Taylor v. City of Philadelphia*,[131] an employee of the City of Philadelphia Free Library alleged discrimination based on his sexual orientation. The District Court dismissed intentional infliction of emotional distress and punitive damages claims against the City. However, it is unclear from the opinion whether other claims were allowed to go forward, and no further opinions or rulings were available online.

Before bringing suit, Taylor had filed two complaints with the Philadelphia Human Relations Commission, one in 1999[132] and one in 2000[133], alleging discrimination based on his sexual orientation and, in 2000, alleging retaliation in response to his previous filing. Both times, the Commission determined that there was probable cause to support the charge.

McDaniels v. Delaware County Cmty. Coll., 1994 WL 675292 (E.D.Pa. Nov. 21, 1994).

Plaintiff filed suit alleging that he was denied a proper pre-termination hearing on the same-sex sexual harassment charges filed against him. A jury awarded Plaintiff reinstatement of his tenured teaching position and $134,081 back pay, but denied relief on his claims of emotional and reputational harm. Plaintiff filed a motion for a new trial, pointing to defense counsel's summation, which included statements that he actually may have committed the sexual harassment for which he was terminated. The court denied the motion, ruling that these statements did not require a new trial since they were not materially prejudicial as they were part of the evidence and were somewhat relevant.[134]

Ashlie v. Chester-Upland Sch. Dist., 1979 U.S. Dist. LEXIS 12516 (E.D. Pa. 1979).

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[130] *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).
[131] *Taylor v. City of Philadelphia*, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).
[132] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).
[133] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).
[134] *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

Plaintiff, a high school art teacher and male-to-female transsexual, was fired without a hearing after returning to school for the new school year as a woman, having undergone a "sex-change" operation. The school cited "immorality" and other similar reasons for Plaintiff's termination. The district court held that the lack of a hearing prior to Plaintiff's dismissal was a violation of procedural due process, and ordered reinstatement to suspended status with pay pending the outcome of the hearing.[135]

2. **Private Employees**

Demuth v. Miller, 438 Pa. Super. 437 (1995).

In *Demuth v. Miller*, a Pennsylvania Superior Court upheld, on appeal, a $110,000 jury verdict awarded in a suit to enforce a noncompetition clause against a homosexual former employee.[136] The noncompetition clause was triggered when the defendant, fired because he was homosexual and had appeared on a local television program in support of a gay and lesbian organization, opened a competitive consulting firm and solicited the plaintiff's clients.

In addition to the noncompetition clause, the employment contract in question contained a termination clause that classified homosexuality as cause for termination.[137] The clause was the admitted reason for the termination of the defendant's employment. Among the considerations on appeal was whether the termination clause violated public policy and/or state and federal constitutions rendering the remainder of the contract, including the noncompetition clause, unenforceable.[138] In affirming the judgment, the Court held that there was no evidence the termination clause violated public policy.[139] Furthermore, the Court held that discrimination based on homosexuality was not actionable under any Pennsylvania statute, the Pennsylvania Constitution or the due process and equal protection doctrines contained in the Fourteenth Amendment of the United States Constitution.[140]

Wood v. C.G. Studios, Inc., 660 F.Supp.176 (E.D. Pa.)(1987).

In 1987, the District Court for the Eastern District of Pennsylvania considered whether the Pennsylvania Human Relations Act ("PHRA") extended to discrimination

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135 *Ashlie v. Chester-Upland Sch. Dist.*, 1979 U.S. Dist. LEXIS 12516 (E.D. Pa. 1979).

136 *See DeMuth v. Miller*, 438 Pa. Super. 437 (1995).

137 "Cause shall include, but is not limited to, moral turpitude, being charged with a felony, use of illicit drugs, intoxication while working, insulting Employer's family and clients, not working, intentionally working slowly, intentionally losing clients, engaging in sexual activities in the office, and homosexuality." 438 Pa. Super. at 440, emphasis added.

138 438 Pa. Super. at 449.

139 438 Pa. Super. at 454-455.

140 "…the appellant has not claimed to have been treated discriminatorily because he is a male, but rather because he is a homosexual who chose to publicize his sexual preference. This type of claim is not actionable under any Pennsylvania statute or its constitution and is certainly not in violation of the doctrines of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution." 438 Pa. Super. at 454.

against those undergoing sex reassignment surgery.[141] In *Wood v. C.G. Studios, Inc.*, the plaintiff alleged that her employer discriminated against her based on sex and in violation of the PHRA when it failed to promote her and terminated her employment solely because it learned she had undergone surgery to correct her hermaphroditic condition.

In *Wood*, a diversity action which interpreted Pennsylvania state law, the Court held that "the Supreme Court of Pennsylvania would find, as a matter of law, that discrimination on the basis of gender-corrective surgery did not constitute discrimination on the basis of sex under Section 5(a) of the PHRA."[142] The Court held that there was no evidence the PHRA was intended to remedy discrimination against individuals having undergone gender-corrective surgery.[143] Furthermore, because there were no PHRA cases on point and Pennsylvania state courts had expressly recognized Title VII cases as persuasive authority on the subject of sex discrimination to that point, the Court considered Title VII cases in reaching its decision. In doing so, the Court was further persuaded by the fact that Title VII cases unanimously held it was not intended to extend protection to transsexuals or those undergoing sexual reassignment surgery.[144]

B. **Administrative Complaints**

The Pennsylvania Human Relations Commission ("PHRC") handles administrative complaints filed under the PHRA, the states' equivalent to Title VII. The complaints are not available via electronic sources. However, a search of relevant case law uncovered at least one instance where a complaint filed with the PHRC alleging discrimination based on homosexuality and disability (HIV-positive condition) was dismissed by the PHRC.[145] In contrast, there are other cases where a plaintiff that filed a harassment claim with the PHRC was issued a right-to-sue letter and ultimately lost in federal court.[146]

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[141] *Wood v. C.G. Studios, Inc.*, 660 F.Supp.176 (E.D. Pa.)(1987).

[142] 660 F. Supp. at 176.

[143] The court's interpretation of the PHRA was echoed in *Dobre v. National Railroad Passenger Corporation ("AMTRAK")*, 850 F.Supp.284 (1993) (After analyzing the legislative history of the PHRA and relevant case law, a second District Court held that the PHRA did not extend protections to a transsexual undergoing hormone treatment and living as a female who alleged discrimination based upon the fact that she was not permitted to dress as a female, use the women's restroom or be addressed by her female name at her place of employment).

[144] 660 F. Supp. at 178.

[145] *Ruberg v. Outdoor World Corporation*, 2005 WL 315070 (M.D.Pa.) (A homosexual male criticized by supervisor for being a homosexual, implored "to be normal" and diagnosed with HIV alleges that his termination was a pretext for discrimination on those bases and; therefore, violative of the PHRA.)

[146] *See Kay v. Independence Blue Cross*, 142 Fed. Appx. 48 (2005) (A homosexual male alleged sexual harassment where among other things, a photocopied flier for a gay phone line was left in his mailbox with a harassing message, he was called a "fag," and he received harassing voice mail messages that included the words, "faggot" and "fem.") *See also Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (2001) (A homosexual male alleged sexual harassment based on his belief that his employer and co-workers perceived him as having HIV/AIDS after he experienced medical complications at work and where a co-worker started a physical altercation with him in which he repeatedly stated, "everybody knows you're gay as a three dollar bill," "everybody knows you take it up the ass").

The PHRC maintains a Public Hearing Opinion Library of all the final decisions that are approved by the Commission. None of the published opinions allege sexual orientation or gender identity discrimination.[147]

In addition to the PHRC, there are local human relations commissions that interpret local anti-discrimination ordinances.[148] A review of the Philadelphia Human Relations Commission webpage detailed that in 2007, 219 employment discrimination complaints were docketed with the Commission.[149] Out of these, 19 involved allegations of discrimination on the basis of sexual orientation, and one involved allegations of discrimination on the basis of gender identity.[150] In 2006, 256 employment discrimination complaints were docketed (14 sexual orientation and 3 gender identity).[151] The City of Philadelphia Law Department provided dispositions of cases filed against Philadelphia government employers pursuant to a written request, including the six cases briefly mentioned below.

Philadelphia Police Department

In 2006, an employee of the Philadelphia Police Department filed a complaint with the City of Philadelphia alleging that he had been discriminated against on the basis of his sexual orientation.[152] The city settled with the employee.[153]

Free Library of Philadelphia

On January 31, 2003, an employee of the Free Library of Philadelphia filed a complaint with the Pennsylvania Human Rights Commission alleging that she had been discriminated against on the basis of gender identity. The employee was harassed after she began to transition from male to female and was involuntarily transferred to an undesirable worksite.[154] The Commission found probable cause to support the charge.[155]

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147 Pennsylvania Human Relations Commission, Legal Opinion Library, *available at*: http://sites.state.pa.us/PA_Exec/PHRC/legal/opinion_library.html.

148 *See Dolan v. Community Medical Center Health-Care System*, 500 F.Supp.2d 503 (2007) (Unsuccessful job applicant who alleged the employer discriminated against her on the basis of sexual orientation filed a written complaint with the Human Relations Commission of the City of Scranton.) *See also* Philadelphia Commission on Human Relations, *About Us*, *available at*: http://www.phila.gov/humanrelations/Mission_Statement.html.

149 PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2007, *available at* http://www.phila.gov/humanrelations/pdfs/2007_Annual_Report.pdf..

150 PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2007, *available at* http://www.phila.gov/humanrelations/pdfs/2007_Annual_Report.pdf..

151 PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2006, *available at* http://www.phila.gov/humanrelations/pdfs/2006AnnualReportFINA.pdf.

152 Complaint, [Redacted] v. Philadelphia Police Department, Philadelphia Human Relations Commission, Complaint No. SGEN-6NQLXT (Apr. 10, 2006).

153 Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

154 Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. PWIS-5JBKJJ (Jan. 31, 2003).

On July 8, 2003, the employee filed a second complaint against the Free Library of Philadelphia alleging that that the library continued to discriminate against her and her co-workers continued to harass her, despite her previous complaint. She also alleged that the library was treating her badly in retaliation for filing the previous complaint.[156] Again, the Commission found that there was probable cause to support the charge.[157]

On May 7, 2004, the employee filed a third complaint against the Free Library of Philadelphia alleging continued discrimination on the basis of gender identity and further retaliation based on her previous complaints.[158] For the third time, the Commission determined that there was probable cause to support her charge.[159]

C. **Other Documented Examples of Discrimination**

Pennsylvania State Department

In 2008, a transgender applicant for a state agency database analyst position was not hired because of his gender identity.[160]

Walnutport Police Department

Plaintiff, a former policeman for the town of Walnutport, alleged that borough officials violated his free speech rights by retaliating against him when he complained about attempts to pry into his sexual orientation and off-duty conduct in response to a demand by a city council member. The claim was settled for $5,000.[161]

Adult Health Services Center

In 1996, a gay nurse at an adult health services center was subjected to a hostile work environment because of his sexual orientation.[162]

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[155] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).
[156] Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5P8LUH (July 8, 2003).
[157] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).
[158] Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5YMHDX (May 7, 2004).
[159] Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).
[160] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).
[161] Lesbian & Gay L. Notes (Feb. 2005), *available at* http://www.qrd.org/qrd/www/legal/lgln/02.2005.pdf.
[162] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Pennsylvania's voluntary deviate sexual intercourse statute was ruled unconstitutional in *Commonwealth of Pennsylvania v. Bonadio.* The statute was formerly repealed in 1995.[163]

In *Commonwealth of Pennsylvania v. Bonadio,*[164] the Court held that the statute "exceed[ed] the valid bounds of police power while infringing the right to equal protection of the laws guaranteed by the Constitution of the United States and of [the] Commonwealth."[165] In doing so, the Court expressed its opinion that the statute, which suggested that "deviate acts" were improper if performed by unmarried persons but acceptable when done by married persons, could not meet the rational basis standard.[166]

B. Hate Crimes

In 2002, the Pennsylvania legislature amended Pennsylvania's ethnic intimidation statute to define the offense as including acts of malicious intention based on perceived sexual orientation, gender or gender identity.[167] However, the amendment was subsequently ruled unconstitutional in *Marcavage v. Rendell.*[168] In *Marcavage*, arrestees charged with ethnic intimidation for evangelizing against individuals at a gay rights event brought an action challenging the constitutionality of the 2002 amendment. The appeals court ultimately held that the 2002 amendment was unconstitutional because it violated a constitutional provision that prohibited altering the original purpose of a bill after it is introduced by amendment. In other words, the process of enacting the 2002 amendment did not meet procedural requirements contained in the state constitution. The Court did not address the substantive question of whether an amendment criminalizing conduct

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[163] 18 PA.CONS. STAT. § 3124. Voluntary deviate sexual intercourse (Repealed March 31, 1995).
[164] *Commonwealth v. Bonadio*, 490 Pa. 91 (1980).
[165] *Bonadio*, 490 Pa. at 50.
[166] *Bonadio*, 490 Pa. at 51.
[167] Act of December 3, 2002, P.L. 1176, No. 143 (Act 143) amended Section 2710 of the Crimes Code (ethnic intimidation) to read as follows: "(a) Offense defined. A person commits the offense of ethnic intimidation if, with malicious intention toward the race, color, religion or national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals, he commits an offense under any other provision of this article…"
[168] *Marcavage v. Rendell*, 936 A.2d 188 (2007), order affirmed by *Marcavage v. Rendell*, 951 A.2d 345 (2008).

based on perceived sexual orientation, gender or gender identity could be constitutional if enacted properly. For further discussion of *Marcavage*, see Section II.A, fn. 1.

C. Education

The Pennsylvania Fair Educational Opportunities Act[169] declares the state's policy with regard to discriminatory practices in education. The Act includes no protection for discrimination based on sexual orientation, gender and/or gender identity. The relevant provision of the Act reads as follows: "It is hereby declared to be the policy of this Commonwealth that all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability.[170]

There are also three provisions in the Pennsylvania Code that speak to protections against sexual orientation/gender identity-based discrimination:

- 22 PA. CODE § 12.4: "Consistent with the Pennsylvania Human Relations Act (43 P. S. § § 951—963), a student may not be denied access to a free and full public education, nor may a student be subject to disciplinary action on account of race, sex, color, religion, sexual orientation, national origin or disability."

- 22 PA. CODE § 235.4(b)(4): "Professional educators shall exhibit consistent and equitable treatment of students, fellow educators and parents. They shall respect the civil rights of all and not discriminate on the basis of race, national or ethnic origin, culture, religion, sex or sexual orientation, marital status, age, political beliefs, socioeconomic status, disabling condition or vocational interest. This list of bases or discrimination is not all-inclusive."

- 22 PA. CODE § 235.8(1): "The professional educator may not: (1) Discriminate on the basis of race, National or ethnic origin, culture, religion, sex or sexual orientation, marital status, age, political beliefs, socioeconomic status; disabling condition or vocational interest against a student or fellow professional. This list of bases of discrimination is not all-inclusive. This discrimination shall be found to exist by an agency of proper jurisdiction to be considered an independent basis for discipline."

D. Health Care

Several provisions within the Pennsylvania code protect against sexual orientation and/or gender identity-based discrimination within the health care area:

4 PA. CODE § 257.4(e)(2) [regarding County-run drug and alcohol treatment programs]: "The case management system shall not discriminate on the basis of age, race, creed, sex, ethnicity, color, national origin, marital status, sexual orientation, handicap or religion."

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[169] Pennsylvania Fair Educational Opportunities Act, Act of July 17, 1961, P.L. 776, as amended.
[170] Pennsylvania Fair Educational Opportunities Act, at § 2(a).

55 PA. CODE § 2600.42(a) [regarding personal care facilities, i.e., nursing homes]: "A resident may not be discriminated against because of race, color, religious creed, disability, handicap, ancestry, sexual orientation, national origin, age or sex."

55 PA. CODE § 3800.32(a) [regarding child residential and day treatment facilities, applicable to children under 18 with mental retardation, a mental illness or a serious emotional disturbance]: "A child may not be discriminated against because of race, color, religious creed, disability, handicap, ancestry, sexual orientation, national origin, age or sex."

E. **Gender Identity**

The State of Pennsylvania addressed the issue of transgender name changes in four decisions spanning between 1977 and 1998.[171] All four cases involved pre-operative transsexual males who wanted to change their name to comport with their identity as a female. The relevant name change statute contained statutory requirements, but also required court approval before a formal name change could be processed.[172] The statute only listed fraud (e.g. avoiding payment of taxes of debt) as cause for denying a petition.[173]

Despite the statute's limited justification for denial, the Courts in the first two cases interpreted an earlier case, *The Supreme Court of Pennsylvania in Falcucci Name Case*, as granting them broad discretion to grant or refuse a name change petition.[174] In accordance with this perceived discretion, they held that permitting a name change prior to sex reassignment surgery did not "comport with good sense, common decency and fairness to all concerned, especially the public."[175]

In the latter two cases, the petitioners were denied name changes in the lower courts; however, the appellate courts ultimately held that the trial court's failure to grant a name change was improper.[176] In the 1998 case on the matter, the state Supreme Court expressed its opinion that *Falcucci* did not permit a judge "concerned about a male assuming a female identity in mannerism and dress…a matter which is of no concern to the judiciary, and which has no bearing on the outcome of a simple name change

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171 *See In Re Dowdrick*, 4 Pa. D. & C.3d 681 (1978); *In Re: the Petition of Percy Richardson to Change Name*, 23 Pa. D. & C.3d 199 (1982); *In re Brian Harris, a/k/a Lisa Harris*, 707 A.2d 225 (Pa. Super. Ct. 1997); *In the Matter of Robert Henry McIntyre*, 552 Pa. 324 (1998).

172 *See* 54 PA.CONS. STAT. §§ 701-705.

173 *In Re Dowdrick, supra*, 4 Pa. D. & C.3d at 683.

174 *See The Supreme Court of Pennsylvania in Falucucci Name Case*, 355 Pa. 588 (1947) ("whenever the court has discretion in any matter (as it has in the matter of a change of name) it will exercise that discretion in such a way as to comport with good sense, common decency and fairness to all concerned and to the public").

175 *In Re Dowdrick, supra*, 4 Pa. D. & C.3d at 685; *In Re: the Petition of Percy Richardson to Change Name, supra*, Pa.D. & C.3d at 200 ("as we see it is that we are being asked to lend the dignity of the court and the sanctity of the law to this freakish rechristening").

176 *In re Brian Harris, a/k/a Lisa Harris, supra*, at p. 228; *In the Matter of Robert Henry McIntyre, supra*, at 329-330.

application" to deny a name change petition.[177] Furthermore, the Court held that there was no public interest being protected by the denial of a transsexual name change petition and that they saw no reason to impose restrictions on name change petitions beyond those expressly contained in the statute.[178]

Similarly, in *In re Nadine Ann Miller*, the Superior Court of Pennsylvania considered whether denial of a woman's petition to change her surname to that of her life companion was improper.[179] The name change petition had been denied by the Court of Common Pleas, when the Court held that the name change offended law and public policy insofar as it would have "give[en] the appearance of approval of a same-sex marriage."[180] The Superior Court ultimately held that there was no acceptable public policy reason for denying the name change and; therefore, that the trial court abused its discretion in denying the petition.[181]

F. **Parenting**

Constant A. v. Paul C.A. remains good law on the issue of custody, where a homosexual parent has borne children in a prior heterosexual relationship.[182] In the case, a Pennsylvania Superior Court upheld a lower court's denial of a lesbian mother's petition for expanded shared custody of her children. The lower court's denial was rooted in a belief that the mother's lesbian relationship rendered her immoral.[183] While the Court acknowledged that the trial court's finding concerning the moral nature of the mother's relationship was "gratuitous," it ultimately agreed with the lower court's ruling.[184] Among other things the Court established that, "where there is a custody dispute between members of a traditional family environment and one of homosexual composition, *the presumption of regularity applies to the traditional relationship* and the burden of proving no adverse effect of the homosexual relationship falls on the person advocating it."[185] Furthermore, it insinuated that allowing the children, particularly the female child, to be exposed to the mother's relationship would indicate that homosexuality "[was] a suitable life style for the children."[186]

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[177] *In the Matter of Robert Henry McIntyre*, at 330.
[178] *In the Matter of Robert Henry McIntyre*, at 330.
[179] *In re Nadine Ann Miller*, 824 A.2d 1207 (2003).
[180] *In re Nadine Ann Miller*, at 1212.
[181] *In re Nadine Ann Miller*, at 1214.
[182] *Constant A. v. Paul C.A.*, 496 A.2d 1 (Pa. Super. Ct.1985).
[183] In its decree, the lower court stated: "Notwithstanding the efforts of the so called 'Gay Rights' movement, we conclude that the natural mother's lesbian relationship shows her moral deficiency; however, there is no proof that the mother's homosexuality constitutes a grave threat to the children. Therefore, under such circumstances, we will consider the factor of the natural mother's lesbian relationship only to limit visitation and not to completely deny it." 496 A.2d at 3.
[184] "[W]e find, after a careful review of the record, the briefs of the parties including the Amicus Brief of the Civil Liberties Union, and the Opinion of the trial court, that the lower court, in its findings, was basically correct and his decree must be sustained." 496 A.2d at 7-8.
[185] 496 A.2d at 5.
[186] 496 A.2d at 8.

In the cases of *In Re Adoption of C.C.G. and Z.C.G.* and *In Re Adoption of R.B.F and R.C.F.* two Pennsylvania Superior Courts considered whether Pennsylvania's Adoption Act permits a domestic partner to adopt their partner's children without the partner (and each child's natural parent) relinquishing parental rights.[187] Both cases required interpretation of the Act, which, if strictly interpreted, did not permit a non-*spouse* to adopt a child where the legal parents had not relinquished their parental rights.[188] Both courts ultimately held that the plain language of the Act did not permit the adoptions. The dissent in *In Re Adoption of C.C.G. and Z.C.G.* expressly stated its dissatisfaction with the majority's discriminatory analysis, which it believed "erroneously focused upon the relationship between the [parents] rather than the parent-child relationship.[189]

On appeal, the Supreme Court of Pennsylvania reversed the decisions, ruling that the Act gave courts the discretion to deviate from its express language for good cause.[190] The Court's opinion contained the following: "There is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents. It is therefore absurd to prohibit their adoptions merely because their children were either the biological or adopted children of their partners prior to the filing of the adoption petition."[191]

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions, & Domestic Partnership

As noted in section II.D, *supra*, several of Pennsylvania's cities and boroughs have same-sex "life partnership" registries. Relevant state statutes specifically define marriage as between "one man and one woman." When the statute limiting marriage to one man and one woman came to a vote in 1997, the Senate passed it 43-5 and the House, 189-13. One representative commented after the hearing, "I just thank God I'm going back to Oakdale, where men are men and women are women, and believe me boys, there's one hell of a difference."[192]

In *De Santo v. Barnsley*,[193] the Court held that as a matter of law, two persons of the same sex cannot contract a common law marriage. The Court concluded that even though the law with regard to common law marriage did not expressly prohibit same-sex marriage,[194] the practical effect of expanding common law marriage to include same-sex

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187 *In Re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724 (200); *In Re Adoption of R.B.F. and R.C.F.*, 569 Pa. 269 (2002).
188 23 PA.CONS. STAT..ANN. § 2711(d).
189 *In Re Adoption of C.C.G. and Z.C.G*, 762 A.2d at 728.
190 *In re Adoption of R.B.F. and R.C.F*, 569 Pa. 269 (2002).
191 569 Pa. at 281-282.
192 PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 97 (1997 ed.).
193 *De Santo v. Barnsley*, 476 A.2d 952 (1984).
194 "A common law marriage is one affected by agreement of the parties without the benefit of the formality of a church ceremony or officiating officer, and without a license." *In re: Manfredi's Estate*, 399

marriage would have been to amend the Marriage Law, something only the legislature could do.[195] However, see section II.D.2., *supra*, for a discussion of *Devlin v. City of Philadelphia*, which upheld the Philadelphia Bill that included "life partner" within the definition of "marital status."

H. Other Non-Employment Sexual Orientation and Gender Identity Related Laws

Prison Cases

The United States District Court for the Eastern District of Pennsylvania considered whether state prison officials were "deliberately indifferent" to a transsexual inmate's serious medical needs in *Wolfe v. Horn*.[196] In *Wolfe*, state prison officials abruptly terminated prescribed hormonal treatment for an inmate who suffered from a gender identity disorder and whose medical history reflected depression, alcoholism and suicidal impulses without treatment.[197] In considering the state's motion for summary judgment, the court held that the termination of treatment might have risen to the level of "deliberate indifference," in which case it violated the Eighth Amendment's ban against "cruel and unusual punishment." Accordingly, it ordered that the Eighth Amendment claim go forward to trial.[198] Subsequent opinions and rulings were not available online and an internet search did not provide any details about whether the plaintiff ultimately prevailed.

In *Abdullah v. Fetrow,*[199] the court considered alleged denigration based on sexual orientation by a police officer to an accused. The accused, Abdullah, was an African-American, homosexual, disabled male, whose sister reported that he was using her social security number to open lines of credit.[200] Abdullah had injuries that required him to use an adult diaper.[201] In response to the sister's accusations, Officer Fetrow allegedly burst into Adbullah's apartment where he was asleep with his partner, called him a "little baby faggot" and refused to allow him to dress.[202] Thereafter, the officers allegedly refused to accommodate Abdullah's disabilities during his stay in prison pending charges.[203] On appeal, the court reversed dismissal of Abdullah's claims of discrimination based on his homosexuality because the complaint impliedly alleged that Officer Fetrow had charged Abdullah with a crime because of his sexual orientation.[204]

Pa. 285 (1960). "A common law marriage may be created by uttering words in present tense with intent to establish a marital relationship." *Com. v. Sullivan*, 484 Pa. 130 (1979).

195 484 Pa. at 956.

196 *Wolfe v. Horn*, 130 F.Supp.2d 648 (2001).

197 130 F.Supp. at 650.

198 130 F.Supp. at 653.

199 2006 WL 1274994 (M.D. Pa.).

200 *Id.* at *1.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.* at *7.

This violated the Fourteenth Amendment, which forbids punishment based on something other than conduct.[205]

Non-employment Administrative Complaints

A review of the Philadelphia Human Relations Commission webpage detailed that in 2006 it docketed seven non-employment related discrimination complaints based on sexual orientation and resolved six.[206] In 2007, it docketed three such complaints based on sexual orientation and resolved five.[207] It is not clear from either report what percentage of complaints docketed or resolved were filed against state or local actors. No local non-employment related discrimination complaints came up during the course of our research.

[205] *Id.*

[206] PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2006, *available at* ,http://www.phila.gov/humanrelations/pdfs/2006AnnualReportFINA.pdf.

[207] PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2007, *available at* http://www.phila.gov/humanrelations/pdfs/2007_Annual_Report.pdf..

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Rhode Island – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

In 1995, Rhode Island's General Assembly added protection from discrimination based on sexual orientation to the state civil rights law, initially passed in 1949.[1]

The bill took eleven years to enact, and was at times hotly contested in the legislature.[2] A proponent of the legislation described the antipathy toward the gay community in the Rhode Island legislature in the mid 1980's as such:

> "In the last session you had the extreme of [Senator Robert Motherway] saying that if such a bill passed you could potentially have a rescue worker with gonorrhea of the throat giving you mouth-to-mouth resuscitation, the implication being that we are dirty people and are going to spread disease."[3]

As the debate continued on the House Floor, in 1995 Representative Metts used such derisive phrases as "mankind shall not lie with mankind" and "immoral sexual behavior is an abomination to God," in voicing his opposition to the bill.[4]

In the Senate debate in 1995, Senator Graziano argued that the bill would be construed to protect those with a "sexual orientation toward children."[5] Also in opposition, Senator Lawrence echoed the opponents in the House, noting that if Rhode Island has a right to criminalize sodomy, it should not be required to adopt legislation protecting homosexuals from discrimination.[6]

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[1] R.I. GEN .LAWS. § 28-5.1-5.2 (1949).
[2] R.I. GEN. LAWS § 28-5-3 (1995), R.I. GEN. LAWS § 28-5-7 (1995), R.I. GEN. LAWS § 34-37-4 (1995), R.I. GEN. LAWS § 34-37-4.3 (1995), R.I. GEN. LAWS § 11-24-2 (1995).
[3] Thomas Morgan, *Gay Alliance Champions the Silent 10%*, PROV. J., Jul. 24, 1985, at 06.
[4] Floor Statement of R.I. Rep. Metts, R.I. House of Rep.,, Mar. 29, 1995.
[5] Floor Statement of R.I. Sen. Graziano,, R.I. Sen.,. May 19, 1995.
[6] Floor Statement of R.I. Sen. Lawrence, R.I. Sen., May 19, 1995. Senator Lawrence's 1995 statements preceded the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that state sodomy laws violate the federal constitution).

In 2001, the General Assembly voted to prohibit discrimination based on gender identity.[7]

The city of Providence also has had an anti-discrimination ordinance that prohibits sexual orientation discrimination since 1995, that has been interpreted to also prohibit discrimination on the basis of gender identity. When the Providence City Council voted against adding sexual orientation as a protected basis in its anti-discrimination ordinance in 1985,[8] One former city councilman, Thomas Pearlman, sstated: "These courageous councilmen have relieved organizations such as nursery schools, Girl Scouts, Boy Scouts and. . .Day-Care Centers from being required to hire sexual perverts…"[9]

Since the enactment of the Rhode Island law prohibiting sexual orientation discrimination, public employees have filed claims alleging sexual orientation discrimination. From 2000 to the present, seven such complaints have been filed against public employers with the Rhode Island Commission for Human Rights ("RICHR"). In five of these complaints, employees alleged harassment and/or discriminatory termination. In the other two complaints, employees claimed they were denied benefits.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Rhode Island include:

- In 2007, a gay man working for the State of Rhode Island Department of Corrections reported having problems at work because of his sexual orientation. He was called "gay cop," "cum swallowing pig," and other derogatory names in front of inmates by his coworkers.[10]

- A gay male public employee was terminated from his job as a beach manager after three years. His employer publicly informed him that he was under investigation for sexual harassment, due to a complaint made by a male ex-employee. In the past, his employer had referred to homosexuals as "fags." The employee stated that similarly situated heterosexuals were not accused of sexual harassment.[11]

- In 2004, a Rhode Island State Trooper, who was a lesbian, reported that she was harassed and ultimately fired because of her sexual orientation.

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[7] *Law Now Bans Transgender Bias*, PROV. J., Jul. 20, 2001, at B5; R.I. GEN. LAWS § 28-5-3 (2001), R.I. GEN. LAWS § 28-5-7 (2001), R.I. GEN. LAWS § 34-37-4 (2001), R.I. GEN. LAWS § 34-37-4.3 (2001), R.I. GEN. LAWS § 11-24-2 (2001).

[8] Russell Garland, *Gay Rights Out, Anti-Bias Law Passed by Council 'Sexual Orientation' Clause Removed by a Vote of 8 to 6*, PROV. J., Sept. 6, 1985.

[9] Richard C. Dujardin & Russell Garland, *Gay Rights Vote Satisfies Bishop Gelineau*, PROV. J., Sept. 6 1985 at C1.

[10] GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 22, 2007) (on file with GLAD) (hereinafter "GLAD Intake Form" ([date])).

[11] Charge of Discrimination Form, R.I. Comm'n on Human Rts. (Aug. 16, 2006, as amended) (on file with the Williams Institute) (hereinafter "R.I. Charge of Discrimination" ([date(s)],[any amendments thereto]).

The trooper was concerned that if she filed a complaint, she would not be able to get another job in law enforcement in the state.[12]

- A teacher who alleged that the Cranston Public Schools unlawfully discriminated against her based on sexual orientation in violation of Rhode Island's anti-discrimination law. The Rhode Island Commission for Human Rights found probable cause to believe that teacher had been unlawfully discriminated against before the case was transferred to the Superior Court. The teacher was denied family medical leave when she took time off work to care for her ill same sex partner. The Superintendent stated that family medical leave could only be granted where there is an "illness in the family" and not for "non-related individuals living in the household."[13] The hearing on the teacher's motion for summary judgment is scheduled for March 3, 2009.[14]

- A lesbian public employee was terminated from her job as a certified nursing assistant. Her employer's stated reason for her termination was that her sexual orientation made other employees uncomfortable.[15]

- In 2003, a woman working for a state agency overheard a conversation in the cafeteria at work in which an employee made derogatory comments about gay people, such as "homosexuals are pedophiles." She complained to her supervisor, who scheduled a mediation session. However, the person who made the comment refused to participate, and the matter was dropped. She feared retaliation if she filed another complaint.[16]

- In 2002, a teacher at a Rhode Island public school, who is gay, reported that several of his coworkers made anti-gay comments to him, such as "What, are you a homo?" "Where are your wife and kids?" and "We can't deal with this gay and lesbian shit." In response to his complaints, the teacher's classroom and teaching schedule was changed without notice, he has been screamed at, and he was warned to "not get into a pissing match" with them. The teacher reported that he felt intimidated and was treated differently and passed over for other work opportunities because of his sexual orientation. After filing a complaint with his union and the school district, union officials and the principal wrote the teacher up for insubordination. The teacher spoke to someone in the Rhode Island Department of Education, but he feared that if he filed an official complaint, the Department of Education would take the school's side.[17]

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[12] GLAD Intake Form (Mar. 18, 2004).
[13] *See* Plaintiff's Memorandum of Points and Authorities In Support of Motion for Summary Judgment, *D'Amico v. Cranston Sch. Comm.*,P.C.C.A. No. 06-5997 (R.I. Super. Ct. 2009).
[14] *See* R.I. Charge of Discrimination (May 26, 2004); *infra* Section III.A.1.
[15] *See* R.I. Charge of Discrimination (Nov. 1, 2004).
[16] GLAD Intake Form (July 17, 2003).
[17] GLAD Intake Form (Oct. 30, 2002).

- In 2002, a science teacher came out to his colleagues and his principal began to harass him. As the harassment continued, the teacher became more depressed and anxious and began to stay out of school and then was fired.[18]

- A lesbian public employee was harassed and subjected to discriminatory terms and conditions of employment by her supervisor. Since her supervisor learned of her sexual orientation, she has been treated in a demeaning/harassing manner. She was constantly questioned about time, work assignments, and her manner of dress and was the only employee not allowed to wear jeans to work.[19]

- A lesbian public employee was subjected to discriminatory terms and conditions of employment. The employee stated that her supervisor was jealous of her relationship with a female coworker and so harassed her and issued inappropriate disciplinary actions. The supervisor also harassed her outside of work, following her home and to her partner's house on numerous occasions.[20] A public employee was terminated and her supervisor stated that the reason for termination was that employee threw a snack at a patient. However, prior to termination, her supervisor told her that she would not tolerate the employee's homosexuality.[21]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[18] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).
[19] *See* R.I. Charge of Discrimination (June 1, 1999); R.I. Charge of Discrimination (Apr. 28, 2000).
[20] *See* R.I. Charge of Discrimination (Dec. 1, 1997); R.I. Charge of Discrimination (June 13, 1998).
[21] See R.I. Charge of Discrimination (Oct. 18, 1997); R.I. Charge of Discrimination (Nov. 5, 1997).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

In 1995, the Rhode Island General Assembly amended the Fair Employment Practices Act ("FEPA") to include sexual orientation as a protected basis, joining race, religion, sex, disability, age, and country of ancestral origin.[22] In 2001, the General Assembly also voted to prohibit employment discrimination based on "gender identity or expression."[23] The bill defines "sexual orientation" as "[H]aving or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality."[24] The language in the bill directly following this definition reflects the contentiousness in the debate leading up to passage: "[t]his definition does not confer legislative approval of said status, but is intended to assure basic human rights of persons to obtain and hold employment, regardless of such status."[25]

The bill further defines "gender identity or expression" as "a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth."[26]

The FEPA, which covers public and private employers, employment agencies and labor organizations, prohibits intentional discrimination and practices or policies that have a disparate impact on the basis of sexual orientation and/or gender identity.[27]

While the bill is relatively broad in scope, it contains several exemptions. First, employers with fewer than four employees are exempt.[28] Second, the statute does not apply "to a religious corporation, association, education institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities."[29] Third, public and private employers may defend against a discrimination claim by arguing that a "bona fide occupational qualification" for the particular position is that it be held by someone who is non-gay or non-transgender.[30] Finally, owners who live in units housing three families or less are not covered by the corresponding Fair Housing Practices Act.[31]

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[22] R.I. GEN. LAWS § 28-5-7 (1995).
[23] R.I. GEN. LAWS § 28-5-7 (2001).
[24] R.I. GEN. LAWS § 28-5-6(13).
[25] R.I. GEN. LAWS § 28-5-6(13).
[26] R.I. GEN. LAWS § 28-5-6(14).
[27] *See* R.I. GEN. LAWS § 28-5-7; R.I. GEN. LAWS § 28-5-7.2.
[28] R.I. GEN. LAWS § 28-5-6(7)(i).
[29] R.I. GEN. LAWS § 28-5-6(7)(ii).
[30] R.I. GEN. LAWS § 28-5-7(4).
[31] R.I. GEN. LAWS §§ 34-37-4.4, 34-37-4.5.

Rhode Island's FEPA was intended by the legislature as an analog to Title VII.[32] Thus, when analyzing a discrimination claim under the FEPA, courts will apply the same three part burden shifting analysis applicable under Title VII.[33]

2. Enforcement & Remedies

Individuals alleging discrimination on the basis of sexual orientation or gender identity have one year from the date of the alleged harm to file a complaint with the RICHR, the agency that enforces the antidiscrimination laws.[34] Once an individual files a complaint, the RICHR will typically conduct a preliminary investigation to determine whether there is probable cause to believe that unlawful discrimination has occurred.[35]

If the RICHR finds probable cause, then it must first attempt to settle the matter with "informal methods of conference, persuasion, and conciliation."[36] Where informal methods of settlement have failed, the RICHR will conduct a formal hearing and upon a finding of unlawful discrimination, must issue an order requiring the employer to

> "cease and desist … and to take such further affirmative action … including, but not limited to, hiring; reinstatement, or upgrading of employees with or without back pay[,] admission or restoration to union membership or to training practices with utilization of objective criteria for admission …."[37]

Additionally, attorneys' fees may be awarded to the prevailing plaintiff and, if the Commission finds intentional discrimination, then it may award compensatory damages as well.[38]

There are two ways in which a case may be heard in Rhode Island state court. First, if the RICHR is unable to secure a settlement agreement, and has not begun a hearing on the complaint, then the complainant may ask for a right to sue in state court "if not less than one hundred and twenty days and not more than two years have elapsed from the date of filing of a charge …."[39] Once the complainant makes a request, the RICHR must grant the right to sue within thirty days. Second, if the RICHR finds probable cause to believe that unlawful discrimination occurred, then the complainant "may elect within twenty days … to terminate by written notice … all proceedings before the commission and have the case heard in the superior court …."[40]

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[32] *Tardie v. Rehabilitation Hosp.*, 6 F. Supp. 2d 125, 133 (R.I. Dist. Ct. 1998).
[33] *Id.*
[34] R.I. Comm'n for Human Rts. Rules & Reg., Rule 4.5.
[35] Rule 5.01.
[36] R.I. GEN. LAWS § 28-5-16; R.I. Comm'n for Human Rts. Rules & Reg., Rule 5.02.
[37] R.I. Comm'n for Human Rts. Rules & Reg., Rule 12.02(B)(1).
[38] *See* R.I. GEN. LAWS § 28-5-24(a)-(b); R.I. Comm'n for Human Rts. Rules & Reg., Rule 16.01.
[39] R.I. GEN. LAWS § 28-5-24.1(a).
[40] R.I. GEN. LAWS § 28-5-24.1.

A Rhode Island state court may award punitive damages if it finds that the employer's conduct was motivated by "malice or ill will" or "involve[d] reckless or callous indifference to the statutorily protected rights of others."[41]

B. Attempts to Enact State Legislation

On March 29, 1995, the Rhode Island House of Representatives passed the amendment prohibiting discrimination on the basis of sexual orientation in employment, housing, public accommodations, and granting credit.[42] The amendment was passed in the Senate on May 19, 1995.[43] Civil rights activist Julie Pell attributed the bill's passage to "a cumulative effect of testimony about discrimination from men and women who were openly gay."[44]

Bills prohibiting discrimination on the basis of sexual orientation were introduced in the legislature for eleven consecutive years before passage in 1995.[45] A proponent of the legislation described the antipathy toward the gay community in the Rhode Island legislature in the mid 1980's as such:

> "In the last session you had the extreme of [Senator Robert Motherway] saying that if such a bill passed you could potentially have a rescue worker with gonorrhea of the throat giving you mouth-to-mouth resuscitation, the implication being that we are dirty people and are going to spread disease."[46]

In the debate on the House Floor on March 29, 1995, two principal arguments emerged against passage of the bill: one based on religion and the other on the constitution. Representative Metts spearheaded the religious argument, invoking such phrases from the Bible as "mankind shall not lie with mankind," and "immoral sexual behavior is an abomination to God." His general point was that anyone whose behavior could be described as an "abomination" in the Bible should not be granted civil rights.[47] The constitutional argument against the bill was put forth by Representative Knowles, who maintained that civil rights legislation should only extend to certain protected classes based on immutable factors such as race and gender. Representative Knowles believed

[41] R.I. GEN. LAWS § 28-5-29.1.
[42] H.B. 6678 (1995).
[43] R.I. Sen. J., May 19, 1995.
[44] David Dunlap, *Rhode Island's Senate Sends Gay-Rights Bill to Governor*, N. Y. TIMES, May 20, 1995, at 10.
[45] *See generally* Morgan, *supra* note 3; *Panel OKs Scaled-Down Bill Prohibiting Bias*, PROV. J., Apr. 08, 1988, at C20; Russell Garland, *Judiciary Again Takes Up a Gay Rights Bill*, PROV. J., Mar. 26, 1993 at B6; Lynn Arditi, *Gay Shoppers Boycott R.I.*, PROV. J., Dec. 6 1992, at I2; Scott MacKay, *Gay Rights Go Before Assembly for 11th Year*, PROV. J., Mar. 14, 1995 at C4.
[46] Morgan, *supra* note 45.
[47] Floor Statement of R.I. Rep. Metts, R.I. House of Rep., Mar. 29, 1995.

that sexual orientation was not an immutable characteristic, and thus opposed granting "special rights" to gays and lesbians.[48]

Another stated concern in the debate was fear of the teaching of the "gay lifestyle." The original version of the bill contained a provision directing the Commission and the State Department of Education to prepare a comprehensive educational program addressing protecting students from bullying and harassment on the basis of sexual orientation in the schools.[49] Representative Pires moved to strike this provision, which the majority of the House supported.[50] Representative McDevitt, a vocal opponent of an anti-discrimination educational program, argued that it would be tantamount to forcing an "abhorrent sexual philosophy" on people, stating "I don't have to live with people flaunting a lifestyle that I don't agree with [sic]."[51]

Several senators expressed opposition to various aspects of the bill by moving to amend it. Senator Lawrence introduced an amendment that would exempt the Boy Scouts from the bill; it was ultimately rejected.[52] Senator Walaska introduced two amendments, which also failed. His first proposed amendment exempted small businesses with 25 or fewer employees.[53] His second proposed amendment was to insert the following provisions in the bill:

> "Nothing in this chapter shall be construed to: (1) mean the state of Rhode Island condones homosexuality or bisexuality or any equivalent lifestyle; (2) authorize or permit the promotion of homosexuality or bisexuality in education institutions or require the teaching in education institutions of homosexuality or bisexuality as an acceptable lifestyle; (3) authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality or bisexuality in the administration or enforcement of the provisions of this chapter; or (4) authorize the recognition of or the right of marriage between persons of the same sex." [54]

Senator Polisena introduced an amendment that was also rejected, urging the Senate to defer voting on the bill and instead to submit it to a referendum. Several

[48] Floor Statement of R.I. Rep. Knowles,, R.I. House of Rep., Mar. 29, 1995.
[49] *See* R.I. H. J., Mar. 29, 1995. A similar section, designed to eradicate sexual orientation discrimination in the schools was later passed in 1997. *See* R.I. GEN. LAWS § 28-5-14 (1997).
[50] *See* R.I. H. J., Mar. 29, 1995.
[51] Floor Statement of R.I. Rep. McDevitt, R.I. House of Rep., Mar. 29, 1995.
[52] *See* R.I. SEN. J., May 19, 1995.
[53] *See* R.I. SEN. J., May 19, 1995.
[54] R.I. SEN. J. (May 19, 1995).

senators argued that the bill presented emotional issues that must be left for the voters to decide.[55]

In the floor debate on the bill as a whole, several themes emerged. In opposition to the bill, Senators Graziano, Flynn, Walaska, and Mathieu all questioned the need for the bill.[56] Senator Graziano argued that the bill would be construed to protect those with a "sexual orientation toward children" and that the bill would make radical feminists very happy because it would result in straight, white males being the only unprotected group.[57] Also in opposition, Senator Lawrence echoed the opponents in the House, arguing that homosexuals do not constitute a suspect or quasi-suspect class deserving of protection, and further noting that if Rhode Island has a right to criminalize sodomy, it should not be required to adopt legislation protecting homosexuals from discrimination.[58]

On May 1, 2001 the House passed a bill prohibiting discrimination on the basis of "gender identity or expression" in employment, housing, public accommodations, and in granting credit.[59] The Senate passed the bill on Thursday, June 28, 2001, and it became law without the Governor's signature on July 13, 2001.[60] Upon passage, Rhode Island became the third state in the nation to prohibit discrimination against transgender individuals.[61]

In contrast to the heated debate surrounding the 1995 law prohibiting sexual orientation discrimination, the gender identity bill passed quietly. The House Minority Leader, Robert Watson, also opposed the bill, posing the question: "Could boys say they feel more comfortable in the Girl Scouts?"[62] Only one other Representative and one Senator made floor statements in opposition.[63]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

In 1985, Governor Edward DiPrete issued the first executive order prohibiting employment discrimination by state agencies on the basis of sexual orientation.[64]

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[55] Floor Statements of R.I. Sen. Holland, Palazzo, & Celona, R.I. Sen., May 19, 1995.
[56] Floor Statements of R.I. Sen. Graziano, Flynn, Walaska &Mathieu , R.I. Sen., May 19, 1995.
[57] Floor Statement of R.I. Sen. Graziano, R.I. Sen., May 19, 1995.
[58] Floor Statement of R.I. Sen. Lawrence, R.I. Sen. May 19, 1995. Senator Lawrence's 1995 statements preceded the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that state sodomy laws violate the federal constitution).
[59] H.B. 5920 (2001).
[60] *See* R.I. SEN. J., June 28, 2001.
[61] *Law Now Bans Transgender Bias*, PROV. J., Jul. 20, 2001, at B5.
[62] Ariel Sabar, *House Extends Civil Rights Protection*, PROV. J., Apr. 29, 2001 at 1B.
[63] *See* Floor Statement of R.I. Rep. Corvese, R.I. House of Rep., May 1, 2001; Floor Statement of R.I. Sen. Polisena, R.I. Sen., Jun. 28, 2001.
[64] R.I. Exec. Order No. 11 (1985) (Equal Opportunity and Affirmative Action Policy, amending R.I. Exec. Order No. 9 (1985)).

Governors Sundlun, Almond, and, most recently, Carcieri, have issued similar orders.[65] Only Governor Carcieri's Order also offers protection for gender identity.[66]

2. State Government Personnel Regulations

The Rhode Island State Equal Opportunity Office accepts "[F]rom both State employees and applicants for State employment, complaints of discrimination that are based on. . .sexual orientation ."[67]

3. Attorney General Opinions

None.

D. Local Legislation

1. City of Providence

The city of Providence is the only locality in Rhode Island with a comprehensive anti-discrimination ordinance. Providence prohibits discrimination on the basis of sexual orientation in housing, education, employment, public accommodations, and in granting credit.[68] Sexual orientation was added as a protected basis in 1995, thus joining race, color, sex, religion, marital status, disability, age, and country of ancestral origin.[69] Exemptions mirror those in the FEPA.[70] Complaints under the ordinance are filed with the Providence Human Relations Commission, the local analog to the RICHR.[71]

Unlike the FEPA, the Providence antidiscrimination ordinance does not include language prohibiting discrimination on the basis of gender identity or expression.[72] However, the Providence Human Relations Commission's website clearly states that it protects individuals who have been discriminated against because of their gender identity.[73]

The Providence City Council voted against adding sexual orientation as a protected basis in its anti-discrimination ordinance in 1979 and again in 1985.[74] One

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[65] *See* R.I. Exec. Order No. 11 (1993) (Equal Opportunity Affirmative Action Policy Statement, Handicapped)(; R.I. Exec. Order No. 14 (1996)(Promotion of Equal Opportunity by State Government); R.I. Exec. Order No. 11 (2005) (Promotion of Equal Opportunity and The Prevention of Sexual Harassment in State Government), *available, respectively, at* http://bit.ly/jXgGe.
[66] *See* R.I. Exec. Order No. 1 (2005) (Promotion of Equal Opportunity and the Prevention of Sexual Harassment in State Government), *available at* http://bit.ly/pxcet.
[67] R.I. Equal Opportunity Office Rules & Reg. (Hearings on Discrimination Complaints).
[68] PROVIDENCE CODE OF ORD., Art. II, § 16, *et seq.*
[69] PROVIDENCE CODE OF ORD., Art. II, § 16, *et seq.*
[70] PROVIDENCE CODE OF ORD., Art. II, §§ 16-54(d)-16-54(h).
[71] PROVIDENCE CODE OF ORD., Art. II, §§ 16-62-16-84.
[72] PROVIDENCE CODE OF ORD., Art. II, § 16-57.
[73] City of Providence, Providence Providence Human Relations Commission, http://providenceri.com/phrc (last visited Sept. 8, 2009).
[74] Russell Garland, *Gay Rights Out, Anti-Bias Law Passed by Council "Sexual Orientation" Clause Removed by a Vote of 8 to 6,* PROV. J., Sept. 6, 1985.

former city councilman, Thomas Pearlman, speaking in support of the 1985 decision, stated:

> "These courageous councilmen have relieved organizations such as nursery schools, Girl Scouts, Boy Scouts and. . .Day-Care Centers from being required to hire sexual perverts regardless of whether they are heterosexual, bi-sexual or homosexual, and subjecting themselves to lawsuits for failure to hire them."[75]

2. City of Richmond

A personnel regulation states that Richmond strives to ensure a system of personnel administration based on merit and without regard to "sexual orientation" or "gender identity or expression."[76]

3. City of Warwick

The Director of the Warwick Personnel Department issued a statement declaring that "The City of Warwick is an Equal Opportunity Employer where there shall be no discrimination based on … sexual orientation."[77]

4. Town of Burrillville

An employment application for the town of Burrillville states that "We consider applicants for all positions without regard to … sexual orientation … or any other legally protected status."[78]

5. City of Coventry

A Coventry ordinance states that "There shall be no discrimination against any person seeking employment or employed in the classified service …because of …sexual orientation. . .or any other grounds upon which discrimination is prohibited."[79]

6. City of Glocester

The Glocester Sexual Harassment Policy states that "[t]he Town of Glocester will administer all provisions of this policy without regard to … sexual orientation…."[80]

7. City of Johnston

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[75] Richard C. Dujardin & Russell Garland, *Gay Rights Vote Satisfies Bishop Gelineau*, PROV. J., Sept. 6 1985 at C1.
[76] RICHMOND CODE OF ORD. § 2.20.010(B) (Personnel Chapter).
[77] Statement of Oscar Shelton, Director, City of Warwick Personnel Department.
[78] Town of Burrillville Application for Employment, http://bit.ly/pIo8N (last visited Sept. 6, 2009)..
[79] COVENTRY, CODE OF ORD., Personnel, Art. 51-11.
[80] GLOCESTER CODE OF ORD. § 399-1 (Sexual Harassment Policy).

The Johnston Personnel Policy states that "no person shall be discriminated against because of any … sexual orientation [or] gender identity or expression…."[81]

8. Town of Little Compton

The Little Compton Sexual Harassment Policy states that "[t]he Town will administer all provisions of this policy without regard to … sexual orientation…."[82]

9. Town of South Kingston

The South Kingston Sexual Harassment Policy states that "[t]he Town will administer all provisions of this policy without regard to … sexual orientation…."[83]

E. Occupational Licensing Requirements

Several occupational licenses in Rhode Island require a showing of "good moral character," or proof that an individual has not been convicted of a "crime of moral turpitude."[84]

[81] JOHNSTON, CODE OF ORD. § 47-3 (Personnel Policies).
[82] LITTLE COMPTON CODE OF ORD. § 10-1.16 (Sexual Harassment Policy).
[83] S. KINGSTON CODE OF ORD., Art. III:, § 13-51 (Sexual Harassment Policy).
[84] *See* Rhode Island Government, R.I. Licensing, https://www.ri.gov/Licensing (last visited Sept. 8, 2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

D'Amico v. Cranston Sch. Comm., P.C.C.A. No. 06-5997 (R.I. Super. Ct. 2009).

Attorneys from New England-based Gay & Lesbian Advocates & Defenders ("GLAD") recently filed a motion for summary judgment in the Rhode Island Superior Court on behalf of Debra D'Amico, who alleged that the Cranston Public Schools unlawfully discriminated against her based on sexual orientation in violation of the FEPA. The RICHR found probable cause to believe that D'Amico had been unlawfully discriminated against before the case was transferred to the Superior Court. D'Amico, a teacher with the Cranston Public Schools, was denied family medical leave when she took time off work to care for her ill same sex partner. The Superintendent stated that family medical leave could only be granted where there is an "illness in the family" and not for "non-related individuals living in the household."[85] The hearing on D'Amico's motion for summary judgment is scheduled for March 3, 2009.

2. Private Employers

None.

B. Administrative Complaints

1. RICHR

From 2000 to 2008, the RICHR received a total of 49 employment discrimination complaints based on sexual orientation. Seven were filed against public employers. These seven filings are detailed below:[86]

Aug. 16, 2006

Gay male public employee was terminated from his job as a beach manager after three years. Employer publicly informed him that he was under investigation for sexual harassment, due to a complaint made by a male ex-employee. In the past, employer had

[85] *See* Plaintiff's Memorandum of Points and Authorities In Support of Motion for Summary Judgment, *D'Amico v. Cranston Sch. Comm.* , P.C.C.A. No. 06-5997 (R.I. Super. Ct. 2009).
[86] *See* Sexual Orientation Case Closures (on file with the R.I. Comm'n for Human Rts.). Observers have attributed the relatively low number of complaints to the ongoing stigma attached to being openly gay in the workplace. Scott MacKay, *Gay Rights Complaints Rare Under Fledgling Law*, PROV. J.-BULL., Dec. 10, 1996, at 1A.

referred to homosexuals as "fags." Employee stated that similarly situated heterosexuals were not accused of sexual harassment.[87]

Nov. 7, 2005 to Jan. 1, 2006

Public Employer declared that it no longer had the responsibility to provide domestic partners with health coverage or job protection granted by the FMLA.[88]

Nov. 1, 2004

Lesbian public employee was terminated from job as certified nursing assistant. Employer's stated reason for termination was that her sexual orientation made other employees uncomfortable.[89]

May 26, 2004

Cranston school district denied teacher's request for family leave benefits to care for same sex sick partner. Arbitrator concluded that district's Master Agreement did not require it to provide teacher with family medical leave because she and her partner were not related by blood or marriage.[90]

June 1, 1999 to Apr. 28, 2000

Lesbian public employee was harassed and subjected to discriminatory terms and conditions of employment by supervisor. Since supervisor learned of employee's sexual orientation, she has treated employee in a demeaning/harassing manner. Employee was constantly questioned about time, work assignments, and manner of dress. Employee was the only employee not allowed to wear jeans to work.[91]

Dec. 1, 1997 to June 13, 1998

Lesbian public employee was subjected to discriminatory terms and conditions of employment. Employee stated that her supervisor was jealous of her relationship with a female coworker and so harassed her and issued inappropriate disciplinary actions. The supervisor also harassed her outside of work, following her home and to her partner's house on numerous occasions.[92]

Oct. 18, 1997 to Nov. 5, 1997

[87] R.I. Charge of Discrimination (Aug. 16, 2006).
[88] R.I. Charge of Discrimination (Nov. 7, 2005 – Jan. 1, 2006).
[89] R.I. Charge of Discrimination (Nov. 1, 2004).
[90] R.I. Charge of Discrimination (May 26, 2004); *see supra* Section III.A.1.
[91] R.I. Charge of Discrimination (June 1, 1999 – Apr. 28, 2000).
[92] R.I. Charge of Discrimination (Dec. 1, 1997 – June 13, 1998).

Public employee was terminated. Supervisor stated that the reason for termination was that employee threw a snack at a patient. Prior to termination, supervisor told employee that she would not tolerate employee's homosexuality.[93]

2. EEOO

City of Providence EEO Officer Olayinka Oregduba provided sexual orientation discrimination complaints filed by city employees dating back to March 2005. Out of the five complaints filed, two were filed by heterosexual men claiming same-sex sexual harassment. Probable cause was found in both cases. The other three complainants are gay. The EEO Office did not find probable cause to believe unlawful sexual orientation discrimination had occurred in any of these three cases. The first complainant was a lesbian firefighter who claimed she was discriminated against based on "gender and possibly sexual orientation" in her station placement. Despite a finding of no probable cause, the EEO Office nonetheless negotiated with the fire department to secure her placement in the station that she sought. The second complainant was a gay male employed as a Systems Analyst. He claimed that a heterosexual female office clerk with whom he worked had acted in a demeaning fashion toward him. He stated that she probably knew he was gay, but was "unsure whether her demeaning attitude toward him was because of his sexual orientation or because she was just a rude person." Again, despite its finding of no probable cause, the EEO Office nonetheless gave the clerk warnings about her behavior. The final complaint based on sexual orientation was filed by a gay male lab technician claiming discrimination by two male heterosexual coworkers who he said did not like gay men. While it is a bit unclear from the face of the complaint, it appears that the man was teased by these coworkers after the film "Brokeback Mountain" was released. Each of these heterosexual coworkers later filed their own sexual harassment complaints against the gay male.[94]

C. Other Documented Examples of Discrimination

Rhode Island Department of Corrections

In 2007, a gay man working for the State of Rhode Island Department of Corrections reported having problems at work because of his sexual orientation. He was called "gay cop," "cum swallowing pig," and other derogatory names in front of inmates by his coworkers.[95]

Rhode Island State Trooper

In 2004, a Rhode Island State Trooper, who is a lesbian, reported that she was harassed and ultimately fired because of her sexual orientation. The trooper was

[93] R.I. Charge of Discrimination (Oct. 18, 1997 – Nov. 5, 1997).
[94] *See* City of Providence, Office of Equal Opp., Complaint Filings (2005-08) (filings indicating discrimination based upon sexual orientation)..
[95] GLAD Intake Form (Mar. 22, 2007).

concerned that if she filed a complaint, she would not be able to get another job in law enforcement in the state.[96]

Rhode Island State Department

In 2003, a woman working for a state agency overheard a conversation in the cafeteria at work in which an employee made derogatory comments about gay people, such as "homosexuals are pedophiles." She complained to her supervisor, who scheduled a mediation session. However, the person who made the comment refused to participate, and the matter was dropped. She feared retaliation if she filed another complaint.[97]

Rhode Island Public School

In 2002, a teacher at a Rhode Island public school, who is gay, reported that several of his coworkers made anti-gay comments to him, such as "[w]hat, are you a homo[,]" "[w]here are your wife and kids[,]" and "[w]e can't deal with this gay and lesbian shit." In response to his complaints, the teacher's classroom and teaching schedule was changed without notice, he has been screamed at, and he was warned to "not get into a pissing match" with them. The teacher reported that he felt intimidated and was treated differently and passed over for other work opportunities because of his sexual orientation. After filing a complaint with his union and the school district, union officials and the principal wrote the teacher up for insubordination. The teacher spoke to someone in the Rhode Island Department of Education, but he feared that if he filed an official complaint, the Department of Education would take the school's side.[98]

[96] GLAD Intake Form (Mar. 18, 2004).
[97] GLAD Intake Form (July 17, 2003).
[98] GLAD Intake Form (Oct. 30, 2002).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

In 1998, Rhode Island repealed its 102-year-old law against sodomy. This law described sodomy as "abominable and detestable crimes against nature" and subjected violators to a maximum prison term of 20 years.[99] In the 1995 legislative sessions, Senator Lawrence invoked the sodomy laws as a reason for why discrimination based on sexual orientation should not be prohibited.[100]

B. Housing & Public Accommodations Discrimination

As set forth above, in 1995 and 2001, respectively, the Legislature voted to prohibit sexual orientation and gender identity discrimination not just in employment, but also in housing, public accommodations and in granting credit.

An East Greenwich ordinance states that "The recipient of any expenditure of funds from the Affordable Housing Trust Fund shall comply with all applicable federal, state and local law relating to discrimination on the basis of. . .sexual orientation. . .or other prohibited classifications."[101]

C. HIV/AIDS Discrimination

In 1988, Rhode Island made it illegal for public and private entities to discriminate on the basis of real or perceived HIV status in employment, housing, granting credit, public accommodation, and the delivery of services.[102] An HIV test may not be required as a condition of employment, "[E]xcept where nondiscrimination can be shown, on the testimony of competent medical authorities, to constitute a clear and present danger of HIV transmission to others."[103] Discrimination complaints based on real or perceived HIV status may be filed with the RICHR.[104]

D. Hate Crimes

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[99] *See* Carey Goldberg, *Rhode Island Moves to End Sodomy Ban*, N.Y. TIMES, May 10, 1998; R.I. GEN. LAWS §11-10-1.
[100] Floor Statement of Senator Lawrence, R.I. Sen. (June 28, 1995).
[101] EAST GREENWICH CODE OF ORD., § 34-33(g)(2).
[102] R.I. GEN. LAWS § 23-6-22.
[103] R.I. GEN. LAWS § 23-6-22.
[104] R.I. GEN. LAWS § 23-6-23. We attempted to get copies of discrimination complaints filed with the RICHR based on real or perceived HIV status. The executive director informed us that these complaints are lumped in with other disability discrimination complaints and would take a very long time to procure.

Rhode Island enacted a hate crime law that addresses violence based on sexual orientation, but not gender identity.[105] An amendment to the hate crime law that would include protection based on gender identity passed the House in 2008 but was defeated in the Senate Judiciary Committee.[106]

E. Education

There are no state laws in Rhode Island explicitly prohibiting discrimination on the basis of sexual orientation and/or gender identity in the schools.[107] In 1997, the General Assembly did, however, direct the RICHR and the State Department of Education to prepare a comprehensive curriculum emphasizing the harmful effects of prejudice based on sexual orientation.[108] In the same year, the Rhode Island Board of Regents for Elementary and Secondary Education issued a statement announcing that "[n]o student shall be excluded from, discriminated against, or harassed in any educational program, activity or facility in a public school on account of sexual orientation or perception of same."[109]

F. Health Care

Rhode Island law does not permit a partner to make medical decisions on behalf of a same-sex partner in the absence of an advance directive.[110]

G. Parenting

Rhode Island courts have allowed a former same-sex partner to petition for visitation.[111]

H. Domestic Partner Benefits

The state of Rhode Island extends health benefits to same-sex domestic partners of its employees, provided that both members of the couple are over 18, have lived together for at least one year, and can show that they are financially interdependent.[112]

J. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

City of Warren

[105] R.I. GEN. LAWS § 12-19-38.
[106] *See* H.B. 7457 (R.I. 2008).
[107] The city of Providence does, however, prohibit "any school, educational institution or facility" from discriminating on the basis of sexual orientation. *See* PROVIDENCE CODE OF ORD., Art. II, § 16-56.
[108] R.I. GEN. LAWS § 28-5-14 (1997).
[109] Rhode Island Board of Regents Policy Statement On Discrimination Based On Sexual Orientation, R.I. & Providence Plantations, Dep't of Ed. (1997).
[110] R.I. GEN. LAWS § 23-4.10-2.
[111] *See Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).
[112] R.I. GEN. LAWS § 36-12-1.

A Warren Ordinance states that City funds may only be allocated to projects and programs that "Do not discriminate on the basis of. . . sexual preference. . . ."[113]

[113] WARREN CODE OF ORD. § 7-139(a)(1)(a) (Programs & Operations).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **South Carolina – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

South Carolina state and local law provides virtually no protection against job discrimination on the basis of sexual orientation or gender identity. No state-wide statute has been enacted in South Carolina to prohibit discrimination in employment on the basis of sexual orientation or gender identity despite substantial efforts to pass such legislation. South Carolina has enacted an extensive administrative grievance procedure for public employees, but an Attorney General's Opinion in 1975 concluded that "homosexuality is a valid ground for refusing State employment."[1] That opinion has not been changed or rescinded. Several South Carolina universities and one municipality have enacted non-discrimination policies. However, the one local ordinance addressing these issues does not cover employment discrimination.

Documented examples of discrimination on the basis of sexual orientation and gender identity in South Carolina include:

- A lesbian police officer who reported in 2007 that when she applied to a police department in South Carolina, she underwent a routine polygraph exam and was asked if she was a lesbian. She responded truthfully that the answer was "yes." She thereafter was not selected for the position. She learned from references she had given that they had not been contacted.[2] She had quit the state police academy in another state to move to South Carolina, received a good reference from her former employer, and had a clean background and a degree.

- In 2006, a gay emergency medical technician was fired by a county department because of his sexual orientation.[3]

- A junior high school teacher in Union County was suspended and put on probation for showing the Oscar-winning film *Philadelphia*, about a gay man with AIDS, to seventh and eighth graders. Parents and a local pastor complained that the film was vulgar and promoted homosexuality. The school superintendent criticized the teacher for not getting permission from the principal, the health committee, or the school board to show the film, but he did not agree that the

[1] See Part II. C. 2. below; S.C. Op. Att'y Gen. 4345, 172 (1975-76).
[2] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).
[3] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

teacher was trying to promote homosexuality. One of the parents who complained said she had not wanted the teacher suspended. 'We felt like she owed an apology to those students and those parents,' she said, stating that she will be satisfied if the school district prevents the showing of such films in the future.[4]

- An employee of the State Law Enforcement Division ("SLED") who alleged that he was constructively discharged because of his perceived sexual orientation after allegations that he had slept with a co-worker's husband and was then harassing her at work.[5] The employee denied the allegations, but the court found that the truth or falsity of the basis upon which the employee was discharged "neither enhances nor diminishes" his claim.[6] The Court stated that it was not willing to extend the right of privacy to include the conduct at issue in this case, because such "activity clearly bears no relationship to marriage, procreation, or family life"[7] and held that homosexual conduct is not protected under the due process clause of the Fourteenth Amendment.[8] The Court also stated that "the constitutional right of privacy and free association do not preclude a law enforcement agency from inquiring into an officer's off-duty same-sex relationships."[9] Further, it stated that the employee's equal protection rights had not been violated because, in discharging Dawson based on his perceived engagement in homosexual activity, SLED had the "legitimate purpose of maintaining its order, discipline and mutual trust."[10] Dawson v. State Law Enforcement Div., 1992 WL 208967 (D.S.C. April 6, 1992).

A number of incidents reported in the press indicate the hostility of state and local officials in South Carolina to LGBT people and laws prohibiting employment discrimination against them:

- In 1998, the mayor of Myrtle Beach, South Carolina joined local business and religious leaders in attacking a statewide group and its plans for a gay pride festival. In voting against closing city streets to accommodate the pride festival, he expressed concern that allowing gay men and lesbians to parade through the streets would set a dangerous precedent and would encourage Black Panthers, white supremacist skinheads and other extremist groups to stage similar marches.[11]

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[4] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 96 (1995 ed.).

[5] *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *1-2 (D.S.C. April 6, 1992).
[6] *Id.* at *5.
[7] *Id.* at *6.
[8] *Id.* at *1-2.
[9] *Id.* at *5 (citing Walls v. Petersburg, 895 F.2d 188 (4th Cir.1990)).
[10] *Id.* at *6.
[11] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 130 (1998 ed.).

- In 1997, the Greenville County Council passed a resolution that condemned "homosexuality" as "incompatible" with community standards. The three-hour discussion of the resolution was marked by assertions that gays would go to hell, and that the devil brought gay men and lesbians to Greenville.[12]

- In 1993, a gay restaurant and bar sought a license for beer and wine sales and consumption. [13] At a hearing for the license in 1993, state Senator Mike Fair testified against granting the license, stating that "homosexuality is a public health problem."[14] Despite that and other protests to the license, the administrative law judge determined that the club could be issued the license.[15]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[12] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 99 (1997 ed.).
[13] *Treehouse Club v. S.C. Dep't of Revenue*, 2003 WL 24004603, at *1. (S.C. Admin. Law. Judge. Div., 2003).
[14] *Id.* at *2.
[15] *Id.* at *5.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of South Carolina has not enacted laws to prohibit sexual orientation and gender identity employment discrimination.

B. Attempts to Enact State Legislation

Senate Bill No. 438 was introduced before the 117th Session of the South Carolina General Assembly on February 14, 2007.[16] The bill was submitted to the Committee on the Judiciary and to the relevant sub-committee, but no further action was taken. The bill would have amended Section 1-13-80 of the South Carolina Code prohibiting discrimination in employment on the basis of race, religion, color, sex, age, national origin, or disability, so as to also prohibit such discrimination on the basis of sexual orientation or gender identity.

The bill would have established a cause of action against employers engaging in the "unlawful employment practices" outlined below, for which a court could have ordered an injunction or affirmative action as appropriate, including reinstatement, with or without back pay, payable by the employer, employment agency or labor organization responsible, and any other equitable relief the court deemed appropriate. The bill would have designated actions by the following entities as an "unlawful employment practice":

> (1) **Employer Action:** To discriminate in hiring/firing or compensation decisions or otherwise take action that would adversely affect the individual's employment status or opportunities on the basis of sexual orientation or gender identity.
>
> (2) **Employment Agency Action:** To fail/refuse to refer, or to refer or classify for employment, or otherwise discriminate on the basis of sexual orientation or gender identity.
>
> (3) **Labor Organization Action:** To cause or attempt to cause an employer to discriminate, to exclude/expel from membership, or classify or otherwise take action that would deprive or limit employment opportunities on the basis of sexual orientation or gender identity.
>
> (4) **Additional Action:** For any of the above entities to discriminate in admission to or employment in a program established to provide apprenticeship or other training on the basis of sexual orientation or gender identity.

[16] S. 438, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

The bill defined "sexual orientation" and "gender identity" as follows: "sexual orientation means heterosexuality, homosexuality, or bisexuality, whether actual or perceived," and "gender identity means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior, or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex, or sex at birth." Further, the bill set out to create or recognize advisory agencies and conciliation councils to study and make recommendations regarding discrimination on the basis of sexual orientation or gender identity and to foster goodwill, cooperation, and conciliation among the population of the State.

A substantially similar, if not identical, bill text was introduced as part of Senate Bill No. 443 before the 117th Session of the South Carolina General Assembly on February 14, 2007.[17] The bill was referred to the Committee on the Judiciary and the relevant sub-committee, but was not passed.

1. Discrimination by State or Political Subdivisions in Public Employment, Public Education or Public Contracting Legislation

House Bill No. 4115 was introduced before the 112th Session of the South Carolina General Assembly on March 5, 1997.[18] The bill would have prohibited the State or any of its political subdivisions from using race, sex, color, ethnicity, or national origin as a criterion for either discriminating against or granting preferential treatment to any individual or group in the operation of the state's system of public employment, public education, or public contracting.

During the consideration of amendments in the House of Representatives, Amendment No. 37 was proposed which would have amended the bill so as to also prohibit discrimination on the basis of sexual orientation. However, the amendment was tabled.[19]

2. Employment Bill of Rights for Persons with Disabilities

Senate Bill No. 292 was introduced before the 110th Session of the South Carolina Senate on January 26, 1993.[20] The bill was referred to the Committee on the Judiciary and read favorably in the House before it was sent to the Senate, where it was referred to the Committee on Labor, Commerce and Industry, but no further action was taken. The bill would have prohibited employment discrimination on the basis of disability. However, the House Committee on the Judiciary proposed an amendment, which was adopted, providing that the term 'disability' would not include "homosexuality,

[17] S. 443, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).
[18] H.R. 4115, 112th Gen. Assemb., Reg. Sess. (S.C. 1997).
[19] S.C. H.R.J., 1998 Gen. Assemb., 112th Sess. (S.C. Feb. 12, 1998).
[20] S. 292, 110th Gen. Assemb., Reg. Sess. (S.C. 1993).

bisexuality, transvestism, transsexualism, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."[21]

C. Executive Orders, State Government Personnel Regulations, and Attorney General Opinions

1. Executive Orders

Based on a non-exhaustive review of the executive orders available on the Governor's website, no executive orders issued since 2003 discuss sexual orientation or gender identity discrimination in the context of employment.[22]

2. State Government Personnel Regulations

Section 8-11-210 of the South Carolina Code establishes the State Personnel Division under the State Budget and Control Board "to administer a comprehensive system of personnel administration responsive to the needs of the employees and agencies and essential to the efficient operation of State Government".[23] The State Budget and Control Board was granted the authority to manage almost every aspect of State personnel administration, including the development of fair employment policies to ensure that employment decisions are made "on the basis of merit and fitness without regard to race, sex, age, religion, political affiliation or national origin."[24] Pursuant to the Code, the State Budget and Control Board has the authority to exercise final approval on all policies and programs incident to the administration of such duties.[25] With regard to this section, in 1975 the South Carolina Attorney General set forth an opinion stating that "homosexuality is a valid ground for refusing State employment."[26] There is no record that that opinion has been changed or rescinded in the last thirty-five years.

The South Carolina Forestry Commission has a policy prohibiting "discrimination in all programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status."[27]

The University of South Carolina has banned discrimination in employment and educational opportunities on the basis of sexual orientation. The official policy states, "The University of South Carolina does not discriminate in educational or employment opportunities or decisions for qualified persons on the basis of race, color, religion, sex,

[21] S.C. S.J., 1994 Gen. Assemb., 110th Sess. (S.C. Mar. 3, 1994).
[22] See South Carolina, Office of the Governor, *Executive Orders in PDF File Format*, http://governor.sc.gov/executive/orders/ (last visited Sept. 8, 2009).
[23] S.C. CODE ANN. § 8-11-210 (2007).
[24] S.C. CODE ANN. § 8-11-230.
[25] S.C. CODE ANN. § 8-11-240.
[26] S.C. Op. Att'y Gen. 4345, 172 (1975-76).
[27] South Carolina Forestry Commission, Home Page, http://www.state.sc.us/forest/ (last visited Sept. 14, 2009).

national origin, age, disability, sexual orientation or veteran status."[28] The University's policy did not address health benefits to same sex couples or extend affirmative action policies at the school to include sexual orientation.[29] The policy was approved by the University's Faculty Senate by a vote of 48-14 after the Student Government Association brought the issue before them.

The University of South Carolina, School of Law has instituted a similar policy of non-discrimination. In addition to the application of the policy to its own employment and educational opportunities, the School of Law extends this policy to employers who intend to utilize the law school's facilities, stating "the law school's facilities are available only to employers whose practices are consistent with this policy."[30]

There is some ambiguity as to whether the Medical University of South Carolina also has instituted a similar policy of non-discrimination: some of the program pages state that the university does not "discriminate on the basis of . . . sexual orientation or sex/gender" in its admissions and other educational activities and programs,"[31] but the University's official policy statement on Equal Employment Opportunity does not include sexual orientation.[32]

3. Attorney General Opinions

As noted above., the Attorney General issued an opinion regarding Section 8-11-210 of the South Carolina Code stating that "homosexuality is a valid ground for refusing State employment."[33] However, inn 2007, in response to an inquiry from the Board of Trustees for the Medical University of South Carolina, the Attorney General released an opinion which concluded that no provision of State or federal law prevents the University of South Carolina or any public or private entity "from adopting a policy stating that it will not discriminate based on sexual orientation." The Board of Trustees had received a proposal from the Student Government Association which aimed to expand the University's non-discrimination policy to prohibit discrimination on the basis of sexual orientation.[34]

D. Local Legislation

[28] University of South Carolina, Office of Equal Opportunity Programs (2002), *available at* http://www.sc.edu/eop (last visited Sept. 8, 2009).
[29] Jeff Stensland, *USC Faculty Would Ban Sexual Orientation Bias*, THE STATE, Dec. 6, 2001, *available at* http://www.glapn.org/sodomylaws/usa/south_carolina/scnews002.htm.
[30] Law School Admissions Council, *University of South Carolina School of Law: Nondiscrimination* Policy (2009), *available at* http://www.lsac.org/SpecialInterests/lgbt/u-southcarolina.asp (last visited Sept. 8, 2009).
[31] *See* Medical University of South Carolina. *Physician Assistant Studies*, *available at* http://www.musc.edu/chp/pa (last visited Sept. 8, 2009).
[32] Raymond Greenberg, MD, Ph.D., President, Medical University of South Carolina, *Policy Statement: Medical University of South Carolina Commitment to Equal Employment Opportunity*, *available at* http://www.musc.edu/eeo/nondis.html (last visited Sept. 8, 2009).
[33] S.C. Op. Att'y Gen. 4345, 172 (1975-76).
[34] S.C. Op. Att'y Gen., 2007 WL 1651332 (S.C.A.G. May 2, 2007).

The ordinances for every county/municipality in South Carolina are available in an online database.[35] According to a press release by South Carolina Equality, as of March 5, 2008, Columbia was the only city to have enacted a human rights ordinance prohibiting sexual orientation or gender identity discrimination.[36]

[35] *See* Municipal Code Corporation, *Online Library: South Carolina* (2005), *available at* http://www.municode.com/resources/code_list.asp?stateID=40**}** (last visited Sept. 8, 2009).
[36] *See infra* Part IV. B.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Dawson v. State Law Enforcement Div., 1992 WL 208967 (D.S.C. April 6, 1992).

In *Dawson v. State Law Enforcement Division*, Dawson brought an action in federal district court against the State Law Enforcement Division ("SLED") appealing an administrative decision upholding his discharge from SLED.[37] Dawson had filed a grievance under the State Employee Grievance Act, contending that his resignation was a constructive discharge on the basis of his perceived sexual orientation. Dawson had been accused of being involved in homosexual activity with another SLED employee's husband. Although Dawson denied the allegations, SLED requested Dawson's resignation based on concerns that this situation had caused problems in the workplace between Dawson and the SLED employee. The Grievance Committee upheld Dawson's discharge, having found that Dawson had been terminated for attempting to intimidate the SLED employee at work following the incident involving her husband. The Court found that the Grievance Committee's final decision was binding.[38]

Dawson also claimed that the constructive termination by SLED violated his constitutional rights of privacy and freedom of association under the Fourteenth Amendment. According to the Court, homosexual conduct is not protected under the due process clause of the Fourteenth Amendment. Moreover, the Court stated that "the constitutional right of privacy and free association do not preclude a law enforcement agency from inquiring into an officer's off-duty same-sex relationships."[39] Dawson also argued that he had been terminated upon the *mistaken* belief that he was involved in homosexual conduct, but the Court found that the truth or falsity of the basis upon which Dawson was discharged "neither enhances nor diminishes petitioner's claim."[40] The Court stated that it was not willing to extend the right of privacy to include the conduct at issue in this case, because such "activity clearly bears no relationship to marriage, procreation, or family life."[41] Further, the Court stated that Dawson's equal protection rights had not been violated because, in discharging Dawson based on his perceived engagement in homosexual activity, SLED had the "legitimate purpose of maintaining its order, discipline and mutual trust."[42]

2. Private Employees

B. Administrative Complaints

[37] 1992 WL 208967, at *1-2 (D.S.C. April 6, 1992).
[38] *Id.* at *1-2.
[39] *Id.* at *5 (citing Walls v. Petersburg, 895 F.2d 188 (4th Cir.1990)).
[40] *Id.*
[41] *Id.* at *6.
[42] *Id*.

Pursuant to the South Carolina Code, the State Employee Grievance Procedure Act was established to address grievances of public employees against public employers.[43] According to the Act, each agency is required to establish an employee grievance procedure which provides that all grievances be initiated by internal complaint to the agency. The grievances governed by this procedure concern terminations, suspensions, involuntary reassignments, and demotions.[44] Once the agency renders a decision, the employee may appeal to the State Human Resources Director who will refer proper appeals to mediation and then, if necessary, to the State Employee Grievance Committee for an administrative hearing. The employee may be represented by counsel and may call witnesses at this hearing. Only upon completion of this administrative review process can the employee seek judicial review before the Administrative Law Court.[45]

Based on a non-exhaustive review of the decisions of the Administrative Law Court, no such decisions related to discrimination based on sexual orientation or gender identity were found. Also, note that, based on a review of the State Office of Human Resources' website, records of employee grievance proceedings do not appear to be available online.[46]

C. **Other Documented Examples of Discrimination**

Police Department

In 2007, a lesbian police officer had quit the state police academy in another state to move to South Carolina. She received a good reference from her former employer, and she has a clean background and a degree. When the officer applied to a police department in South Carolina, she underwent a routine polygraph exam and was asked if she was a lesbian. She responded truthfully that the answer was "yes." She thereafter was not selected for the position. She learned from references she had given that they had not been contacted.[47]

County Department

In 2006, a gay emergency medical technician was fired by a county department because of his sexual orientation.[48]

[43] S.C. CODE ANN. § 8-17-310.
[44] S.C. CODE ANN. § 8-17-330.
[45] S.C. CODE ANN. § 8-17-340.
[46] Note that attempts to contact the State Office of Human Resources to determine if records of employee grievance proceedings are publicly available have been unsuccessful. State Human Resources Department Contact: (803) 737-0900.
[47] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).
[48] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

Union County Public School

A junior high school teacher in Union County was suspended and put on probation for showing the Oscar-winning film *Philadelphia*, about a gay man with AIDS, to seventh and eighth graders. Parents and a local pastor complained that the film was vulgar and promoted homosexuality. The school superintendent criticized the teacher for not getting permission from the principal, the health committee, or the school board to show the film, but he did not agree that the teacher was trying to promote homosexuality. One of the parents who complained said she had not wanted the teacher suspended. 'We felt like she owed an apology to those students and those parents,' she said, stating that she will be satisfied if the school district prevents the showing of such films in the future.[49]

[49] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 96 (1995 ed.).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

South Carolina Code Section 16-15-120 provides, "whoever shall commit the abominable crime of buggery, whether with mankind or with beast" shall be guilty of a felony, punishable by five years in prison or a $500 fine.[50] This law, while still on the books in South Carolina, is no no longer valid after the U.S. Supreme Court decision in *Lawrence v. Texas*.[51]

B. Housing & Public Accommodations Discrimination

Senate Bill No. 443 ("SB 443") appears to have been the most substantial and widely applicable proposed legislation in South Carolina. It was introduced during the 117th Session of the General Assembly on February 14, 2007.[52] SB 443 would have amended Section 31-21-40 of the South Carolina Code prohibiting discrimination pursuant to the South Carolina Fair Housing Law, concerning the purchasing, selling or renting of dwellings on the basis of race, color, religion, sex, handicap, familial status, or national origin, so as to also prohibit such discrimination on the basis of sexual orientation or gender identity. The bill would have also made it unlawful to refuse to sell, rent or negotiate, to discriminate in the terms, conditions or privileges of sale or rental or the provisions of services in connection therewith, to advertise a preference or limitation with respect to a sale or rental, or to induce any person to sell or rent by representations regarding the entry into the neighborhood on the basis of sexual orientation or gender identity. The bill would have provided the same definition for "sexual orientation" and "gender identity" as was provided in Senate Bill No. 438, the employment discrimination legislation described above. The bill was referred to the Committee on the Judiciary and the relevant sub-committee, but was not passed.

A substantially similar, if not identical, bill text was introduced as Senate Bill No. 441 before the 117th Session of the South Carolina General Assembly on February 14, 2007.[53] The bill was referred to the Committee on Labor, Commerce and Industry, but was not passed.

[50] S.C. CODE ANN. § 16-15-120.
[51] 538 U.S. 558 (2003).
[52] S. 443, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).
[53] S. 441, 117th Gen. Assem., Reg. Sess. (S.C. 2007).

On March 5, 2008, the Columbia City Council voted unanimously to pass ordinances prohibiting discrimination on the basis of sexual orientation or gender identity in housing and public accommodations. According to a press release by South Carolina Equality, Columbia was the first municipality in South Carolina to pass comprehensive human rights ordinances in housing and public accommodations including sexual orientation and gender identity

Pursuant to Section 11-392 of the Columbia Municipal Code, "It is the policy of the City of Columbia, South Carolina, that no person shall be discriminated against in the sale or rental of housing on the basis of race, color, religion, sex, age, national origin, familial status, handicap, disability, or sexual orientation."[54] The code defines sexual orientation to mean "a person's real or perceived heterosexuality, homosexuality, or bisexuality or gender identity or expression."[55] This provision applies to real estate owners, operators, real estate salesman, or any individual employed or acting on behalf of such persons. Sexual orientation was added to this provision by Order No. 2008-023 on March 5, 2008.

Pursuant to Section 11-502 of the Columbia Municipal Code, "It is the policy of the City of Columbia, South Carolina, that no person shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation on the basis of race, color, religion, sex, age, national origin, familial status, handicap, disability or sexual orientation."[56] Sexual orientation is given the same definition as above. This provision applies to all places which serve the public and require a license or permit issued by the State of South Carolina, its agencies or the City of Columbia to operate, except for private clubs or other establishments not open to the general public. This provision was enacted by Order No. 2008-024 on March 5, 2008. [57]

C. **Hate Crimes**

SB 443 would have established penalties for a person convicted of a non-capital criminal offense where the offender had the intent to commit the crime on the basis of the actual or perceived race, religion, color, national origin, ancestry, age, disability, gender, sexual orientation or gender identity of the victim. The bill would have provided the same definition for "sexual orientation" and "gender identity" as was provided in Senate Bill No. 438, the employment discrimination legislation described above.

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[54] COLUMBIA, S.C. CODE § 11-395 (2008).
[55] COLUMBIA, S.C. CODE § 11-393.
[56] COLUMBIA, S.C. CODE §§ 11-503 & 11-504.
[57] South Carolina Equality, *Columbia, S.C., Bans Housing Discrimination on Basis of Sexual Orientation and Gender Identity: Council Passes Ordinances Prohibiting Discrimination in Housing and Public Accommodations*, THE MIAMI HERALD, Mar. 5, 2008, *available at* http://miamiherald.typepad.com/gaysouthflorida/2008/03/columbia-sc-ban.html.

Several substantially similar bills were also introduced before the South Carolina General Assembly, including House Bill No. 3738 before the 117th Session on May 20, 2007,[58] Senate Bill No. 37 before the 112th Session on January 14, 1997,[59] Senate Bill No. 440 before the 117th Session on February 14, 2007,[60] and House Bill No. 3161 before the 113th Session on January 6, 1999,[61] each of which was referred to the appropriate committee, but was not passed. In addition, Senate Bill No. 45 before the 113th Session on January 12, 1999 and Senate Bill No. 708 before the 113th Session on April 8, 1999[62] were each reviewed favorably by the Senate and sent to the House, where they were referred to the Committee on the Judiciary, but were not passed.[63]

E. **Education**

House Bill No. 4840 was introduced before the 112th Session of the South Carolina General Assembly on March 18, 1998.[64] The bill was referred to the Committee on Education and Public Works, but was not passed. The bill would have amended the Comprehensive Health Education Act which governs the health education curriculum in the public schools. As introduced, the bill provided that "homosexuality may be discussed only in the context of saying that homosexual behavior and homosexual marriages are not legal in this State."[65]

House Bill No. 4907 was introduced before the 117th Session of the South Carolina General Assembly on April 1, 2008.[66] The bill was referred to the Committee on Education and Public Works, but was not passed. The bill would have provided that a public school could not present, or allow to be presented, a program that involved instruction or discussion of "alternative sexual behavior." The bill defined "alternative sexual behavior" to include "homosexuality, bisexuality, lesbianism, transsexuality, transgenderism, cross-dressing, pansexuality, promiscuity, sodomy, pederasty, prostitution, oral sex, anal sex, bestiality, and similar behaviors," as well as "issues and relationships deriving from those behaviors, including sexual orientation and alternative family, parenting, and marriage contracts."

In 1988, South Carolina enacted the Comprehensive Health Education Act to provide guidelines for health education programs to be implemented by each local school board. The statute outlines the subjects that must be included in the comprehensive health education instruction as well as those which may not be included. According to South Carolina Code Section 59-32-30, instruction "may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to,

[58] H.R. 3738, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).
[59] S. 37, 112th Gen. Assemb., Reg. Sess. (S.C. 1997).
[60] S. 440, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).
[61] H.R. 3161, 113th Gen. Assemb., Reg. Sess. (S.C. 1999).
[62] S. 708, 113th Gen. Assemb., Reg. Sess. (S.C. 1999).
[63] S. 45, 113th Gen. Assemb., Reg. Sess. (S.C. 1999).
[64] H.R. 4840, 112th Gen. Assemb., Reg. Sess. (S.C. 1998).
[65] S.C. Leg. Update, 1998 Gen. Assemb., 112th Sess. (S.C. Mar. 24, 1998).
[66] H.R. 4907, 2007 Gen. Assemb., 117th Sess. (S.C. 2007).

homosexual relationships except in the context of instruction concerning sexually transmitted diseases."[67]

In response to an inquiry regarding a particular health education program being used in many of South Carolina's public schools, the Attorney General released an opinion that the program violated the Comprehensive Health Education Act because it was "quite graphic in its references to homosexuality and alternative sexual activities."[68] According to the Attorney General, the legislative history of the Comprehensive Health Education Act indicates that the legislation was intended to teach abstinence as the primary method of combating sexually transmitted diseases and teenage pregnancy. In a statement endorsing the bill, Senator McDonald stated that the legislation "does not authorize instruction on homosexuality or other sexual practices unless reference is absolutely necessary to answer questions or inform teenagers about AIDS or other sexually transmitted diseases." The Attorney General concluded that the programs in question "ignored this expressed intent at virtually every turn" by informing the students about contraceptives and thereby promoting premarital sex.

In response to a separate inquiry by Representative Sandifer, Member of the South Carolina House of Representatives, regarding a particular magazine being proposed as part of the health education program, the Attorney General released an opinion that inclusion of the magazine in the program would violate the Comprehensive Health Education Act.[69] Representative Sandifer found it objectionable that the magazine included an article which discussed sexual orientation. The article provided a true-life story of a gay high school student and stated "because heterosexuality is the predominant sexual orientation in most societies, there are many young people who look upon homosexuality as abnormal and unacceptable. As a result, many young people who think they are homosexual attempt to hide - even reject - their new sense of who they are." The Attorney General discussed the provisions of the Comprehensive Health Education Act which limit the discussion of "alternate sexual lifestyles" to instruction concerning sexually transmitted diseases. The opinion found that the Comprehensive Health Education Act defined "the limits of the discussion of homosexual relationships in the classroom of the State's schools. Such a statutory requirement is reasonably related to legitimate pedagogical concerns and thus is constitutionally valid." The Attorney General concluded that the magazine article at issue did not involve instruction concerning sexually transmitted diseases and therefore violated the provisions limiting discussion of homosexuality in South Carolina public schools.

F. **Health Care**

SB 443 would have required health care facilities to establish protocols allowing patients to designate any individual as an authorized visitor, regardless of the blood or legal relationship of the patient to the individual. This bill applied to "health care facilities," as defined in South Carolina Code Section 44-7-130, "acute care hospitals,

[67] S.C. CODE ANN. § 59-32-30 (2007).
[68] S.C. Op. Att'y Gen., 2000 WL 1347161 (S.C.A.G. Aug. 18, 2000).
[69] S.C. Op. Att'y Gen., 1997 WL 569098 (S.C.A.G. Aug. 21, 1997).

psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which Certificate of Need review is required by federal law."

House Bill No. 4882 was introduced before the 108th Session of the South Carolina House of Representatives on March 21, 1990.[70] The bill proposed a concurrent resolution requesting the Department of Highways and Public Transportation to take whatever measures necessary to prevent the interstate rest areas from becoming "places for homosexual acts" and to request that the Department of Health and Environmental Control not place condom machines in those rest areas. The concurrent resolution was adopted by the House of Representatives and ordered sent to the Senate where it was referred to the Committee on Transportation, but was not passed.

G. **Parenting**

House Bill No. 3470 was introduced before the 111th Session of the South Carolina General Assembly on February 2, 1995.[71] The bill was referred to the Committee on Medical, Military, Public and Municipal Affairs, but was not passed. The bill would have prohibited foster care placements with persons who have a history of child abuse or neglect or a criminal record for certain crimes, or who are homosexual or bisexual. Also, the bill would have prohibited adoptions by person who have a history of child abuse or neglect, or a criminal record for certain crimes, or who are homosexual or bisexual.

A substantially similar bill was introduced as House Bill No. 3649 before the 110th Session of the South Carolina General Assembly on January 18, 1994.[72] The bill was adopted by the House of Representatives and sent to the Senate, where it was referred to the Committee on the Judiciary, but was not passed. In debate over this bill, Representative Waites spoke against the bill, stating "this bill implies that children raised by gays, lesbians or bisexuals would be subjected to abuse or neglect. There is no evidence to support that presumption."[73]

I. **Recognition of Same-Sex Couples**

In 1996, House Bill No. 4502 and Senate Bill No. 1151 were passed, providing that same-sex marriages performed in other states shall not be valid or recognized by the State of South Carolina. The law was subsequently signed into law by then Governor Beaseley.[74] In response to an inquiry from Representative Haskins, Speaker Pro Tempore of the South Carolina House of Representatives, the Attorney General released

[70] H.R. 4882, 1990 Gen. Assemb., 108th Sess. (S.C. 1990).
[71] H.R. 3470, 1995 Gen. Assemb., 111th Sess. (S.C. 1995).
[72] H.R. 3649, 1994 Gen. Assemb., 110th Sess. (S.C. 1994).
[73] S.C. H.R.J., 1994 Gen. Assemb., 110th Sess. (S.C. Jan. 18, 1994).
[74] S.C. CODE ANN. § 20-1-15 (2007).

an opinion which concluded that certain legislation proposed by Representative Haskins prohibiting recognition of same-sex marriages would be constitutional.[75]

Senate Bill No. 326 was introduced before the 117th Session of the South Carolina General Assembly on January 24, 2007.[76] The bill was referred to the Committee on Judiciary and the relevant sub-committee, but was not passed. The bill would have enacted the Civil Union Equality Act, providing that two persons of the same sex could form a civil union and all laws applicable to marriage would apply to civil unions.

J. Other Non-Employment Sexual Orientation and Gender Identity Related Laws

Senate Bill No. 1423 was introduced before the 117th Session of the South Carolina General Assembly on May 27, 2008.[77] The bill was referred to the Committee on the Judiciary, but was not passed. The bill would have amended sections of the South Carolina Code relating to the Law Enforcement Training Council, so as to create an Office of Professional Standards to investigate and hear complaints against law enforcement officers. This bill would have established an administrative process and complaint procedure to handle citizen complaints against law enforcement officers alleging abuse or misuse of police power while on duty or in the course and scope of employment. Pursuant to the bill, in order for such claims to be heard, they would first have to be screened by the Office of Professional Standards, which office shall have the authority to review and dismiss for cause, or refer the claim to the Law Enforcement Training Council for a hearing. The types of complaints handled by this process would have included those claiming discriminatory treatment on the basis of sexual orientation.

In 1998, the mayor of Myrtle Beach, South Carolina joined local business and religious leaders in attacking a statewide gay group and its plans for a pride festival. Organizers had chosen Myrtle Beach because the mayor, when a city councilman, had protested a gay bar opening in downtown Myrtle Beach. The mayor entered the fray as the only council member to vote against closing city streets to accommodate the pride festival. He expressed concern that allowing gay men and lesbians to parade through the streets would set a dangerous precedent and would encourage Black Panthers, white supremacist skinheads and other extremist groups to stage similar marches.[78]

In 1997, the Greenville County Council passed a resolution that condemned "homosexuality" as "incompatible" with community standards, and defunded activities that would 'contravene' such community standards, on a vote of nine to three. The three-

[75] S.C. Op. Att'y Gen., 1996 WL 265499 (S.C.A.G. April 11, 1996).
[76] S. 326, 2007 Gen. Assemb., 117th Sess. (S.C. 2007).
[77] S. 1423, 117th Gen. Assemb., 2d Reg. Sess. (S.C. 2007).
[78] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 130 (1998 ed.).

hour discussion of the resolution was marked by assertions that gays would go to hell, and that the devil brought gay men and lesbians to Greenville.[79]

According to an article in the Myrtle Beach Sun News, the State implemented a "South Carolina is so Gay" ad campaign aimed at potential European gay tourists in London. The ad campaign focused on South Carolina's plantations and "gay beaches."[80] However, according to the article, there was substantial negative reaction to the spending of public money on the ad campaign. Governor Mark Sanford's office made a statement that public money shouldn't be spent on "political or social agendas." The ad campaign was subsequently cancelled and renounced by state officials.[81]

In *The Treehouse Club v. South Carolina Department of Revenue*, The Treehouse Club sought a license for beer and wine sales and consumption. Due to the multiple protests filed against the application, a hearing was required. According to the Court, The Treehouse Club represents itself as "Greenville's Only Gay Restaurant and Nightclub."[82] At the hearing, Senator Mike Fair testified against granting the license, stating that "homosexuality is a public health problem."[83] Despite the multiple protests, the administrative law judge determined that The Treehouse Club fulfilled the requirements for the license, and the license must be issued.[84]

[79] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 99 (1997 ed.).
[80] Issac J. Bailey, *A Different Perspective: Tourism Ad Uproar 'So Stupid'*, MYRTLE BEACH SUN NEWS, Aug. 10, 2008, 2008 WLNR 14988497.
[81] Alex Johnson, *Gay Tourism Ad Causes Uproar in S. Carolina*, MSNBC, Jul. 15, 2008, http://www.msnbc.msn.com/id/25677373/.
[82] 2003 WL 24004603, at *1. (S.C. Admin. Law. Judge. Div., 2003).
[83] *Id.* at *2.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **South Dakota – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

At the state level, South Dakota has no formal laws banning discrimination based on sexual orientation. However, South Dakota State University, one city, and two counties in South Dakota have ordinances prohibiting discrimination in employment based on sexual orientation and/or gender identity.

Documented examples of discrimination on the basis of sexual orientation and gender identity by state and local governments in South Dakota include:

- A teacher who was terminated after twenty-nine years of service because he answered a question about same-sex sexual activity during an annual question and answer session, which he was asked to lead by his school for over 15 years, following a sex education video.[1] The South Dakota Supreme Court reversed the termination as arbitrary. Since 1980, the Faith School Board had made it a practice to contract with the community health nurse to provide sex education for elementary students. Following the sex education presentation, the boys then went to the classroom for a question and answer session led by the teacher, as requested by the health nurse. The teacher was instructed to answer the boys' questions as honestly as possible and he continued to carry out what had been an established practice for fifteen years. During the session in 1995, one of the boys related that he had heard that two men could have sex and asked how this was possible. The teacher preceded his explanation with the disclaimers that this type of conduct is frowned upon, most people do not believe in it, and the boys would find it gross. He then described oral and anal sex in explicit language. In response to complaints by parents, a termination hearing was held and the teacher was terminated. The Supreme Court reversed, indicating that it was arbitrary for the Board to ignore Collins' twenty-nine years of faithful service purely based on his indiscreet answer. Collins v. Faith Sch. Dist., 574 N.W.2d 889 (1998).

Other actions and statements by government officials indicate that LGBT people may face discrimination in the public sector in South Dakota. For example, in 2001, the Sioux Empire Gay and Lesbian Coalition ("Coalition") volunteered to adopt two miles of highway through the state's Adopt-A-Highway program. The South Dakota Department of Transportation, however, refused their request, based on the fact that the Coalition was an "advocacy" group. At that time, several other advocacy groups already were

[1] *Collins v. Faith Sch. Dist.*, 574 N.W.2d 889 (1998).

participants in the program, including College Republicans, the Yankton County Democrats, and the Animal Rights Advocates of South Dakota. The Coalition then filed a lawsuit alleging violations of its rights to free speech and equal protection. Governor Bill Janklow temporarily allowed the group to post their Adopt-A-Highway sign – but simultaneously announced he was terminating the program altogether.[2]

- In 1992, a justice of the South Dakota Supreme Court wrote a concurring opinion in a case limiting visitation for a mother who was a lesbian.[3] In the opinion, he stated: "Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children. After years of treatment, she could then petition for rights of visitation. My point is: she is not fit for visitation at this time. Her conduct is presently harmful to these children. Thus, she should have no visitation. There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan "Egyptian Book of the Dead" bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement."

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[2] Andrew Gumbel, *Adopt-A-Highway Dispute Pits Gay Coalition Against Governor*, INDEPENDENT (U.K.), Aug. 17, 2001, *available at* http://www.independent.co.uk/news/world/americas/adoptahighway-dispute-pits-gay-coalition-against-governor-665882.html; *S. Dakota Gay Group Gets Highway Sign, For A While*, L.A. TIMES, Aug. 18, 2001, at 18, *available at* http://articles.latimes.com/2001/aug/18/news/mn-35549.
[3] *Chicoine v. Chicoine*, 479 N.W.2d 891 (1992).

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of South Dakota has not enacted laws to protect against employment discrimination based on sexual orientation or gender identity.[4]

B. Attempts to Enact State Legislation

None.

C. Executive Orders, State Government Personnel Regulations, and Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

South Dakota State University's nondiscrimination policy includes sexual orientation among its categories of protected classes. The policy applies in the offering of all benefits, services, and educational and employment opportunities.[5]

3. Attorney General Opinions

None.

D. Local Legislation

The City of Brookings has enacted a local ordinance banning discrimination in public employment due to a person's sexual orientation. Minnehaha County has enacted an affirmative action policy stating that Minnehaha County officials should provide equal employment opportunities to all persons and that there shall be no discrimination on the basis of sexual orientation. In April 2009 Shannon County unanimously voted to add sexual orientation and gender identity to its nondiscrimination policy." In addition, Rapid City has recently publicly indicated that it will consider such legislation.[6]

1. City of Brookings

In 2004, the City of Brookings Human Rights Committee unanimously recommended modifying the language in the City Conflict of Interest Ordinance ("Conflict Ordinance") and City Charter to add "sexual orientation" as protected areas in

[4] *See* S.D. Codified Laws §§ 20-13-10, 20-13-20, 20-13-23, 20-13-24 (2002).
[5] *See* SOUTH DAKOTA STATE UNIVERSITY NON-DISCRIMINATION POLICY, http://catalog.sdstate.edu/ (last visited Sept. 3, 2009).
[6] *See* Press Release, Equality South Dakota, Victory in Shannon County, http://www.eqsd.org/news/30-state/282-victory-in-shannon-county.html (last visited Sept. 3, 2009).

the anti-discrimination sections of both documents.[7] In 2006, the Brookings City Council amended the City Charter to read: "No person shall be appointed to or removed from, or in any way favored or discriminated against with respect to any city position or appointive city administrative office because of race, gender, sexual orientation, age, handicap, religion, country of origin, or political affiliation."[8] The Conflicts Ordinance was updated to read: "No person shall be appointed to or removed from, or in any way favored or discriminated against with respect to any city position or appointive city administrative office because of race, gender, sexual orientation, age, handicap, religion, country of origin, or political affiliation."[9] A similar provision applies for appointments to the "Brookings Health System Board of Trustees."[10] Violations of these provisions are punishable under the general penalty provision of the Brookings City Code, as well as through various actions that may be taken by the City Manager to remedy any violation.[11]

2. Rapid City

Several members of a city council committee in Rapid City have publicly announced their desire to add gays, lesbians, bisexuals and transgender people to the groups of people protected from discrimination under the city's human relations ordinance.[12] However, lawyers for the city have stated that such additions could lead to more lawsuits and higher costs for taxpayers.[13] One member of the City Council has stated that the existing ordinance already covers sexual orientation. The issue is to be revisited by the Legal and Finance Committee by mid-February. The current discrimination ordinance defines discrimination as any "act or attempted act which because of race, color, sex, creed, religion, ancestry, disability or national origin results in the unequal treatment or separation or segregation of any person, or denies, prevents, limits or otherwise adversely affects or if accomplished would deny, prevent, limit or otherwise adversely affect, the benefit or enjoyment by any person of employment, membership in a labor organization, ownership or occupancy of real property, a public accommodation, a public service or an educational institution."[14]

E. Occupational Licensing Requirements

None.

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[7] *See* Brookings City Council Meeting Minutes, June 1, 2004, *available at* http://cityofbrookings.org/council/minutes/pdfs/2004Jun01Minutes.pdf.
[8] City of Brookings Charter § 7.02(a)(1).
[9] City of Brookings Code of Ordinances § 2.63(k)(1).
[10] City of Brookings Code of Ordinances § 42.92(f).
[11] City of Brookings Code of Ordinances §§ 1.8, 2.63(m)
[12] *Rapid City Wants to Ban Discrimination Based on Sexual Orientation*, ARGUS LEADER, Jan 16, 2009, http://www.argusleader.com/apps/pbcs.dll/article?AID=200990116002 (last visited Sept. 3, 2009).
[13] *Id*.
[14] Rapid City Code of Ordinances § 2.64.020.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

Collins v. Faith Sch. Dist., 574 N.W.2d 889 (1998).

In *Collins v. Faith School District*,[15] the South Dakota Supreme Court held that a school board's termination of a teacher on the basis of alleged incompetence, stemming from his indiscreet answer with regard to homosexual activity during a question and answer session following a sex education video, was arbitrary.

Since 1980, the Faith School Board ("Board") had made it a practice to contract with the community health nurse to provide sex education for elementary students. Following the sex education presentation, the boys then went to the classroom of Richard Collins for a question and answer session, as requested by the health nurse. Collins was instructed to answer the boys' questions as honestly as possible and he continued to carry out what had been an established practice for fifteen years. During the session in 1995, one of the boys related that he had heard that two men could have sex and asked how this was possible. Collins preceded his explanation with the disclaimers that this type of conduct is frowned upon, most people do not believe in it, and the boys would find it gross. Collins then described oral and anal sexual intercourse in explicit language. Soon after, parents' complaints critical of Collin's comments were received by the superintendent. In response, a termination hearing was then scheduled before the Board to consider Collins' dismissal. Notice for the hearing made vague references to issues other than the parental complaints, but the only evidence the Board heard pertained to the question and answer session and Collins' inappropriate response. The high school principal testified that it was inappropriate and immoral for a teacher to discuss homosexual activities with fourth and fifth grade boys, and the superintendent testified without elaboration that the incident adversely affected Collins' ability to perform his teaching duties. At the conclusion of the hearing, the Board voted to terminate Collins' contract on the basis of incompetency, which termination was subsequently upheld by the circuit court. However, the Supreme Court reversed, indicating that it was arbitrary for the Board to ignore Collins' twenty-nine years of faithful service and terminate Collins' teaching contract on the basis that he was incompetent purely based on his indiscreet answer with regard to homosexual activity.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

None.

[15] *Collins*, 574 N.W.2d at 889.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

The South Dakota state legislature repealed the state's sodomy law in 1977.

B. Health Care

The South Dakota Department of Human Services, Division of Mental Health includes gender identity disorders in childhood and adolescence among its list of diagnoses and codes used for psychiatric inpatient data regarding minors.[16]

C. Parenting

Chicoine v. Chicoine, 479 N.W.2d 891 (1992).

Chicoine v. Chicoine[17] involved the review of a lower court order dividing marital property and awarding child visitation. Michael and Lisa Chicoine divorced in 1989 following Lisa's engagement in a series of affairs with women. Michael was awarded custody of the children, and Lisa, who was undergoing treatment for various psychological problems, did not contest the custody award. Lisa was awarded visitation, which included alternate weekends, with the only restriction being that no unrelated female or homosexual male could be present during the children's visits.

The court stated that "Lisa has experienced a myriad of psychological problems including . . . active homosexual relationships with several female partners." The court also noted that "Lisa and her lover were affectionate toward each other in front of the children," and that "Lisa has openly exposed her homosexual feelings in front of her sons on more than one occasion." In light of these facts, the court reversed the lower court's visitation order and remanded so that the trial court might consider further measures aimed at assuring the well-being of the children, including requiring a home study.

In a concurrence to the court's decision, Justice Henderson states:

> "[The] Lesbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor

[16] *See* SD Admin. Art. 46:24, Ch. 46:24:01, App. A, §§ 302.60, 302.85.
[17] 479 N.W.2d 891 (1992).

> judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children. After years of treatment, she could then petition for rights of visitation. My point is: she is not fit for visitation at this time. Her conduct is presently harmful to these children. Thus, she should have no visitation.
>
> ****
>
> There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan "Egyptian Book of the Dead" bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement

D. Recognition of Same-Sex Couples

In 1996, the legislature passed a measure defining marriage as a "personal relation between a man and a woman,"[18] making South Dakota one of the first states to expressly ban same-sex marriage.[19] In 2000, the legislature enacted an additional law declaring that the state will respect any marriage contracted out of state "except a marriage contracted between two persons of the same gender."[20] In 2006, South Dakota voters approved (52% to 48%) an amendment to the state constitution indicating that only marriage between a man and a woman would be recognized in the state.[21] The amendment goes on to state that the "uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota."[22]

[18] S.D. Codified Laws §§ 25-1-1.
[19] *See* Press Release, National Gay and Lesbian Task Force, Major Hot Air Balloon Crashes as Gay Sponsors Withdraw Following Passage of Anti-Marriage Law, http://www.qrd.org/qrd/usa/south_dakota/gay.sponsors.withdraw.from.event-02.28.96 (last visited Sept. 3, 2009).
[20] S.D. Codified Laws §§ 25-1-38.
[21] S.D. Const., Art. 21, § 9.
[22] *Id*.

E. Other Non-Employment Sexual Orientation and Gender Identity Related Laws

Comment 3 to Rule 8.4 (Misconduct) of the South Dakota Rules of Professional Conduct for attorneys states that attorneys may not engage in conduct exhibiting bias or prejudice in the course of representing a client based upon numerous classifications, including sexual orientation. Attorneys engaging in such conduct may be deemed to violate Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).[23]

In 2001, the Sioux Empire Gay and Lesbian Coalition ("Coalition") volunteered to adopt two miles of State Highway 38 west of Sioux Falls through the state's Adopt-A-Highway program. The South Dakota Department of Transportation, however, refused to allow the Coalition to erect an Adopt-A-Highway sign that this particular two mile stretch was sponsored by the Coalition. The state based its argument on the fact that the Coalition was an "advocacy" group, despite the fact that several other advocacy groups already were participants in the program, including College Republicans, the Yankton County Democrats, and the Animal Rights Advocates of South Dakota. The Coalition then filed a lawsuit alleging violations of its rights to free speech and equal protection. Governor Bill Janklow then temporarily allowed the group to post their sign, apparently to diffuse the lawsuit. However, Governor Janklow simultaneously announced he was terminating the program, declaring that all Adopt-A-Highway signs would be taken down by the end of the year.[24]

[23] STATE BAR OF S.D. RULES OF PROF'L CONDUCT (2004), *available at* http://www.sdbar.org/Rules/Rules/PC_Rules.htm.
[24] Andrew Gumbel, *Adopt-A-Highway Dispute Pits Gay Coalition Against Governor*, INDEPENDENT (U.K.), Aug. 17, 2001, *available at* http://www.independent.co.uk/news/world/americas/adoptahighway-dispute-pits-gay-coalition-against-governor-665882.html; *S. Dakota Gay Group Gets Highway Sign, For A While*, L.A. TIMES, Aug. 18, 2001, at 18, *available at* http://articles.latimes.com/2001/aug/18/news/mn-35549.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Tennessee – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Tennessee's anti-discrimination law, known as the Tennessee Human Rights Act, does not explicitly address either sexual orientation or gender identity discrimination.[1] Further, the state does not provide protection to state or private employees against discrimination based on sexual orientation or gender identity.[2] In addition, no executive orders, local laws or state government personnel policies exist that prohibit job discrimination on either basis. The formal state employee grievance policy addresses discrimination, but does not include these characteristics.

The state lacks a comprehensive statutory scheme for recognizing sexual orientation or gender identity as a protected class in the workplace.[3] As a result, individuals have no method to assert a complaint of discrimination based on either characteristic.

Despite this lack of protection and recordkeeping, documented examples of discrimination based on sexual orientation or gender identity by state and local government employers include:

- A Director/Superintendent of Schools was not selected to continue in his position by the Morgan County School Board because of the public outrage that resulted after he was invited to speak at a church with predominantly gay and lesbian members. In early 2000, Paul Scarbrough was asked by a friend to speak at a convention held by a church. At the time, Scarbrough was unaware that the church had a predominately gay and lesbian congregation. Scarbrough agreed to consider the request, but ultimately was unable to accept the invitation and so declined. However, approximately a month later, a newspaper published an article announcing—incorrectly—that Scarbrough would be a speaker at the convention, which was sponsored by a predominately gay and lesbian church. After this article ran, school board members began receiving criticisms and concerns regarding Scarbrough continuing on as superintendent. The board

[1] *See* TENN. CODE ANN. § 4-21-101 (2001). While the Tennessee discrimination law addresses both disability and sex discrimination, it is unclear whether a joint use of these provisions could provide a cause of action for gender identity discrimination. Human Rights Campaign, Tennessee Homepage: Non-Discrimination Law, http://www.hrc.org/your_community/1785.htm (last visited Sept. 3, 2009).
[2] Lambda Legal Tennessee Homepage, http://www.lamdalegal.org/states-regions/tennessee.html (last visited Sept. 3, 2009).
[3] *See* TENN. CODE ANN. § 4-21-101 (2001).

members also questioned Scarbrough's judgment and thought the article undermined public confidence in Scarbrough. In response, Scarbrough provided written statements to two newspapers explaining the inaccuracies of the article and noting that while he did not endorse homosexuality, he would not refuse to associate with gay people. When Scarbrough was then not selected by the school board to continue as Superintendnet/Director, he sued and won a judgment from the U.S. Court of Appeals for the Sixth Circuit. Scarbrough v. Morgan County Bd of Educ., 470 F.3d 250 (6th Cir. 2007).

- The impact of Tennessee's state sodomy law on employment was mentioned several times in the state court case striking it down. In the opinion, the Tennessee Court of Appeals noted that the identity of one of the plaintiffs (John Doe) had been sealed "due to concern that he would be fired from his job if his violation of the [Homosexual Practices Act] became known to his employer."[4] Next, the court notes that the plaintiffs "believe they are threatened with prosecution for violations of the statute, which could result in plaintiffs losing their jobs, professional licenses, and/or housing should they be convicted."[5]

- Ray Bush, an inmate employee at a state facility, brought suit alleging discrimination based on his actual or perceived sexual orientation. Bush alleged that he was fired from his job in the facility kitchen because he was perceived to be homosexual, and that defendants subjected him to verbal abuse and slander, and placed him in fear of sexual assault because they believed him to be gay.[6] The Sixth Circuit upheld the trial court's dismissal of his claim for lack of a basis in law, stating that "[i]nmates have no constitutional right to a particular prison job and verbal abuse does not constitute punishment which is subject to eighth amendment scrutiny" and "mere defamation does not invoke the guarantee of procedural due process." In Bush v. Potter, 875 F. 2d 862 (6th Cir. 1989).
- In 2007, an employee of a state-supported women and children's center came out to colleagues as lesbian after she witnessed them ridiculing a lesbian client. They then started harassing her, including questioning her religious beliefs. She was later terminated.[7]

Outside the context of the workplace, gay Tennesseans were subjected to discriminatory treatment in 2007, when a local police department publicized in an unprecedented press release the photographs of 40 men arrested in a public sting operation targeting men having sex with men. While there is no explicit prohibition on same-sex couples jointly adopting or on a same-sex partner petitioning to adopt his or her

[4] *Campbell v. Sundquist*, 926 S.W.2d 250, 253 n.1 (Court of Appeals of Tennessee, 1996).
[5] *Id.* at 253.
[6] *Bush v. Potter*, 875 F. 2d 862 (6th Cir. 1989).
[7] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

partner's adoptive child, a same-sex partner may not adopt his or her partner's biological child.[8] In sum, there are no express protections ensuring equal treatment of gay parents.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Tennessee has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[9]

B. Attempts to Enact State Legislation

Research, including non-exhaustive research into secondary sources, did not uncover any directly relevant legislative bill history.

C. Executive Orders, State Government Personnel Regulations, and Attorney General Opinions

1. Executive Orders

Research, including non-exhaustive research into secondary sources, did not uncover any executive orders related to employment discrimination on the basis of sexual orientation or gender identity/expression.

2. State Government Personnel Regulations

Due to the fact that there are no existing or repealed state statutes related to sexual orientation or gender identity in the employment context, there are accordingly no applicable agency regulations or guidelines related to the subject.

Several of the universities in Tennessee include policies related to sexual orientation discrimination in the academic and employment contexts, including Vanderbilt University, a private university, and Tennessee Technological University,

[8] TENN. CODE ANN. § 36-1-115.; TENN. CODE ANN. §§ 36-1-117(f), 36-1-117(a)(1); Human Rights Campaign, Tennessee Homepage: Tennessee Adoption Law, http://www.hrc.org/your_community/1778.htm (last visited Sept. 3, 2009).

[9] The Tennessee Human Rights Act provides that it is a "discriminatory practice for an employer" to classify employees on the basis of an individual's "race, creed, color, religion, sex, age or national origin." TENN. CODE ANN. § 4-21-401. There is no mention of sexual orientation or gender identity. *See id.*

University of Memphis, East Tennessee State University, Middle Tennessee State University, and University of Tennessee Knoxville, which are public universities.

In the Tennessee Technological University's Human Resource Services Policy on Equal Employment Opportunity, the university declares that neither students nor employees may be discriminated against on the basis of such individual's sexual orientation.[10] The university's policy defines sexual orientation as "the direction of an individual's emotional, physical, and/or sexual attraction to others, which may be the same sex (homosexual), the opposite sex (heterosexual), or both sexes (bisexual)."[11] This policy is limited, however, and does not require the compliance of religious associations or other external organizations.[12] Moreover, an additional limitation is that despite the university's policy, employee benefits are determined by state laws and regulations and are consequently not affected by the university policy.[13]

University of Memphis and East Tennessee State University have nearly identical policies on sexual orientation. Both universities' policies make it clear that they apply equally in the University's programs and activities, recruitment and admissions, and employment practices.[14] It is the policy of these universities that neither their students nor employees be discriminated against on the basis of such individual's sexual orientation.[15] The policies define sexual orientation as "heterosexual, homosexual, or bisexual status," which is a more brief definition than that of Tennessee Technological University.[16] The Middle Tennessee State University's policy is very similar to that of the University of Memphis and East Tennessee State University, except that Middle Tennessee's policy is contained within a larger Policies and Procedures Manual in the Personnel Section.[17]

University of Tennessee Knoxville's nondiscrimination guidelines state that "all qualified applicants will receive equal consideration for employment without regard to race, color, national origin, religion, sex, pregnancy, marital status, sexual orientation, age, physical or mental disability, or covered veteran status" and clearly applies to employment decisions.[18] While this university's policy declares that it is compliant with

[10] TENNESSEE TECHNOLOGICAL UNIVERSITY, HUMAN RESOURCE SERVICES POLICIES AND PROCEDURES, AFFIRMATIVE ACTION, EQUAL EMPLOYMENT OPPORTUNITY AND DISCRIMINATION (2007), http://www.tntech.edu/adminpandp/perspay/pp1.html (last visited Sept. 3, 2009).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] UNIVERSITY OF MEMPHIS POLICY MANUAL: POLICY ON SEXUAL ORIENTATION (1996), http://policies.memphis.edu/12a1205.html (last visited Sept. 3, 2009); *EAST TENNESSEE STATE UNIVERSITY, POLICY ON SEXUAL ORIENTATION* (2000), http://www.etsu.edu/HUMANRES/ppp/PPP-62.htm (last visited Sept. 3, 2009).
[15] *Id.*
[16] *Id.*
[17] MIDDLE TENNESSEE STATE UNIVERSITY POLICIES AND PROCEDURES MANUAL 1:01:10 (2002), at 6, http://frank.mtsu.edu/~iec/Discrimination&Nepotism.pdf (last visited Sept. 3, 2009).
[18] UNIVERSITY OF TENNESSEE GUIDELINES FOR ADVERTISING AND REQUIRED USE OF THE EQUAL EMPLOYMENT OPPORTUNITY/NON-DISCRIMINATION/AFFIRMATIVE ACTION STATEMENT, http://oed.admin.utk.edu/docs/Non-Discrimination_Statement_UT_Knoxville_Searches.doc (Sept. 3, 2009).

all federal nondiscrimination laws in the provision of education and employment programs and services, it is unclear whether the university's policy against sexual orientation discrimination applies equally to student life as it does to employment decisions.[19]

3. Attorney General Opinions

Research, including non-exhaustive research into secondary sources, did not uncover any directly relevant attorney general opinions.

D. Local Legislation

1. Nashville and Davidson County

In August 2009, the Metro Council, the legislative body of Nashville and Davidson County, voted 23-16 to pass an ordinance prohibiting sexual orientation discrimination against city workers. One council member who voted against the ordinance, Jim Hodge, made the following remarks during the debate:

> "As a Christian I cannot endorse a lifestyle that is condemned in both the old testament and new….It doesn't make sense to me….For those constituents and members of our community who are in the homosexual community, who have sat at my dining room table, who have had conversations with me, I cannot support or endorse a lifestyle that is unhealthy. We as a government make many suggestions and recommendations to folks to live a better lifestyle, whether it's menu labeling, whether it's exercising, whether it's recycling, because it's good for the individual or it's good for the community….We ask folks to leave their cigarettes outside….It's not easy to make a lifestyle change but it can be done.
>
> "When I look at the information on this lifestyle, it's not something that we should endorse. Individuals here are eight times more likely to have to seek professional mental health treatment for all manner of reasons. Those in a committed relationship, four times more likely to have multiple partners. That's not stable. Significantly higher rate of STDs, about 60 percent, and shorter lifespan of 14 years. I would think that we as a government should be

[19] *See id.*

> encouraging our folks to make better lifestyle choices than this. I will vote no."[20]

E. Occupational Licensing Requirements

The research, including non-exhaustive research into secondary sources, did not uncover any directly relevant licensing requirements.

[20] Posting of Jeff Woods to Pith in the Wind, *Metro Council Votes to Ban Discrimination Against Gay Workers*, http://blogs.nashvillescene.com/pitw/ (Aug. 18, 2009, 19:58 CST).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

Scarbrough v. Morgan County Bd of Educ., 470 F.3d 250 (6th Cir. 2007).

Paul Scarbrough was elected school superintendent for Morgan County, Tennessee, in 1996. The position expired by law in August of 2000—a new law provided for appointment of a Director of Schools, who would perform the same duties as the superintendent. In early 2000, Scarbrough was asked by a friend to speak at a convention held by a church. At the time, Scarbrough was unaware that the church had a predominately gay and lesbian congregation. Scarbrough agreed to consider the request, but ultimately was unable to accept the invitation and so declined. However, approximately a month later, a newspaper published an article announcing—incorrectly—that Scarbrough would be a speaker at the convention, which was sponsored by a predominately gay and lesbian church. After this article ran, school board members began receiving criticisms and concerns regarding Scarbrough continuing on as superintendent. The board members also questioned Scarbrough's judgment and thought the article undermined public confidence in Scarbrough. In response, Scarbrough provided written statements to two newspapers explaining the inaccuracies of the article and noting that while he did not endorse homosexuality, he would not refuse to associate with gay people.

Afterwards, Scarbrough was not selected by the school board as the Director of Schools. Scarbrough brought a lawsuit, alleging, among other things, that the Board violated his rights to equal protection and freedom of speech by denying him the position of Director of Schools in retaliation for the article which reported he would speak at the convention.

The district court granted summary judgment in favor of defendants. Scarbrough appealed to the Sixth Circuit Court of Appeal. The Sixth Circuit reversed the district court's grant of summary judgment as to Scarbrough's First Amendment retaliation claim, and his equal protection claim (it upheld summary judgment on his free exercise and association claims). In reviewing Scarbrough's claim of disparate treatment, the court held that Scarbrough had presented sufficient evidence to create a genuine issue of material fact as to whether the Board was motivated by an animus against homosexuals.[21]

Bush v. Potter, 875 F. 2d 862 (6th Cir. 1989).

Ray Bush, an inmate employee at a state facility, brought suit alleging discrimination based on his actual or perceived sexual orientation. The district court dismissed his claims as frivolous. The Sixth Circuit upheld the decision for lack of an arguable basis in law, stating that "[i]nmates have no constitutional right to a particular prison job and verbal abuse does not constitute punishment which is subject to eighth

[21] *Scarbrough v. Morgan County Bd of Educ.*, 470 F.3d 250 (6th Cir. 2007).

amendment scrutiny" and "mere defamation does not invoke the guarantee of procedural due process." Bush alleged that he was fired from his job in the facility kitchen because he was perceived to be homosexual, and that defendants subjected him to verbal abuse and slander, and placed him in fear of sexual assault because they believed him to be gay.[22]

B. Administrative Complaints

The Tennessee Department of Personnel (the "Department") governs employment issues relating to state employees. The Department's Grievance Policy (the "Grievance Policy") establishes the guidelines and procedures for grievances related to the terms and conditions of employment and employee terminations for career and permanent employees.[23] The Grievance Policy does not permit job applicants to take advantage of the procedures.[24]

The Grievance Policy provides that grievances alleging covered discrimination may be appealed directly to the appointing authority, bypassing three of the five steps in the procedure.[25] However, permissible grievances are limited to those discriminatory practices outlined in the Tennessee Human Rights Act and other nondiscrimination statutes, which include race, creed, color, religion, sex, age, national origin and disability.[26] It appears then that sexual orientation and gender identity discrimination are not grievable issues.

C. Other Documented Examples of Discrimination

1. State-supported Women and Children's Center

State-Supported Women and Children's Center

In 2007, an employee of a state-supported women and children's center came out to colleagues as a lesbian after she witnessed them ridiculing a lesbian client. They then started harassing her, including questioning her religious beliefs. She was later terminated.[27]

[22] *Bush v. Potter*, 875 F. 2d 862 (6th Cir. 1989).
[23] Tennessee Dep't of Pers. § 1120-11, *et seq.*
[24] *See id.*
[25] *Id.* at §1120-11-.04(9).
[26] *See id.*; see TENN. CODE ANN. § 8-50-103.
[27] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with The Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Tennessee's Homosexual Practices Act (the "HPA") established it as a misdemeanor for any person to engage in consensual sexual penetration with someone of the same gender.[28] In *Campbell v. Sundquist*, the Tennessee Court of Appeals found the HPA violated the right to privacy and was thereby unconstitutional.[29] Tennessee asserted five state interests, reflecting anti-gay animus, that were promoted by the HPA: (1) discouraging nonprocreative sexual activities; (2) discouraging residents from "choosing a lifestyle that is socially stigmatized and leads to higher rates of suicide, depression, and drug and alcohol abuse;" (3) discouraging gay relationships which are "'short-lived,' shallow, and initiated for the purpose of sexual gratification; (4) preventing the spread of sexually transmitted diseases; and (5) promoting "the moral values of Tennesseans."[30] The court's opinion pointed out how each purported state interest was contrary to established common law, was overly-broad, or lacked sufficient evidence. Despite the defendants' arguments, the Court of Appeals held that the right to privacy encompasses an adult's right to engage in consensual, noncommercial, sexual activities in the privacy of one's home.[31]

B. Housing and Public Accommodations Discrimination

Research, including non-exhaustive research into secondary sources, did not uncover any directly relevant information related to sexual orientation or gender identity discrimination in housing.

Research, including non-exhaustive research into secondary sources, did uncover examples of legislation to prevent discrimination on the basis of sexual orientation in public accommodations. The Memphis Code of Ordinances proscribes sexual orientation discrimination in consideration of applications for parades and public assemblies.[32] Similarly, state legislation enacted in 2005 required that no entity within specified resort districts may discriminate against patrons on the basis of sexual orientation, among other

[28] Tenn. Code Ann. § 39-13-510 (1990).
[29] *See Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); Sabine Koji, *Campbell v. Sundquist: Tennessee's Homosexual Practices Act Violates the Right to Privacy*, 28 U. MEM. L. REV 311, 331-32 (1997) (hereinafter "Koji").
[30] *Campbell*, 926 S.W.2d at 262; Koji, *supra* note 30, at 329.
[31] *Campbell*, 926 S.W.2d at 266.
[32] Memphis Code of Ordinances § 12.52.08.

bases.[33] There was no mention of gender identity or gender expression as a protected category.

C. **Hate Crimes**

Research, including non-exhaustive research into secondary sources, uncovered legislation to address discrimination on the basis of sexual orientation. However, there are also examples of police practices that exhibit anti-gay animus.

Tennessee's hate crimes law expressly includes as an enhancement factor in the sentencing of a criminal offense when the defendant intentionally selected the victim because of the defendant's belief or perception of the victim's sexual orientation.[34] The hate crimes law does not, however, explicitly include gender identity within the gambit of eligible enhancement factors.[35]

An example of the police practices that exhibit anti-gay animus are the actions of the Johnson City Police Department, which, on October 1, 2007, publicized the photographs of 40 men arrested in a public sting operation targeting men having sex with men.[36] The press release from the police department included photos that were taken at the scene of the sting and was personally approved by the police chief.[37] Of 600 other press releases in the last year by the police department, none pertaining to arrests were accompanied by photos or personally approved by the police chief.[38] Lambda Legal has filed a federal lawsuit based on the incident due to the unequal treatment of these men based on their perceived or actual sexual orientation.[39]

D. **Parenting**

Research into Tennessee family law indicates that gay and lesbian couples and parents are treated with animosity not directed towards other couples or parents, as evidenced by case law and legislation related to adoption, custody, and visitation.

1. **Adoption**

At this time, Tennessee statutes permit any single person to adopt a child in the state. [40] In the first state case to address the issue of adoption by a lesbian, the Court of Appeals held that a "parent's lifestyle . . . does not control the outcome of custody or

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[33] 2005 Tenn. Pub. Acts Chptr. 212.
[34] TENN. CODE ANN. § 40-35-114 (2001).
[35] *See id.* Some LGBT advocates have proposed that since disability and gender are explicitly included in the hate crime law, it may be possible to prosecute violence motivated by the victim's gender identity using those bases. *See* Human Rights Campaign, Tennessee Homepage: Tennessee Hate Crimes Law, http://www.hrc.org/your_community/1782.htm (last visited Sept. 3, 2009).
[36] Press Release, Lambda Legal, Lambda Legal Files Federal Lawsuit Charging Johnson City Police Department with Bias, (Sept. 30, 2008), *available at* http://lambdalegal.org/new/pr/lambda-legal-files-federal-lawsuit-in-tenn.html.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] TENN. CODE ANN. § 36-1-117; Human Rights Campaign, *supra* note 35.

adoption decisions, particularly absent evidence of its effects on the child."[41] Despite the favorable rule in *In re Adoption of M.J.S.* from 2000, it appears that the court was uncomfortable with non-heterosexual sexuality.[42] The court did not specifically acknowledge the prospective mother as a lesbian and referred to her long-time partner with whom the mother, Langston, had purchased a home, as a "roommate."[43] The court, however, did review evidence that Langston and her "roommate" slept in separate bedrooms and "had ceased their sexual relationship since the child came into the home. [The women] did not rule out the possibility of resuming their sexual relationship at some future date, but their present focus was on parenting their respective children." *Id.* The court's reasoning and holding appear to have been inappropriately influenced by the cessation of the sexual relationship between the "roommates" which bears no relationship to the mother's ability to parent.

It appears that there is at least some movement, however, to restrict the freedom of any individual to adopt.[44] SB 3910 was introduced in the Tennessee State Senate on January 30, 2008 which aimed to prohibit unmarried, "cohabitating" adults in a sexual relationship from adopting.[45] The bill died when the legislature adjourned.[46] While this proposed legislation would apply to both gay and straight couples, it is likely to have been intended to disproportionately impact gay couples, whose marriages are not recognized in the state.

Tennessee currently prohibits an adoption by a same-sex partner of the child's biological parent.[47] This "second parent adoption" is proscribed due to the rule that permits the continuation of a birth parent's rights after an adoption only if the adoption is by the birth parent's spouse.[48] As a result of a lack of change to this law and as long as same-sex marriage is not legally recognized in Tennessee, second parent adoption for same-sex couples is not permissible. Moreover, there is a lack of authority as to whether a same-sex couple may jointly petition to adopt or whether a same-sex partner may petition to adopt a partner's adopted child.[49]

2. Custody and Visitation

Tennessee case law suggests that the state does not view homosexuality as *per se* evidence of parental unfitness, but gay and lesbian parents have been treated with

[41] *Adoption of M.J.S.*, 44 S.W.3d at 57.
[42] *See id.*
[43] *Id.*
[44] Human Rights Campaign, *supra* note 35.
[45] Tenn. SB 3910 (105th Gen. Assembly, 2008) (Sen. Stanley). The bill would prohibit gay and straight unmarried, "cohabitating" couples from adopting a child. *Id.*
[46] Human Rights Campaign, Tennessee SB 3910 Page, http://www.hrc.org/your_community/9670.htm (last visited Sept. 3, 2009). The only ascertainable legislative history is a policy and fiscal summary, consisting of a half-page analysis and a one-page record of the bill history through the various legislative committees.
[47] *See* TENN. CODE ANN. § 36-1-117(f) and 36-1-117(a)(1).
[48] *Id.*
[49] Human Rights Campaign, *supra* note 35.

hostility when seeking custody and visitation of their children.[50] At this time in custody cases, as in adoption cases, the key issue is whether a parent's sexuality has a harmful effect on the child, as determined in a best interests analysis.[51]

In an early case, *Dailey v. Dailey*, a trial court changed the custody arrangement in favor of the father upon evidence that the mother was in a lesbian relationship.[52] The court noted that "there is also proof in the record that [the mother] flagrantly flaunted her relationship with [her partner] in the presence of the minor child."[53] Yet the court still failed to find any harm to the child as a result of being in the mother's custody.[54] But, in deciding to change the custody of the child to the father, the court noted that the father's expert stated that:

> "In his professional opinion it would be damaging to a child whose parents were openly living in a homosexual situation because of peer pressure and social stigma. He stated that homosexuality would be more likely to be learned by one who was exposed to it than by an individual who was not. . . . and it would be very difficult for [the child] to learn and approximate sex role identification from a homosexual environment."[55]

The mother's custody was revoked as a result of the "changed circumstances" of her being a lesbian and her visitation privileges were restricted.[56] Her visitation prohibited her from having her child in the home where she was living with her partner and from having her child in the presence of her partner "or any other homosexual with whom [the mother] may have a lesbian relationship."[57]

In more recent cases, there appears to be less anti-gay animus directed toward biological parents seeking custody and visitation of their children.[58] The Tennessee Court of Appeals upheld a change of custody to a lesbian mother where the mother and her "roommate" had never engaged in "inappropriate sexual conduct or contact" and

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[50] *See In re Price*, No. 02A01-9609-CH-00228, 1997 Tenn. App. LEXIS 435 (Western Section, June 20, 1997) (reversing trial court's award of custody to lesbian mother and giving custody of son to unwed father); 1-8 RICHARDS ON TENN. FAM. L. § 8-3.
[51] *See Massey-Holt v. Holt*, 255 S.W.3d 603 (Tenn. Ct. App. 2007).
[52] *Dailey v. Dailey*, 635 S.W.2d 391 (Tenn. Ct. App. 1981).
[53] *Id.* at 393. The court further stated that "[The mother and her lesbian partner] would hug and passionately kiss each other and rub the private parts of their bodies while in the home where the child was." *Id.*
[54] *See id.*
[55] *Id.* at 394.
[56] *Id.* at 392-93, 396; 1-8 RICHARDS ON TENN. FAM. L. § 8-3.
[57] *Dailey v. Dailey*, 635 S.W.2d at 396.
[58] 1-8 RICHARDS ON TENN.FAM. L. § 8-3. *See also Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001) (finding no abuse of discretion by the trial court, the judgment of the court of appeals prohibiting the presence of the mother's lesbian partner during overnight visitation was vacated); *Massey-Holt v. Holt*, 255 S.W.3d 603 (Tenn. Ct. App. 1997) (holding that the trial court erred by re-examining the comparative fitness of the parents in light of the mother's sexual orientation when there was no material change on that issue).

where the mother's home was no less fit for the rearing of her child than the father's home.[59] However, the custody order prohibited "inappropriate expression of sexual conduct between Mother and the roommate."[60] The court also included a note that its decision "should not be interpreted as a blanket approval or disapproval of [the mother's lesbian] lifestyle."[61]

For former same-sex partners, the Tennessee courts have been more restrictive in granting visitation rights.[62] Two cases were consolidated in *In re Thompson*, in which each biological mother's former long-term partner sought visitation rights for children for whom the partner planned for, participated in the conception and birth of, provided financial assistance for, and until foreclosed from doing so by the biological mother, acted as a parent to the child borne by her partner.[63] The court relied on the statutory definition of parent which limits parents to the biological mother and a man married to the mother.[64] Rather than applying the doctrines of *de facto* parenthood or *in loco parentis*, the court denied the former partners' standing to seek visitation of the children.[65]

E. Recognition of Same-Sex Couples

1. Marriage, Civil Unions, & Domestic Partnership

The Tennessee constitution limits marriage to male-female couples.[66]

A 1988 Attorney General Opinion stated that a marriage license could not be validly issued to an individual who has undergone gender reassignment surgery and a partner of the same birth sex,[67] because it is statutorily prohibited to change one's sex on a birth certificate, irrespective of a later "sex change surgery."[68]

[59] *In re Parsons*, 914 S.W.2d 889, 894 (Tenn. 1995) (finding that the majority of the child's problems stemmed from his father's influences).
[60] *Id.* A Chancellor in West Tennessee, without being asked by any party, ordered a lesbian couple who had been together for nine years to live separately in order for one of the women to maintain custody of her children under her custody agreement. An evaluation showed that neither of the children were being harmed. *Editorial*, COMMERCIAL APPEAL, Dec. 29, 2008.
[61] *Id.*
[62] *See* 1-9 RICHARDS ON TENN. FAM. L. § 9-4-1.
[63] 11 S.W.3d 913, 914 (Tenn. Ct. App. 1999) (denying appeal).
[64] *Id.* at 917-18.
[65] *Id.* at 923.
[66] TENN. CODE ANN. § 36-3-113.
[67] 88 Op. Tenn. Att'y Gen. 43 (1988); 1-3 RICHARDS ON TENN. FAM. L. § 3-2.
[68] *Id.*; TENN. CODE ANN. § 68-3-203(d).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Texas – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

There are no state laws in Texas that prohibit employment discrimination based on sexual orientation or gender identity, although five of Texas's six largest cities have local ordinances partially banning such discrimination in specific contexts.[1] State legislators have repeatedly introduced bills at the state level to add sexual orientation and/or gender identity as protected classes in various contexts, although none of these bills has left the committee stage.

Documented examples of job discrimination based on sexual orientation or gender identity by state or local governments include:

- A federal court ruled that a transgender employee of a state agency could bring an employment discrimination claim alleging a hostile work environment by utilizing sex discrimination law.[2]

- In 1997, two former employees of the Texas governor's office in Austin filed a lawsuit alleging that their former supervisor used hostile language to describe victims' assistance programs for homosexuals. The women were fired from the governor's Criminal Justice Division after complaining about abusive language and attitudes towards gays and lesbians by the division's executive director.[3]

- In 2009, a lesbian public school teacher was subjected to a hostile work environment because of her sexual orientation.[4]

- In 2009, a public school teacher was censored for expressing pro-LGBT viewpoints.[5]

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[1] *See infra* Part II.B, D.
[2] Trevino v. Center for Health Care Services, 2008 WL 4449939 (W.D.Tex., Sept. 29, 2008).
[3] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 100-101 (1997 ed.).
[4] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[5] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

- In 2009, a lesbian public school guidance counselor was subjected to a hostile work environment because of her sexual orientation and was censored for expressing pro-LGBT viewpoints.[6]

- In April 2008, the head of the Collin County's teen court program resigned under pressure after it was revealed that he was gay during his campaign for Plano City Council.[7]

- Since 2007, a teacher at Keller Learning Center has been experiencing harassment based on his sexual orientation at his workplace. Approximately one year after he began teaching at Keller in 2006, a student asked him if he was gay. He truthfully answered "yes." The assistant principal, having heard about the conversation between him and the student, implored him to keep his sexual orientation a secret because his job would be in danger if he were "out" at work and he might also be in physical danger. In response, he wrote a letter stating that he felt it would be disingenuous and would work a disservice to the students if he acted like there was something shameful about being gay. Thereafter, three students were allowed to transfer out of his class and his request to conduct a diversity training was denied. The discrimination makes him feel isolated at work and unable to interact with his colleagues.[8]

- In 2007, a code compliance inspector reported that after she designated her same-sex partner as a beneficiary for certain employment benefits, the officer administrator told everyone that she was a lesbian, after which she became a target for harassment and other negative treatment on the job.[9]

- In December 2004, the women's high school basketball coach in Bloomburg, who been named both "Teacher of the Year" in 2004 and "Coach of the Year" was placed on administrative leave and later dismissed after rumors started spreading around the town regarding her sexual orientation.[10]

- In 1994, In August, the Dallas County Sheriff's Department suspended a bailiff after he was heard making derogatory remarks about a lesbian rape victim. The bailiff joked to the rapist's attorney that "if it was me [on the jury], I'd only give him 30 days for raping a lesbian." A review board suspended the bailiff for 10

[6] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[7] Justin Nichols lost his race for City Council. Although he does not believe this loss was a result of his sexual orientation, the campaign against him and his supporters did at times focus on this fact. *See* John Wright, *Attack E-mail Implies Gay Candidate is Child Molester*, DALLAS VOICE, Mar. 28, 2008, *available at* http://www.dallasvoice.com/artman/publish/article_8481.php.
[8] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[9] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, The Williams Institute (Feb. 11, 2009) (on file with The Williams Institute).
[10] NCLR, Employment Case Docket: Stephens v. Bloomburg School District, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_stephens.

working days and ordered him to undergo sensitivity training and apologize in writing to the woman.[11]

- Dallas police officers have twice sued the department alleging anti-gay discrimination. In both instances, in 1981[12] and 1993,[13] the police department asserted that state's sodomy law permitted it to discriminate based on sexual orientation.

Anti-gay hostility and animus is obvious in non-employment contexts as well. Texas criminalized homosexual sexual behavior until the United States Supreme Court declared its statute unconstitutional in *Lawrence v. Texas*.[14] In 2005, Texas Representative Robert Talton introduced a measure to prohibit gay, lesbian and bisexual individuals from being foster parents in Texas. While heavily promoting this bill, which ultimately did not pass, Representative Talton stated, "We do not believe that homosexuals or bisexuals should be raising our children. Some of us believe they would be better off in orphanages than in homosexual or bisexual households because that's a learned behavior."[15] Another state representative opposed adding sexual orientation to the definition of what constitutes a hate crime on the ground that gay people bring violence upon themselves by their behavior. Representative Warren Chisum stated that they "put themselves in harm's way. They go to parks and pick up men, and they don't know if someone is gay or not."[16]

In the late 1990's, the state's Republican Party platform stated, "The Republican Party of Texas believes that the practice of sodomy, which is illegal in Texas, tears at the fabric of society, contributes to the breakdown of the family unit, and leads to the spread of dangerous, communicable diseases. Homosexual behavior is contrary to the fundamental, unchanging truths that have been ordained by God, recognized by our country's founders, and shared by the majority of Texans. Accordingly, homosexuality should not be presented as an acceptable 'alternative' lifestyle in our public policy. We are opposed to any granting of special legal entitlements, recognition, or privileges including, but not limited to, marriage between persons of the same sex, custody or adoption of children, spousal (partner) insurance or retirement benefits."[17]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment

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[11] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 70 (1994 ed.).
[12] *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981).
[13] *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993).
[14] 539 U.S. 558 (2003).
[15] *See* Press Release, Lambda Legal, Proposed Antigay Texas Law is Unconstitutional and Harmful to Children in Foster Care, Lambda Legal Says, http://www.lambdalegal.org/news/pr/proposed-antigay-texas-law-is.html (last visited Sept. 3, 2009).
[16] *See* Louisa C. Brinsmade, *Bloody Murders: Gay Rights Lobby's Quiet Fight for Hate Crimes Bill*, AUSTIN CHRON., Jan. 23, 1997, *available at* http://www.austinchronicle.com/gyrobase/Issue/column?oid=oid%3A527262 (last visited, Sept. 3, 2009).
[17] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 100-101 (1997 ed.).

discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Texas has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[18]

B. Attempts to Enact State Legislation

Numerous bills have been introduced in the Texas House of Representatives since 1988 to prohibit employment discrimination, both generally and specifically by state agencies, on the basis of sexual orientation and/or gender identity. A review of the legislative history of all bills introduced after 2001 shows that none of these bills have made it past the committee stage.[19]

On January 12, 2009 Representative Villarreal introduced H.B. No. 538 which would amend various sections of Texas' Labor Code to prohibit employment discrimination on the basis of either sexual orientation or gender identity or expression.[20] It has not been adopted.

C. Executive Orders, State Government Personnel Regulations, and Attorney General Opinions

1. Executive Orders

None.[21]

2. State Government Personnel Regulations

None.

3. Attorney General Opinions

None.

D. Local Legislation

Although Texas's nondiscrimination law does not explicitly address sexual orientation or gender identity, at least four Texas cities have nondiscrimination

[18] *See* TEX. LAB. CODE §§ 21.001-.556.
[19] House bills introduced after 2001 relating to the prohibition of employment discrimination on the basis of sexual orientation and/or gender identity include HB 1136, HB 810, HB 574, HB 3463 and HB 1524 in 2003; HB 1515, HB 1526, HB 143, HB 2519 and HB 1206 in 2005; and HB 900 and HB 307 in 2007. Some of these bills were considered in public hearings, but no information regarding those hearings was found. All of these bills died in Committee.
[20] *See* HB 538.
[21] Only executive orders issued by the current governor, Rick Perry, were reviewed. Governor Perry has been in office since December 21, 2000.

ordinances in place that prevent employment discrimination on the basis of sexual orientation and/or gender identity: Austin, Fort Worth, Houston and Dallas.[22]

1. City of Austin

Austin's City Code regarding employment discrimination covers both sexual orientation and gender identity. Gender identity is defined as "a person's various individual attributes, actual or perceived, that may be in accord with or sometimes opposed to, one's physical anatomy, chromosomal sex, genitalia, or sex assigned at birth." Sexual orientation is not specifically defined.[23]

The code makes it unlawful for an employer[24] to fail or refuse to hire, or discharge, any person on the basis of sexual orientation or gender identity. It also makes it unlawful for an employer to discriminate against any person with respect to compensation or other terms of employment or to limit, segregate or classify employees or applicants in any way that deprives a person of employment or employment opportunities, on the basis of sexual orientation or gender identity. The unlawful employment practices covered by the ordinance also include actions by employment agencies and labor organizations.[25]

Charges of unlawful discriminatory practices may be filed with Austin's Equal Employment/Fair Housing Office[26] (the "EEO") within 180 days of the date the violation occurred. The EEO conducts a preliminary review before accepting a charge. Once a charge is accepted, an investigation is initiated and if the EEO determines there is reasonable cause to believe a violation occurred, an attempt will be made to resolve the alleged violation through a conciliation agreement. If this attempt is unsuccessful, the EEO may refer a case to the city attorney for civil prosecution.[27]

2. City of Fort Worth

Fort Worth's City Code protects against employment discrimination on the basis of sexual orientation. Sexual orientation is defined as "heterosexuality, homosexuality or

[22] There are approximately 465 cities in Texas and an exhaustive search was not performed to determine if any additional cities may have nondiscrimination ordinances in place that cover sexual orientation and/or gender identity. According to the Equality Texas website, the only Texas cities with nondiscrimination policies addressing sexual orientation and/or gender identity are the four listed and El Paso, which has a local ordinance prohibiting such discrimination only in the context of public accommodations.
[23] *See* Austin City Code, Chapter 5-3.
[24] "Employer" is defined in the Austin City Code as "a person who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and the person's agent. The term does not include the United States, or a corporation wholly owned by the government of the United States; a bona fide private membership club (other than a labor organization) which is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1954; or the state, a state agency, or political subdivision." *Id.* at § 5-3-2.
[25] *Id*. at § 5-3-4.
[26] "Equal Employment/Fair Housing Office" is defined in Section 5-3-2 of the Austin City Code as "the office in the Human Resources Department responsible for receiving, investigating, conciliating, making determinations, and taking other action related to charges received under this chapter."
[27] *Id*. at § 5-3-6 through 5-3-12.

bisexuality or being identified with such orientation." Gender identity is not covered by the Fort Worth City Code.[28]

The code makes it unlawful for an employer,[29] employment agency, labor organization or joint labor-management committee to discriminate against any individual because of sexual orientation in any manner involving employment, including hiring, firing and recruitment of individuals.[30] Discriminate is defined broadly to capture various forms of indirect discrimination as well.[31]

Charges of employment discrimination may be filed with the Enforcement Division of the Fort Worth Community Relations Department ("CRD"). The CRD may require an individual alleging discrimination to participate in settlement discussions. If these efforts are unsuccessful, the CRD may investigate the charge, determine its merits and issue a Letter of Determination regarding the merits of the charge.[32] Violations are punishable by a fine not to exceed $500.[33]

3. **City of Houston**

In July 2001, Houston amended its Code of Ordinances to prohibit discrimination on the basis of sexual orientation and gender identity in connection with city employment and employment opportunities, the awarding of city contracts, the use of city facilities and the delivery of city services. Sexual orientation and gender identity is defined as "having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having a self-image or identity not traditionally associated with one's biological maleness or femaleness. Sexual orientation and gender identity does not include pedophilia, exhibitionism, voyeurism or any unlawful conduct."[34]

An employee or officer found to be in violation of the ordinance shall be subject to disciplinary action up to and including indefinite suspension/termination or removal from office pursuant to applicable city ordinances, city charter provisions, executive orders, administrative procedures, laws and policies.[35]

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[28] *See* Fort Worth City Code, art. III, §§ 17-66 through 17-71.

[29] "Employer" is defined in the Fort Worth City Code as "a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of such person." The definition states that the term "employer" does not include "[t]he United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or [a] bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26." *Id*. at § 17-66. The definition of "employer" does not specifically exclude employees of the state government.

[30] *Id*. at § 17-67(a).

[31] *Id*. at § 17-67(c).

[32] *Id*. at § 17-69; *see also* City of Fort Worth, Employment Discrimination Homepage, http://www.fortworthgov.org/crd/info/default.aspx?id=5104 (last visited Sept. 3, 2009).

[33] *Id*. at §17-71.

[34] *See* Houston Code of Ord., art. IV, §§ 2-451 through 2-454.

[35] *Id*. at § 2-455.

Prior to Houston's amendment of its Code of Ordinances, its mayor, Lee Brown, signed an executive order in 1998 prohibiting discrimination on the basis of sexual orientation in connection with city employment and other city programs. In response to this executive order, City Councilman Rob Todd sued the mayor and the city, asking that the court declare the order invalid and enjoin its enforcement. Todd claimed that this executive order bypassed the citizens of Houston, who had voted against a similar referendum 13 years earlier, and usurped a power allocated to the city council and the civil service commission. After multiple appeals, the Supreme Court of Texas determined that neither Todd nor a citizen co-plaintiff had standing to bring the case, and the claims were dismissed.[36]

4. City of Dallas

In May 2002, the Dallas City Council amended its City Code to prohibit employment discrimination on the basis of sexual orientation or gender identity.[37] While the code uses only the term "sexual orientation" throughout, it defines such term to mean "an individual's real or perceived orientation as heterosexual, homosexual, or bisexual *or an individual's real or perceived gender identity*."[38] The ordinance does not apply to religious organizations or the United States or Texas governments.[39]

The ordinance makes it unlawful for an employer[40] to fail or refuse to hire, or discharge, any person on the basis of sexual orientation. It also makes it unlawful for an employer to discriminate against any person with respect to compensation or other terms of employment or to limit, segregate or classify employees or applicants in any way that deprives a person of employment or employment opportunities, on the basis of sexual orientation. The unlawful employment practices covered by the ordinance also include actions by employment agencies and labor organizations.[41]

Complaints of unlawful discriminatory practices may be filed by any person with the administrator, who shall commence an investigation of the alleged discrimination. During the investigation, if it appears that an unlawful practice has occurred, the administrator shall attempt to conciliate the complaint. If this is not successful, and the administrator determines that an unlawful practice has occurred, the administrator shall refer the case to the city attorney for prosecution in municipal court.[42] A person who knowingly or intentionally violates a provision of the ordinance, or knowingly or

[36] *See Brown v. Todd*, 53 S.W.3d 297 (Tex. 2001).
[37] *See* Dallas City Code, Chptr. 46.
[38] *Id*. at § 46-4(18).
[39] *Id*. at § 46-5.
[40] "Employer" is defined in the Dallas City Code as: "any person who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and includes any agent of such a person. The term does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1954, as amended." *Id*. at § 46-4.
[41] *Id*. at § 46-6.
[42] *Id*. at §§ 46-9 through 46-12.

intentionally obstructs or prevents compliance with the ordinance, can be fined between $200 and $500.[43]

E. Occupational Licensing Requirements

The Texas Department of Licensing and Regulation is the state's umbrella occupational regulatory agency, responsible for the licensing and regulation of over 20 occupations and industries.[44] Within these industries, the Texas Occupations Code provides for specific licensing requirements for various types of professionals - i.e., Title 3 of the Occupations Code covers Health Professionals, but there are specific licensing requirements for chiropractors, podiatrists, midwives and various other titles. The general provisions relating to licensing do not include a "moral turpitude" or similar clause and only allow licensing authorities to restrict licenses from being granted to individuals who have been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the licensed occupations.[45]

However, a sampling of the specific licensing requirements for various occupations indicates that many of the licensing requirements do include moral character clauses. For example, individuals applying for a Real Estate Broker and Salesperson license must have a moral character that complies with the commission's moral character requirements.[46] Applicants for a license to practice dentistry or dental surgery must be of "good moral character,"[47] electrician applicants must demonstrate "honesty, trustworthiness, and integrity"[48] and engineers must be "of good character and reputation."[49] A non-exhaustive search of cases, news articles and websites did not uncover any examples of these standards being applied to LGBT applicants.

In the pre-*Lawrence* landscape in Texas, "individuals *convicted* of violating consensual sodomy statutes can find their ability to pursue their careers sharply curtailed by state licensing laws that deny individuals with criminal convictions, even convictions for misdemeanors like § 21.06, the right to practice certain professions. For example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d)."[50]

In *Lawrence v. Texas*, both the majority opinion of the U.S. Supreme Court and Justice O'Connor's concurring opinion relied on the impact of Texas' sodomy statute on employment as one reason that *Bowers* should be overturned. In particular, Justice

[43] *Id*. at § 46-13.
[44] *See* Texas Dep't of Licensing and Reg. "About Us" Page, http://www.tdlr.state.tx.us/about.htm (last visited Sept. 3, 2009).
[45] *See* TEX. OCCUPATIONS CODE, § 53.021.
[46] *See* TEX. OCCUPATIONS CODE, § 1101.353.
[47] *Id*. at § 256.002.
[48] *Id*. at § 1305.152.
[49] *Id*. at § 1001.302.
[50] *See* Texas Dep't of Licensing and Reg. "About Us" Page, http://www.tdlr.state.tx.us/about.htm (last visited Sept. 3, 2009).

O'Connor's concurrence noted the impact on employment, with the restrictions that would keep a homosexual from joining a variety of professions.[51]

[51] *Id.* at 581, O'Connor, concurring ("It appears that petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. *See, e.g.,* Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer).")

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Trevino v. Center for Health Care Services, 2008 WL 4449939 (W.D.Tex., Sept. 29, 2008).

U.S. Magistrate Judge Nancy Stein Nowak refused to dismiss a Title VII sex and race discrimination claim brought by Ramsey Trevino, a transgender person, against Center for Health Care Services, a state agency. The court found that "Trevino has met her burden to plead enough facts to state a claim for relief that is plausible on its face. Assuming the allegations in the complaint are true, Trevino's factual allegations - that she has been subjected to inappropriate comments, jokes, and a hostile work environment because of her race and gender - are enough to raise a right to relief above the speculative level."[52]

In 2009, the court denied the defendant's motion for summary judgment. As to Trevino's Title VII hostile environment claim, defendant's sought to dismiss because Trevino's allegations did not show that the harassment was severe or pervasive. The court disagreed, stating, "Trevino presented summary-judgment evidence showing that she experienced harassment for years. Her evidence indicates that her coworkers and supervisors referred to Trevino as a 'he-she,' 'cross-dresser,' 'transsexual,' and 'cross-gender,' and made such comments as 'you're not a woman,' 'why are you dressing like a woman,' 'you look like man,' 'you look like a drag queen,' 'did the doctor cut off your penis,' 'can you have sex,' 'you cannot be married,' 'you're a man,' and 'what parts do you have?'" The court further mentioned that despite Trevino's internal complaints about the insults and comments, the Center did not investigate the complaints or take remedial action. The court concluded that the statements and internal inaction were sufficient to support a claim of severe and pervasive harassment, conveying the message that Trevino is incompetent because of her sex.[53]

Gonzalez v. Kleberg County, 2008 WL 194370 (S.D. Texas, Jan. 22, 2008).

A man who was employed as a Dispatcher by the Kleberg County Sheriff's Department can maintain a retaliation action under Title VII but not a sex discrimination sexual harassment action, ruled U.S. District Judge John D. Rainey.

Soon after being hired, Plaintiff was subjected to harassing comments by his supervisor, Ms. Barbour, and her supervisor, Mr. Vera. Evidently they perceived Mr. Gonzalez to be gay, because they taunted him with such expressions as "queer bait," "fruit loop sucker," and "fruitcake." Gonzalez stated his objections to these comments,

[52] Lesbian & Gay L. Notes (Nov. 2008).
[53] *Trevino v. Center for Health Care Services*, 2009 WL 2406196 *3 (W.D. Tex. Aug. 3, 2009).

but no action was taken on his complaints. When Gonzalez had been working at the department about three months, he was called into a meeting with these individuals and a Captain and confronted with a letter claiming that he had falsely represented himself as an officer of the sheriff's department to obtain information about a friend who had been arrested by the Bishop Police Department, that he was living with the friend and that he was involved in selling drugs. County officials also claimed to have a recording of a telephone call where Gonzalez identified himself as an officer. He was told he could quit or be fired. He protested that the allegations were false, but he quit and filed his discrimination charges, alleging a hostile environment and retaliation for his complaints.

The court dismissed the discrimination claim because the harassment was aimed at his perceived sexual orientation, not his sex, and was thus not actionable under Title VII. However, the court found that the retaliation claim could proceed, as "Plaintiff has sufficiently stated a cause of action for retaliation to survive a motion to dismiss because he reasonably believed that he was opposing an unlawful employment practice under Title VII."[54]

Hotze v. Brown, 1999 WL 418363 (Tex.App., 14th Dist., June 24, 1999).

In *Hotze v. Brown*, a Texas appellate court affirmed a temporary injunction halting enforcement of an executive order issued by Houston Mayor Lee Brown that would have banned discrimination based on sexual orientation in connection with the activities of the Houston municipal government.

In 1985, after the city council passed a gay rights bill, there was a referendum which repealed the bill. In 1998, newly-elected Mayor Brown signed an executive order prohibiting discrimination based on sexual orientation that applied only to activities and employees of the City of Houston. Richard Hotze, an organizer of the referendum repeal drive, and Councilman Rob Todd sought a temporary injunction to halt enforcement of the executive order, arguing that, under the Houston City Charter, only the civil service commission, with the City Council's approval, may make rules and regulations pertaining to civil service employees. In their motion, Hotze and Todd argued that, by issuing an executive order applicable to civil service employees, Brown usurped the powers granted to the City Council and civil service commission and thereby exceeded his legal authority. The trial court granted the motion, while holding that Hotze did not have standing to participate in the litigation as a plaintiff.

The appeals court agreed with the trial court that Hotze, a private citizen, did not suffer a "special" injury and therefore did not have standing. However, the court also agreed that Todd could establish standing based on his allegation that his power as a City Councilman was usurped, and therefore considered the request for an injunction. The appeals court found that an injunction was warranted because enforcement of the order would usurp Todd's authority as a legislator instantly, and if the order were enforced, City employees would be limited in their ability to act. Because the City Council had not failed to enact a rule similar to the Mayor's executive order, the Council had affirmed a

[54] *Gonzalez v. Kleberg County*, 2008 WL 194370 (S.D. Texas, Jan. 22, 2008).

"hands off" policy with regard to those types of discriminatory actions, which conflicted with the Mayor's executive order.[55]

City of Dallas v. England, 846 S.W.2d 957 (Tex. App. 1993).

City of Dallas and Mack Vines v. England[56] involves a lesbian, Mica England, who was denied a job as a Dallas Police Officer in 1989 because she admitted to being a lesbian during her job interview. At the time, the Texas Penal Code criminalized consensual sexual relations between same-sex adults, so the Dallas Police Department had a policy of refusing to hire gay and lesbian applicants because they violated this criminal statute. Ms. England challenged the constitutionality of the Texas statute criminalizing private sexual relations between consenting same-sex adults and the police department's related hiring policy, and sought to enjoin the Dallas Police Department from refusing to hire lesbians and gay men because they violate this criminal statute.[57]

The Texas appellate court held that the statute was unconstitutional and that the City of Dallas and its police chief were enjoined from denying lesbians or gay men employment in the police department solely because they violate this statute. The court also found that the State of Texas was immune from the suit without its consent due to sovereign immunity.[58]

Childers v. Dallas Police Dep't, 513 F. Supp. 134 (N.D. Tex. 1981).

Plaintiff, a Dallas City Employee, was disqualified for a promotion to employment with the Property Division of the Dallas Police Department, despite exceptional performance on the requisite civil service exam, on the basis that he was a practicing homosexual and thus a "habitual lawbreaker" (homosexual conduct was prohibited by Texas penal statutes). The police department believed the plaintiff would be a security risk "because of the kind of contraband that the property room controls, and because Childers might warn other homosexuals of impending police raids." The police department also suggested that Plaintiff, by virtue of his homosexuality, was likely to be emotionally unstable and unable to endure the harassment he was likely to encounter from police officers.

The court upheld the police department's refusal to hire Plaintiff, basing its decision on its findings that many people openly despise and fear homosexuals, that Plaintiff had publicly "flaunted" his homosexuality by his involvement with a gay church, which would "discredit" on the police department, that Plaintiff's homosexual activities "undermine the legitimate needs for obedience and discipline within the police department," and because '[t]here [were] also legitimate doubts about a homosexual's ability to gain the trust and respect of the personnel with whom he works.'"[59]

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[55] *Hotze v. Brown*, 1999 WL 418363 (Tex.App.,14th Dist., June 24).
[56] 846 S.W.2d 957 (Tex. App. 1993).
[57] *Id*. at 958.
[58] *Id*.
[59] *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981).

Van Ooteghen v. Gray, 628 F.2d 488, 490 (5th Cir. 1980), aff'd en banc, 654 F.2d 304 (1981).

Plaintiff, the Assistant County Treasurer for Harris County, Texas, was fired after he told his employer that he was gay and that he intended to speak at the Commissioner's Court about gay rights. Plaintiff's employer attempted to prevent Plaintiff from making the public speech, and Plaintiff was fired after he refused. The district court rendered judgment in favor of Plaintiff, finding that Plaintiff's First Amendment rights had been violated and awarding reinstatement and back pay. The Fifth Circuit affirmed, and remanded the District Court's award of $7,500 for attorney's fees because the District Court did not explain how it reached this amount. On a second appeal for award of attorney's fees, the Fifth Circuit upheld the reduced amount awarded by the District Court.[60]

2. Private Employees

Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008).

In 2005, Izza (Raul) Lopez, a transgender woman, applied for the position of Scheduler with River Oaks Imaging & Diagnostic, a Houston medical clinic. After being offered the job, Ms. Lopez was told that her offer was being rescinded because of her "misrepresentation" of herself as a woman. Ms. Lopez sued in federal court in the Southern District of Texas, charging that River Oaks violated her rights under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment.[61]

The court found that while transgendered persons are not a protected class under Title VII *per se*, such persons are protected under the *Price Waterhouse* theory if they can demonstrate that they were subject to discrimination, not because they are transgendered, but because their appearance and conduct does not conform to traditional male or female stereotypes. The court found that Ms. Lopez had a legally viable claim because she developed facts in support of a claim that "River Oaks discriminated against her, not because she is transgendered, but because she failed to comport with certain River Oaks employees' notions of how a male should look."[62] The court further found that Ms. Lopez had presented ample evidence to disprove River Oaks' misrepresentation claim and that there was a genuine fact issue about whether River Oaks' stated reasons for rescinding its job offer were pretexts for unlawful discrimination.[63] For these reasons, the court denied motions for summary judgment from both sides and mediation was set

[60] *Van Ooteghen v. Gray*, 628 F.2d 488, 490 (5th Cir. 1980), aff'd en banc, 654 F.2d 304 (1981).
[61] 542 F. Supp. 2d 653 (S.D. Tex. 2008).
[62] *Id*. at 660.
[63] *Id*. at 665.

for April 30, 2008.[64] According to the attorney at Lambda Legal who handled this case, it was settled to the parties' mutual satisfaction in April 2008.[65]

B. Administrative Complaints

The Texas Workforce Commission Civil Rights Division ("TWC-CRD") enforces the Texas Commission on Human Rights Act ("CHRA"), codified in the Labor Code, which applies to both public and private entities.[66] The CHRA aims to assure equal employment opportunity without discrimination on the basis of race, color, religion, national origin, sex (includes sexual harassment and pregnancy), age, disability or retaliation, and the TWC-CRD has the authority to investigate claims brought under the CHRA. The CHRA also details procedures for administrative review of claims, alternative dispute resolution and exhaustion of administrative remedies which are designed to favor conciliation over litigation.[67] The Supreme Court of Texas has stated that "the CHRA provides the exclusive state statutory remedy for public employees alleging retaliation arising from activities protected under the CHRA."[68]

When an employee feels he or she has been treated in a discriminatory manner, they may file a complaint with the TWC-CRD in person, over the phone or by completing an online form and sending a notarized copy to the TWC-CRD.[69] After a charge has been filed, the TWC-CRD will conduct an investigation if it believes that a violation may have occurred and may offer mediation to the parties involved, or contact the employer for more information. An employee may file a lawsuit in state or federal court if their charge is dismissed at any stage. Copies of filed complaints were not found on the Texas Workforce website and it is unlikely that complaints would be filed alleging discrimination on the basis of sexual orientation or gender identity since those are not protected classes.[70]

Texas also has a State Office of Administrative Hearings ("SOAH"), which is an independent agency created to manage contested cases and conduct hearings in contested cases for other state agencies.[71] One of the functions of the SOAH is to provide alternative dispute resolution ("ADR") services to state agencies. These services range from publishing model guidelines for ADR to conducting mediations. The SOAH website indicates that state agencies frequently use ADR for employee grievances and the

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[64] *Id*. at 668.
[65] *See* e-mail from Cole Thaler of Lambda Legal, Lead Counsel for Ms. Lopez (Jan. 23, 2009) (on file with author).
[66] *See* TEX. ADMIN. CODE, Chapter 819 and TEX. LAB. CODE §§ 21.001-.556. Note that the definition of "employer" in the Labor Code includes "a county, municipality, state agency or state instrumentality."
[67] *See* TEX. LAB. CODE §§ 21.201-.211.
[68] *See City of Waco v. Lopez*, 259 S.W.3d 147 (Tex. 2008).
[69] *See* TEXAS WORKFORCE, HOW TO FILE AN EMPLOYMENT DISCRIMINATION COMPLAINT (2008), *available at* http://www.twc.state.tx.us/crd/file_emp.html.
[70] The Texas Workforce website includes links to numerous reports and publications, but does not provide copies of discrimination charges. *See* Texas Workforce: Reports, Publications and Internet Systems Homepage, http://www.twc.state.tx.us/customers/rpm/rpmsub4.html (last visited Sept. 3, 2009).
[71] *See* STATE OFFICE OF ADMINISTRATIVE HEARINGS, SOAH PROCEDURAL RULE CHANGES (2009), *available at* http://www.soah.state.tx.us.

Texas Government Code directs state agencies to develop and use ADR as appropriate to resolve disputes as quickly and fairly as possible.[72]

While the SOAH provides guidance on establishing ADR procedures to state agencies, each individual agency is responsible for developing its own policy, as well as for developing a policy regarding how to handle employee grievances before ADR is needed. For example, the Texas Department of Criminal Justice has issued an Executive Directive describing how complaints of discrimination in the workplace should be handled and detailing the various options available to the complainant.[73] Each school district in Texas is also required to have a grievance policy outlining its internal dispute resolution system.[74] Complaints handled by the SOAH or individual state agencies were not found on state websites.

C. **Other Documented Examples of Discrimination**

A Texas Public School

In 2009, a lesbian public school teacher was subjected to a hostile work environment because of her sexual orientation.[75]

A Texas Public School

In 2009, a public school teacher was censored for expressing pro-LGBT viewpoints.[76]

A Texas Public School

In 2009, a lesbian public school guidance counselor was subjected to a hostile work environment because of her sexual orientation and was censored for expressing pro-LGBT viewpoints.[77]

Collin County Teen Court Program

In April 2008, the head of the Collin County's teen court program resigned under pressure after it was revealed that he was gay during his campaign for Plano City Council.[78] Although the Commissioner later withdrew this proposal amid media scrutiny

[72] *See* TEX. GOV'T CODE §§ 2009.002 and 2009.051.
[73] *See* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, DISCRIMINATION IN THE WORKPLACE 31 (rev. 5), *available at* http://www.tdcj.state.tx.us/vacancy/hr-policy/pd-31.pdf .
[74] *See* ASSOCIATION OF TEXAS PROFESSIONAL EDUCATORS, THE GRIEVANCE PROCESS, *available at* http://www.atpe.org/protection/EmploymentRights/grievanceprocess.asp.
[75] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[76] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[77] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[78] Justin Nichols lost his race for City Council. Although he does not believe this loss was a result of his sexual orientation, the campaign against him and his supporters did at times focus on this fact. *See* John

of the matter, Justin Nichols entered into a severance agreement with the county in June 2008 and agreed to leave his position in exchange for the equivalent of $38,500, more than his $35,500 annual salary. The severance agreement does not specify that Mr. Nichols was asked to leave because he is gay, but the clear implication is that this was the case, and the county could have fired him solely because of his sexual orientation since neither Texas nor Collin County law protects against such discrimination.[79]

Keller Learning Center

Since 2007, a teacher at Keller Learning Center, an alternative public high school in Keller, Texas, has been experiencing harassment based on his sexual orientation at his workplace. Approximately one year after he began teaching at Keller Learning Center in 2006, a student asked him if he was gay. He truthfully answered "yes." The assistant principal, having heard about the conversation between him and the student, implored him to keep his sexual orientation a secret because his job would be in danger if he were "out" at work and he might also be in physical danger. In response, he wrote a letter stating that he felt it would be disingenuous and would work a disservice to the students if he acted like there was something shameful about being gay. Thereafter, three students were allowed to transfer out of his class and his request to conduct a diversity training was denied. The discrimination makes him feel isolated at work and unable to interact with his colleagues.[80]

Municipal Department

In 2007, a code compliance inspector reported that after she designated her same-sex partner as a beneficiary for certain employment benefits, the officer administrator told everyone that she was a lesbian. Co-workers made repeated derogatory comments about "faggots" and one female religious employee told the compliance inspector that, because she did not have a boyfriend, she "wasn't whole … that's your problem." A picture of Janet Jackson's breast was placed on the compliance inspector's computer. Her complaints to her manager were rejected. When a new supervisor was hired, he would ignore the compliance inspector and avoid eye contact with her at meetings. He also required her to train three replacements for a management position that she was qualified for and that she had been told she would receive prior to his arrival, but to which she was never promoted.[81]

Bloomburg Public School

Wright, *Attack E-mail Implies Gay Candidate is Child Molester*, DALLAS VOICE, Mar. 28, 2008, *available at* http://www.dallasvoice.com/artman/publish/article_8481.php.

[79] *See* Theodore Kim & Ed Housewright, *Collin County Employee Gets a Year's Salary in Exchange for Resignation*, DALLAS MORNING NEWS, June 26, 2008; *Editorial: Collin County Wrong to Run Off Gay Workers*, DALLAS MORNING NEWS, June 29, 2008.

[80] E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

[81] E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, The Williams Institute (Feb. 11, 2009) (on file with the Williams Institute).

In 2005, Merry Stephens, an award-winning teacher and basketball coach, settled her sexual orientation discrimination claim against Bloomburg Independent School District. Coach Stephens was honored as a "Teacher of the Year" in 2004 and named "Coach of the Year" in three of her five years as head coach of the Lady Wildcats basketball team. In December 2004, the School Board initiated proceedings to terminate Coach Stephens. The school board president testified under oath that the board's decision to terminate Coach Stephens was based on the personal anti-gay animosity of several school board members. In exchange for Coach Stephens' agreement not to pursue further legal action, the district agreed to pay Coach Stephens a monetary settlement.[82]

Dallas County Sheriff's Department

In 1994, In August, the Dallas County Sheriff's Department suspended a bailiff after he was heard making derogatory remarks about a lesbian rape victim. The bailiff joked to the rapist's attorney that "if it was me [on the jury], I'd only give him 30 days for raping a lesbian." A review board suspended the bailiff for 10 working days and ordered him to undergo sensitivity training and apologize in writing to the woman.[83]

Texas Governor's Office

In 1997, two former employees of the Texas governor's office filed a lawsuit in Austin alleging that their former supervisor used hostile language to describe victims' assistance programs for homosexuals. The women were fired from the governor's Criminal Justice Division after complaining about abusive language and attitudes towards gays and lesbians by the division's executive director. They claimed the director had described victims' assistance programs as "homo projects." The suit further alleged that the director wanted to track the number of crime victims who were gay and threatened to retaliate against grant applicants who complained about budget cuts. The governor's office denied the allegations.[84]

[82] NCLR, Employment Case Docket: *Stephens v. Bloomburg School District*, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_stephens.
[83] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 70 (1994 ed.).
[84] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 100-101 (1997 ed.).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Until the law was struck down by the U.S. Supreme Court in *Lawrence v. Texas*[85] in 2003, Texas prohibited "deviate sexual intercourse" with another individual of the same sex, regardless of whether the sexual intercourse was consensual.[86] Based on the sodomy law, the Dallas Police Department had a hiring policy that prohibited applicants who admitted to or engaged in deviate sexual intercourse, or any sexual contact, with a member of the same sex since age 15.[87]

B. Housing and Public Accommodations Discrimination

Similar to the situation involving employment, Texas does not have a state law prohibiting discrimination on the basis of sexual orientation or gender identity in connection with housing or public accommodations, although there have been attempts to enact such legislation.[88] However, the nondiscrimination laws in the cities of Austin[89] (sexual orientation and gender identity), Fort Worth[90] (sexual orientation only) and Dallas[91] (sexual orientation and gender identity) all prohibit discrimination in both the housing and public accommodations contexts, in addition to employment.

Additionally, in 2003 El Paso's City Council unanimously voted to expand its anti-discrimination ordinance covering public accommodations to ban discrimination on the basis of sexual orientation or gender identity. Violating the ordinance is a misdemeanor punishable by a fine of up to $200.[92] El Paso does not protect against employment discrimination on the basis of sexual orientation or gender identity.

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[85] 539 U.S. 558 (2003).
[86] TEX. PENAL CODE § 21.06. This section remains a part of Texas's Penal Code, although there is a notation that it was declared unconstitutional by *Lawrence v. Texas*.
[87] *See Dallas v. England*, 846 S.W.2d 957 at 958 (Tex. App. 1993), and discussion *supra* Part II.D.4.
[88] Several of the house bills introduced to prevent employment discrimination on the basis of sexual orientation and/or gender identity included provisions relating to housing and public accommodations as well. *See, e.g.*, HB 1136 (2003); HB 1515 (2005); HB 900 (2007).
[89] *See* Austin City Code, Chptrs. 5-1 and 5-2.
[90] *See* Fort Worth City Code, art. III, §§ 17-46-17-51; 17-86-17-106.
[91] *See* Dallas City Code, Chptr. 46.
[92] *See* Charles K. Wilson, *City Amends Ordinance on Discrimination*, EL PASO TIMES, Apr. 9, 2003, *available at* http://www.genderadvocates.org/News/El%20Paso.html.

C. **Hate Crimes**

The Texas hate crimes law includes "sexual preference" but does not explicitly cover gender identity. Disability and gender are included, but neither has been used to provide a cause of action for violence motivated by the victim's gender identity as of March 27, 2007.[93]

In 1995, legislators in the Texas House of Representatives killed a bill that clarified the definition of a hate crime, including sexual orientation as a category of victim selection, and stiffened penalties for hate crimes.[94] The legislature enacted a hate crimes law in 1993 that covers offenses based on 'bias or prejudice' without specifying any categories; it has rarely been enforced.[95] The proposed bill was attacked by Religious Right groups, but was passed overwhelmingly in the Senate.[96] Democratic State Rep. Warren Chisum led a coalition of conservatives to defeat it, 70-68, in the House.[97] According to Chisum, gay people "put themselves in harm's way. They go to parks and pick up men, and they don't know if that someone's gay or not."[98] He has also stated, "[I]t sets precedent in the law to give special consideration to the gay and lesbian community just as if they were the same stature as all minorities."[99]

D. **Health Care**

Texas law does not permit a partner to make a medical decision on behalf of an incapacitated same-sex partner in the absence of an advance directive,[100] but an adult may designate his or her same-sex partner as a health care agent through an advance health care directive.[101] A bill has been introduced in the current session of the Texas House of Representatives that would treat domestic partners the same as spouses and allow them to make medical decisions on behalf of their partners.[102]

In 1995, three Dallas County Commissioners, Jim Jackson, Kenneth Mayfield and Mike Cantrell, sent a letter to local doctors urging them to support the county's ban on condom distribution because homosexuality, like prostitution and drug abuse, is unacceptable. Their letter stated that "[w]e don't want anyone, especially anyone in authority, telling our children or future grandchildren that it's an approved or acceptable lifestyle to be a homosexual, a prostitute or a drug user." [103] Jim Jackson is currently a

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[93] *See* TEX. CODE CRIM. PROC. art. 42.014; TEX. PENAL CODE § 12.47. *See also* HUM. RTS. CAMPAIGN STATE LAW LISTINGS: TEXAS HATE CRIMES LAW (2007), http://www.hrc.org/1770.htm (last visited Sept. 3, 2009).
[94] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 98 (1995 ed.).
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *See* TEX. HEALTH AND SAFETY CODE, § 313.004.
[101] *See* TEX. HEALTH AND SAFETY CODE Chptr. 166.
[102] *See* HB 353.
[103] *See* John Wright, *Dallas County Overturns Condom Ban*, DALLAS VOICE, Jan. 13, 2009, *available at* http://www.dallasvoice.com/instant-tea/2009/01/13/commissioners-court-overturns-condom-ban/.

member of the Texas House of Representatives and Ken Mayfield and Mike Cantrell remain Dallas County Commissioners. The condom ban remained in force until January 2009. In each of the last two years, Dallas County had the highest rate of new HIV infections in the state and the rate of new HIV infections among people aged 13 to 24 has nearly tripled in the last five years.[104]

E. Parenting

Texas does allow adoption by single gay individuals[105] and there is no explicit prohibition against same-sex couples jointly adopting a child. Lower courts have allowed such adoptions and the Texas Court of Appeals has held that a district court had the power to grant an adoption to a same-sex couple.[106]

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The Texas state constitution bans same-sex marriage[107] and recognition of other legal status protetions for same-sex couples. Texas' Family Code states that a license may not be issued for the marriage of persons of the same sex[108] and that marriages and civil unions between persons of the same sex is "contrary to the public policy of this state" and void.[109]

2. Benefits

Bailey v. City of Austin, 972 S.W.2d 180 (Tex. App. 1998).

This case was originally brought by gay employees of the City of Austin to challenge the constitutionality of an amendment to the city charter which effectively discontinued the extension of health benefits to domestic partners of city employees. Although this amendment affected all domestic partners - heterosexual and homosexual - the heterosexual couples could choose to marry and obtain the benefits, while the homosexual couples do not have that right in Texas. The court held that there was insufficient evidence to prove that the intent of the amendment was to discriminate against homosexuals as a class, so the city only had to prove that the classification be rationally related to a legitimate state interest. The court also found that the government has a legitimate interest in recognizing and favoring the legal relationship of marriage

[104] *Id*.
[105] TEX. FAM. CODE ANN. § 162.001.
[106] *See Goodson v. Castellanos*, 214 S.W.3d 741, 746-752 (Tex. App. 2007).
[107] TEX. CONST. art. I,,§ 32.
[108] TEX. FAM. CODE ANN. § 2.001.
[109] TEX. FAM. CODE ANN. § 6.204.

and, therefore, concluded that the amendment was constitutional and did not violate the equal protection clauses of the Texas Constitution.[110]

[110] *Bailey v. City of Austin*, 972 S.W.2d 180 (Tex. App. 1998). The court did hold that there was a genuine issue of material fact regarding whether the employees acted in detrimental reliance on the benefits that had been granted and were later taken away, but this was separate from the equal protection issue.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Utah – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Utah has no state-wide statutes, administrative regulations or executive orders that protect its residents – including employees of state government – from discrimination based on sexual orientation or gender identity. A 1993 executive order that addressed sexual harassment in state government workplaces was worded in such a way that it covered same-sex harassment, but that order was rescinded in 2006 and replaced by an executive order that does not address the issue. Local ordinances in Salt Lake County and Salt Lake City protect municipal government workers in those locations from sexual orientation or gender identity discrimination.[1]

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local employers in Utah include:

- A bus driver employee of the Utah Transit Authority who was terminated for being transsexual. Despite her spotless employment record, the bus driver was fired after she began living as a woman and using women's restrooms while on the job. The Transit Authority claimed that they terminated her because they were concerned that her continued employment could expose them to liability from other employees based on Plaintiff's restroom usage; however, no complaints had been made regarding Plaintiff's restroom usage. The transit authority told her that she would be eligible for rehire only after undergoing sex reassignment surgery. The bus driver filed suit in federal court, but the court rejected her argument that Title VII sex discrimination claims could apply to transsexuals, construing the term "sex" to equate to biological sex at birth "and nothing more."[2] Etsitty v. Utah Trans. Auth., 502 F.3d 1215 (10th Cir. 2007).

- In 2007, a gay deputy sheriff was subjected to a hostile work environment based on his sexual orientation.[3]

- A tenured public school teacher and volleyball coach who was removed from her coaching position by the school after she admitted to a player, in response to a direct and unsolicited question, that she was gay. When the player refused to play on the team, claiming discomfort because of the teacher's sexual orientation, the

[1] *See infra* Section III.A. and Section III. B.8.
[2] *Etsitty v. Utah Trans. Auth.*, 502 F.3d 1215 (10th Cir. 2007).
[3] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

> teacher was removed from her coaching position and informed that if she discussed her sexual orientation with anyone else, whether on or off-duty, she would face disciplinary action or termination with regard to her teaching position. The teacher sued, alleging discrimination and violation of her First Amendment rights. The court held that the school district had no rationally related basis for Plaintiff's dismissal, because outdated prejudices and vague claims of disruption without any evidence of actual disruption (aside from one student) did not constitute a rational basis under the Equal Protection Clause. The court ordered the District to rescind its gag order, remove certain letters from the teacher's file, pay her the $1,500 she would have been paid had she coached the team in the year in question, and appoint her to coach for the 1999-2000 school year. Following the federal court's decision, a local citizen's group calling itself "Citizens for Nebo School District for Moral and Legal Values" filed a lawsuit against the state seeking revocation of her teaching license on grounds of moral unfitness. The plaintiffs alleged, in part, that the teacher violated the state's sodomy law and the certification requirement that teachers and psychologists possess good moral character. The Utah Supreme Court threw the case out of court because the plaintiffs raised no justiciable controversy.[4] Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998); Miller v. Weaver, 66 P.3d 592 (Apr. 4, 2003).

Outside the realm of employment , although the state has a hate crimes law, the statute does not list protected classes, a drafting decision reportedly made specifically to avoid including sexual orientation. Similarly, an amendment to the state's foster care and adoption law was motivated by a desire to avoid implicitly legitimating same-sex partnerships. And, although in *Lawrence v. Texas*,[5] the U.S. Supreme Court struck down as unconstitutional the remaining state sodomy laws in the United States,[6] the Utah legislature rejected an attempt to repeal its sodomy law in 2007.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[4] *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Miller v. Weaver*, 66 P.3d 592 (Apr. 4, 2003).
[5] 539 U.S. 558 (2003).
[6] *Id*. at 578.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Utah's non-discrimination law, the "Utah Antidiscrimination Act"[7] (the "Act") , passed in 1969, does not prohibit discrimination on the basis of gender identity and sexual orientation.[8] The Act states that "race; color; sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion; national origin; or disability" cannot be used as basis for employment discrimination.[9] .

Under the Utah State Personnel Management Act,[10] the state, its officers, and employees are governed by the Act with respect to discriminatory and prohibited employment practices;[11] hence, it does not prohibit discrimination on the basis of gender identity and sexual orientation against state employees.

B. Attempts to Enact State Legislation

In 2008, Utah legislature considered amendments to the Act to prohibit discrimination based on sexual orientation and gender identity in House Bill 89.[12] The bill would have defined gender identity and sexual orientation, included gender identity and sexual orientation as a prohibited basis for employment discrimination, and prohibited quotas or preferences on the basis of sexual orientation or gender identity.[13] The bill was defeated.

In 2009, the Utah legislature once again considered amending the Act to prohibit discrimination based on sexual orientation and gender identity. The proposed amendments, outlined in House Bill 267,[14]would have defined sexual orientation and gender identity, and prohibited discrimination based on sexual orientation and gender identity in housing and employment.[15] The bill was defeated.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

On May 28, 1985, Governor Norman H. Bangerter issued an executive order charging Utah State Division of Personnel Management with the responsibility for

[7] UTAH CODE ANN.§§ 34A-5-101-108 (2008).
[8] *Id*.
[9] *Id.* at § 34A-5-106(1)(a)(i)(A)-(H).
[10] *Id*. at § 67-19-1.
[11] *Id*. at § 67-19-4.
[12] Text of proposed bill, H.B. 89 (Utah 2008), *available at* http://le.utah.gov/~2008/bills/hbillint/hb0089.pdf.
[13] *Id*.
[14] Text of proposed bill, H.B. 267 (Utah 2008), *available at* http://le.utah.gov/~2009/bills/hbillint/hb0267.pdf.
[15] *Id*.

"instituting and maintaining continued affirmative action for fair employment practices for the employees and perspective employees of the State of Utah."[16] Among various statutes listed in the executive order as authority is the Utah Fair Employment Practices Act of 1965, as amended in 1975 and 1979, that prohibits "employment discrimination on the basis of race, creed, color, sex, age, religion, ancestry or national origin, [and] handicap."[17] The executive order does not mention prohibition against discrimination based on gender identity or sexual orientation.

On July 25, 1986, Governor Norman H. Bangerter issued an executive order that established Utah's Code of Fair Practices as the governing policy for every department of the executive branch of Utah's government.[18] The Code of Fair Practices consists of Articles I—XI and is outlined in the executive order. It prohibits discrimination when recruiting, promoting and discharging state personnel "on account of race, color, sex, religious creed, national origin, age or handicap." The articles cover various areas where such discrimination is prohibited, including, but not limited to: (1) prohibiting inquiries on the application forms regarding race, color, sex, religious creed, national origin, age or handicap; (2) requiring training for jobs without regard to race, color, sex, religious creed, national origin, age or handicap; and (3) providing services regardless to individuals' race, color, sex, religious creed, national origin, age or handicap.[19] The executive order does not mention prohibition against discrimination based on gender identity or sexual orientation.

On March 17, 1993, Governor Michael O. Leavitt issued an executive order prohibiting sexual harassment "which is a form of sex discrimination, in any and every workplace in which state employees and employees of public and higher education are required to conduct business."[20] Sexual harassment was defined, in part, as "unwanted behavior or communication of a sexual nature which adversely affects a person's employment relationships and/or creates a hostile working environment" and which "may involve intimidation by persons of either sex against persons of the opposite or same sex."[21]

On December 13, 2006, Governor Jon M. Huntsman, Jr. issued Executive Order 2006-0012 which superseded the 1993 executive order on sexual harassment order. The 2006 executive order prohibits unlawful harassment rather than sexual harassment and defines unlawful harassment, in part, as "a form of discrimination, [that] has been defined to be unwanted behavior or communication of a discriminatory nature which adversely affects a person's employment relationships and/or creates a hostile working environment."[22] Unlawful harassment is also a "*discriminatory treatment based on race*,

[16] Utah Exec. Order (May 28, 1985).
[17] *Id*.
[18] Utah Exec. Order (July 25, 1986).
[19] *Id*.
[20] Division of Administrative Rules, Governors' Executive Orders, *available at* http://bit.ly/1fQgRu (last visited Sept. 6, 2009)..
[21] *Id*.(emphasis added).
[22] Div. of Admin. Rules, Archive of Exec. Orders, *available at* http://bit.ly/6CCj5 (last visited Sept. 6, 2009) (emphasis added).

religion, national origin, color, sex, age, protected activity or disability."[23] The new order, thus, eliminated references to same sex sexual harassment and explicitly excluded sexual orientation and gender identity from the list of characteristics upon which discrimination is prohibited.

The State of Utah Office of the Governor issued Domestic Violence Prevention Guidelines for State Employees (the "Guidelines"), updated January 2006, following the issuance on April 28, 2005, of an executive order by Governor Jon M. Huntsman Jr. that prohibits violence against women in the workplace. The Guidelines define domestic violence/abuse as "violent conduct or coercive tactics perpetrated against a cohabitant."[24] Cohabitants include individuals who were "living as if a spouse of the other party" and those who "reside[] or ha[ve] resided in the same residence as the other party."[25] Training, counseling and work adjustments are available to all employees regardless of their sexual orientation.[26] See below for more information on executive orders.

2. State Government Personnel Regulations

Utah Administrative Code is Utah's equivalent to the Code of Federal Regulations. Title R606 addresses antidiscrimination. However, because sexual orientation and gender identity are not protected by Utah's antidiscrimination statute, they are also not addressed in Utah's Administrative Code. For example, Rule R606-2 "Pre-Employment Inquiry Guide" states that "Any inquiry is improper which … is designed to elicit information as to Race, Color, Sex, Age, Religion, National Origin, or Disability. The prime consideration for any job is the ability to perform it."[27]

However, Utah Department of Agriculture and Food stated in its Equal Opportunity Employment and Services Plan, revised September 26, 2005, that it "prohibits discrimination in all its programs and activities on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, and marital or family status."[28]

[23] *Id*. (emphasis added).
[24] UTAH EMPLOYEE HANDBOOK, Domestic Violence Prevention Guidelines for State Employees, http://bit.ly/tJqFQ (last visited Sept. 6, 2009)..
[25] *Id*.
[26] *Id*.
[27] UTAH ADMIN. CODE R. 606-2-2 (2008).
[28] Utah Dep't of Agriculture &Food Equal Employment Opportunity Statement, http://ag.utah.gov/divisions/admin/documents/EEO-UDAF.pdf (last visited Sept. 6, 2009).

3. **Attorney General Opinions**

None.

D. **Local Legislation**

1. **South Salt Lake City**: A city in Salt Lake County, with the population of 22,038 at the 2000 census.

(a) **Employee Code of Conduct**

> "[E]mployees should not use harassing, libelous, threatening, abusive, foul, or offensive or obscene speech, conduct, or otherwise. Among those things which are considered offensive are any verbal or nonverbal communications which contain sexual implications, racial slurs, gender-specific comments, or *any other comment that offensively addresses someone's age, sexual orientation, religious or political beliefs, national origin, or disability*."[29]

2. **Salt Lake City**

In 2005, Salt Lake City enacted an ordinance establishing the Human Rights Commission.[30] Among the many duties of the commission is to advise the mayor on various matters regarding discrimination with respect to the commission's use educational resources on issues of discrimination and equal treatment, review of complaints of discrimination involving city departments or city services, review legislation, gather factual data, conduct research, etc.[31] Discrimination is defined as

> "a practice in employment, immigration, housing, public safety, public transportation or in other city departments or services that unfairly segregates or separates on the grounds of age, ancestry, color, disability, gender, national origin, marital status, medical condition, physical limitation, race, religion, or sexual orientation…."[32]

According to the 2009 Discrimination Report (the "Report") issued by this Salt Lake City Human Rights Commission (the "Commission"), the Utah Antidiscrimination and Labor Division (the "UALD") no longer keeps data on sexual orientation and gender identity discrimination complaints.[33] When statistics were kept, between June 2007 and September 2008, the data suggested an average of three sexual orientation and gender

[29] S. SALT LAKE CITY MUNI. CODE, Ch. 2.60.030(E)(1) (emphasis added), *available at* http://www.municode.com/Resources/gateway.asp?pid=16602&sid=44.
[30] SALT LAKE CITY CODE § 2.78.030, *available at* http://www.slcgov.com/HRcomm/ordinance.htm.
[31] SALT LAKE CITY CODE § 2.78.110.
[32] SALT LAKE CITY CODE § 2.78.020(E).
[33] SALT LAKE CITY HUM. RTS. COMM' N DISCRIMINATION REP. 1 (2009).

identity employment discrimination complaints per month.[34] The Report also found that the forms of discrimination currently experienced by Salt Lake City's residents includes heterosexism.[35] Individuals present at the focus groups conducted by the Commission reported facing discrimination in both housing and employment, including eight people who believed they were terminated from their jobs when their sexual orientation was discovered.[36]

On April 5, 2000, Mayor Ross C. "Rocky" Anderson adopted an executive order regarding non-discrimination in Salt Lake City employment that also prohibited discrimination based on sexual orientation. The executive order has since been amended, but has retained the prohibition to discriminate in City employment based on sexual orientation. The current language reads as follows, " Salt Lake City Corporation employees shall not discriminate against an otherwise qualified employee or applicant based on race, color, national origin, sex, religion, age, honorable or general service in the United States uniformed services, sexual orientation, or disability."[37] The City also extends certain benefits to the City's employees' domestic partners.[38]

3. **County of Salt Lake**: County seat in Salt Lake City. As of 2007, the population in Salt Lake County was estimated at 1,009,518.

(a) **Administrative organization**

"*Discrimination* in Salt Lake County government services *based on* age, marital status, color, disability, national origin, sex, *sexual orientation*, race or religion *is prohibited*. Individuals shall be assured of equal access, opportunity and protection in all areas of Salt Lake County government services. This section is not intended to expand the services of county government beyond those required by state or federal law."[39]

(b) **Personnel Management**

"*Discrimination* in Salt Lake County government employment *based on* age, marital status, color, disability, national origin, sex, *sexual orientation*, race or religion *is prohibited*. Individuals shall be assured of equal access, opportunity and protection in all areas of Salt Lake County government employment opportunities. Nothing in this section is intended to require additional employee benefits,

[34] *Id.*
[35] *Id.*
[36] *Id.* at 32.
[37] SALT LAKE CITY CODE § 2.53.035(A).
[38] SALT LAKE CITY CODE § 2.52.100.
[39] SALT LAKE COUNTY CODE OF ORD. § 2.08.110 (emphasis added), *available at* http://www.municode.com/Resources/gateway.asp?pid=16602&sid=44.

> including benefits related to family, marital, cohabitant or dependent status unless provided for by state or federal law or contract."[40]

E. Occupational Licensing Requirements

1. Title 58 ("Occupations and Professions")

Within its Department of Commerce, Utah created the Division of Occupational and Professional Licensing (the "Division") that administers and enforces all licensing laws of Utah Code Title 58 "Occupations and Professions."[41] Currently, the Division issues licenses in approximately 60 categories of licensure, with most categories including several individual license classifications.[42] The Division is assisted by approximately 60 professional boards and commissions that advise the Division by recommending, assisting and supporting the Division in taking appropriate action in licensure and investigative matters.[43] Title R156 of the Utah Administrative Code contains the corresponding to Utah Code Title 58 licensing act rules. The Division may "refuse to issue a license … renew or … revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee [when] … the applicant or licensee has engaged in unprofessional conduct."[44] The Division may also issue cease and desist orders to those who may be disciplined for unlawful or unprofessional conduct.[45] Of relevance is the umbrella definition of "unprofessional conduct" which references "probation[s] with respect to a crime of moral

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[40] SALT LAKE COUNTY CODE OF ORD. § 2.80.140 (emphasis added), *available at* http://www.municode.com/Resources/gateway.asp?pid=16602&sid=44.
[41] UTAH CODE ANN. § 58-1-103 (2008).
[42] The Division issues licenses for the following occupations and professions promulgated by the appropriate acts under Title 58: Architects Licensing Act; Podiatric Physician Licensing Act; Funeral Services Licensing Act; Barber, Cosmetologist/Barber, Esthetician, Electrologist, and Nail Technician Licensing Act; Health Care Providers Immunity from Liability Act; Health Facility Administrator Act; Utah Optometry Practice Act; Pharmacy Practice Act; Environmental Health Scientist Act; Professional Engineers and Professional Land Surveyors Licensing Act; Physical Therapist Practice Act; Certified Public Accountant Licensing Act; Veterinary Practice Act; Nurse Practice Act; Nurse Licensure Compact; Advanced Practice Registered Nurse Compact; Utah Controlled Substances Act; Utah Drug Paraphernalia Act; Imitation Controlled Substances Act; Utah Controlled Substance Precursor Act; Clandestine Drug Lab Act; Drug Dealer's Liability Act; Alternative Dispute Resolution Providers Certification Act; Recreational Therapy Practice Act; Athletic Trainer Licensing Act; Speech-language Pathology and Audiology Licensing Act; Occupational Therapy Practice Act; Nurse Midwife Practice Act; Hearing Instrument Specialist Licensing Act; Massage Therapy Practice Act; Dietitian Certification Act; Private Probation Provider Licensing Act; Landscape Architects Licensing Act; Radiology Technologist and Radiology Practical Technician Licensing Act; Utah Construction Trades Licensing Act; Utah Uniform Building Standards Act; Respiratory Care Practices Act; Mental Health Professional Practice Act; Psychologist Licensing Act; Security Personnel Licensing Act; Deception Detection Examiners Licensing Act; Utah Medical Practice Act; Physicians Education Fund; Utah Osteopathic Medical Practice Act; Dentist and Dental Hygienist Practice Act; Physician Assistant Act; Naturopathic Physician Practice Act; Acupuncture Licensing Act; Chiropractic Physician Practice Act; Certified Court Reporters Licensing Act; Genetic Counselors Licensing Act; Professional Geologist Licensing Act; Direct-entry Midwife Act.
[43] General Information About the Utah Division of Occupational and Professional Licensing, http://www.dopl.utah.gov/info.html (last visited Sept. 3, 2009).
[44] UTAH CODE ANN. § 58-1-401(2)(a) (2008).
[45] § 58-1-401(4)(a).

turpitude."[46] Moreover, most of the occupations and professions that must be licensed under Title 58 also contain language in their appropriate acts requiring that the applicant must "be of good moral character," "show evidence of good moral character," "be of good moral character in that the applicant has not been convicted of … a misdemeanor involving moral turpitude," "provide satisfactory evidence of good moral character."

2. Private Investigators

Title 53 governs licensure of private investigators by the Private Investigator Hearing and Licensure Board. Qualified individuals must be of "good moral character" and "may not have been … convicted of an act involving moral turpitude."[47]

3. Educators

Title 53A governs licensure of the educators by the Educator Licensing and Professional Practices Act. The Utah State Board of Education may refuse to issue a license to an individual who "has been found … to have exhibited behavior … which would, had the person been an educator, have been considered to be immoral…."[48] To avoid licensing discipline, an educator who receives a license must be role models of civic and societal responsibility. This duty requires them to "be forthcoming with accurate and complete information to appropriate authorities regarding known educator misconduct which could adversely impact performance of professional responsibilities, *including role model responsibilities*, by himself or others;" they also cannot "be convicted of *any illegal sexual conduct*, including offenses that are plea bargained to lesser offenses from an initial sexual offense."[49] However, educators may be disciplined for "exclud[ing] a student from participating in any program, or deny or grant any benefit to any student on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, physical or mental conditions, family, social, or cultural background, or *sexual orientation*," and cannot "engage in conduct that would encourage a student(s) to develop a prejudice on these grounds or any other, consistent with the law."[50]

4. Attorneys

Utah State Bar oversees admissions to the practice law. Utah's rules governing admission to the bar require that applicants be of "good moral character"[51] and "conduct should conform to the requirements of the law, both in professional service to clients and in the attorney's business *and personal affairs*."[52]

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[46] § 58-1-501(2)(c).
[47] § 53-9-108(1)(a); (b)(v).
[48] § 53A-6-405(1).
[49] UTAH ADMIN. CODE § 277-515-3(C) (2008)(emphasis added).
[50] § 277-515-3(D)(1).
[51] UTAH S. CT. RULES OF PROF'L PRACTICE, Rule 14-703(a)(4)).
[52] Rule 14-708(a).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. State & Local Government Employees

Etsitty v. Utah Trans. Auth., 502 F.3d 1215 (10th Cir. 2007).

In *Etsitty v. Utah Transit Authority*, the Court of Appeals for the Tenth Circuit held that Krystal Etsitty, a transsexual bus driver, did not suffer unlawful discrimination when she was fired for using the women's restroom.

Despite her spotless employment record, Plaintiff, an employee of the Utah Transit Authority and a male-to-female transsexual, was fired after she began living as a woman and using women's restrooms while on the job.. The Transit Authority claimed that they terminated her because they were concerned that her continued employment could expose them to liability from other employees based on Plaintiff's restroom usage; however, no complaints had been made regarding Plaintiff's restroom usage. The transit authority told her that she would be eligible for rehire only after undergoing sex reassignment surgery.

Etsitty filed suit in federal court, claiming that she was protected by Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, including nonconformity to sex stereotypes. On its motion for summary judgment, the UTA argued that transsexuality is not a protected classification under Title VII, that a sexual-stereotyping argument is not available to transsexuals, and in the alternative, that Etsitty had failed to raise a genuine issue of material fact as to whether supervisors had terminated her employment for failing to conform to male behavior. The court rejected Plaintiff's argument that Title VII sex discrimination claims could apply to transsexuals, construing the term "sex" in Title VII to equate to biological sex at birth "and nothing more" and dismissed her action, finding there was no evidence that the Transit Authority had discharged her for any reason other than the stated concerns regarding restroom usage.[53]

Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998); Miller v. Weaver, 66 P.3d 592 (Apr. 4, 2003).

Plaintiff, a tenured public school teacher and volleyball coach, was removed from her coaching position by the school after she admitted to a player, in response to a direct and unsolicited question, that she was gay.[54] When the player refused to play on the team, claiming discomfort because of Plaintiff's sexual orientation, Plaintiff was removed from her coaching position and informed that if she discussed her sexual orientation with anyone else, whether on or off-duty, she would face disciplinary action or termination with regard to her teaching position.[55]

[53] *Etsitty*,502 F.3d at 1215.
[54] *Weaver*, 29 F. Supp. 2d at 1279.
[55] *Id*.

Plaintiff sued, alleging discrimination and violation of her First Amendment rights. The district court entered judgment for Plaintiff and ordered monetary damages and reinstatement. The court held that the school district had no rationally related basis for Plaintiff's dismissal, because outdated prejudices and vague claims of disruption without any evidence of actual disruption (aside from one student) did not constitute a rational basis under the Equal Protection Clause. The court ordered the District to rescind its gag order, remove certain letters from Weaver's file, pay her the $1,500 she would have been paid had she coached the team in the year in question, and appoint her to coach for the 1999-2000 school year.

Following the federal court's decision, a local citizen's group calling itself "Citizens for Nebo School District for Moral and Legal Values" filed a lawsuit against the state seeking revocation of Weaver's teaching license on grounds of moral unfitness.

The plaintiffs alleged, in part, that the teacher violated the state's sodomy law and the certification requirement that teachers and psychologists possess good moral character. The suit alleged that the education department and other state agencies acted illegally by failing to suspend her certification and require the school district to discharge her. The Utah Supreme Court threw the case out of court because the plaintiffs raised no justiciable controversy.[56]

B. Private Employees

Johnson v. Cmty. Nursing Serv., 932 F. Supp. 269 (D. Utah 1996).

In *Johnson v. Community Nursing Services*,[57] a female former employee brought action against former employer and female supervisor on the basis of sex discrimination and sexual harassment in violation of Title VII, as well as constructive discharge and defamation.[58] Plaintiff alleged that the former supervisor, who is a female and openly homosexual, became increasingly hostile after plaintiff ended her relationship with a woman and started dating a man.[59] The District Court ruled that a cause of action exists under Title VII for victims of sexual harassment by a member of the same sex.[60]

C. Other Documented Examples of Discrimination

Municipal Sheriff's Department

In 2007, a gay deputy sheriff was subjected to a hostile work environment based on his sexual orientation.[61]

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[56] *Id.*
[57] 932 F. Supp. 269 (D. Utah 1996).
[58] *Id.* at 271.
[59] *Id*. at 270.
[60] *Id.* at 274.
[61] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

The Utah sodomy law[62] was rendered unconstitutional under the U. S. Supreme Court's decision in *Lawrence v. Texas*.[63] Nevertheless, the sodomy law has never been repealed by the Utah legislature.

In 1997, an amendment to the sodomy law was proposed, decriminalizing sodomy between consenting married persons, but it failed.[64] In 2007, another attempt to decriminalize consensual sodomy, this time as just between adults or "persons at least 14 years of age, but younger than 18 years of age," also failed.[65] The 2007 amendment was sponsored by Senator Scott McCoy, who said it was '"bad form when we have unconstitutional laws on the books," which may be misused by prosecutors and judges.[66]However, according to Senate Majority Leader Curt Bramble, "'The Senate caucus unanimously decided that sodomy should not be legal in the state of Utah.'"[67]

B. Housing & Public Accommodations Discrimination

Utah Fair Housing Act[68] does not prohibit discriminatory housing practice based on sexual orientation and gender identity, excluding such from the list of protected classes.[69] The Antidiscrimination & Labor Division's Fair Housing administers and enforces Utah's Fair Housing Act. Fair Housing receives, mediates (for early resolution), investigates, and resolves charges of housing discrimination. Utah Fair Housing Administrative Rules are outlined in Rule R608-1 "Utah Fair Housing Rules" in Utah Administrative Code.[70] They do not, however, provide any information on discrimination based on sexual orientation and gender identity.

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[62] *Id.* at. § 76-5-403.
[63] 539 U.S. 558 (2003).
[64] Text of the proposed bill, H.B. 134 (Utah 1997), *available at* http://www.le.state.ut.us/asp/billsintro/SubResults.asp?Listbox4=02126u; *see* SODOMY LAWS, Nov. 2007, *available at* http://www.glapn.org/sodomylaws/usa/utah/utah.htm.
[65] Text of the proposed bill, S.B. 169 (Utah 2007), *available at* http://le.utah.gov/~2007/bills/sbillint/sb0169.pdf.
[66] Arthur S. Leonard, LESBIAN & GAY L. NOTES (Mar. 2007).
[67] *Id*.
[68] UTAH CODE ANN. § 57-21-1 (2008).
[69] § 57-21-5(1).
[70] UTAH ADMIN. CODE REG. § 608-1-1, *et seq.* (2008).

Utah Housing Corporation, a continuation of the Utah Housing Finance Agency, assists low or moderate income persons to with receiving housing.[71] The agency does not list classes of protected persons against whom it cannot discriminate but its policy is to "make every effort to make housing available in rural, inner city, and other areas experiencing difficulty in securing construction and mortgage loans, and to make decent, safe, and sanitary housing available to low income persons and families."[72]

C. **Hate Crimes**

The Utah hate crime law[73] does not enumerate classes of victims that it is designed to protect, and, as such, it does not specifically address gender identity or sexual orientation.[74] Rather, the Utah hate crime law punishes an offender for violating a victim's constitutional or civil right.[75] A review of the legislative history indicates that the law does not list the protected classes because of the legislature's opposition to include sexual orientation on that list of protected classes.[76] A recent decision by the Tenth Circuit Court of Appeals upheld the constitutionality of the Utah hate crime law.[77] Since the passage of the hate crime bill in 1992, there have been several amendments, but none introduced the language regarding sexual orientation. In 1999, an attempt to introduce sexual orientation and gender to a statute on criminal identification and crime reporting and the Utah hate crime law, failed.[78] In 2001, attempts to repeal and reenact the Utah hate crime law to punish an offender who selects the victim primarily because of bias or prejudice against a group have also failed.[79]

In 2006, the Utah hate crime law was amended to add Section 76-3-203.4. This provision mandates that sentencing judges consider any public harm caused by offenses as an aggravating factor,

> "including the degree to which the offense is likely to incite community unrest or cause members of the community to reasonably fear for their physical safety or to freely exercise or enjoy any right secured by the [Utah] Constitution or laws … or by the [U.S.] Constitution or laws…."[80]

D. **Education**

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[71] UTAH CODE ANN. § 9-4-910.
[72] § 9-4-902(4)(b).
[73] UTAH CODE ANN. §§ 76-3-203.3 and 53-10-202 (2008).
[74] *Id*.
[75] *Id*.
[76] *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, UTAH L. REV. 209 (1994).
[77] *See Ward v. Utah*, 398 F.3d 1239 (10th Cir. 2005).
[78] Text of proposed bill, S.B. 34 (Utah 1999), *available at* http://www.le.state.ut.us/~1999/bills/sbillint/SB0034S1.pdf.
[79] Text of the proposed bill, S.B. 37(Utah 2001), *available at* http://www.le.state.ut.us/~2001/bills/sbillamd/SB0037.pdf ; text of proposed bill, H.B. 50 (Utah 2001), *available at* http://www.le.state.ut.us/~2001/bills/hbillint/HB0050.pdf.
[80] UTAH CODE ANN. § 76-3-203.4 (2008).

Utah's safe schools law does not specifically address gender identity and sexual orientation.[81] The law simply states that every student in the public schools should be afforded an opportunity to learn in a safe environment, conducive to the learning process and free from unnecessary disruptions.[82]

Utah Administrative Code provides interpretations of the Utah Code in various areas. For example, it contains Rule R277-112 "Prohibiting Discrimination in the Public Schools." The Administrative Code, however, does not broaden the scope of the Code's protected classes against discrimination and, as such, does not include sexual orientation and gender identity as a protected class in its rules.[83]

In 2007, Utah legislature enacted a House Bill 236 titled the "Student Clubs Amendments,"[84] pursuant to which students are required to obtain written parental or guardian consent to join clubs.[85] Under that law, a school administration may limit or deny authorization to clubs for several reasons, including to "maintain the boundaries of socially appropriate behavior."[86] The State Board of Education and local boards of education are charged with adopting rules establishing procedures for implementing the Student Clubs Act in a way that "ensure protection of individual rights against excessive and unreasonable intrusion."[87] Under the current law, gay-straight alliances remain an option for Utah students, although the original version of the bill sought to bar such clubs.

In 2007, Equality Utah drafted a bill to amend Utah's school safety law.[88] The proposed legislature included gender identity and sexual orientation among the motivating factors for harassment or intimidation and required schools to report instances of harassment and intimidation, including the reason for the incident and alleged statements made by the alleged perpetrator, as well as the steps the school had taken following the incident.[89] The bill was defeated.

In 2006, House Bill 393 was introduced that would have prevented organizations of gay clubs within Utah's public education system.[90] The bill strove to deny authorization or school building use to a club whose activities "would as a substantial, material, or significant part of their conduct or means of expression … involve human

[81] *See* UTAH CODE ANN. § 53A-11-901 (2008).
[82] § 53A-11-901(1).
[83] UTAH ADMIN. CODE REG. 277-112-3 (2008).
[84] Text of the bill, H.B. 236 (Utah 2007), http://le.utah.gov/~2007/bills/hbillenr/hb0236.pdf; *see also* UTAH CODE ANN. § 53A-11-1201 (2008).
[85] UTAH CODE ANN. § 53A-11-1210(1) (2008).
[86] § 53A-11-1206(1)(a)(v).
[87] § 53A-11-1305.
[88] Text of the proposed bill, H.B. 186 (Utah 2007), *available at* http://le.utah.gov/~2007/bills/hbillamd/hb0186.pdf.
[89] *Id*.
[90] Text of the proposed bill, H.B. 393 (Utah 2006), *available at* http://le.utah.gov/~2007/bills/hbillenr/hb0236.pdf.

sexuality."[91] "Involve human sexuality" was partly defined as "advocating or engaging in sexual activity outside of legally recognized marriage or forbidden by state law."[92] The bill was defeated but was reintroduced the following year in altered form, in 2007, as H.B. 236 ("Student Clubs Amendments"), which was signed into law.

E. Health Care

Under the Advance Health Care Directive Act, an individual can appoint a health care agent who will make health care decisions on behalf of the individual when that individual loses the capacity to make own decisions.[93] The law allows same-sex partners to be designated as health care agents and doctors must follow their decisions. Further, if there is no official appointment of a health care agent and no family members are available to act as surrogate decision makers, a same-sex partner can make health care decisions.[94]

F. Gender Identity

Utah amends birth certificates for people who have a sex change.[95] A person undergoing a sex change approved by an order of a Utah district court or a court of competent jurisdiction of another state or a Canadian province may file a certified copy of the order with the Utah state registrar along with an application and the required fee.[96] The state registrar registers a complete application and notes the fact of the amendment on the original birth certificate.[97] The amendment is then registered with and becomes a part of the original birth certificate.[98]

G. Parenting

1. Custody & Visitation

Utah law lists several factors the court will consider to make its decision on what is in the best interests of a child whose parents are divorcing, including "the past conduct and demonstrated moral standards of each of the parties."[99] Utah courts have considered a parent's sexual orientation to deny custody and visitation to render gay and lesbian parents.

In 2007, a bill was introduced to define the common law doctrine of in loco parentis and to allow a court of competent jurisdiction under certain circumstances to

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[91] *Id.*
[92] *Id.*
[93] Text of bill, S.B. 75 (Utah 2007), *available at* http://le.utah.gov/~2007/bills/sbillenr/sb0075.pdf; *see also* UTAH CODE ANN. § 75-2a-107.
[94] UTAH CODE ANN. § 75-2a-108(2) (2008).
[95] § 26-2-11.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] § 30-3-10(1)(a)(i).

prevent termination of an in loco parentis relationship by a parent.[100] However, the bill was abandoned following the Utah Supreme Court decision in *Jones v. Barlow*[101].

In 1996, the Utah Supreme Court reversed an appellate court's ruling that awarded custody of a minor child to a lesbian mother.[102] The Supreme Court agreed with the district court that analyzed several factors, including parental bonding, religious compatibility and the amount of time that each parent could devote to the child, that it would be in the best interests of the child to award the physical custody to the straight father.[103] The district court found that the mere fact that the mother is a lesbian does not make her an unfit parent but questioned the morality of the lesbian mother who while still married to her husband had cohabited with a (female) partner.[104]

In *Jones v. Barlow*,[105] the Supreme Court denied standing to a former same-sex partner of the child's biological mother to seek visitation because in loco parentis doctrine did not apply to the former domestic partner.[106] In this case, a same-sex female couple decided to have a child and one of the women was artificially inseminated.[107] For several years the couple jointly raised the child until they ended their relationship and the biological mother and the child moved out.[108] In *Jones*, the Utah Supreme Court denied same-sex partners parental status.

2. **Foster Placement & Adoption**

Under Utah law, a minor child may be adopted only by a legally married couple or a single adult who is not "cohabiting in a relationship that is not legally valid and binding marriage under … [Utah] laws…."[109] Prior to the enactment of the current law, adoption was permitted by any adult person.[110] Current law also states that "it is not in a child's best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."[111]

Same-sex couples, as well as unmarried heterosexual couples, are also ineligible to foster children in Utah's state custody pursuant to the Board of Child and Family

[100] Text of the proposed bill, S.B. 248 (Utah 2007), *available at* http://le.utah.gov/~2007/bills/sbillamd/sb0248s01.pdf.
[101] 154 P.3d 808 (2007).
[102] *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996).
[103] *Id*. at 1212-13.
[104] *Id*. at 1213; 1217-18.
[105] *Jones*, 154 P.3d at 808.
[106] *Id*. at 815.
[107] *Id*. at 810.
[108] *Id*.
[109] UTAH CODE ANN. § 78B-6-117(2)-(3) (2008).
[110] *Id*.
[111] *Id*.

Services rules and policies.[112] As with adoptions, only single individuals and legally married couples are eligible to serve as foster parents.[113]

One of the reasons that Utah amended its law on foster care and adoption was the concern that "permitting gay and lesbian 'partnership' adoptions would open the door for legalizing same-sex marriage"[114] One legislator stated that "'we've got to make it clear we do not approve of homosexual marriage in this state.'" during consideration of the bill.[115]

Same-sex couples cannot become parties to a gestational agreement with a prospective gestational mother to become parents because the prospective parents must be married.[116]

In 2008, the Utah legislature introduced a House Bill 318,[117] which would have lifted the state's ban on adoption of children by individuals who are cohabiting in a sexual relationship but are not married under Utah's laws.[118] The bill was defeated.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Utah prohibits and voids marriages between persons of the same sex.[119] Utah also does not recognize marriages of the same sex persons obtained in other jurisdictions[120] In 2004, Utah amended its state constitution to define marriage as "the legal union between a man and a woman. [] No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."[121]

By Salt Lake City Ordinance No. 16 of 2008, Salt Lake City offers its residents who share a primary residence and rely on one another as dependents, including same-sex couples, to register with the mutual commitment registry.[122] The mutual commitment registry is a tool that local employers can use to decide whether they want to offer company benefits. Registration provides Salt Lake City residents visitation rights to Salt

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[112] *See* Utah Dep't of Human Services Website FAQ, *available at* http://www.hsdcfs.utah.gov/faq.asp (last visited Sept. 3, 2009).
[113] UTAH CODE ANN. § 62A-4a-602(5)(b) (2008).
[114] Scott H. Clark, *Married Persons Favored as Adoptive Parents*: *The Utah Perspective*, 5 J.L. & FAM. STUD. 203, 219 (2003).
[115] *Id*. at 219n.74.
[116] UTAH CODE ANN. § 78B-15-801(3) (2008).
[117] Text of the proposed bill, H.B. 318 (Utah 2008), *available at* http://le.utah.gov/~2008/bills/hbillint/hb0318.pdf.
[118] *Id*.
[119] UTAH CODE ANN. § 30-1-2(5) (2008).
[120] § 30-1-4.1.
[121] UTAH CONST. Art. I, § 29 (2008).
[122] SALT LAKE CITY CODE, Chapter 10.03, *available at* http//:www.slcgov/recorder/MCregistry/MC_ordinance.pdf ; *see also* Salt Lake City Recorder's Office Homepage, http://www.slcgov.com/Recorder/MCregistry.htm (last visited Sept. 3, 2009).

Lake City health care facilities and access to all facilities owned and operated by the city in the same way as if the same-sex couple were spouses.[123]

Same-sex cohabitation terminates alimony rights. In 2002, in *Garcia v. Garcia*,[124] the Utah Court of Appeals ruled that a divorced woman's right to alimony terminated when she began living with another woman in a sexual relationship.[125] According to Utah divorce law, a party that pays alimony can stop doing so after the payor establishes that the "former spouse is cohabiting with another person."[126] The appellate court reasoned that because the statute does not require that the cohabitant be of the opposite sex and merely states "with another person," it did not matter that the payee cohabited with a member of the same sex.[127]

2. Benefits

(a) Wrongful Death

Currently, under Utah law, domestic partners have no standing to sue when their partner dies due to malpractice or negligence.[128]

In 2008, SB 73[129] attempted to introduce amendments to the definition of heirs once again to include among the individuals able to sue those who are designated by the decedent as the sole wrongful death heir and had a "mutual supportive and dependent relationship with the decedent."[130] The bill outlined several requirements a person would have to meet to be considered a wrongful death designee, one of which was "cohabiting with the decedent … for a period of at least five years."[131] The bill was defeated.

In 2007, SB 58 introduced amendments to the definition of heirs who are eligible to sue including individuals who, at the time of the decedent's death, resided with him or her in a "mutually dependent relationship" and "is designated as a wrongful death heir in decedent's will, trust, or other notarized written directive."[132] The bill died in the Senate Rules Committee.

(a) Domestic Violence

[123] *Id.*
[124] 60 P.3d 1174 (Utah Ct. App. 2002).
[125] *Id.* at 1176.
[126] UTAH CODE ANN. § 30-3-5(10) (2008).
[127] *Garcia*, 60 P.3d at 1174, 1176.
[128] UTAH CODE ANN. § 78B-3-105 (2008).
[129] Text of proposed bill, S.B. 73 (Utah 2008), *available at* http://le.utah.gov/~2008/bills/sbillint/sb0073.pdf.
[130] *Id.*
[131] *Id.*
[132] Text of proposed bill, S.B. 58 (Utah 2007), *available at* http://le.utah.gov/~2007/bills/sbillint/sb0058.pdf.

Currently, the Utah law allows cohabitants who have been subjected to abuse or domestic violence to file restraining orders regardless of the gender.[133] The definition of cohabitant includes individuals who reside or have resided in the same residence.[134]

In 2007, House Bill 28 was introduced to add dating partners as individuals who can file restraining orders regardless of the gender.[135] The bill was defeated.

I. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

The 2009 General Session considered several important issues to the LGBT community, which are outlined in five bills known as the Common Ground Initiative.[136] The issues included protection against discrimination in housing and employment related to sexual orientation and gender identity,[137] extension of the right to sue to financially dependent members of non-nuclear families in the event of a wrongful death,[138] coverage for domestic partners in health insurance plans, statewide domestic partnership registry that will help determine insurance eligibility, rights of inheritance and hospital visitation rights, as well as a bill that would allow voters to amend Utah's Constitution to allow for the proposed legislation listed above.[139] The Utah Legislature rejected all five bills.[140] Substitute bills were proposed for SB 32[141] and HB 267[142].

In 2008, SB 299[143] was signed into law by the governor authorizing municipalities and counties to enact ordinances making benefits generally available to all municipal and county employees to their dependents, and "an unmarried employee's financially dependent or interdependent adult designee."[144] Municipalities and counties may create registries for adult relationships of financial dependence and interdependence but may not call them registries of domestic partnerships.[145] However, the municipal and county registries are prohibited from "giv[ing] legal status or effect to a domestic

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[133] UTAH CODE ANN. at § 78B-7-103(1).
[134] § 78B-7-102(2)(f).
[135] Text of proposed bill, H.B. 28 (Utah 2007), *available at* http://le.utah.gov/~2007/bills/hbillint/hb0028.pdf.
[136] Equality Utah, Fact Sheets, Mar. 24, 2009, *available at* http://www.equalityutah.org/informed/facts.html; *Human Rights: Common Ground Initiative Only Fair*, SALT LAKE TRIB., Jan. 22, 2009, *available at* http://www.sltrib.com/opinion/ci_11530336.
[137] H.B. 267 (Utah 2009).
[138] S.B. 32 (Utah 2009).
[139] *Id.*
[140] Equality Utah, Legislative Score Card, Mar. 24, 2009, http://www.equalityutah.org/informed/facts.html; http://www.equalityutah.org/informed/card.html.
[141] Utah State Legislature, S.B. 32 Substitute, Mar. 24, 2009, *available at* http://le.utah.gov/~2009/htmdoc/sbillhtm/SB0032S01.htm.
[142] Utah State Legislature, H.B. 267 Substitute, Mar. 24, 2009, *available at* http://le.utah.gov/~2009/htmdoc/hbillhtm/HB0267S01.htm.
[143] Text of bill, S.B. 299 (Utah 2008), *available at* http://le.utah.gov/~2008/bills/sbillenr/sb0299.pdf.
[144] *Id*; *see* UTAH CODE ANN. §§ 10-8-1.5(1) and 17-50-325(1).
[145] UTAH CODE ANN. at §§ 10-8-1.5(2)(a) and 17-50-325(2)(a); *see also Anti-Registry Bill Passes House Without Amendment*, Q SALT LAKE, Mar. 5, 2008, *available at* http://bit.ly/nMZrN.

partnership, civil union, or domestic cohabitation relationship other than marriage."[146] Further, nothing a municipality or county does "may … be treated the same as or substantially equivalent to marriage."[147]

[146] UTAH CODE ANN. §§ 10-8-1.5(2)(b) and 17-50-325(2)(b) (2008).
[147] §§ 10-8-1.5(3) and 17-50-325(3).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Vermont – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

In 1992, the State of Vermont passed a comprehensive statewide law prohibiting discrimination on the basis of sexual orientation,[1] which is defined as "female or male homosexuality, heterosexuality, or bisexuality."[2] Protection with respect to gender identity was added in May 2007.[3] Vermont's Human Rights Law prohibits discrimination on the basis of sexual orientation in areas such as employment, housing, and education.

Since enactment of the 1992 law, there have been several complaints of job discrimination filed by state employees. (*See* Section II.A.4 *infra*.). Documented examples of employment discrimination on the basis of sexual orientation and gender identity in Vermont include the following:

- In 2008, a public school teacher who works with autistic children was harassed and ultimately terminated because he was gay. He filed a complaint with the attorney general's office.[4]

- In 2008, a teacher came out to a colleague and after this perceived a hostile work environment. The teacher tried to get the union to intercede on his behalf, but the union refused.[5]

- In 2003, a lesbian employee of the Vermont State Department of Corrections reported that a co-worker used derogatory language about her and another co-worker in regards to their sexual orientation. The employee filed a formal complaint, however there was no investigation.[6]

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[1] GLAD, VERMONT, OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 1 (2009).

[2] 1 V.S.A. § 143.

[3] Public Act 41 (2007-2008) Leg., Reg. Sess. (Vt. 2007). *See also*, 1 V.S.A §144; Senate Bill 51, 2007 Vt. Laws 41 (legislative history).

[4] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

[5] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

[6] GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 12, 2009) (on file with GLAD) [hereinafter GLAD Intake Form (date)].

- In 2002, a transgender officer was told that the police chief was being pressured to run him off the force because he was transgender.[7] The officer began working at the Hardwick Municipal Police Department in April 2002. Shortly after he began employment, town officials doing an internet search on him found a website that described him as "transsexual." Based on the information, town officials presumed his inability to do the job. Following the dissemination of the information to senior police department personnel, he was subjected to a continuous pattern of harassment and inferior work conditions that became so severe he had to leave his job. In issuing its probable cause ruling, the Attorney General credited testimony of a former police chief that a town official had directed him to make the transgender officer so uncomfortable that he would leave the force. The Town of Hardwick settled the claim. [8]

- A judicial law clerk alleged that she was told, *inter alia*, that she may not wear buttons or affix bumper stickers to her car tending to indicate her sexual orientation, use her residence as a "safe home" for lesbians or gay men needing shelter, or write articles for a monthly newspaper serving Vermont's lesbian and gay population, because doing so violated Canon 6 which provides that "a law clerk should refrain from inappropriate political activity." She also alleged she was reprimanded for these activities, and that she was told that one or more violations would result in immediate dismissal. The Vermont Supreme Court dismissed her claim that Canon 6 was unconstitutional because the action should have first been filed as a grievance under procedures designed to serve state employees and then been commenced in superior court. Aranoff v. Bryan, 153 Vt. 59 (1989).

In addition, there have been at least two complaints filed alleging that public school officials failed to take steps to prevent harassment of students perceived to be gay. Probable cause to believe that discrimination had occurred was found in one case, and a settlement agreement was entered in the other case. Again, complete records as to other charges of discrimination are not available. (*See* Section III.D.1 *infra*.)

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[7] GLAD Intake Form (Sept. 9, 2002).
[8] Press Release, GLAD, Vermont Attorney General Issues Landmark Ruling Prohibiting Discrimination of Transgender Employees (Apr. 23, 2004), *available at* http://bit.ly/1LIrql.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

Vermont's Human Rights Law, passed April 23, 1992, prohibits discrimination on the basis of sexual orientation[9] in public employment, public accommodations, private employment, education, housing, credit, insurance and union practices.[10] The anti-discrimination laws themselves do not distinguish between actual and perceived sexual orientation, and there is no case law on this particular issue to date.[11] The school harassment law, discussed below in Section III, explicitly provides protection for students and their family members who are gay, lesbian or bisexual, or perceived as such.[12]

In May, 2007, Vermont explicitly prohibited discrimination on the basis of gender identity. The law defines gender identity as "an individual's actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual's gender or gender-identity, regardless of the individual's assigned sex at birth."[13] Thus, in the case of gender identity discrimination, there is explicit protection both for transgender people and for people who are perceived as transgender.

The nondiscrimination law prohibits any employer, employment agency or labor organization from discriminating against any individual because of his or her sexual orientation or gender identity.[14] This applies to both private and government employers and covers most significant job actions, such as hiring, firing, failure to promote, demotion, excessive discipline, harassment and different treatment of the employee and similarly situated co-workers.[15]

In addition, employment agencies may not participate in discrimination by refusing to classify or refer their customers for employment or otherwise discriminate because of sexual orientation or gender identity. Unions may not deny union membership or otherwise discriminate against its members because of sexual orientation or gender identity.[16] The law also forbids these entities from advertising in such a way as to restrict employment or membership because of sexual orientation or gender identity.[17] Discrimination "on the basis of a person's having a positive test result from an HIV-related blood test" is also prohibited.[18]

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[9] *Supra* note 1, at 1.
[10] 21 V.S.A. § 495; 9 V.S.A. § 4503; 8 V.S.A. § 10403; 8 V.S.A. § 4724; 3 V.S.A. § 963.
[11] *Supra* note 1, at 1.
[12] 16 V.S.A. § 11 (2001).
[13] Pub. Act 41, Leg., Reg. Sess. (Vt. 2007). *See also*, 1 V.S.A §144; Senate Bill 51, 2007 Vt. Laws 41 (legislative history).
[14] 21 V.S.A. § 495 (a)(1).
[15] 21 V.S.A. § 495 (a)(3).
[16] 21 V.S.A. § 495 (a)(4).
[17] 21 V.S.A. § 495 (a)(2).
[18] 21 V.S.A. § 495 (a)(6), (a)(7).

The anti-discrimination law does not apply to every employer in Vermont – there are exceptions to its application:

(a) "Bona Fide" Occupational Qualifications

An employer, agency or labor organization may defend against a discrimination claim by arguing that a "bona fide occupational qualification" of the particular job is that it have someone in it who is non-gay or has a traditional gender identity. There are no general occupational exemptions from the reach of the nondiscrimination law, however, and this defense is very rarely successful.[19]

(b) Religious Institutions, Charities & Educators

Religious institutions, charitable organizations and educational associations are also exempt from the law.[20] Where an employer is operated or supervised by a religious institution, it may preferentially hire members of its own religion, and may take employment actions that it "calculate[s will] ... promote the religious principles for which it is established or maintained."

2. Enforcement & Remedies

The Vermont Human Rights Commission is the entity responsible for hearing unlawful discrimination claims where the claimant has been discriminated against in employment by a state agency, public accommodations, or housing.[21] The Human Rights Commission is regulated by the "Rules of the Human Rights Commission," contained in the Code of Vermont Rules.[22] These rules delineate the procedural mechanisms by which complaints can be made, and redress can be sought.

Those discriminated against by private employers can either sue directly in the Superior Court of the county where the discrimination occurred, or file a complaint with the Civil Rights Unit of the Office of the Attorney General.[23] This Civil Rights Unit publishes an Employment Discrimination Questionnaire, which is accessible through their website, and allows for individuals who feel they have been discriminated against to seek relief.[24]

B. Attempts to Enact State Legislation

None.

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[19] *Supra* note 1, at 3-4.
[20] 21 V.S.A. § 495 (e).
[21] The procedure for filing complaints and seeking relief is clearly set forth at 9 V.S.A. § 4554.
[22] CVR 80-250-001 (2009).
[23] *Supra* note 1, at 9-11.
[24] Office of the Attorney General, Employment Discrimination Complaint Form, http://bit.ly/MOpnP (last visited Sept. 6, 2009).

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

None.

3. Attorney General Opinions

The Office of the Attorney General of Vermont publicly posts all Attorney General Opinions since the year 2000 on their website.[25] None of these opinions involve employment discrimination with respect to sexual orientation or gender identity.

D. Local Legislation

None.

E. Occupational Licensing Requirements

None.

[25] Office of the Attorney General of Vermont, http://www.atg.state.vt.us (last visited Sept. 4, 2009).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Aranoff v. Bryan, 153 Vt. 59 (1989).

A judicial law clerk commenced an action in the Vermont Supreme Court, alleging that her supervisors, trial court judges, had attempted to restrain her expression of personal and political beliefs under the authority of Canon 6 (which provides that "a law clerk should refrain from inappropriate political activity"), that she was reprimanded for her LGBT-related activities, and that she was told that one or more violations would result in immediate dismissal.

The law clerk complained specifically that she was "told," *inter alia*, that she may not write articles for a monthly newspaper serving Vermont's lesbian and gay population; that she may not remain a secretary of the Vermont Coalition of Lesbians and Gay Men, allegedly because it is a political organization; that she may not serve such organization in a ministerial capacity; that she may not actively disseminate information for the organization; that she may not wear buttons or affix bumper stickers to her car tending to indicate sexual orientation; and that she may not use her residence as a "safe home" for lesbians or gay men needing shelter. She further alleged that she was reprimanded for her activities and told that one more violation would result in immediate dismissal from employment. She was also told to limit her activities at a public march on abortion by not indicating which side of the debate she might be on. She allegedly was told that she could neither disseminate information about, nor testify at a hearing of the Vermont House of Representatives concerning discrimination on the basis of sexual orientation. Petitioner sought a declaration that Canon 6 is "unconstitutional because it is overbroad, vague, and invades the privacy and association rights of law clerks."

The court denied relief. The court first observed that it was not the appropriate forum because its jurisdiction was principally one of appellate review. Assuming that the judicial law clerk had a stated justiciable claim, the action should have been commenced in the superior court. Regardless, the court considered the merits and dismissed the petition on three grounds. First, the judicial law clerk presented no basis for her assertion that the trial court judges were involved in the disciplinary process. Thus, she stated no claim in law against any named respondent. Second, the matter should have been brought as a grievance under procedures designed to serve state employees. Third, the judicial law clerk's constitutional claim was premature. A grievance hearing would have given the court a factual record on which to determine whether a judgment on the constitutionality of Canon 6 was essential.

2. **Private Employers**

None.

B. **Administrative Complaints**

None.

C. **Other Documented Examples of Discrimination**

A Vermont Public School

In 2008, a public school teacher who works with autistic children was harassed and ultimately terminated because he was gay. He filed a complaint with the attorney general's office.[26]

A Vermont Public School

In 2008, a teacher came out to a colleague and after this perceived a hostile work environment. The teacher tried to get the union to intercede on his behalf, but the union refused.[27]

Vermont State Department of Corrections

In 2003, a lesbian employee of the Vermont State Department of Corrections reported that a coworker used derogatory language about her and another coworker in regard to their sexual orientation. The employee filed a formal complaint; however there was no investigation.[28]

Town of Hardwick Police Department

In 2002, a transgender police officer was told that the police chief was being pressured to run him off the force because he was transgender.[29] Anthony Barreto-Neto, an experienced and skilled police officer, began working at the Hardwick Municipal Police Department in April 2002. Shortly after he began employment, town officials doing an internet search on Mr. Barreto-Neto found a website that described him as "transsexual." Based on the information, town officials presumed his inability to do the job. Following the search and dissemination of the information to senior police department personnel, Barreto-Neto was subjected to a continuous pattern of harassment and inferior work conditions that became so severe he had to leave his job. In issuing its

[26] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

[27] E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

[28] GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 12, 2009) (on file with GLAD) [hereinafter GLAD Intake Form (date)].

[29] GLAD Intake Form (Sept. 9, 2002).

probable cause ruling, the Attorney General credited testimony of a former police chief, Gregory Rambo, that a town official directed him to make Barreto-Neto so uncomfortable that he would leave the force. The Town of Hardwick settled the claim. [30]

[30] Press Release, GLAD, Vermont Attorney General Issues Landmark Ruling Prohibiting Discrimination of Transgender Employees (Apr. 23, 2004), *available at* http://bit.ly/1LIrql.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Sodomy Law

Vermont repealed its sodomy law in 1977.[31]

B. Housing & Public Accommodations Discrimination

In 1992, the State of Vermont passed a comprehensive statewide law prohibiting discrimination on the basis of sexual orientation,[32] which is defined as "female or male homosexuality, heterosexuality, or bisexuality."[33] Protection with respect to gender identity was added in May, 2007.[34] Vermont's Human Rights Law prohibits discrimination on the basis of sexual orientation in areas such as employment, housing, and education.

Tanner v. Clair, HRC Charge No H05-0007.

Tanner, the tenant, filed a charge that Clair, the landlord, discriminated against him on the basis of sexual orientation, among other things. Clair allegedly had said the following things to third parties, based on his sexual orientation: Tanner was a "faggot," a "pedophile," a "male prostitute," and that "he had AIDS." After some heated confrontations between Tanner and Clair, Clair attempted to evict him. Tanner filed a claim of discrimination with the Human Rights Commission, and the Commission found reasonable grounds to believe that Clair discriminated against Tanner on the basis of sexual orientation.[35]

C. Hate Crimes

Vermont hate crime law explicitly recognizes and addresses hate crimes based on gender identity and sexual orientation.[36]

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[31] *Supra* note 1, at 41.
[32] GLAD, VERMONT, OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 1 (2009).
[33] 1 V.S.A. § 143.
[34] Public Act 41 (2007-2008) Leg., Reg. Sess. (Vt. 2007). *See also*, 1 V.S.A §144; Senate Bill 51, 2007 Vt. Laws 41 (legislative history).
[35] Subsequent history for this matter is unavailable.
[36] 13 V.S.A. § 1455 (2001).

D. Education

Vermont's Human Rights Law, passed April 23, 1992, covers education.[37]

Vermont's anti-harassment education law expressly prohibits discrimination and harassment based on sexual orientation. The statute's purpose is to reduce the hostile educational environment for all students.[38] It explicitly provides protection for students and their family members who are gay, lesbian or bisexual, or perceived as such.[39]

Sunflower v. Missiquoi Valley Union High Sch. Dist., Charge No. PA08-0019.

"Sunflower" alleged that the respondents were deliberately indifferent to his repeated complaints to staff that he was being subjected to severe and persistent harassment by other students who were on the hockey team, due to their perception of his sexual orientation. The Pre-Determination Conciliation Agreement, signed by the parties, provided for student programs for training and education in the areas of school climate including issues of bullying and harassment. Furthermore, the staff was to undergo training from the Human Rights Commission, and an investigation was to be conducted.

Peach v. Northfield Elem. Sch., HRC Charge No. PA07-0009.

"Peach" alleged that over the past two years, students at Northfield Elementary had called her son names like "girl," "retard," "queer," "gay," "poser," and "lesbo." There was evidence of repeated harassment, and Peach claimed that the staff had not done enough to intervene. The Human Rights Commission found that there were reasonable grounds to believe that Northfield Elementary discriminated against her son on the basis of sex and sexual orientation.[40]

E. Health Care

A member of a civil union is considered a spouse for all medical treatment decisions and visitation rights.[41] An adult may also designate his or her same-sex partner as having the authority to make medical decisions on his or her behalf.[42]

F. Gender Identity

The state registrar of Vermont will amend the sex on an individual's birth records only by the decree of the probate court of the district in which the birth occurred.[43]

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[37] 21 V.S.A. § 495; 9 V.S.A. § 4503; 8 V.S.A. § 10403; 8 V.S.A. § 4724; 3 V.S.A. § 963 (2003).
[38] 16 V.S.A. § 11 (2001).
[39] 16 V.S.A. § 11 (2001).
[40] Subsequent history for this matter is unavailable.
[41] 15 V.S.A. § 1204(b); Civil Unions in Vermont are defined in V.S.A. tit. 15 §§ 1201-07.
[42] 18 V.S.A. § 9701; Advance Directives for Health Care and Disposition of Remains: 18 V.S.A. §§ 9700-20.
[43] 18 V.S.A. § 5075.

G. **Parenting**

Vermont law permits any person, including single LGBT individuals, to petition to adopt.[44] Same-sex couples who are joined by civil unions may petition to adopt jointly. According to the Vermont Department of Children and Families,"[y]ou can be. . . living with a partner, or joined through a civil union."[45] Vermont law also permits a same-sex co-parent to petition to adopt partner's child.[46]

Titchenal v. Dexter, 166 Vt. 373 (1997).

The dispute arose after the breakup of a relationship between two women who had both participated in raising a child adopted by only one of them.[47] Plaintiff was the mother who had spent more time with the child throughout the five years of the child's life, but after the breakup, the defendant was the one who took the child with her. The appellate court rejected Plaintiff's arguments seeking visitation rights, and found that the superior court had no jurisdiction over this matter.

In re B.L.V.B., 160 Vt. 368 (1993).

After the mother and her same-sex partner had lived together in a committed relationship for several years, the mother became pregnant by artificial insemination and gave birth to two children. The mother and her partner were raising the children together and wanted legal recognition of their status as co-parents. They filed an adoption proceeding, and the social workers that conducted the home study and the psychologist who evaluated the family concluded that the adoptions were in the best interests of the children. The court held that the statutory requirements for a stepparent adoption were satisfied and that the termination of the mother's rights was not necessary. In so holding, the court found that (1) the language of Vt. Stat. Ann. tit. 15, §§ 431, 448 did not prohibit the adoption of the children by the partner; (2) requiring the termination of the mother's parental rights under § 448 would reach an absurd result; and (3) that result would be inconsistent with the best interests of the children and the public policy of the state.

H. **Recognition of Same-Sex Couples**

1. **Marriage, Civil Unions & Domestic Partnership**

In 1999 Vermont became the first state to legalize civil unions for same-sex couples.[48] In 2009, the Vermont legistature extended marriage to same-sex couples.[49]

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[44] 15A V.S.A. § 1-102(a).

[45] Human Rights Campaign, State Law Listings, Vermont Adoption Law, http://www.hrc.org/1173.htm (last visited Sept. 4, 2009).

[46] 15A V.S.A. § 1-102(b); 15 V.S.A. § 1204(a), (e)(4).

[47] This was before the Civil Unions Law was in effect. The Civil Unions Law was passed two years after this case, in 1999. *See supra* Section IV.I.1.

[48] Baker v. State, 170 Vt. 194 (1999) (under the Vermont constitution plaintiffs were not entitled to marriage licenses, but were entitled to the same benefits and protections afforded opposite-sex, married

I. Freedom of Speech

One informal Attorney General Opinion from the year 2000 involves freedom of speech with respect to sexually explicit materials in publications displayed in the State House Cafeteria. The question was to what extent display and distribution of the publication, "Cartoons Out in the Mountains" may be regulated in the State House.[50] The Attorney General opined that:

> "[i]t is constitutionally permissible to prohibit access by minors to displays within the State House of material that depicts intimate sexual activity. Such regulation is likely to be impermissibly overbroad if it also restricts the access of adults to such materials. Any regulation that prohibits or restricts access to material that depicts homosexual activity without prohibiting or restricting access to material depicting similar heterosexual activity is likely to fail because of its tendency to suppress a particular viewpoint."[51]

couples); Noelle Frampton, *For Civil Unions, Justices of the Peace Can Say 'I Won't'*, BOSTON GLOBE, July 7, 2008, *available at* http://bit.ly/CVzWQ.

[49] S. 115, 2009-2010 Leg. Sess. (Vt. 2009).

[50] Archive of Attorney General Opinions Issued in 2000, http://209.190.248.167/upload/1072727554_INDEX_TO_OPINIONS_ISSUED_IN_2000.pdf (last visited Sept. 3, 2009). Although the actual cartoon is unavailable, the opinion differentiates between homosexual and heterosexual explicit materials, and it can therefore be assumed that the cartoon involved explicit material containing homosexual activity.

[51] *Id.*

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Virginia – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

No Virginia statute prohibits employment discrimination based on sexual orientation or gender identity. State employees cannot enroll their partners in their workplace insurance plans. In fact, Virginia is the only state to forbid even private companies, unless self-insured, from extending health insurance benefits to unmarried couples.

Although two governors have issued Executive Orders protecting state employees from discrimination based on sexual orientation, the Attorney General issued a formal opinion in the month following the most recent Order stating that the Governor had exceeded his powers and that the protection against sexual orientation discrimination was invalid. To date, attempts to enact state legislation to override the Attorney General's Opinion have failed. As such, the current status of the only source of protection against job discrimination in state government is uncertain at best.

In debates in the state legislature on unsuccessful bills that would have prohibited discrimination on the basis of sexual orientation in state employment, one Virginia delegate stated in 2006, "sexual orientation is a broad term . . . . There are eight different sexual orientations, including pedophilia and bestiality. I think we'd be opening up Pandora's box and allowing judges to interpret what that means."[1] Another delegate stated in 2009 that such protection "may not be in the best interest of our society."[2]

A similar struggle is going on between localities and the state Attorney General, as the Attorney General has left the validity of non-discrimination laws promulgated by local governments in doubt. The Attorney General of Virginia has issued opinions that Fairfax County School Board and Fairfax County as a whole could not enact policies prohibiting sexual orientation discrimination, indicating that no local governing body in the state had such authority without authorization by the Virginia legislature.[3] So far, the

[1] Rosalind S. Helderman, *Virginia Senate to Weigh Gay Workers' Protections*, WASH. POST, Feb. 6, 2006, at B5.

[2] Va. Assembly Access Website, http://assemblyaccess.wordpress.com (last visited Sept. 4, 2009).

[3] Virginia Attorney General Op. No. 02-089 (Nov. 8, 2002) (Absent enabling legislation, the Fairfax County School Board has no authority to include sexual orientation in its nondiscrimination policy); Virginia Attorney General Op. No. 02-029 (Apr. 30, 2002) (General Assembly would need to enact legislation authorizing Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation).

legislature has repeatedly refused to grant authority to localities that wish to adopt anti-discrimination protections for LGBT Virginians to do so.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity in Virginia by state and local governments include:

- A 2009 case in which an employee of the Virginia Museum of Natural History, a state agency, was forced to resign because of his sexual orientation shortly after receiving a positive evaluation that otherwise would have resulted in a raise. The Executive Director of the Museum expressed concerns that the employee's sexual orientation would jeopardize donations to the museum. A Virginia appellate court dismissed his sexual orientation employment discrimination claim because of the Virginia Attorney General's Opinion that the governor's executive order prohibiting such discrimination order did not create a private right of action. [4]

- A police officer who reported in 2008 that she was harassed by her captain and made to work long shifts without breaks because of her sexual orientation. When she tried to leave and apply for another job, the captain accosted her future employer in a restaurant and announced that she was a lesbian.[5]

- In 2009, a lesbian public school teacher was subjected to a hostile work environment on account of her sexual orientation.[6]

- In 2008, a Virginia state corrections psychologist, who was a lesbian, was subjected to a hostile work environment because of her sexual orientation.[7]

- In 2008, an athletic trainer at a Virginia state military academy was subjected to a hostile work environment on account of her association with lesbians.[8]

- In 2007, a gay public school teacher was subjected to a hostile work environment on account of his sexual orientation.[9]

- In 2006, a transgender scientist was not hired by a Virginia state agency on account of her gender identity.[10]An administrator of the City of Petersburg's

[4] Va. Dept. of Hum. Res. Mgmt. O.E.E.S, Priv. Ltr. Rul. 0107-038 (Jan. 7, 2009); Final Order, *Moore v. Virginia Museum of Natural History*, No. 690CL09000035-00 (Va. Cir, June 15, 2009).

[5]E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

[6] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

[7] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

[8] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

[9] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

Community Diversion Incentive Program who was fired in 1986 for refusing to answer questions about her sexual orientation as part of a city background check. She had already been in her position for three years when she was asked to complete a questionnaire for the background check. When she initially refused, she was suspended without pay but then reinstated with back pay by the City Manager because he determined that her position did not require a background check. However, at the same time he changed city policy to require her to have a background check. When she again refused to answer the question about whether she had had sex with someone of the same sex, she was terminated. In 1990, analyzing her claim under the United States constitutional right to privacy, with respect to the question about same-sex behavior, the 4th Circuit relied upon *Bowers v. Hardwick* in holding that she had no right to privacy with respect to this information although it did note that the relevance of this information was "uncertain".[11] In 2003, the United States Supreme Court held that *Bowers v. Hardwick* was wrong when it was decided in 1986.[12]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[10] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[11] *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).
[12] *Lawrence v. Texas*, 539 U.S. 558 (2003).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Virginia has not enacted laws to protect sexual orientation and gender identity from employment discrimination.

B. Attempts to Enact State Legislation (All of the following bills failed)

1. 2009

HB 1933 To allow a county with the urban county executive form of government (Fairfax County) to add the category of "sexual orientation" in ordinances prohibiting discrimination.[13]

HB 2385 To prohibit

> discrimination in public employment based on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, or status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974, as amended. The bill defines "sexual orientation" as a person's actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity or expression. The bill expressly provides that "sexual orientation" shall not include any person's attraction towards persons with whom sexual conduct would be illegal due to the age of the parties.[14]

In debate on the bill, Delegate Todd Gilbert argued that the measure "may not be in the best interest of our society."[15] The bill was defeated in a House vote.

SB 1247 To "[a]dd[] sexual orientation to the definition of unlawful discriminatory practice in the Virginia Human Rights Act. The bill also removes the provision limiting private causes of action to where the employers employed more than five but less than 15 persons."[16]

2. 2008

HB 675 To allow

> Fairfax County (the only county with such form of government) by ordinance to prohibit discrimination in

[13] H.B. 1933, 2009 Gen. Assem., Reg. Sess (Va. 2009).
[14] H.B. 2385, 2009 Gen. Assem., Reg. Sess. (Va. 2009).
[15] Va. Assembly Access Website, http://assemblyaccess.wordpress.com (last visited Sept. 4, 2009).
[16] S.B. 1247, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

> housing, real estate transactions, employment, public accommodations, credit, and education on the basis of sexual orientation. Such authority currently exists with regard to race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability.[17]

HB 1493 To add sexual orientation to Virginia's nondiscrimination policy for State employees.[18]

3. **2007**

HB 2550 Introduced in response to a non-binding opinion by the Attorney General proclaiming that the addition of sexual orientation as a protective employment class under a Gubernatorial Executive Order is "beyond the scope of executive authority and is unconstitutional." HB 2550 would have prohibited discrimination against state employees on the basis of sexual orientation.[19]

HB 2252 To provide

> that the City of Richmond may enact an ordinance prohibiting discrimination in housing, employment, public accommodations, credit, and education on the basis of sexual orientation, provided that the scope of the protections provided by such ordinance are not inconsistent with nor more stringent than those of any state law prohibiting discrimination on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability. "Sexual orientation" means having or being perceived as having an orientation toward heterosexuality, bisexuality, or homosexuality. "Sexual orientation" does not include sexual deviant disorders ("paraphilias") as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).[20]

HB 2598 To "[a]dd 'sexual orientation' as prohibited discrimination in a county with the urban county executive form of government (Fairfax County)."[21]

SB 820 To "[p]rohibit[] discrimination in state employment on the basis of pregnancy, childbirth or related medical conditions, marital status, sexual orientation, or

[17] H.B. 675, 2008 Gen. Assem., Reg. Sess. (Va. 2008).
[18] HB 1493, 2008 Gen. Assem., Reg. Sess. (Va. 2008).
[19] HB 2550, 2007 Gen. Assem., Reg. Sess. (Va. 2007).
[20] HB 2252, 2007 Gen. Assem., Reg. Sess. (Va. 2007).
[21] HB 2598, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974."[22]

SB 1310 To "prohibit discrimination in state employment on the basis of pregnancy, childbirth or related medical conditions, marital status, sexual orientation, or status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974."[23]

4. **2006**

HB1373 To "[a]dd[] 'sexual orientation" as prohibited discrimination in a county with the urban county executive form of government (Fairfax County)."[24]

SB 700 The bill provided:

> No state agency, institution, board, bureau, commission, council, or instrumentality of the Commonwealth shall discriminate in employment based on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, or status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974, as amended.[25]

Delegate Mark L. Cole stated in reference to the bill, "sexual orientation is a broad term…There are eight different sexual orientations, including pedophilia and bestiality. I think we'd be opening up Pandora's box and allowing judges to interpret what that means."[26]

5. **2005**

HB 2116 To "[a]dd[] 'sexual orientation' as prohibited discrimination and authorize[] action against such discrimination by a human rights commission in a county with the urban county executive form of government (Fairfax County)."[27]

HB 2894 To "[p]rohibit[] discrimination in state employment on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, disability, or sexual orientation."[28]

[22] S.B. 820, 2007 Gen. Assem., Reg. Sess. (Va. 2007).
[23] S.B. 1310, 2007 Gen. Assem., Reg. Sess. (Va. 2007).
[24] H.B. 1373, 2006 Gen. Assem., Reg. Sess. (Va. 2006).
[25] S.B. 700, 2006 Gen. Assem., Reg. Sess. (Va. 2006).
[26] Rosalind S. Helderman, *Virginia Senate to Weigh Gay Workers' Protections*, WASH. POST, Feb. 6, 2006, at B5.
[27] H.B. 2116, 2005 Gen. Assem., Reg. Sess. (Va. 2005).
[28] H.B. 2894, 2005 Gen. Assem., Reg. Sess (Va. 2005).

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

On December 16, 2005, Virginia Governor Mark Warner amended a preexisting Executive Order[29] banning discrimination by Virginia state agencies by adding provisions that prohibited discrimination on the basis of sexual orientation. When Warner's successor, Timothy Kaine, assumed power in January of 2006, he affirmed Warner's actions in Executive Order 1.[30] Kaine's order reads: "By virtue of the authority vested in me as Governor, I hereby declare that it is the firm and unwavering policy of the Commonwealth of Virginia to assure equal opportunity in all facets of state government."[31]

This policy specifically prohibits discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, political affiliation, or against otherwise qualified persons with disabilities.

On February 24, 2006 the Virginia Attorney General issued an Opinion that declared this Order unconstitutional.[32] It stated:

> It is my opinion that while Executive Order No. 12 is permissible to the extent the Governor is ensuring that the laws are faithfully being executed, the addition of sexual orientation as a protected employment class within state government was intended to, and in fact did, alter the public policy of the Commonwealth. It is further my opinion that changing the public policy of the Commonwealth is within the purview of the General Assembly; therefore, that portion of Executive Order No. 1 is beyond the scope of executive authority and, therefore, unconstitutional.[33]

2. State Government Personnel Regulations

Based on research conducted, Virginia has no general public personnel regulations that protect against discrimination based on sexual orientation or gender expression.

All public universities in the state have non-discrimination policies based on sexual orientation, but not gender identity.

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[29] Va. Exec. Order No. 1 (2002, rev'd Dec. 16, 2005).
[30] Va. Exec. Order No.1 (Jan. 14, 2006).
[31] *Id.*
[32] Va. Atty Gen. OP. No. 05-094 (2006).
[33] *Id*.

The following policies apply to the state government of Virginia pursuant to the governor's executive order:[34]

Dep't of Hum. Res. Mgmt., Policy No.: 2.30 - Workplace Harassment.

> "The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability."

Dep't of Hum. Res. Mgmt., Policy No.: 2.05 - Equal Employment Opportunity.

This policy provides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability in accordance with the Governor's Executive Order on Equal Opportunity and state and federal laws. (For the purpose of this policy "disability" is defined in accordance with the "Americans With Disabilities Act.")

Dep't of Hum. Res. Mgmt., Policy No.: 2.10 – Hiring.

Each agency must take action consistent with Policy, 2.05, Equal Employment Opportunity, to ensure that its recruiting and hiring procedures are conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability.

3. **Attorney General Opinions**

Op. No. 05-094 (Feb. 24, 2006).

> Executive Order is permissible to extent Governor is ensuring that laws are faithfully being executed, addition of sexual orientation as protected employment class within state government was intended to, and in fact did, alter public policy of Commonwealth. Changing public policy of Commonwealth is within purview of General Assembly and, therefore, beyond scope of executive authority and is unconstitutional.[35]

Op. No. 02-089 (Nov. 8, 2002).

[34] *But See supra*, Part II.C.1.
[35] Op. No. 05-094 (Feb. 24, 2006).

"Fairfax County School Board has no authority to include sexual orientation as category in its nondiscrimination policy, absent enabling legislation."[36]

Op. No. 02-029 (Apr. 30, 2002).

"General Assembly would need to enact legislation authorizing Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation."[37]

1997 Op. Va. Att'y Gen. (Oct. 20, 1997).

> No express or implied statutory authorization for locality to provide health insurance benefits to persons other than government employees or to such employees' family or dependents; no legislative intent to extend insurance coverage to "eligible domestic partner" of employees. County lacks power to extend health insurance coverage provided its employees to persons other than spouse, children or dependents of county employees, in absence of statutory authority indicating intent to permit such coverage.[38]

D. **Local Legislation**

Virginia law requires local governments to have express authority from the state legislature or implied power derived from expressly granted authority in order to enact local laws.[39] In *Arlington County v. White*, the Virginia Supreme Court struck down a local law granting health care benefits to domestic partners of county employees. No Virginia court has yet confirmed the authority of local governments to include sexual orientation as a class protected from discrimination in any context. Thus the ability of local government to enforce its laws barring discrimination based on sexual orientation is uncertain. In addition to Arlington, Alexandria and Charlottesville, other Virginia localities with non-discrimination policies on the basis of sexual orientation for city or county employment include Williamsburg,[40] Fairfax County,[41] Virginia Beach[42] and Roanoke.[43]

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[36] Op. No. 02-089 (Nov. 8, 2002).
[37] Op. No. 02-029 (Apr. 30, 2002).
[38] 1997 Op. Va. Att'y Gen. (Oct. 20, 1997).
[39] *See Arlington County v. White*, 528 S.E.2d 706 (Va. Sup. Ct. 2000); *Bono Film and Video, Inc. v. Arlington County Human Rts. Comm'n*., 2006 WL 3334994 (Va. Cir. Ct. Nov. 16, 2006).In *Bono Film and Video*, a Virginia court refused to answer the question of "whether Arlington County may authorize their Human Rights Commission to investigate complaints of discrimination based upon sexual orientation through their enabling legislation, VA. CODE § 15.2-725 (2006), which does not specifically list the categories of discrimination to be covered by Arlington's Human Rights Ordinance." 2006 WL 3334994.
[40] *See* City of Williamsburg, Application for Employment, *available at* http://www.ci.williamsburg.va.us/Index.aspx?page=34 (last visited Sept. 15, 2009) ("The City of Williamsburg does not discriminate on the basis of race, color, national origin, sex, religion, age, sexual orientation, or disability in employment or the provision of services.")

1. City of Alexandria

The City of Alexandria Code states:

> [I]t is and shall be the policy of the city generally, except as hereinafter provided, to prohibit discrimination because of race, color, sex, religion, ancestry, national origin, marital status, familial status, age, sexual orientation or disability with respect to housing, public accommodations, employment, health and social services, credit, education and city contracts.[44]

2. City of Charlottesville

The City of Charlottesville prohibits employment discrimination by the city on the basis of sexual orientation. Furthermore, the city requires that any city contractors with a contract over $10,000 agree not to discriminate against an employee or applicant for employment on the basis of sexual orientation in the performance of the contract.[45]

3. County of Arlington

In Arlington County, it is unlawful to discriminate because of Race, National Origin, Color, Marital Status, Sex, Religion, Age, Disability, Sexual Orientation, or Familial Status in housing, the provision of brokerage services, public accommodation, credit lending, education, employment and appointment to the Arlington Human Rights Commission.[46]

E. Occupational Licensing Requirements

Based on research conducted, Virginia has no licensing requirements that protect against discrimination based on sexual orientation or gender expression.

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[41] Fairfax County Standards of Conduct, Ch. 16, Addendum 1 (2007), *available at* http://www.fairfaxcounty.gov/jobs/regs_pdf/chap16.pdf (last visited Sept. 14, 2009).
[42] *See* City of Virginia Beach, *Diversity Management*, http://www.vbgov.com (enter "Diversity Management" in Search field; click on first link entitled "Diversity Management") (last visited Sept. 14, 2009).
[43] City of Roanoke, Application for Employment, *available at* http://www.roanokeva.gov/DeptApps/jobpost.nsf/CityJobAppl.pdf?OpenFileResource (last visited Sept. 14, 2009).
[44] ALEXANDRIA CODE- § 12-4-2.
[45] CHARLOTTESVILLE CODE §§ 19-7, 22-10.
[46] ARLINGTON COUNTY CODE § 31-3 (Human Rights).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990).

In *Walls v. City of Petersburg*, the court held that an employee of the City's Bureau of Police had no right to privacy with respect to information about her sexual orientation.

Walls was hired as the administrator of the City of Petersburg's "Community Diversion Incentive Program" ("CDI") in December 1985. This program provides alternative sentencing for non-violent criminals. In her position, Walls had financial responsibility for the CDI program, oversaw restitution payments, had regular contact with convicted criminals, and was in a position to make recommendations concerning sentencing.

In July 1986, the administration of the program was transferred from the City Manager's Office to the City's Bureau of Police. After the transfer took place, the police department required all CDI employees to undergo the same background check as its other employees. The City had never required background checks of employees working with the CDI program when it was administered by the City Manager's Office. At the time of the transfer, Walls did not complete a background questionnaire. Upon discovering this in March 1988, her supervisors notified her that she would be required to fill out the questionnaire. Walls refused to do so, objecting specifically to four questions. One question was whether the employee had ever had sexual relations with a person of the same sex.

Because of her refusal to fill out the questionnaire, Walls was suspended without pay and her supervisor recommended to the City Manager that Walls be terminated. After determining that the current administrative policy concerning background checks did not apply to Walls, the City Manager ordered Walls to be reinstated with backpay. At the same time, however, he promulgated a new policy requiring all current employees in Walls' position to fill out the questionnaire. Walls still refused to comply, and was terminated for failure to complete the background questionnaire.

The Court primarily analyzed plaintiff's claim asserting that the questions violated her constitutional right to privacy. With respect to the question about homosexual activity, citing *Bowers*, the Court held that plaintiff had no right to privacy with respect to this information (although it did note that the relevance of this information was "uncertain").[47]

2. Private Employees

[47] *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

Evans v. Virginia Employ. Comm'n, 1995 WL 110099 (Va. App.).

Plaintiff was discharged from the Navy because he was homosexual. When he applied for unemployment compensation benefits due to ex-military servicemen his request was denied. The VA Court of Appeals upheld this decision.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

Virginia Museum of Natural History

Michael Moore, a Martinsville, Virginia resident and former employee of the Virginia Muesum of Natural History, filed suit against the museum in 2006 after he was forced out based on his sexual orientation. Shortly after gossip began to circulate about Moore's sexual orientation, the museum's Executive Director arranged a meeting with the Human Resources Manager. During the meeting, the Executive Director, fearing that Moore's known sexual orientation would jeopardize expected donations, asked the Human Resources Manager if Moore could be terminated. The Human Resources Manager explained that Moore could be terminated for a "valid and good reason," but explicitly stated that he could not be terminated just because he was gay. Shortly thereafter, the Executive Director questioned Moore about his sexual orientation during a performance evaluation meeting; Moore truthfully answered that he was gay. The meeting resulted in an unfavorable review and Moore was forced to resign. Following an investigation, the Office of Equal Employment Services concluded that there was "sufficient evidence to support that there was improper consideration of [Moore's] sexual orientation." Moore filed suit in a Virginia circuit court based on protection afforded to state employees by a gubernatorial executive order, because Virginia does not statutorily prohibit employment discrimination based on sexual orientation. The court dismissed the suit for lack of subject matter jurisdiction, stating that the executive order does not provide for a private right of action.[48]

Municipal Police Department

In 2008, a lesbian police officer reported that she was harassed by her captain and made to work long shifts without breaks. When she applied to another job, the captain accosted her future employer in a restaurant and announced that she was a lesbian.[49]

[48] Va. Dept. of Hum. Res. Mgmt. O.E.E.S, Priv. Ltr. Rul. 0107-038 (Jan. 7, 2009); Final Order, *Moore v. Virginia Museum of Natural History*, No. 690CL09000035-00 (Va. Cir, June 15, 2009).
[49] E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Virginia Human Rights. Act

Virginia's Human Rights Act makes no reference to sexual orientation or gender expression. The stated purpose of the Human Rights Act is to:

> Safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; preserve the public safety, health and general welfare; and further the interests, rights and privileges of individuals within the Commonwealth.[50]

B. Criminalization of Same-Sex Sexual Behavior

Although Virginia's sodomy law was invalidated by the U.S. Supreme Court on June 26, 2003 as a result of the Court's decision in *Lawrence v. Texas*, Virginia has not yet amended its statute that outlaws sodomy.[51]

C. Health Care

Domestic partners are not listed among those who may give consent for an incapacitated partner in Virginia.[52] An adult may however, specifically designate their domestic partner as having the authority to make medical decisions on their behalf. A written advance directive shall be signed by the declarant in the presence of two subscribing witnesses. An oral advance directive shall be made in the presence of the attending physician and two witnesses.[53]

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[50] VA CODE § 2.2-3900.
[51] VA. CODE § 18.2-361. *See also Doe v. City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975) which upheld Virginia's sodomy law. The case was summarily affirmed by the U.S. Supreme Court. For a second time, the court in *DePriest v. Virginia*, upheld the Virginia sodomy law as constitutional. *DePriest v. Virginia*, 537 S.E.2d 1 (2000). In *DePriest*, the court held that specific cases of individuals charged with solicitation to commit sodomy did not establish a presumption of privacy by seeking to commit sodomy in a public park.
[52] VA. CODE § 54.1-2986.
[53] VA. CODE § 54.1-2983.

Virginia law requires licensed hospitals to permit adult patients to receive visits from any individual, including a same-sex partner.[54]

D. Parenting

1. Adoption

Virginia permits any person or married couple residing in the state to petition to adopt.[55] There is no explicit prohibition on same-sex adoption, but the law is unclear on whether same-sex couples may jointly petition to adopt. In 2005, the Virginia Anti-Gay Adoption bill was passed by the Virginia House of Delegates 71-24. It was then rejected by a Senate committee. The law would have required social workers to determine the sexual orientation of prospective adoptive parents to prevent members of the LGBT community from adopting children in the state.

Kaufman v. Va. Dep't of Soc. Serv.

Virginia resident Linda Kaufman, a lesbian Episcopal minister, sought to adopt a child from Washington, D.C. Citing Virginia's sodomy law, the State barred the adoption. The Virginia Department of Social Services settled the case and agreed to allow Kaufman to adopt a child from D.C. The settlement also required a directive from the Department stating that "there are no absolute barriers," including the potential adoptive parents' sexual orientation, to Virginia's consent to interstate adoption.[56]

Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822 (Va. 2008).

Janet and Lisa Miller-Jenkins lived in Virginia, and traveled to Vermont to enter into a civil union. Back in Virginia, Lisa was artificially inseminated and gave birth to Isabella in April 2002. In 2003, the couple split up. Lisa then filed a petition for dissolution of the civil union in Vermont family court. As part of the civil union dissolution, Lisa conceded that Janet had parental rights to Isabella and in light of that fact asked the Vermont court to determine custody of Isabella.

In June 2004, the Vermont court issued a temporary custody order providing that Janet have visitation and contact with Isabella. Lisa, however, refused to obey the order and instead filed a new custody proceeding in Frederick County Circuit Court on July 1, 2004. The Virginia judge held that he had jurisdiction over the case. He relied on the recently enacted "Marriage Affirmation Act," which declares civil unions and other agreements "purporting to bestow the privileges and obligations of marriage" between persons of the same sex to be unenforceable. While awaiting the Virginia Court of Appeals' ruling, the Vermont Supreme Court on August 4, 2006 held that Vermont has jurisdiction over the case, and that Lisa was in contempt of court order for refusing to

[54] VA. CODE ANN. §§ 54.1-2981 to 54.1-2993 (Health Care Decisions Act).
[55] VA. CODE ANN. § 63.2-1225.
[56] Lambda Legal, *Linda Kaufman v. Virginia Department of Social Services* (Aug. 14, 2002), http://www.lambdalegal.org/our-work/publications/facts-backgrounds/kaufman-facts.html.

allow visitation. On November 28, 2006 the Virginia Court of Appeals concurred with the Vermont Supreme Court's ruling.

The Court of Appeals denied Lisa's request for a hearing before the full court, and she asked the Virginia Supreme Court to hear the case. On May 7, 2007, the Virginia Supreme Court of Appeals dismissed her appeal because she failed to file a notice of appeal. In a related ruling, the Virginia Court of Appeals held in April 2007 that the Frederick County Circuit Court must give full faith and credit to Vermont's orders. On June 6, 2008, the Virginia Supreme Court upheld the Court of Appeals decision giving Vermont jurisdiction. The Court declined to overrule the 2006 Court of Appeals ruling that Vermont had custody over the case under the federal Parental Kidnapping Prevention Act and held that the 2006 opinion was the final word on all of the relevant legal issues.

Lisa Miller then initiated a new action, which asked the Frederick County Circuit Court not to enforce Vermont's orders because of Virginia's constitutional marriage amendment banning same-sex marriage. On August 15, 2008, Judge John Prosser dismissed Lisa's claims and remanded the case to the county juvenile and domestic relations court for enforcement of the Vermont order.

J.R.V. v. A.O.V, 2007 WL 581871 (Va. App. Feb. 27, 2007).

When A.O.V. and J.R.V. divorced in 2004, J.R.V. came out as a gay man. He also made it known that he was in an exclusive relationship with a man and that they lived together. In the divorce proceedings, a circuit court judge awarded primary physical custody of the couples' three children to A.O.V., with joint custody and liberal visitation to J.R.V, including allowing his partner to be present during the day when the children were visiting. A.O.V. appealed the judge's decision to not grant her sole custody of the children and his refusal of more draconian restrictions, arguing that J.R.V.'s homosexuality had negative effects on the children. The Court of Appeals affirmed the joint custody and ruled that no further visitation restrictions on J.R.V. were necessary. It also affirmed the trial court's restrictions prohibiting J.R.V. from having his partner spend the night when the children were visiting or engaging in public displays of affection in front of the children.

Davenport v. Little-Bowser, 269 Va. 546 (Va. 2005).

Three same-sex couples, two living in Washington, D.C., and one in New York City, adopted children who had been born in Virginia. The adoptions were approved by the couples' home states, but Virginia authorities refused the couples' applications for new birth certificates listing both adoptive parents, claiming that this would violate Virginia's rules concerning birth certificates as well as the state's policy against same-sex marriage. The Virginia Supreme Court ruled that Virginia must indeed issue birth certificates listing the names of both same-sex adoptive parents.[57]

[57] After the verdict, the Virginia Department of Vital Records refused to comply with the ruling claiming that the state's form only allowed for one mother and one father to be listed and thus could not accommodate two mothers or two fathers. In January of 2006, the Department amended its issuance of

Piatt v. Piatt, 499 S.E.2d 567 (Va. App. 1998).

Court acknowledges that the sexual behavior, namely a homosexual relationship, can be a consideration in deciding which parent offers a more stable home environment. Consequently, in *Piatt*, a mother who engaged in two homosexual "experimental" relationships was denied her request for primary physical placement of her child.

Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995).

The maternal grandmother of a child petitioned for custody of the child in preference of the mother. While the court noted numerous factors in its decision to grant the grandmother custody, it also acknowledged that the mother's lesbianism was an "important consideration" in determining custody.

2. Surrogacy

Virginia law appears to prohibit same-sex couples from participation in uncompensated surrogacy agreements. (Compensated surrogacy is prohibited for all couples in Virginia.) As the Virginia Code establishes:

> a surrogate ... and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child.[58]

The term "intended parents" is limited to "a man and a woman, married to each other."

E. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Virginia law prohibits a civil union or partnership arrangement that would accord the incidents of marriages to couples of the same sex. Civil unions from other jurisdictions are not recognized in Virginia.[59]

Virginia does not license marriage between couples of the same sex. The state does not honor marriages between same-sex couples obtained in an outside jurisdiction. Moreover, under Virginia law, , "any contractual rights created by such marriage shall be void and unenforceable."[60]

2. Benefits

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birth certificates so that they now have listings for "Parent 1" and "Parent 2." Press Release, ACLU of Va., Department of Vital Records Finally Changes Birth Certificates to Accurately Reflect Same-Sex Parents (Jan. 26, 2006), http:www.acluva.org/newsreleases2006/Jan26.html (last visited Sept. 4, 2009).

[58] VA. CODE ANN. § 20-159.

[59] VA. CODE ANN. § 20-45.3.

[60] VA. CODE ANN. § 20-45.2

Arlington County v. White, 528 S.E.2d 706 (Va. Sup. Ct. 2000).

Taxpayers brought action against county challenging the extension of health care coverage to unmarried "domestic partners" of the county's employees. The Virginia Supreme Court ruled that the act of extending health care coverage to domestic partners is an *ultra vires* act outside of the county's implied authority under the statues. Under the so-called Dillon's Rule, local governments:

> have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable. Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable.[61]

The Court found that in allowing local governments to adopt their own definitions of "dependent" with regard to self-funded health insurance benefit plans, the General Assembly of Virginia did not contemplate the type of financial interdependence that the County of Arlington's definition of "domestic partners" suggests.

Bono Film and Video, Inc. v. Arlington County Human Rts. Comm'n, 2006 WL 3334994 (Va. Cir. Ct. Nov. 16, 2006).

After the Arlington County Human Rights Commission dismissed its case against the Plaintiffs, the circuit court ruled that the plaintiffs had no standing to contest the Arlington County Human Rights Ordinance. Consequently, the court refused to answer the question of "whether Arlington County may authorize their Human Rights Commission to investigate complaints of discrimination based upon sexual orientation through their enabling legislation, Va. Code § 15.2-725 (2006), which does not specifically list the categories of discrimination to be covered by Arlington's Human Rights Ordinance."

F. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Mainstream Loudoun v. Bd. of Tr., 24 F.Supp.2d 552 (E.D. Va. 1998).

Several nonprofit organizations sued the Loudon County Library for banning access to "sexually explicit" internet sites. Some of these banned websites simply contained information on gay and transgender organizations. The district court declared the policy unconstitutional because it was not narrowly tailored to serve a compelling government interest and therefore an unconstitutional prior restraint on free speech.

[61] *Arlington County v. White*, 528 S.E.2d 706 (Va. Sup. Ct. 2000) (*citing City of Virginia Beach v. Hay*, 258 VA. 217, 221, 518 S.E.2d 314, 316 (1999)).

Veney v. Wyche, 293 F.3d 726 (4th Cir. 2002).

In this case, the court upheld the segregation and gender related disparate treatment of homosexual inmates finding the division was rationally related to legitimate governmental interests.

Portsmouth Public High School

Following a warning letter from the ACLU, school officials at a Portsmouth, VA high school allows a student to wear her lesbian pride t-shirt to school. Before intervention by the ACLU, the school threatened to suspend the student if she wore her t-shirt to school.[62]

[62] ACLU, *ACLU Demands Virginia High School Stop Censoring Gay Student* (Dec. 20, 2007), http://www.aclu.org/lgbt/youth/33321prs20071220.html.

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Washington – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

In 2006, the Washington legislature enacted a bill adding protection from discrimination based on sexual orientation and gender identity to its state civil rights law, initially passed in 1949.[1] Advocates had been trying to pass this legislation for 30 years, but were consistently met with strong opposition in the legislature.[2] The first bill protecting individuals from sexual orientation discrimination was introduced in Washington in 1977.[3] In 1986, gay rights opponents in Washington introduced proposals that would ban gays and lesbians from working in schools and government offices. These proposals were defeated in committee.[4]

Opposition in the Senate to the 2006 anti-discrimination bill took a particularly negative tone. Two Washington Senators introduced an amendment, which they later withdrew, to clarify that "sexual orientation" does not include "bestiality, necrophilia, incest, adultery, pedophilia, or sadomasochism."[5] Senator Stevens used the term "labyrinth of perversion" to describe LGBT people."[6] Senator Weinstein argued that this amendment was designed to "smear gays and lesbians" by implying that they participate in these types of behavior.[7] Senator Benson expressed opposition to the bill on the ground that that "homosexuals don't need protection" because they have "better education, nicer cars, and nicer homes" than most people.[8] Senator Benton also opposed the bill on the ground that it would advance a "political agenda," and argued that protecting behavior was a big mistake because, "who knows what other kinds of behavior the rest of society will be forced to tolerate."[9] Senator Oke said he cannot support the bill because it "endorses homosexuality" which he viewed as an "abomination to God."[10]

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[1] *See* ESHS 2661.
[2] See Chris McGann, *Gay Rights Highly Charged Political Issue*, SEATTLE POST-INTEL., May 7, 2005, at A1.
[3] Chris McGann, *A Long-Awaited Win For Gay Rights-Senate OKs State Anti-Bias Bill*, SEATTLE POST-INTEL., Jan. 28, 2006, at A1 [hereinafter *A Long-Awaited Win*].
[4] *Id.*
[5] Wash. S.H.B. 2661 - Sen. Amend. 20 (2006) (introduced by Sens. Stevens & Hargrove, but later withdrawn).
[6] Statement of Wash. Sen. Stevens, Wash. Sen. Fl. (Jan. 25, 2006).
[7] Statement of Wash. Sen.Weinstein, Wash. Sen. Fl., (Jan. 25, 2006).
[8] Statement of Wash. Sen. Benson, Wash. Sen. Financial Inst., Housing & Cons. Protection Comm. Statement (Jan. 24, 2006).
[9] Statement of Wash. Sen. Benton, Wash. Sen. Financial Inst., Housing & Cons. Protection Comm. (Jan. 24, 2006).
[10] Statement of Wash. Sen. Oke, Wash. Sen. Fl. (Jan. 27, 2006).

Senator Mulliken expressed concern that homosexuality would be taught in schools, stating that kindergartners would be subjected to the "promotion of a lifestyle not even preferred by those who live it."[11] Ed Murray, the bill's sponsor, tried to encourage support by highlighting derogatory comments made in 2005 by Lou Novak, the former president of the Puget Sound Rental Housing Association. While in the State House office building, Novak remarked, "[l]ooks like it's anal-sex week" as a group from the Lifelong AIDS Alliance walked by.[12] After the Washington legislature passed the non-discrimination bill in 2006, opponents continued to fight it, launching a campaign to overturn it by referendum,[13] but failed to collect the required number of signatures to put it on the ballot.[14]

Prior to 2006, several litigants in Washington state and federal courts attempted to bring sexual orientation and/or gender identity discrimination claims under federal or municipal laws. Since the bill went into effect, the state Human Rights Commission has received 20 complaints alleging sexual orientation and/or gender identity discrimination by public employers. The complaints have been filed against a wide range of state agencies, including the departments of corrections and of licensing and health care providers. Documented examples of discrimination on the basis of sexual orientation and gender identity by state and local governments in Washington include these complaints and several court cases:

- In *Smith*, a 2008 complaint to the Washington State Human Rights Commission, a gay male alleged employment discrimination based on sexual orientation. An employee of WorkSource Thurston County, a state agency that provides resources to job-seekers, alleged that his supervisor had treated him differently ever since she became aware of his sexual orientation. This supervisor allegedly restricted his work hours and deprived him of support staff. Smith also alleged that another coworker had made derogatory comments about his sexuality. The public employee alleged that he was asked if he had "personal relationships" with any of the customers that he served. The employee felt that he was being accused of soliciting sex from customers. He also alleged that he was being investigated for ethics violations concerning his partner's interview at this workplace, even though he took no part in the selection process. The administrative disposition of this case was unavailable.[15]

- In *Spring*, a 2008 complaint to the Washington State Human Rights Commission, a transgender female alleged employment discrimination and harassment based on sexual orientation/gender identity. An employee of the Washington Department of Social & Health Services, she alleged that in a new employee orientation, her supervisor asked "what's your real name? Robert or Roberta?" She also alleged

[11] Statement of Wash. Sen. Mulliken, Wash. Sen. Fl. (Jan. 27, 2006).
[12] Rebecca Cook, *Official Quits Over Anti-Gay Remarks*, SEATTLE TIMES, Mar. 4, 2005, at B3
[13] Phuong Cat Le, *Anti-Bias Law Still At Risk –Initiative's Failure Isn't End of Opposition*, SEATTLE POST-INTEL., Jun.19, 2006, at B1.
[14] *See* Referendum 65 (2006).
[15] Wash. State Hum. Rights Comm'n Complaint, *Smith v. WorkSource Thurston County*, No. 34Ex-0238-08-9 (Sept. 3, 2008).

that her supervisor did nothing when she reported that she was being harassed by other employees. When she went home because of illness one day, her supervisor allegedly yelled: "I'm sick of your excuses. Get off the island." The administrative disposition of this case was unavailable.[16]

- In a court case decided in 2008, an employee of the Snohomish County Center for Battered Women sued alleging that her supervisor created a hostile work environment by making racist and homophobic comments in violation of the state anti-discrimination law. The employee alleged that her supervisor once asked aloud why the domestic violence movement attracted so many lesbians and commented that she did not understand why "they" (the lesbians) "all had tattoos and dressed so poorly." This supervisor later transferred one lesbian woman from her position, stating that she dressed poorly. The Court of Appeals held that no hostile work environment existed, noting that "that the supervisor's allegedly discriminatory comments were not sufficiently severe and pervasive to alter the terms and conditions of Pedersen's employment." Pedersen v. Snohomish County Ctr. for Battered Women, 2008 Wash. App. LEXIS 1040 (Wash. Ct. App. May 5, 2008).

- In *Collins*, a 2007 complaint to the Washington State Human Rights Commission, an employee of the Washington Department of Corrections alleged employment discrimination based on sex and sexual orientation. She alleged that she was subjected to hostile treatment by subordinate staff and colleagues because of her sexual orientation. She alleged that a colleague told other staff that she was a lesbian who "hated men" and that male members of her staff would not get ahead working for her. When she complained about this colleague's comments, she was told to "pick her battles wisely" and "take the high road." She also alleged that one supervisor suggested that she use the men's restroom instead of the women's and another challenged her ability to manage her subordinates.[17]

- In *Day*, a 2007 complaint to the Washington State Human Rights Commission, a lesbian cook and driver who worked at the Economic Opportunity Commission alleged discrimination based on sexual orientation. She alleged that after she questioned her supervisor about pay discrepancies in the workplace, her supervisor said "don't you make enough money for (female name of her partner)"? She alleged that she was treated differently by supervisors after this conversation. She was moved to a different worksite, avoided by supervisors, and not given timely updates about trainings.[18]

- In *McGlumphy*, a 2007 complaint to the Washington State Human Rights Commission, a lesbian truck driver employed by the Washington Department of

[16] Wash. State Hum. Rights Comm'n Complaint, *Spring v. Wash. State Dep't of Social & Health Svc's* , No. 27EX-0186-08-9 (Aug. 22, 2008).
[17] Wash. State Hum. Rights Comm'n Complaint, *Collins v. Wash. State Dep't of Corr.*, No. 34ESX-0319-07-8 (Oct. 20, 2007).
[18] Wash. State Hum. Rights Comm'n Complaint, *Day v. Economic Opp. Comm'n*, No. 06EX-0647-06-7 (Feb. 26, 2007).

Social and Health Services, alleged employment discrimination based on sex and sexual orientation. She alleged offensive and hostile environment in which employees are allowed to participate in making inappropriate comments about gays and lesbians. Her shift supervisor used the term "homo" and other employees made offensive jokes about a man stereotyped to be "gay." Her employment was terminated on January 5, 2007.[19]

- In *Hayes,* a 2007 complaint to the Washington State Human Rights Commission, a lesbian operations assistant for the City of Tieton alleged employment discrimination based on sexual orientation. She alleged that when the Mayor of Tieton discovered she was a lesbian, the Mayor forbade her from going to City Hall to collect mail, making copies, and also was forbade from meter reading. Her request for a pay raise was also denied. She was the fired on August 23, 2006 and the official reason given was that she lied about requesting time off.[20]

- In *Miller,* a 2006 complaint to the Washington State Human Rights Commission, an openly gay public safety officer at Washington University Harborview Medical Center alleged employment discrimination based on sex, sexual orientation and retaliation. The officer was subjected to constant verbal harassment by an administrator. He was called a "faggot" and other demeaning remarks related to his sexual preference. He alleged that the administrator made several attempts to sabotage his employment. He lodged an internal complaint, but the administrator continued to supervise him.[21]

- In a case decided in 2005, one member of a couple who were volunteer firefighters brought suit when his application to be a full-time firefighter was rejected. The couple began living together in early 2003 and were married in Canada in 2004. He filed his claim not as a sexual orientation discrimination claim, but a claim that he had suffered sex discrimination in violation of Title VII. A United States District Court did not accept his argument, finding that any discrimination based on the relationship of the two men would be sexual orientation discrimination, which is not actionable under Title VII. Haladay v. Thurston County Fire Dist. No. 1, 2005 WL 3320861 (W.D.Wash., Dec 7, 2005).

- In 2001, a lesbian brought an action against her former employer, a public hospital district, for wrongful termination based on sexual orientation under 42 U.S.C. section1983 and the federal equal protection clause. Davis's co-Plaintiff and her immediate supervisor, Nan Miguel, was terminated for opposing the hospital's discriminatory treatment of Davis. The director of the radiology department at the hospital where Davis worked made several derogatory comments to her throughout the course of her employment. On a number of

[19] Wash. State Hum. Rights Comm'n Complaint, *McGlumphy v. Wash. State Dep't of Social & Health Svc's*, No. 27ESX-0610-06-7 (Feb. 9, 2007).
[20]Wash. State Hum. Rights Comm'n Complaint, *Hayes v. City of Tieton*, No. 39EX-0365-06-7 (Oct. 30, 2006).
[21] Wash. State Hum. Rights Comm'n Complaint, *Miller v. Univ. of Wash./Harbor View Med. Ctr.*, No. 17EXZ-0876-06-7 (May 29, 2007).

occasions, he called her a "fucking faggot," a "fucking dyke," and a "queer." He also said "I don't think that fucking faggot should be doing vaginal exams and I'm not working with her." One time when she did not come to work, her department director remarked that it was gay pride week and "she was probably off marching somewhere." When her supervisor sent a memo to an administrator objecting to the department director's behavior, the hospital responded by reducing her hours to three-quarters time. She later filed a grievance against the hospital and copied information from patient files to show that her reduction in hours was the result of the department director's animus toward her. The hospital later fired her and Miguel. The Washington Court of Appeals held that she had raised material issues of fact with respect to whether the hospital and the doctor were "state actors" under section 1983 and remanded the case for trial on Davis's 1983 claims. The Court refused to find, however, that her discharge violated a clear mandate of Washington public policy, which at that time did not have a state law prohibiting sexual orientation discrimination.[22] The hospital eventually settled with Davis for $75,000.[23] Miguel v. Guess 112 Wn. App. 536, (Wash. Ct. App. 2002).

- In 1997, a gay man, brought an action against his employer alleging that he was unlawfully terminated based on his sexual orientation in violation of public policy and Seattle Municipal Code section 14.04.[24] He had been employed by Puget Sound Broadcasting Company as a radio host. On one occasion, the Company accused him of airing an abundance of shows with "gay themes" before they terminated him. The Washington Court of Appeals held for the Broadcasting Company, noting that the radio show host "did not cite any constitutional, statutory, or regulatory provision establishing that discharging an employee based on his sexual orientation contravened a clear mandate of public policy." Webb v. Puget Sound Broad. Co., 138 Lab. Cas. (CCH) P58, 612 (Wash. Ct. App. Dec. 28, 1998).

- In 1996, a county firefighter was subjected to a hostile work environment based on his sexual orientation.[25]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments

[22] *Miguel v. Guess*, 51 P.3d 89 (Wash. Ct. App. 2002).
[23] ACLU, *Following ACLU Lawsuit, Lesbian Illegally Fired from Washington Hospital Received Generous Settlement* (Oct. 8, 2003), http://www.aclu.org/lgbt/discrim/12359prs20031008.html.
[24] § 14.04 of the Seattle Municipal Code declares that it is the policy of the city of Seattle to "assure equal opportunity to all persons, free from restrictions because of ... sexual orientation ...." SEATTLE MUN. CODE § 14.04.

[25] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

against LGBT people. Part IV discusses state laws and policies outside the employment context.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

In January 2006, the legislature amended the Washington Law Against Discrimination ("WLAD") to prohibit discrimination based on sexual orientation and gender identity in employment, housing, public accommodations, granting credit, and insurance.[26] Before 2006, the WLAD provided protection based on race, creed, color, national origin, families with children, sex, marital status, age, military status and mental or physical disability.[27] WLAD defines "[s]exual orientation" as "heterosexuality, homosexuality, bisexuality, and gender expression or identity."[28] Gender expression or identity is defined as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."[29]

The WLAD, which covers public and private employers, employment agencies and labor organizations, makes it unlawful for an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation, terms, conditions or privileges of employment based on sexual orientation or gender identity.[30] Additionally, employers may not print or circulate statements, advertisements or publications that contain discriminatory content.[31] Employers who retaliate against whistleblowers are also held responsible under the law, as are individuals who aid and abet unfair employment practices.[32] The law states that employers are not required "to establish employment goals or quotas based on sexual orientation."[33]

There are several exemptions in the WLAD. First, it only prohibits employers from discriminating on the basis of sexual orientation or gender identity if they have eight or more employees.[34] Second, the law does not apply to "any religious or sectarian organization not organized for private profit."[35] Third, persons employed in the domestic service profession are not protected under the law.[36] Finally, public and private employers may defend against a discrimination claim by arguing that a "bona fide occupational qualification" for the particular position is that it be held by someone who is not a member of a protected group.[37] In housing, the law only covers "multifamily

[26] *See* ESHB 2661; WASH. REV. CODE § 49.60.030(1)(a)-(f).
[27] § 49.60.010.
[28] § 49.60.040(15).
[29] *Id.*
[30] § 49.60180(1)-(3).
[31] § 49.60.180(4).
[32] §§ 49.60.210, 49.60.220.
[33] § 49.60.180(1).
[34] § 49.60.040(3).
[35] *Id.*
[36] § 49.60.040(4).
[37] § 49.60.180(1).

dwellings" consisting of four or more dwelling units.[38] Finally, the law states that employers are not required "to establish employment goals or quotas based on sexual orientation."[39]

2. Enforcement and Remedies

Individuals alleging discrimination on the basis of sexual orientation or gender identity may either file a complaint with the Washington State Human Rights Commission ("WHRC") or initiate a civil action in Washington Superior Court.[40] Employment discrimination complaints must be filed within six months of the alleged discriminatory conduct.[41] In housing discrimination cases, complainants have up to one year to file an action.[42] Complaints alleging whistleblower retaliation must be filed within two years.[43]

Once an individual files a complaint, the WHRC will investigate the matter to determine if there is reasonable cause for believing that an unfair practice has been or is being committed.[44] If the Commission finds reasonable cause, then it "shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion."[45] In the event that the matter is not resolved by these informal methods, the chairperson of the Commission will request that an administrative law judge be appointed to conduct a formal hearing.[46] If the administrative law judge finds that unlawful discrimination has occurred, then he or she must serve an order on the respondent requiring them to "cease and desist . . . and to take such affirmative action, including (but not limited to) hiring [and] reinstatement or upgrading of employees, with or without back pay. . . ."[47] The administrative law judge may also impose any additional remedy that could be ordered by a court, provided that damage awards for humiliation or mental suffering are limited to $ 20,000 or less.[48] If an employer fails to comply with the administrative law judge's order, then the aggrieved individual or the Commission may seek appropriate temporary relief or a restraining order in Washington Superior Court.[49]

[38] § 49.60.040(21).
[39] § 49.60.180(1).
[40] §§ 49.60.030(1)(a), 49.60.350.
[41] § 49.60.230(2).
[42] *Id.*
[43] *Id.*
[44] § 49.60.240.
[45] § 49.60.250(1)
[46] *Id.*
[47] § 49.60.250(5).
[48] *Id.*
[49] § 49.60.260(1).

B. Attempts to Enact State Legislation

Washington has a long legislative history of bills that would both protect LGBT from and subject them to employment discrimination. The first bill protecting individuals from sexual orientation discrimination was introduced in Washington in 1977.[50] In 1986, gay rights opponents introduced proposals that would ban gays and lesbians from working in schools and government offices. These proposals were defeated in committee.[51]

In the early 1990s, an openly gay state senator, Cal Anderson, took the lead in championing various versions of a sexual orientation anti-discrimination bill.[52] Supporters achieved a near victory in 1994 when the bill passed the House and missed passage in the Senate by a single vote.[53] From 1996-2006, Senator Ed Murray, also openly gay, emerged as another strong leader on gay rights issues, sponsoring sexual orientation and/or gender identity anti-discrimination bills for ten consecutive years.[54] In 1997, gay rights supporters suffered a setback when Washington voters rejected a ballot initiative prohibiting unfair employment practices on the basis of sexual orientation.[55] This initiative was defeated despite being relatively narrow in scope. It did not require partner benefits or preferential treatment, and also exempted religious organizations and businesses with fewer than eight employees.[56]

In 2005, a bill prohibiting sexual orientation and gender identity discrimination passed the House but was defeated in the Senate by a vote of 25-24. Senator Jim Hargrove, emphatically explained: "I believe homosexuality is wrong. Therefore, I cannot give government protection to this behavior."[57]

In 2006, the House again voted to pass the bill prohibiting sexual orientation and gender identity discrimination by a margin of 61-37. The bill finally passed the Senate as well.[58]

For example, two Washington Senators introduced another amendment, which they later withdrew, clarifying that "sexual orientation" does not include "bestiality, necrophilia, incest, adultery, pedophilia, or sadomasochism."[59] Senator Stevens used the

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[50] *A Long-Awaited Win*, *supra* note 3.
[51] *Id.*
[52] WASHINGTON STATE HUMAN RIGHTS COMMISSION: ONE YEAR REPORT ON SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION, Appendix A History of ESHB 2661: The Cal Anderson Bill (July 2007) (hereinafter ONE YEAR REPORT).
[53] *Id.*
[54] *Id.*
[55] Chris McGann, *Eyman to File Signatures Monday Latest Referendum Would Repeal Newly Enacted Gay Rights Law*, SEATTLE POST-INTEL., June 2, 2006, at B2.
[56] Wash. Ballot Initiative Meas. 677 (2005).
[57] *Id.*
[58] *A Long-Awaited Win*, *supra* note 3.
[59] Wash. S.H.B. 2661 - Sen. Amend. 20 (2006) (introduced by Sens. Stevens & Hargrove, but later withdrawn).

term "labyrinth of perversion" to describe the lifestyles of those who "move away from traditional means of procreation."[60] Senator Weinstein argued that this amendment was designed to "smear gays and lesbians" by implying that they participate in these types of behavior.[61] Senator Benson expressed opposition to the bill on the ground that sexual orientation is not an immutable characteristic deserving special protection. He further argued that "homosexuals don't need protection" because they have "better education, nicer cars, and nicer homes" than most people.[62] Senator Benton also opposed the bill on the ground that it would advance a "political agenda," and argued that protecting behavior was a big mistake because, "who knows what other kinds of behavior the rest of society will be forced to tolerate."[63] Senator Oke's statements lent a religious dimension to the debate. He said he cannot support the bill because it "endorses homosexuality" which he viewed as "morally wrong" and an "abomination to God."[64] Senator Mulliken expressed concern that homosexuality would be taught in schools, stating that kindergartners would be subjected to the "promotion of a lifestyle not even preferred by those who live it."[65] Ed Murray, the bill's sponsor, tried to encourage support by highlighting derogatory comments made in 2005 by Lou Novak, the former president of the Puget Sound Rental Housing Association. While in the state House office building, Novak remarked, "[l]ooks like it's anal-sex week" as a group from the Lifelong AIDS Alliance walked by.[66]

On January 31, 2006, Governor Christine Gregoire signed bill 2661 into law, remarking that "a generation from now, citizens will wonder what took us so long."[67] Opponents of the bill, led by conservative activist Tim Eyman, attempted to overturn it by referendum, but failed to collect the required number of signatures to put it on the ballot.[68]

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

Governor Booth Gardner issued executive orders in 1985 and 1991 prohibiting state agencies and institutions of higher education from discriminating in employment solely on the basis of sexual orientation."[69] Governor Mike Lowry issued a subsequent order in 1993 echoing Gardner's previous two orders.[70] The executive orders do not

[60] Statement of Wash. Sen. Stevens, Wash. Sen. Fl. (Jan. 25, 2006).
[61] Statement of Wash. Sen.Weinstein, Wash. Sen. Fl., (Jan. 25, 2006).
[62] Statement of Wash. Sen. Benson, Wash. Sen. Financial Inst., Housing & Cons. Protection Comm. Statement (Jan. 24, 2006).
[63] Statement of Wash. Sen. Benton, Wash. Sen. Financial Inst., Housing & Cons. Protection Comm. (Jan 24, 2006).
[64] Statement of Wash. Sen. Oke, Wash. Sen. Fl. (Jan 27, 2006).
[65] Statement of Wash. Sen. Mulliken, Wash. Sen. Fl. (Jan 27, 2006).
[66] Rebecca Cook, *Official Quits Over Anti-Gay Remarks,* SEATTLE TIMES, Mar. 4, 2005, at B3
[67] ONE YEAR REPORT, *supra* note 54.
[68] Phuong Cat Le,*supra* note 13.
[69] Wash. Exec. Order No. 91-06 (1991) (rescinding Exec. Order No. 85-09 (1985)).
[70] Wash. Exec. Order No. 93-07 (1993).

describe or reference any procedure under which an employee could file a complaint of discriminatory conduct. They do, however, direct the Washington State Human Rights Commission to "enforce all applicable federal and state laws pertaining to nondiscrimination . . . to ensure compliance with the content and spirit of [the orders]."[71]

2. State Government Personnel Regulations

Pursuant to the Washington Administrative Code and state statute, all directors of state agencies are required to publish statements affirming equal employment opportunity regardless of sexual orientation.[72]

D. Local Legislation

Washington's King County, as well as the cities of Seattle, Tacoma and Burien, all have anti-discrimination ordinances that mirror the Washington state anti-discrimination law.

1. King County

The King County ordinance covers both gender identity and sexual orientation, and applies only to public or private employers with eight or more employees.[73]

2. City of Seattle

The Seattle ordinance covers both gender identity and sexual orientation and applies to all employers with one or more employees.[74]

3. City of Tacoma

The Tacoma ordinance covers both sexual orientation and applies only to employers with eight or more employees.[75] In Tacoma, proponents of the anti-discrimination ordinance faced considerable opposition from lawmakers and the general public. The Tacoma City Council first passed an ordinance prohibiting sexual orientation discrimination in 1989, which voters overturned a few months later. In 1990, Tacoma voters again rejected an initiative aimed at reviving the anti-discrimination ordinance.[76] After the City Council passed a new ordinance in 2002, which included gender identity,

[71] Wash. Exec. Order Nos. 85-09; 91-06; Exec. Order No. 93-07.
[72] *See* WASH. CODE ANN. § 356-09-030; WASH. REV CODE §§ 41.06.040, 41.06.150
[73] *See* KING COUNTY ORD. §15399 (gender identity added in 2006).
[74] *See* SEATTLE MUN. CODE § 14.04 *et seq.* (enacted 1973, gender identity added in 1999).
[75] *See* TACOMA MUN. ORD. § 1.29.010 *et seq.* (enacted 2002).
[76] D. Parvaz, *Gays, Lesbians Await Tacoma Vote; Fourth Attempt to Ban Discrimination Expected to Pass,* SEATTLE POST-INTEL., Apr. 23, 2002, at B1.

opposition groups launched another initiative to repeal it, but were ultimately unsuccessful.[77]

4. City of Burien

The Burien ordinance covers both sexual orientation and gender identity and applies to all employers with one or more employees.[78]

5. City of Duvall

The City of Duvall protects city employees from discrimination based on sexual orientation.[79]

6. City of Spokane

The City of Spokane protects city employees from discrimination based on sexual orientation.[80]

7. Snohomish County

Snohomish County protects county employees from discrimination based on sexual orientation.[81]

8. City of Des Moines

The City of Des Moines protects city employees from discrimination based on sexual orientation.[82]

9. City of Olympia

The City of Olympia protects city employees from discrimination based on sexual orientation.[83]

10. City of Vancouver

The City of Vancouver protects city employees from discrimination based on sexual orientation.[84]

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[77] Vanessa Ho, *Fate of Tacoma's Gay Rights Law is on Tuesday's Ballot*, SEATTLE POST-INTEL., Oct. 31, 2002, at B1.
[78] *See* BURIEN MUN. CODE § 8.50.010 *et seq.* (gender identity added in 2004).
[79] DUVALL MUN. CODE § 4.12.
[80] SPOKANE COUNTY CODE § 1.17A.180.
[81] SNOHOMISH COUNTY CODE § 3.57.010.
[82] DES MOINES MUNICIPAL CODE § 2.12.110.
[83] OLYMPIA MUNICIPAL CODE § 01.24.010.
[84] Vancouver Equal Employment Opportunity Statement (1989), *available at* http://vancouver.ca/eeo/sexualharassmentpolicy.htm.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Pedersen v. Snohomish County Center for Battered Women, 2008 Wash. App. LEXIS 1040 (Wash. Ct. App. May 5, 2008).

Pedersen sued her former employer, the Snohomish County Center for Battered Women, alleging that her supervisor created a hostile work environment by making racist and homophobic comments in violation of the state anti-discrimination law. Pedersen alleged that her supervisor once asked aloud why the domestic violence movement attracted so many lesbians and commented that she did not understand why "they" (the lesbians) "all had tattoos and dressed so poorly." This supervisor later transferred one lesbian woman from her position, stating that she dressed poorly. The Court of Appeals held that no hostile work environment existed, noting that "that the supervisor's allegedly discriminatory comments were not sufficiently severe and pervasive to alter the terms and conditions of Pedersen's employment."[85]

Bray v. King County, 2007 U.S. Dist. LEXIS 52976 (W.D. Wash. July 22, 2007).

Plaintiff Lynne Bray, sued her former employer, the King County Department of Transportation, claiming that her supervisors unlawfully discriminated against her based on her sexual orientation in violation of 42 U.S.C. section 1983. Bray claimed that after her supervisors were informed that she is a lesbian, they began treating her differently. Bray alleged that her supervisors changed her assignments to "alienate her from the crew." Bray was later terminated for misconduct. The district court granted King County's motion for summary judgment, holding that Bray failed to produce evidence that her termination was the result of a County policy, custom or practice that allows for discrimination based on sexual orientation.[86]

Haladay v. Thurston County Fire Dist. No. 1, 2005 WL 3320861 (W.D.Wash., Dec 7, 2005).

In *Haladay v. Thurston County Fire District No. 1*, the Court held that sexual orientation discrimination, as such, is not sex discrimination under Title VII of the Civil Rights Act of 1964. The lawsuit was filed by David Haladay and Matthew Dare, a same-sex couple who began living together in early 2003 and married in Canada in 2004. The lawsuit claimed that Haladay was discriminated against due to a disability in connection with his application to become a volunteer fire-fighter, and that Dare, a longtime volunteer fire-fighter, had been discriminated against in his application for a full-time fire-fighting position because of his relationship with Haladay. Dare resisted the

[85] *Pedersen v. Snohomish County Ctr. for Battered Women*, 2008 Wash. App. LEXIS 1040 (Wash. Ct. App. May 5, 2008).
[86] *Bray v. King County*, 2007 U.S. Dist. LEXIS 52976 * 21 (W.D. Wash. July 22, 2007).

characterization of his claim as a sexual orientation discrimination claim, insisting instead that he had suffered sex discrimination in violation of Title VII. The court did not accept his argument, finding that any discrimination based on the relationship of the two men would be sexual orientation discrimination, which is not actionable under Title VII.[87]

Miguel v. Guess, 112 Wn. App. 536 (Wash. Ct. App. 2002).

In 2001, Mary Jo Davis, a lesbian, brought an action against her former employer, a public hospital district, for wrongful termination based on sexual orientation under 42 U.S.C. section 1983 and the federal equal protection clause. Davis's co-Plaintiff and her immediate supervisor, Nan Miguel, was terminated for opposing the hospital's discriminatory treatment of Davis. Dr. Guess, the director of the radiology department at the hospital, made several derogatory comments to Davis throughout the course of her employment. On a number of occasions, Dr. Guess called Davis a "fucking faggot," a "fucking dyke," and a "queer." He also said "I don't think that fucking faggot should be doing vaginal exams and I'm not working with her." One time when Davis did not come to work, Dr. Guess remarked that it was gay pride week and "she was probably off marching somewhere." When Nan Miguel, Davis's supervisor, sent a memo to an administrator objecting to Dr. Guess's behavior, the hospital responded by reducing Davis's hours to three-quarters time. Davis later filed a grievance against the hospital and copied information from patient files to show that her reduction in hours was the result of Dr. Guess's animus toward her. The hospital later fired Davis and Miguel. The Washington Court of Appeals held that Davis raised material issues of fact with respect to whether the hospital and the doctor were "state actors" under section 1983 and remanded the case for trial on Davis's 1983 claims. The Court refused to find, however, that Davis's discharge violated a clear mandate of Washington public policy.[88] The hospital eventually settled with Davis for $75,000.[89]

In 1996, Nan Miguel testified about the hospital's discrimination against Mary Jo Davis before the House Committee on Small Business, Subcommittee on Government Programs in support of H.R. 1863 (ENDA). She testified that before she even decided to hire Davis, Dr. Guess told her that some of the technologists thought Davis was gay, and he advised Miguel not to hire her. Miguel recounted instances in which Dr. Guess was "exceedingly rude" to Davis—refusing to review her cases, refusing to evaluate her performance so she understood what was expected of her, and campaigning to drive her out of the hospital. Miguel was fired shortly after Davis filed her grievance at the hospital.[90]

Webb v. Puget Sound Broad. Co., 138 Lab. Cas. (CCH) P58, 612 (Wash. Ct. App. Dec. 28, 1998).

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[87] *Haladay v. Thurston County Fire Dist. No. 1*, 2005 WL 3320861 (W.D. Wash., Dec 7, 2005).
[88] *Miguel v. Guess*, 112 Wn. App. 536, 554-58 (Wash. Ct. App. 2002).
[89] ACLU, *Following ACLU Lawsuit, Lesbian Illegally Fired from Washington Hospital Received Generous Settlement* (Oct. 8, 2003), http://www.aclu.org/lgbt/discrim/12359prs20031008.html.
[90] H.R. Hrg. 104-87, pp. 157-160, Prepared Testimony of Nan Miguel, *Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act*, Wed. Jul. 17, 1996, 104th Congress, 2nd Session.

In 1997, Webb, a gay man, brought an action against his employer alleging that he was unlawfully terminated based on his sexual orientation in violation of public policy and Seattle Municipal Code section 14.04.[91] Webb was employed by Puget Sound Broadcasting Company as a radio host. On one occasion, the Company accused him of airing an abundance of shows with "gay themes" before they terminated him. The Washington Court of Appeals held for the Broadcasting Company, noting that Webb "did not cite any constitutional, statutory, or regulatory provision establishing that discharging an employee based on his sexual orientation contravened a clear mandate of public policy."[92] The Court further concluded that the WLAD did not violate the equal protection clauses of the federal or state constitutions because it did not "exclude homosexuals from coverage or protect only heterosexuals from discrimination."[93]

Gaylord v. Tacoma Sch. Dist., 88 Wn.2d 286 (Wash. 1977).

In 1977, James Gaylord, a teacher with the Tacoma School District, was terminated after admitting to the Vice Principal that he was a homosexual. The Supreme Court of Washington upheld the trial court's finding that Gaylord's termination was proper, holding that "homosexual conduct by a teacher could reasonably be expected to interfere with his fitness for the job or his ability to discharge its responsibilities." The Court concluded that the repeal of Washington's sodomy law does not deprive sodomy of its immoral character.[94] This case has not been overruled and relies, in part, on a Washington statute stating that, "[i]t shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality. . . ."[95]

2. **Private Employers**

Sturchio v. Ridge, 86 Empl. Prac. Dec. (CCH) P. 42, 67 (E.D. Wash. June 23, 2005).

Stuchio, a transgender woman formerly employed by the Spokane Border Patrol, alleged that her employer unlawfully discriminated against her on account of gender in violation of Title VII. Sturchio alleged that after her transition to female, her employer forbade her from wearing dresses to work and using the women's restroom. She also alleged that her employer ordered her to refrain from discussing personal issues with other employees. The district court held that the Spokane Border Patrol did not violate Title VII, noting that, "there was no evidence that any action taken by the Border Patrol was retaliatory or based on a discriminatory motive."[96]

Jane Doe v. Boeing Co., 121 Wn.2d 8 (Wash. 1993).

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[91] The Seattle Municipal Code declares that it is the policy of the city of Seattle to "assure equal opportunity to all persons, free from restrictions because of ... sexual orientation ...." § 14.04.
[92] *Webb v. Puget Sound Broad. Co*., 138 Lab. Cas. (CCH) P58,612 *8 (Wash. Ct. App. Dec. 28, 1998).
[93] *Id.*
[94] *Gaylord v. Tacoma Sch. Dist.*, 88 Wn.2d 286, 295-98 (Wash. 1977).
[95] WASH. REV. CODE § 28A.405.030.
[96] *Sturchio v. Ridge*, 86 Empl. Prac. Dec. (CCH) P. 42, 67 (E.D. Wash. June 23, 2005).

Jane Doe, a biological male who was planning to have sex reassignment surgery, sued her former employer, The Boeing Company, after she was terminated for wearing "excessively feminine" attire in violation of company directives. Doe alleged that her gender dysphoria was a handicap which the Company failed to accommodate under the WLAD. The Supreme Court of Washington held that gender dysphoria is not a "handicap" under the law and that Boeing nonetheless reasonably accommodated Doe by allowing her to wear unisex clothing at work.[97]

B. **Administrative Complaints**

Smith v. Work Source, Sept. 3, 2008.

In *Smith*, a gay male alleges employment discrimination based on sexual orientation. Dennis Smith alleged that he was asked questions about customers that he served if he had "personal relationships" with any of them. Smith felt that he was being accused of soliciting sex from customers. Smith alleged that he was being investigated for ethics violations concerning his partner's interview at this workplace, even though he took no part in the selection process. Smith alleged that his supervisor has treated him differently ever since she became aware of his sexual orientation. This supervisor allegedly restricted his work hours and deprived him of support staff. Smith also alleged that another coworker has made derogatory comments about his sexuality. The administrative disposition of this case is unavailable.[98]

Spring v. Wash. Dep't of Soc. & Health Serv., Aug. 20, 2008.

In *Spring*, a transgender female alleged employment discrimination and harassment based on sexual orientation/gender identity. Roberta Spring alleged that in a new employee orientation, her supervisor asked "what's your real name? Robert or Roberta?" Spring also alleged that her supervisor did nothing when she reported that she was being harassed by other employees. When Spring went home because of illness one day, her supervisor allegedly yelled: "I'm sick of your excuses. Get off the island." The administrative disposition of this case is unavailable.[99]

Collins v. Wash. Dep't of Corr., Oct. 29, 2007.

In *Collins*, a lesbian alleged employment discrimination based on sex and sexual orientation. J.C. Collins alleged that she was subjected to hostile treatment by subordinate staff and colleagues because of her sexual orientation. She alleged that a colleague told other stuff that she was a lesbian who "hated men" and that male members of her staff would not get ahead working for her. When Collins complained about this colleague's comments, she was told to "pick her battles wisely" and "take the high road." Collins alleged that one supervisor challenged her ability to manage her subordinates and another

[97] *Doe v. Boeing Co.*, 121 Wn. 2d 8 (Wash. 1993).
[98] Wash. State Hum. Rights Comm'n Complaint, *Smith v. WorkSource Thurston County*, No. 34Ex-0238-08-9 (Sept. 3, 2008).
[99] Wash. State Hum. Rights Comm'n Complaint, *Spring v. Wash. State Dep't of Social & Health Svc's* , No. 27EX-0186-08-9 (Aug. 22, 2008).

supervisor suggested that she use the men's restroom instead of the women's. The administrative disposition of this case is unavailable.[100]

Day v. Econ. Opp. Comm'n, Feb. 21, 2007.

In *Day*, a lesbian cook/driver alleged discrimination based on sexual orientation. Sandi Day alleged that after she questioned her supervisor about pay discrepancies in the workplace, her supervisor said "don't you make enough money for Joanne (Day's partner)"? Day alleged that she was treated differently by supervisors after this conversation. She alleges that she was moved to a different worksite, avoided by supervisors, and not given timely updates about trainings. The administrative disposition of this case is unavailable.[101]

McGlumphy v. Wash. Dep't of Soc. & Health Serv., Feb. 6, 2007.

In *McGlumphy*, a lesbian truck driver alleged employment discrimination based on sex and sexual orientation. Bethanie McGlumphy alleged offensive and hostile environment in which employees are allowed to participate in making inappropriate comments about gays and lesbians. Shift supervisor uses the term "homo." Employee made offensive joke about man stereotyped to be "gay." McGlumphy's employment was terminated on January 5, 2007. The administrative disposition of this case is unavailable.[102]

Hayes v. City of Tieton, Nov. 25, 2006.

In *Hayes*, a lesbian operations assistant alleges employment discrimination based on sexual orientation. Tiffani Hayes alleged that when Mayor discovered she was a lesbian, she forbade her to go to City Hall for collecting mail, making copies, and also was forbade from meter reading. Hayes' request for a pay raise was denied. Hayes was fired on August 23, 2006 and the official reason given was that she lied about requesting time off. The administrative disposition of this case is unavailable.[103]

Miller v. Harborview Med. Center-UW Med., July 4, 2006.

In *Miller*, an openly gay public safety officer alleged employment discrimination based on sex, sexual orientation and retaliation. Tyler Joseph Miller was subjected to constant verbal harassment by an administrator. He was called a "faggot" and other demeaning remarks related to his sexual preference. The administrator made several attempts to sabotage Miller's employment. Miller lodged an internal complaint, but

[100] Wash. State Hum. Rights Comm'n Complaint, *Collins v. Wash. State Dep't of Corr.*, No. 34ESX-0319-07-8 (Oct. 20, 2007).
[101] Wash. State Hum. Rights Comm'n Complaint, *Day v. Economic Opp. Comm'n*, No. 06EX-0647-06-7 (Feb. 26, 2007).
[102] Wash. State Hum. Rights Comm'n Complaint, *McGlumphy v. Wash. State Dep't of Social & Health Svc's*, No. 27ESX-0610-06-7 (Feb. 9, 2007).
[103] Wash. State Hum. Rights Comm'n Complaint, *Hayes v. City of Tieton*, No. 39EX-0365-06-7 (Oct. 30, 2006).

administrator retained rank, pay and continued to supervise. The administrative disposition of this case is unavailable.[104]

C. **Other Documented Examples of Discrimination**

County Fire Department

In 1996, a county firefighter was subjected to a hostile work environment based on his sexual orientation.[105]

[104] Wash. State Hum. Rights Comm'n Complaint, *Miller v. Univ. of Wash./Harbor View Med. Ctr.*, No. 17EXZ-0876-06-7 (May 29, 2007).

[105] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Housing & Public Accommodations Discrimination

Beaulieu v. Unemployment Claims TeleCenter-Spokane, Apr. 10, 1998.

In *Beaulieu*, a transsexual woman alleged discrimination in public accommodations based on sexual orientation/gender identity. Rikki Beaulieu alleged that during an unemployment benefits determination interview, a representative asked "don't you think your hormones have caused all your problems at work?" The representative allegedly also questioned Beaulieu's ability to perform her job responsibilities as a transsexual woman. As a result, Beaulieu was denied unemployment benefits.[106]

C. HIV/AIDS Discrimination

In 1988, the Washington Legislature passed a bill prohibiting employment discrimination based on real or perceived HIV or hepatitis status. There are two main exemptions to this Act. First, employers may claim that the absence of HIV or hepatitis is a bona fide occupational qualification of the job in question. Second, the Act does not prohibit "fair discrimination" by insurance entities, health service contractors or health maintenance organizations.[107]

D. Hate Crimes

As of 1993, Washington law prohibits "malicious harassment" and violence against individuals because of their sexual orientation (but not gender identity).[108] Prior to 1993, the Washington legislature repeatedly refused to add sexual orientation to an existing law against hate crimes.[109]

E. Education

In 1999, Washington State University officials cancelled a June conference on issues facing gay and lesbian youth because they said they could not "provide a safe and supportive environment" for the attendees. One e-mail announcement for the event that said organizers were hoping for a large turnout was used by conservative state legislators,

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[106] Wash. State Hum. Rights Comm'n Complaint, *Beaulieu v. Unemployment Claims TeleCenter- Spokane*, No. 32PX-0777-07-8 (Apr. 10, 2008).
[107] WASH. REV. CODE § 49.60.172, 49.60.174.
[108] § 9A. 36.080.
[109] *A Long-Awaited Win*, *supra* note 3.

including Sen. Val Stevens, as evidence "that recruitment of children into the lifestyle was central to the homosexual agenda." Rep. Marc Boldt asked, 'What will the university's position be if an AIDS-free child goes there, only to return HIV-infected?" Sen. Harold Hochstatter said he considered it to be WSU's official promotion of a "lethal lifestyle," and Rep. Bob Sump chided WSU for "inviting children to the university for a public celebration of immorality," saying he anticipated the "opportunity next legislative session to trim away" WSU's budget. Sump also said he planned to use his powers in the State House to defund WSU's Gay/Lesbian/Bisexual/Alliance because it helped organize the event and was a "recruitment center" for gay youth.[110]

Johnson v. Othello High Sch., July 23, 2007.

In *Johnson*, Bryan Johnson alleged, on behalf of his minor son, Jared Johnson, that his son was subjected to gender based harassment over the course of the school year, and that other students wrote "Jared is a faggot and a homo" on his sons' backpack. The father alleged that school took no action to stop the harassment.[111]

Iversen v. Kent Sch. Dist., C97-1194 (D. Wash. 1999).

In 1997, the ACLU represented Mark Iversen in a lawsuit against the Kent School District in which he alleged that the school district did not respond adequately to incidents of harassment based on his perceived sexual orientation. Iversen was subjected to years of verbal and physical abuse by classmates before being brutally beaten in 1996 by eight classmates who yelled epithets such as "faggot" and "queer" while they attacked him. The ACLU and the Kent School District reached a settlement in 1999.[112]

F. **Health Care**

Case v. Wash. Dep't of Soc. & Health Serv., Apr. 17, 2007.

In *Case*, a transsexual (male-to-female) alleged discrimination in public accommodations based on gender identity. Stephanie Case alleged that she was denied access to treatment for chronic back impairment and psychiatric disorders, despite demonstrating medical necessities, because she is a transsexual.[113]

In re Shuffield (2006).

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[110] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 224 (1999 ed.).
[111] Wash. State Hum. Rights Comm'n Complaint, *Johnson v. Othello High School*, No. 01PX-0080-07-8 (July 23, 2007).
[112] *See Iversen vs. Kent Sch. Dist.*, C97-1194 (D. Wash. 1999); *see also* The Cost of Harassment: A Fact Sheet for Lesbian, Gay, Bisexual and Transgender High School Students (ACLU Lesbian & Gay Rts. Project Feb. 9, 2007), *available at* http://www.aclu.org/lgbt/youth/11898res20070209.html.
[113] Wash. State Hum. Rights Comm'n Complaint, *Case v. Wash. State Dep't of Social & Health Svc's*, No. 17PX-0801-06-7 (Mar. 17, 2007).

In 2006, Jonathan Shuffield was denied a medical prescription because he is gay, in violation of the WLAD.[114] Shuffield's doctor claimed that his religious beliefs entitled him to withhold care from Shuffield that he would normally provide to heterosexual patients. Lambda Legal represented Shuffield in negotiations with his former doctor; he received a settlement.[115]

G. **Gender Identity**

Colson v. Wash. Dep't of Licensing, Nov. 17, 2006.

In *Colson*, a male-to-female transsexual alleged discrimination in public accommodations based on gender identity. Joyce Colson claimed that her application for a gender change on her license was severely delayed, which was contrary to the Department's policies and procedures.[116]

Campbell v. Wash. Dep't of Licensing, Oct. 30, 2006.

In *Campbell*, a transgender (male-to-female) alleged discrimination in public accommodations based on gender identity Michael (Michelle) Campbell claimed that she attempted to change her driver's license from male to female but was denied because she had not undergone sex reassignment surgery, despite submitting letters of support from physician and therapist.[117]

Adora v. Wash. Dep't of Labor & Ind.

In *Adora*, a transsexual male alleged insurance discrimination based on sexual orientation and gender identity. Anya Adora claimed that his employer falsified medical information regarding her gender dysphoria and continued to use this false information to deny him industrial insurance benefits.[118]

H. **Parenting**

Washington courts will not consider a parent's sexual orientation in custody and visitation determinations unless it is shown to harm the child.[119] Additionally, a same-

[114] *See* WASH. REV. CODE § 49.60.215. Washington's Law Against Discrimination prohibits discrimination based on sexual orientation and gender identity in public accommodations, which includes medical care providers.
[115] *See* Lambda Legal, Summary: In re Shuffield (2007), *available at* http://www.lambdalegal.org/in-court/cases/in-re-shuffield.html (last visited Sept. 7, 2009).
[116] Wash. State Hum. Rights Comm'n Complaint, *Colson v. Wash. Dep't of Licensing*, No. 34PX-0419-06-7 (Nov. 17, 2006).
[117] Wash. State Hum. Rights Comm'n Complaint, *Campbell v. Wash. State Dep't of Licening*, No. 34PX-0363-06-7 (Oct. 30, 2006).
[118] Wash. State Hum. Rights Comm'n Complaint, *Adora v. Wash. State Dep't of Labor & Ind.*, No. 34IX-0231-06-7 (Sept. 18, 2006).
[119] *See* WASH. REV. CODE § 26.10.100.

sex co-parent with no legal or biological relationship to a child may petition a court to be legally recognized as the child's *de facto* parent.[120]

I. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 1998, the Washington legislature enacted the Defense of Marriage Act, which defines marriage as a union between a man and a woman, over the veto of then Governor Gary Locke.[121] In 2006, the Washington Supreme Court upheld the Defense of Marriage Act, ruling that it did not violate the Washington Constitution.[122]

In 2007, Governor Christine Gregoire signed a comprehensive domestic partnership bill. Under the bill, registered domestic partners have the same rights as married couples to visit health care facilities, make health care decisions, authorize autopsies, dispose of remains, make organ donation decisions and administer the estates of their deceased partners.[123]

2. Benefits

Additionally, the Washington Public Employee Benefits Board grants eligibility for health care benefits to same-sex and transgender partners of state employees.[124]

Rinaldo v. Wash. Health Care Auth., Aug. 23, 2008.

In *Rinaldo*, a lesbian alleged discrimination based on sexual orientation in applying for insurance. Angela Rinaldo and her partner applied as a family unit for coverage through her employer's Basic Health Plan but were denied coverage as a family. The employer stated that Basic Health didn't recognize them as domestic partners[125]

DeGroen v. City of Bellevue (2007).

In 2007, Lambda Legal filed a lawsuit against the City of Bellevue on behalf of three gay public employees. In their complaint, the employees alleged that Bellevue violated the equal protection clause of the state constitution by providing family benefits to spouses and children of married city employees but denying these benefits to the family members of its gay and lesbian employees.[126] A few months later, the ACLU

[120] *See In re* L.B., 122 P.3d 161 (Wash. 2005).
[121] *See* WASH. REV. CODE § 26.04.010; *A Long-Awaited Win for Gay Rights*, supra note 3.
[122] *See* Andersen v. King County, 158 Wn. 2d 1 (Wash. 2006).
[123] WASH. REV. CODE § 26.60.
[124] *See* Press Release, Pub. Employee Benefits Program, PEBB Announces Changes to Domestic Partner Elegibility (July 17, 2008), *available at* http://www.pebb.hca.wa.gov/press/pebb-announces-changes-to-domestic-partner-eligibility.html.
[125] Wash. State Hum. Rights Comm'n Complaint, *Rinaldo v. Wash. State Health Care Auth.*, No. 34IX-0219-08-9 (Aug. 23, 2008).
[126] *See* DeGroen v. City of Bellevue, Case No. 07-2-12286-9 SEA (Pl. Complaint).

dropped the lawsuit after the Bellevue City Council approved an equal family benefits plan for lesbian, gay and other unmarried employees in committed relationships.[127]

[127] *See* Lambda Legal, Summary: DeGroen v. City of Bellvue, http://www.lambdalegal.org/in-court/cases/degroen-v-city-of-bellevu.html (last visited Sept. 6, 2009).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **West Virginia – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

West Virginia state law provides no protection for public employees against job discrimination on the basis of sexual orientation or gender identity. Recent legislative attempts to amend West Virginia's Human Rights Act to prohibit such discrimination have failed.[1] At the local level, two cities and two universities in West Virginia have included sexual orientation in their codes or policies related to employment discrimination.

Documented examples of employment discrimination by state and local government employers against LGBT people in West Virginia include:

- A police officer for the Pineville City Police Department whose harassment, physical assault, and termination were reported in a 1996 book. When the officer's coworkers became suspicious about his sexual orientation, he was sent on calls without any backup. After he was tricked into disclosing his sexual orientation to a coworker, the coworker proceeded to hit him across the face with a night stick, breaking his glasses and cutting his eye. When the officer asked him why he was being attacked, the co-worker responded, "You're a faggot." The next day, the officer was asked for his resignation, and when he refused, he was fired. The officer then filed a grievance against the city, which he won.[2]

- A state employee who was not allowed to use his sick leave to attend his partner's surgery because they were not legally married.[3] The West Virginia Public Employees Grievance Board denied his claim of sexual orientation discrimination, citing the "very specific" personnel regulations that provide that sick leave cannot be approved for an employee to attend to another person's medical care except for those family members listed in the policy.[4]

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[1] *See* W. VA. CODE § 5-11-9 (2001) (commonly known as the "Human Rights Act").*See also* Human Rights Campaign, *West Virginia*, http://www.hrc.org (hereinafter HRC) (last visited Sept. 3, 2009).
[2] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 93-97 (Routledge 1996).
[3] West Virginia Grievance Board Database, http://www.state.wv.us/admin/grievance/Database (last visited Sept. 3, 2009).
[4] *Id.*

- In 1983, the West Virginia Attorney General issued an opinion[5] that gay and lesbian teachers could be fired by their districts under a state law that authorized school districts to fire teachers for "immorality."[6] The Attorney General opined that homosexuality was immoral in West Virginia even though the state decriminalized same-sex sexual behavior in 1976. While the Attorney General said homosexuality must be shown to affect the person's fitness to teach, that could be shown if the teacher was "publicly known to be homosexual" as opposed to engaging in "private, discreet, homosexuality." He also noted that there were some jobs where "even such publicized sexual deviation" might not interfere with employment in the public sector, such as "university drama teacher(s)" and "custodians."

- A school teacher who brought a discrimination suit against her school board in 1986 after she resigned under duress. Her resignation came after years of public and internal scrutiny following a rumor that she had been romantically involved with another female teacher and complaints from the community that her manner of dress was "too masculine." The school board asked her to appear and explain her personal situation involving the other female teacher. She did, and assured them that she was not involved in any inappropriate behavior. Later, she was given an improvement plan that called for her to change her style of dress to something more feminine, something that the kindergarten students would "be comfortable with." Just prior to her resignation, approximately 400 people appeared to protest her continued presence in the classroom. According to the court, the public outcry arose because of the West Virginia Attorney General opinion which stated that a school board could use public reputation in the community to establish a teacher's homosexuality and could dismiss a "reputed homosexual teacher" for immorality. A trial jury was held and the jury returned a verdict for the board on Conway's claim of duress. The court of appeals affirmed. Conway v. Hampshire County Bd of Educ., 352 S.E.2d 739 (W. Va. 1986).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[5] 60 W. Va. Op. Atty. Gen. 46, 1983 WL 180826 *1 (W.Va.A.G.), Office of the A. G.,W. Va. (Feb. 24, 1983) ("Sexual Offenses: *A county board of education may dismiss a teacher who engages in sexually deviant conduct if the teacher's conduct substantially adversely affects his fitness to teach.*")
[6] CODE OF W. VA., Ch. 18A, Art. 2, § 8 (1931).

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of West Virginia has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[7]

B. Attempts to Enact State Legislation

In the most recently adjourned legislative session, supporters of S. B. 600 unsuccessfully sought to amend the Human Rights Act,[8] the state's existing non-discrimination law, and the Fair Housing Act[9] to add sexual orientation and gender identity or expression as protected categories.[10] The bill was introduced in the Senate, passed in the Senate, and passed in the House Judiciary Committee, but did not come up for a vote in the House and died when the legislature adjourned. The bill as passed in the Senate defined sexual orientation as "heterosexuality, bisexuality, homosexuality or gender identity or expression, whether actual or perceived."[11] However, the House Judiciary Committee passed an amended version of the bill which simply struck gender identity or expression from the language of the introduced version of the bill.[12] The West Virginia Human Rights Commission, which is statutorily authorized to make recommendations on policies to the governor and Legislature in matters affecting human rights voted to recommend passage of SB 600.[13]

Similar bills were also introduced in the prior legislative session. H. B. 2860 was authored by House members Fleischauer, Doyle, Webster, Brown, Palumbo, Guthrie, and Wells. H. B. 2860 would have added only "sexual orientation" to the categories covered by the Human Rights Act, the state's anti-discrimination statute.[14] There is very little information available related to the legislative history of the bill or any commentary made by its supporters or detractors, except that the bill was introduced and sent to the House Judiciary Committee, wherein no further action was taken. H. B. 2860 died when the 78th Legislature adjourned *sine die*.[15] Another bill from the same legislative session, H. B. 4164 would have prohibited sexual orientation and age

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[7] Lambda Legal, *West Virginia*, http://www.lambdalegal.org/our-work/states/west-virginia.html (last visited Sept. 3, 2009). The West Virginia unlawful discriminatory practice statute protects an individual from discrimination on the basis of an individual's race, religion, color, national origin, ancestry, sex, disability or age. W. VA. CODE § 5-11-9(2) (2001)
[8] W. VA. CODE § 5-11-9(2).
[9] W. VA. CODE § 5-11A-1.
[10] Human Rights Campaign, West Virginia SB 600 Page, http://www.hrc.org/issues/transgender/9334.htm (last visited Sept. 3, 2009).
[11] S.B. 600., 78th Leg., Gen. Sess. (W. Va. 2008)
[12] *Id.* at *H. Jud. Amendment*.
[13] ACLU of West Virginia, *ACLU of WV Builds Senate Bill 600 Coalition*, MOUNTAIN TORCH, Spring 2008, at 3 (citing W. VA CODE § 5-11-8(e)).
[14] H.B. 2860, 78th Leg., Gen. Sess. (W.Va. 2008) (Fleischauer), *text available at* http://www.legis.state.wv.us/Bill_Text_HTML/2008_SESSIONS/RS/Bills/hb2860%20intr.htm (last visited Sept. 3, 2009).
[15] *Id.*

discrimination in the context of civil rights, government agencies and professional occupations, it also failed to make it out of committee.[16]

C. Executive Orders, State Government Personnel Regulations, and Attorney General Opinions

1. Executive Orders

The research, including non-exhaustive research into secondary sources, did not uncover any relevant executive orders.

2. State Government Personnel Regulations

The West Virginia Public Employees Grievance Board (the "Board") governs grievance issues relating to state employees.[17] Covered employees include "any person hired for permanent employment . . . for a probationary, full- or part-time position."[18] There are three levels to the grievance procedure, including an administrator review, alternative dispute resolution, and a hearing with an administrative law judge.[19]

The West Virginia University Board of Governors policy on Affirmative Action and Equal Employment Opportunity is to "[r]ecruit, hire, train, promote, retain and compensate all individuals in [listed] job titles without regard to . . . sexual orientation," among other protected categories.[20] The university also ensures that all personnel actions will be administered without regard to immutable classifications, including sexual orientation.[21] Marshall University has a similar policy.[22]

3. Attorney General Opinions

The research, including non-exhaustive research into secondary sources, did not uncover any directly relevant attorney general opinions.

D. Local Legislation

1. City of Charleston

[16] H.B. 4164, 78th Leg., Gen. Sess. (W. Va. 2008), *text available at*http://www.legis.state.wv.us/Bill_Text_HTML/2008_SESSIONS/RS/Bills/hb4164%20intr.htm (last visited Sept. 3, 2009).
[17] West Virginia Public Employees Grievance Board, Homepage, http://pegboard.state.wv.us (last visited Sept. 3, 2009).
[18] W. VA. CODE § 6C-2-2(e)(1).
[19] *Id.* at §6C-2-4.
[20] W. Va. Univ. Bd. of Govs. Pol'y 34: Affirmative Action and Equal Employment Opportunity § 2-1 (2006), *available at* http://bog.wvu.edu/r/download/4239 (last visited Sept. 13, 2009).
[21] *Id.* at §§2-4.
[22] *See* MARSHALL UNIVERSITY HUMAN RESOURCE SERVICES, CLASSIFIED STAFF HANDBOOK (n.d.), *available at* http://www.marshall.edu/human-resources/handbook/EMPLOYMENT.HTM (last visited Sept 14, 2009).

The Charleston ordinance forbids discrimination in employment and housing based on an individual's sexual orientation.[23] Charleston's ordinance describes sexual orientation as "actual or perceived heterosexuality, bisexuality, or gender-related identity, appearance or behavior of an individual, with or without regard to the individual's assigned sex at birth."[24]

2. City of Morgantown

The Morgantown ordinance states that the city shall strive to eliminate all discrimination in employment, housing, and places of public accommodations by virtue of sexual orientation.[25] Morgantown defines sexual orientation as "having a preference for heterosexuality, homosexuality, or bisexuality, having a history of such preference or being identified with such preference."[26]

[23] CHARLESTON MUN. CODE § 86-261 (2008).
[24] Connie Weber, *Sexual Orientation Law in Place in Charleston*, W. VA. HUM. RESOURCES J.(Winter 2008).
[25] MORGANTOWN MUN. CODE § 153.07 (2001).
[26] *Id.* at § 153.02.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. Public Employees

Conway v. Hampshire County Bd. of Educ., 352 S.E.2d 739 (W. Va. 1986).

In 1986, Linda Conway, an elementary school teacher, brought suit against the school board after she resigned under duress. Her resignation came after years of public and internal scrutiny following a rumor that she had been romantically involved with another female teacher and complaints from the community that her manner of dress was "too masculine." Just prior to her resignation, approximately 400 people appeared to protest Conway's continued presence in the classroom. The public outcry arose because of an Attorney General's opinion that a school board could use public reputation in the community to establish a teacher's homosexuality and that the board could dismiss a reputed homosexual teacher for immorality. A trial jury was held and the jury returned a verdict for the board on Conway's claim of duress. The court of appeals affirmed.[27]

2. Private Employees

Wamsley v. Lab Corp., 2007 U.S. Dist. LEXIS 71702, (N.D. W. Va 2007).

In *Wamsley v. Lab Corp.*,[28] the federal district court for the Northern District of West Virginia assessed whether a claim for sexual orientation discrimination was actionable under the West Virginia Human Rights Act. The district court held that since the West Virginia Supreme Court looks to the federal Title VII discrimination law in its interpretation of the Human Rights Act provisions, and since Title VII jurisprudence does not find sexual orientation discrimination to be actionable, the plaintiff's complaint did not state a claim.[29] The plaintiff had alleged that her supervisor "'made comments indicating that the Plaintiff is gay and treated her different [sic] because of that belief.'"[30] The unpublished opinion does not contain any further facts which explore the sexual orientation discrimination.[31]

3. Administrative Complaints

Research into the database of prior grievances by public employees includes one file related to sexual orientation discrimination. In that grievance, an employee sought

[27] *Conway v. Hampshire County Bd. of Educ.*, 352 S.E.2d 739 (W. Va. 1986).
[28] 2007 U.S. Dist. LEXIS 71702 (N.D. W. Va. 2007).
[29] *Id.* The court also stated that "there are no cases which cite discrimination based upon sexual orientation as an actionable [Title VII] claim." *Id.* at 7.
[30] *Id.* at 5.
[31] *See id.* at 4-5.

to use his sick leave to attend his partner's surgery.[32] The employee alleged that he was discriminated against because he is gay.[33] Despite the fact that the employee had a certificate of union from a church, he did not have a marriage license, which the Board used as the justification for not allowing the employee to use his sick leave.[34] The report cited the "very specific" personnel regulations that provide that sick leave cannot be approved for an employee to attend to another person's medical issues except for those family members listed in the policy: such family members include spouses in marriages recognized by the state, which, in turn, do not include same-sex unions.[35]

C. **Other Documented Examples of Discrimination**

Pineville City Police Department

Jim Blankenship, a gay man, worked as a police officer for the Pineville City Police Department. When his coworkers were suspicious about his sexual orientation, Blankenship was sent on calls without any backup. After Blankenship was tricked into disclosing his sexual orientation to a coworker, his coworker proceeded to hit Blankenship across the face with a night stick, breaking his glasses and cutting his eye. As Blankenship arrested his coworker, he asked him why he did this, he responded, "You're a faggot." The next day, Blankenship was asked for his resignation, and when he refused, he was fired. Blankenship proceeded to file a grievance against the city, which he won. However, even after leaving the police force, the city police continued to harass Blankenship. He decided that he needed to move away from Pineville, and he has decided not to work in law enforcement.[36]

West Virginia Public Schools

In 1983, the West Virginia Attorney General issued an opinion[37] that gay and lesbian teachers could be fired by their districts under a state law that authorized school districts to fire teachers for "immorality."[38] The Attorney General opined that homosexuality was immoral in West Virginia even though the state decriminalized same-sex sexual behavior in 1976. While the Attorney General said homosexuality must be shown to affect the person's fitness to teach, that could be shown if the teacher was "publicly known to be homosexual" as opposed to "private, discreet, homosexuality." He also noted that there were some jobs where "even such publicized

[32] West Virginia Grievance Board Database, http://www.state.wv.us/admin/grievance/Database (last visited Sept. 3, 2009).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 93-97 (Routledge 1996).
[37] 60 W. Va. Op. Atty. Gen. 46, 1983 WL 180826 *1 (W.Va.A.G.), Office of the A. G., W. Va., (Feb.24, 1983) ("Sexual Offenses: *A county board of education may dismiss a teacher who engages in sexually deviant conduct if the teacher's conduct substantially adversely affects his fitness to teach.*")
[38] CODE OF W. VA., Ch. 18A, Art. 2, § 8 (1931).

sexual deviation" might not interfere with employment in the public sector, such as "university drama teacher(s)" and "custodians."

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas

A **Criminalization of Same-Sex Sexual Behavior**

The West Virginia sodomy law was repealed in 1976.[39]

B. **Hate Crimes**

West Virginia's hate crimes law does not explicitly include crimes motivated by sexual orientation or gender identity bias.[40] The protected classes under West Virginia's hate crimes law include race, color, religion, ancestry, national origin, political affiliation, and sex.[41]

C. **Education**

West Virginia's safe schools law is intended to protect students and to promote the general welfare of the students in a non-threatening educational environment.[42] It does not, however, specifically mention the bases of discrimination or harassment from which the law intends to protect students.[43]

Although not by a government actor, after the Supreme Court's ruling in *Boy Scouts of America v. Dale*, an editorial critical of LGBT rights appeared in *Charleston Daily Mail*[44] penned by the head of the West Virginia Family Foundation, a conservative organization seeking to promote "pro-family" values.[45] The editorial rebuked United States Senator Jay Rockefeller for not supporting an amendment which would functionally prohibit public schools from denying the Boy Scouts the ability to meet on school grounds. The author stated that Rockefeller's opposition to the amendment was "raising the banner of tolerance for a lifestyle that civilizations down through time have recognized as perverted and against nature itself. [Rockefeller has] the gall to bring it into the schools where we send our children to get an education."[46] The author further criticized the West Virginia Democratic Party Platform for 2000,

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[39] Laws of W. Va., Ch. 43 at 241(enacted Mar. 11, 1976, eff. June 11, 1976).
[40] *See* W. VA. CODE § 61-6-21 (2001).
[41] *Id.*
[42] *See id.* at § 18-2C-1 *et seq.* (2001).
[43] *See id.*
[44] Kevin McCoy, *Traditional Values are Being Attacked: There's a Campaign to Marginalize the Boy Scouts*, CHARLESTON DAILY MAIL, July 14, 2001, at 5A (hereinafter "*Traditional Values*").
[45] *Id.*; West Virginia Family Foundation, Home Page, http://www.wvfamily.org (last visited Sept. 3, 2009).
[46] McCoy, *Traditional Values*, *supra* note 44..

which recognizes "homosexuality and other perverted sexual orientations as a civil right."[47]

D. Health Care

In West Virginia, except in certain circumstances, a same-sex partner is unable to make medical decisions for his or her partner without an advance directive.[48] A same-sex partner is only authorized to make medical decisions for an incapacitated partner under certain circumstances and is only given such authority under the auspices of being a "close friend" to the incapacitated person.[49] Even then, if the incapacitated person has adult children or parents, the partner is not permitted to exercise the rights of a similarly-situated person whose partner is severely ill.[50] Moreover, if the same-sex partners do have an advance directive drafted, they must ensure that it conforms to certain statutory requirements.[51]

E. Parenting

1. Adoption

As referenced above, West Virginia adoption laws permit any unmarried person, or a husband and wife jointly, to petition to adopt a child.[52] There are no explicit prohibitions against same-sex couples jointly petitioning to adopt or a same-sex partner petitioning to adopt his or her partner's child.[53] However, there have been no cases to test these issues.[54] Moreover, there are no statutes or regulations that address whether adoption proceedings may consider sexual orientation or gender identity as factors in the adoption petition.[55]

2. Custody and Visitation

West Virginia case law suggests that courts will not consider a parent's sexual orientation in custody and visitation hearings, unless one party provides evidence that the parent's sexual orientation harms the minor child.[56] It appears, however, that gay and lesbian parents have been treated differently than other parents when seeking custody and visitation of their children.

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[47] *Id.*
[48] *See* W. VA. CODE §§ 16-30-4; 16-30-8.
[49] See *id.* at § 16-30-8.
[50] *See id.*
[51] W. VA. CODE § 16-30-4.
[52] *Id.* at § 48-22-201.
[53] *Id.*
[54] Human Rights Campaign, West Virginia: West Virginia Adoption Law, http://www.hrc.org/your_community/1122.htm (last visited Sept. 3, 2009).
[55] *Id.*
[56] Human Rights Campaign, West Virginia: West Virginia Custody and Visitation Law, http://www.hrc.org/your_community/1125.htm (last visited Sept. 3, 2009); *see* W. VA. CODE § 48-9-102; § 48-9-401.

In the mid-1980s, two lower court decisions restricted biological parents' custodial and visitation rights due to their relationships with people reputed to be gay.[57] The state Supreme Court reversed these decisions on appeal and ruled that a relationship with a gay, lesbian, or bisexual individual does not qualify as a "substantial change" justifying a change in the custody arrangement between the two parents.[58]

Similarly, the West Virginia Supreme Court has allowed a widowed same-sex partner to petition for custody of her deceased partner's child with whom the widow had no biological or legal relationship.[59] As a result of the court finding that the widowed partner could be considered a "psychological parent," she had the right to petition the court in the custodial proceedings for the infant son she and her partner had intended to raise together.[60] The court limited its ruling, however, to emphasize that this type of adjudication should be exercised with discretion and only used in such unusual or extraordinary cases when intervention is likely to serve the best interests of the child.[61] The West Virginia Supreme Court agreed with the family court finding that the best interests of the child would be served by awarding the widow custody of the child.[62]

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

West Virginia does not provide marriage licenses or any type of relationship recognition for same-sex couples,[63] and also does not recognize any form of same-sex relationship that is treated as a marriage under the laws of another state.:[64] However, the state does allow for a marriage license to be validly issued to a couple, composed of one person who has completed gender-reassignment surgery and a partner of the same birth sex.[65] This marriage is allowable because the State Registrar of Vital Statistics is authorized to make amendments to birth certificates, including those of individuals with court orders and a physician's notarized statement that the individual has completed gender-reassignment surgery.[66]

G. Other Non-Employment Sexual Orientation and Gender Identity Related Laws

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[57] Human Rights Campaign, West Virginia: West Virginia Custody and Visitation Law, http://www.hrc.org/your_community/1125.htm (last visited Sept. 3, 2009); *see also M.S.P v. P.E.P.*, 358 S.E. 2d 442 (W. Va. 1987); *Rowsey v. Rowsey*, 174 W. Va. 692 (W. Va. 1985).
[58] *See Rowsey*, 174 W. Va. at 692.
[59] *Clifford K. v. Paul S.*, 619 S.E.2d 138, 143 (W. Va. 2005).
[60] *Id.* at 143.
[61] *Id.* at 140.
[62] *Id.* at 161.
[63] W. VA. CODE § 48-2-603 (2003); Human Rights Campaign, West Virginia: Marriage/Relationship Recognition Law, http://www.hrc.org/your_community/1133.htm (last visited Sept. 3, 2009).
[64] W. VA. CODE § 48-2-603.
[65] *Id.* at § 16-5-25; W. VA. CODE R. § 64-32-6 (2006); *See also* Lambda Legal Defense Fund, *Sources of Authority to Amend Sex Designation on Birth Certificates* (2009), http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html
[66] W. VA. CODE § 16-5-25 (2006)

West Virginia Code of Judicial Conduct

The West Virginia Code of Judicial Conduct mandates performance of judicial duties to be free from bias or prejudice, including such proscribed conduct on the basis of sexual orientation.[67]

[67] W. VA. CODE OF JUD. CONDUCT, Canon 3(B)(5) (2008).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Wisconsin – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

In 1982 Wisconsin became the first state to pass a comprehensive statute prohibiting sexual orientation discrimination;[1] and its cities, Madison[2] and Milwaukee,[3] recently expanded their local ordinances to prohibit employment and housing discrimination based on gender identity. On the other hand, Wisconsin singled out gays and lesbians from other protected groups when it denied affirmative action programs to remedy sexual orientation discrimination in its landmark 1982 legislation;[4] Milwaukee's Equal Rights Commission, charged with receiving and reviewing complaints of private employer discrimination, has not operated for five years;[5] and Wisconsin's statewide employment discrimination statute excludes gender identity protection[6] and does not provide for a private right of action.[7]

The Wisconsin Department of Workforce Development ("DWD")[8] has the authority to receive and investigate claims of discrimination brought under the state statute.[9] Between 2002 and 2007, thirty-two complaints were filed with the DWD against public employers alleging sexual orientation discrimination.[10] These complaints were filed by employees of the Wisconsin Department of Health and Family Services ("DHFS"), the Wisconsin Public Services Commission ("PSC"), Department of Corrections, University of Wisconsin-Eau Claire, and the Department of Public Safety.[11]

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[1] *See* Wis. Sess. Laws ch. 112 § 901 (1981), *available at* http://bit.ly/EX9mm; *see also* William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS WOMEN'S L.J. 91 (Spring 2007).
[2] MADISON CODE §§ 39.03(2)(hh), 39.03(4) and 39.03(8).
[3] MILWAUKEE CODE §§ 109-41 and 109-45.
[4] Turner, *supra* note 1, at 104-109 (discussing the legislative history that lead to the exclusion of affirmative action).
[5] Interview of Amy Russell, Wis. Dep't of Workforce Dev., Milwaukee. *See also* Milwaukee Equal Rights Comm'n, http://www.ci.mil.wi.us/der/ERC (last visited Sept. 6, 2009) (explaining the City's current policy of referring investigations to state and federal agencies).
[6] WIS. STAT. §§ 111.31 *et seq.*
[7] *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 866 (7th Cir. 1996) (*citing Bachand v. Connecticut Gen. Life Ins. Co.*, 305 N.W.2d 149 (Ct. App. 1981)).
[8] WIS. STAT. § 111.375.
[9] WIS. STAT. § 111.39(1); *see also Aldrich v. Labor & Indus. Rev. Comm'n*, 751 N.W.2d 866, 869 (Wis. Ct. App. 2008) (stating that "[t]he exclusive means of asserting a claim is through the Department of Workforce Development's Equal Rights Division.").
[10] Chart provided by the Williams Institute's Christy Mallory.
[11] *See* Discrimination Complaint, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).

Documented examples of discrimination on the basis of sexual orientation and gender identity in Wisconsin include the following:

- On March 23, 2005, an employee of the State of Wisconsin Department of Corrections filed an administrative complaint with the DWD alleging that she had been discriminated against on the basis of her sexual orientation. The state settled with the employee in a private settlement with undisclosed terms.[12] The employee began to experience hostile treatment from an office mate when she joined the Psychological Services Unit at the Oshkosh correctional facility. The co-worker would abruptly leave the office when the employee would enter the office. After the pattern had persisted for several months, the co-worker approached the employee and told her that "something had been bothering [her] about [the employee]." She proceeded to tell her that the fact that the employee was in a relationship with another female made her "extremely uncomfortable" and she could not work around her. The co-worker began to treat the employee differently than the other employees, making it difficult for the employee to work in the office. The employee reported the co-worker's behavior to her supervisor, who agreed to handle the matter formally. However, the employee's complaint was never addressed. The co-worker's harassing behavior did not stop and the employee eventually suffered a breakdown for which she had to be placed on medical leave for nearly a month. Though the employee again requested that the matter be handled formally, a warden urged her to mediate instead. The mediation failed and no further action was taken by the employer.[13]

- On July 23, 2004, an employee of the State of Wisconsin Department of Health & Family Services filed an administrative complaint with the DWD alleging that he had been discriminated against on the basis of his sexual orientation. The state of Wisconsin settled with the employee, agreeing to let him tender a letter of resignation in lieu of termination and pay his legal fees in exchange for his promise not to sue.[14] At the time of filing, the employee had been a Public Health Educator for the HIV/AIDS program for two years. One co-worker made the employee's work environment particularly difficult, often making derogatory comments to and about the employee, including calling him a "fag," "punk ass," "punk bitch," and "bitch". The co-worker also lodged complaints about the employee's work performance which were later found by a supervisor to be unsubstantiated. Co-workers complained that it was inappropriate for the

[11] Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (May 3, 2006).
[12] Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (May 3, 2006).
[13] Discrimination Complaint, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).
[14] Settlement Agreement and Release, [Redacted] v. Wisconsin Department of Health & Family Services, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR 200403028 (Mar. 7, 2006).

employee to have a book about anal sex on his desk, which the employee was using to prepare for a work-related presentation about HIV transmission. The employee also was forced to take down a desk calendar of men in fitness clothes, while another male employee had a calendar of women in swimming suits at his desk and was not confronted. The Department ultimately terminated the employee alleging that he had been "disrespectful" to a co-worker during a meeting in which he voted against an event she proposed.[15] Brown v. Wis. Dep't of Health & Family Serv., ERD Case No. CR200403028, EEOC Case No. 26GA401756.

- In *Racine Unified School District v. Labor and Industry Review Commission*,[16] decided in 1991, the Racine school board enacted a policy that "excluded" all HIV positive staff from regular attendance at work.[17] The DWD administrative law judge determined that the policy had a disparate impact on gay employees because: (a) seventy-three percent of persons with AIDS are homosexual and bisexual males; (b) one school board member was quoted in a local newspaper as saying he voted for the policy because "he did not believe that homosexuals should be allowed to teach in the school district;" and (c) no other school official attempted to retract that statement.[18] An appeals court reversed that holding[19] but found that the policy discriminated based on handicap.[20]

- A teacher filed a federal lawsuit against the Hamilton School District for failing to respond to severe harassment based on his sexual orientation from students, parents, fellow teachers and administrative staff during his tenure at the school from 1992 to 1995. He alleged that such harassment eventually resulted in a nervous breakdown that lead to his termination. The middle school teacher said that he reported the harassment – including a death threat from a student – and sought to have the district's anti-discrimination policies enforced, but no action was taken. The incidents began soon after he disclosed to a few faculty members that he was gay. According to the lawsuit, constant verbal harassment with slurs like 'faggot' and 'queer' soon followed. The teacher says he began to seek professional help and repeatedly requested a transfer to another school, but 'each request was either ignored or denied.' The teacher further asserts that when he reported that a student threatened to kill him because he was gay, the associate principal told him that 'we can't stop middle school students from talking.' 'Boys will be boys.' The teacher accepted a transfer to an elementary school in 1996 despite his concerns that younger siblings of the same students attend the school. After the transfer, the harassment continued until he ultimately suffered a breakdown and resigned. Upon his resignation, the teacher filed a lawsuit alleging that the school district had violated his right to equal protection by failing

[15] Discrimination Complaint, [Redacted] v. Wisconsin Department of Health & Family Services, Department of Workforce Development, Equal Rights Division, ERD No. CR 200403028 (July 23, 2004).
[16] 476 N.W. 2d 707 (Wis. Ct. App. 1991).
[17] *Racine*, 476 N.W.2d 707, 712 (Wis. App. 1991).
[18] *Racine*, 476 N.W.2d at 718.
[19] *Racine*, 476 N.W.2d at 719.
[20] *Racine*, 476 N.W.2d at 722-723.

to take reasonable measures to prevent further harassment after he reported such conduct to his supervisors. On summary judgment, the District Court held that he failed to raise a genuine issue of material fact and granted the motion in favor of the defendants. On appeal to the Seventh Circuit, the teacher argued that the defendants had "failed to address his complaints in the same manner that they handled complaints of harassment based on race or gender." The Seventh Circuit disagreed; finding that the evidence on record demonstrated that the school had actually made an effort despite limited resources. As such, Court of Appeals affirmed the summary judgment ruling in favor of the defendants.[21] Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002).

- A heterosexual male professor at University of Wisconsin-Whitewater filed suit under Title VII, claiming he had suffered retaliation for complaining about sex discrimination, and claiming that as a heterosexual he suffered discrimination at the hands of the lesbians who were running his department. He also claimed that two straight women in the department were denied tenure because they were friendly with him. He asserted that the lesbians gave him a low merit pay raise and refused to allow him to teach some summer classes that he had taught in the past. University officials denied discrimination or retaliation, but the jury ruled for Albrechtsen on his retaliation charge, awarding him $250,000 for emotional distress, $43,840 for lost income, and $150,000 for legal fees.[22]

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

[21] *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002).

[22] Lesbian & Gay L. Notes (Summer 2001), *available at* http://bit.ly/1OELhH.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

In 1982, Wisconsin became the first state to pass a comprehensive law prohibiting employment discrimination based on sexual orientation. The amended Wisconsin Fair Employment Act ("WFEA")[23] prohibits employment discrimination on the basis of sexual orientation.[24] The statute defines sexual orientation as "having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference."[25] The statute does not cover gender identity. The law prohibits employers, labor organizations, licensing agencies, employment agencies, and "other" people[26] from refusing to hire, barring from employment or terminating an individual based on sexual orientation.[27] It also bars discrimination in promotion, compensation, terms, conditions, and privileges of employment based on an individual's sexual orientation.[28] The statute does not provide for any exceptions and it applies equally to discrimination based on sexual orientation as it does to other protected classes.[29]

The 1982 law that amended the WFEA also amended several other employment-related anti-discrimination statutes to include sexual orientation as a protected class, including: (a) a prohibition against state and municipal employee labor organizations refusing membership because of the individual's sexual orientation;[30] (b) a policy that all state personnel employment actions be based on merit and not an individual's sexual orientation;[31] (c) a prohibition against sexual orientation discrimination in hiring civil servants;[32] and (d) a requirement that all contracts between certain state agencies their contractors prohibit the contractor from discriminating against employees on the basis of sexual orientation.[33] The contractor law also requires state contractors to incorporate

[23] WIS. STAT. §§ 111.31 *et. seq.*; *see* Turner, *supra* note 1, at 91. When Wisconsin amended the WFEA, it also amended numerous other anti-discrimination laws by passing ch. 112, 1981 Wis. Sess. Law 901. No legislative history is available in electronic format. A drafting record of the bill is available on microfiche from the Wisconsin Legislative Reference Bureau. *See generally* Turner, *supra* note 1 (discussing the historical context and files of state representative, David Clarenbach, who was the bill's sponsor); *see also*, Michael J. Keane, *Wisconsin Briefs from the Legislative Reference Bureau: Researching Legislative History in Wisconsin*, BRIEF 06-10 (July 2006), *available at* http://bit.ly/167GGH (explaining available legislative history resources for Wisconsin legislation).
[24] WIS. STAT. § 111.36(1)(d)1.
[25] WIS. STAT. § 111.32(13m).
[26] WIS. STAT. § 111.36(1)(d)1.
[27] WIS. STAT. § 111.36(1)(d)1.
[28] WIS. STAT. § 111.36(1)(d)1.
[29] WIS. STAT. §§ 111.31 *et seq.*
[30] WIS. STAT. §§ 111.70(2); 111.85(2)(b).
[31] WIS. STAT. § 230.01(2)
[32] WIS. STAT. § 230.18.
[33] WIS. STAT. § 16.765(1).

affirmative action hiring programs for certain minority groups but does not include gays and lesbians among such groups.[34]

2. Enforcement & Remedies

The WFEA is administered by the Wisconsin Department of Workforce Development ("DWD").[35] The DWD has the authority to receive and investigate claims of discrimination brought under the statute.[36] An individual that wants to file a discrimination complaint must do so no more than 300 days after the alleged discrimination.[37] If the DWD finds there is probable cause of discrimination, then it "may endeavor to eliminate the discrimination by conference, conciliation or persuasion."[38] If those efforts are unsuccessful, then the DWD can request the discriminating party to answer the complaint before a hearing examiner.[39] If the hearing examiner makes a finding that the respondent engaged in discrimination, then it may order administrative remedies that include back pay, reinstatement, compensation in lieu of reinstatement, and interim earnings.[40] Unfavorable findings can be appealed to the Labor and Industrial Review Committee.[41]

Under the WFEA, a complainant is not offered the opportunity to seek a Right to Sue letter from the DWD and must proceed through the entire administrative process before he or she is entitled to file in court.[42] Only when the DWD had rendered a final decision in the case may the complainant seek judicial review.[43] Further, only when the DWD has made a ruling favorable to the complainant may he or she seek additional remedies by filing a civil action.[44] If a prevailing administrative complainant chooses to file a civil action for additional remedies, he or she may be awarded compensatory and punitive damages as well as attorney's fees and costs.[45] Non-pecuniary, future pecuniary, and punitive damages are subject to the same graduated caps imposed by Title VII.[46]

B. Attempts to Enact State Legislation

None.

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[34] WIS. STAT. § 16.765(1).
[35] Wis. Stat. § 111.375.
[36] WIS. STAT. § 111.39(1); *see also Aldrich v. Labor & Indus. Review Comm'n*, 751 N.W.2d 866, 869 (Wis. Ct. App. 2008) ("The exclusive means of asserting a claim is through the Department of Workforce Development's Equal Rights Division.").
[37] WIS. STAT. § 111.39(1).
[38] WIS. STAT. § 111.39(4)(b).
[39] WIS. STAT. § 111.39(4)(b).
[40] WIS. STAT. § 111.39(4)(c).
[41] WIS. STAT. § 111.39(5).
[42] WIS. STAT. §§ 111.39, 111.395, 11.397.
[43] WIS. STAT. § 111.395.
[44] WIS. STAT. § 111.397.
[45] WIS. STAT. § 111.397(1)(a).
[46] WIS. STAT. § 111.397(2)(a).

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

The Wisconsin Department of Health Services has a personnel policy prohibiting employment discrimination based on sexual orientation.[47] The Wisconsin Technical College System Board[48] and the Department of Veteran Affairs[49] maintain similar policies.

3. Attorney General Opinions

None.

D. Local Legislation

1. City of Madison

In September of 2000, the Madison City Council voted unanimously to amend the City's Equal Opportunities Ordinance to include gender identity as a protected class against employment discrimination.[50] The ordinance also prohibits discrimination based on sexual orientation.[51] The ordinance defines "gender identity" as:

> "[t]he actual or perceived condition, status or acts of 1) identifying emotionally or psychologically with the sex other than one's biological or legal sex at birth, whether or not there has been a physical change of the organs of sex; 2) presenting and/or holding oneself out to the public as a member of the biological sex that was not one's biological or legal sex at birth; 3) lawfully displaying physical characteristics and/or behavioral characteristics and/or expressions which are widely perceived as being more appropriate to the biological or legal sex that was not one's biological or legal sex at birth, as when a male is perceived as feminine or a female is perceived as masculine; and/or 4) being physically and/or behaviorally androgynous." [52]

[47] WIS. ADMIN. CODE [DHS] § 36.10 (2008).
[48] WIS. ADMIN. CODE [TCS] § 6.06 (2008).
[49] WIS. ADMIN. CODE [VA] § 1.13 (2008).
[50] Judith Davidoff, *Council Bans Gender Identity Discrimination*, CAP. TIMES, Sep. 20, 2000, at 3A.
[51] MADISON CODE § 39.03(1).
[52] MADISON CODE § 39.03(2)(t).

The ordinance also defines "sexual orientation" as "homosexuality, heterosexuality, bisexuality and gender identity by preference or practice."[53] All of the provisions that enumerate the protected classes mention sexual orientation but not gender identity, and the definition of sexual orientation encompasses gender identity, so a discrimination claim based on gender identity would be brought as a claim based on sexual orientation under this ordinance.[54]

The Madison law creates the Madison Equal Opportunities Commission, which has the authority to hear complaints of discrimination against private entities.[55] Since 1988, the Commission has received 136 sexual orientation employment discrimination complaints.[56] Complaints against the city are handled internally by the City's Affirmative Action Department.[57]

2. City of Milwaukee

In 2007, the City of Milwaukee amended its Equal Rights law to include gender identity as a protected class against employment discrimination.[58] Under the Milwaukee law, "gender identity" means "a gender-related identity, appearance, expression or behavior of an individual, regardless of the individual's assigned sex at birth."[59] "Sexual orientation" means "homosexuality, heterosexuality, and bisexuality by preference or practice."[60] The ordinance creates an Equal Rights Commission that has the power to receive complaints and pursue remedies for violations of the law.[61] However, the Commission has not met in approximately five years. Instead, Milwaukee has been diverting investigations to state and federal agencies.[62] This has had the deleterious effect of eliminating the ability to bring a complaint and seek a remedy for gender identity discrimination with the Milwaukee Equal Rights Commission.

E. Occupational Licensing Requirements

The WFEA prohibits sexual orientation discrimination by licensing agencies.[63]

[53] MADISON CODE § 39.03(2)(hh).
[54] *See* MADISON CODE §§ 39.03(1), 39.03(2)(hh) and 39.03(8).
[55] MADISON CODE § 39.03(10).
[56] Letter and Chart from Cindy Wick, Executive Assistant, Madison Department of Civil Rights (on file with author).
[57] Telephone Interview with Cindy Wick, Executive Assistant, Madison Department of Civil Rights.
[58] MILWAUKEE CODE § 109-1; *see also* http://www.ci.mil.wi.us/EqualRightsCommissio19612.htm.
[59] MILWAUKEE CODE § 109-3(11).
[60] MILWAUKEE CODE § 109-3(19).
[61] MILWAUKEE CODE § 109-5(4)(b).
[62] *See supra* notes 9-11, and accompanying text.
[63] WIS. STAT. § 111.36(1)(d)1.

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

A. Case Law

1. State & Local Government Employees

Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002).

Schroeder, a gay teacher, filed a federal lawsuit against the Hamilton School District for failing to respond to severe harassment he says he endured from students, parents, fellow teachers and administrative staff during his tenure at the school from 1992 to 1995. He alleged that such harassment eventually resulted in a nervous breakdown that lead to his termination. The middle school teacher said that he reported the harassment – including a death threat from a student – and sought to have the district's anti-discrimination policies enforced, but no action was taken.

The incidents began soon after Schroeder disclosed to a few faculty members that he was a homosexual. Word began to spread that the teacher was gay the year after he was hired, during the 1993-94 school year. According to the lawsuit, constant verbal harassment with slurs like 'faggot' and 'queer' soon followed. The teacher says he began to seek professional help and repeatedly requested a transfer to another school, but 'each request was either ignored or denied,' according to court papers. The teacher further asserts that when he reported that a student threatened to kill him because he was gay, the associate principal told him that 'we can't stop middle school students from talking.' 'Boys will be boys,' she reportedly said. The teacher accepted a transfer to an elementary school in 1996 despite his concerns that younger siblings of the same students attend the school. After the transfer the harassment continued until he ultimately suffered a "mental breakdown" and resigned.

Upon his resignation, Schroeder filed a lawsuit alleging that the school district had violated his right to equal protection by failing to take reasonable measures to prevent further harassment after he reported such conduct to his supervisors. On summary judgment, the District Court held that Schroeder failed to raise a genuine issue of material fact and granted summary judgment in favor of the defendants. On appeal to the Seventh Circuit, Schroeder argued that the defendants had "failed to address his complaints in the same manner that they handled complaints of harassment based on race or gender." The Seventh Circuit disagreed; finding that the evidence on record demonstrated that the school had actually made an effort despite limited resources. As such, the Court of Appeals affirmed the summary judgment ruling in favor of the defendants.[64]

[64] *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002).

Racine Unified Sch. Dist. v. Labor and Indus. Review Comm'n, 476 N.W.2d. 707 (Wis. Ct. App. 1991).

In *Racine Unified School District v. Labor and Industry Review Commission,*[65] the Racine school board enacted and published a policy that "excluded" all HIV positive staff from regular attendance at work and placed HIV positive employees on either sick leave or a leave of absence.[66] The teacher's union brought a claim under the WFEA for discrimination based on sexual orientation and handicap. The union argued that the policy would have a disparate impact on homosexuals. In agreeing with the union, the administrative law judge relied up on the following facts: (a) seventy-three percent of persons with AIDS are homosexual and bisexual males; (b) one school board member was quoted in a local newspaper as saying he voted for the policy because "he did not believe that homosexuals should be allowed to teach in the Racine Unified School District;" and (c) no attempt by any school official was made to retract this statement.[67] But the court of appeals found the administrative law judge's analysis insufficient to support a disparate impact theory, thereby ruling that the policy did not discriminate based on sexual orientation.[68] However, the court did find that the policy discriminated based on handicap.[69]

Hazelton v. State Personnel Comm'n, 505 N.W.2d 793 (Wis. App. 1993).

In *Hazelton v. State Personnel Commission,*[70] decided in 1993, the Wisconsin Army National Guard involuntarily transferred Hazelton to standby reserve after he tested positive for HIV.[71] Hazelton had served for 27 years, and this action prevented him from eligibility for retirement benefits.[72] Hazelton brought a claim under the WFEA for discrimination based on sexual orientation and handicap. The court did not reach the merits of his claim, however, because it found that the federal policy that the Wisconsin Army National Guard was enforcing against Hazelton preempted the WFEA.[73]

B. **Administrative Complaints**

WFEA complaints must be filed with the Department of Workforce Development's Equal Rights Division. Wisconsin has published a detailed guide for the raising, investigating, and hearing of employment discrimination complaints brought before the DWD.[74] Sexual orientation discrimination complaints brought against private actors for the years 2002 to 2007 numbered 79, 59, 71, 54, 46, and 54, respectively.[75] Sexual orientation discrimination complaints brought against public employers for that

[65] *Racine*, 476 N.W.2d at 707.
[66] *Racine*, 476 N.W.2d at 712.
[67] *Racine*, 476 N.W.2d at 718.
[68] *Racine*, 476 N.W.2d at 719.
[69] *Racine*, 476 N.W.2d at 722-723.
[70] *Hazelton v. State Personnel Comm'n*, 505 N.W.2d 793 (Wis. App. 1993).
[71] *Hazelton*, 505 N.W.2d at 795.
[72] *Hazelton*, 505 N.W.2d at 795.
[73] *Hazelton*, 505 N.W.2d at 798.
[74] WIS. ADMIN. CODE §§ 218 *et seq*.
[75] Chart of Annual Reports of Discrimination, 2002-07 (on file with the Williams Institute).

same period numbered 3, 11, 3, 5, 5, and 5, respectively.[76] These complaints were filed by employees of the Wisconsin Department of Health and Family Services ("DHFS"), the Wisconsin Public Services Commission ("PSC"), Department of Corrections, University of Wisconsin-Eau Claire, and the Department of Public Safety.[77]

> [Redacted] v. State of Wisconsin Dep't of Corr., ERD Case No. CR200500985 (May 3, 2006).

On March 23, 2005, an employee of the State of Wisconsin Department of Corrections filed an administrative complaint with the Equal Rights Division of the Department of Workforce Development alleging that she had been discriminated against on the basis of her sexual orientation. The employee began to experience hostile treatment from an officemate when she joined the Psychological Services Unit at the Oshkosh correctional facility. The co-worker would abruptly leave the office when the employee would enter the office. After this pattern had persisted for several months, the co-worker approached the employee and told her that "something had been bothering [her] about [the employee]." She proceeded to tell her that the fact that the employee was in a relationship with another female made her "extremely uncomfortable" and she could not work around her. The co-worker began to treat the employee differently than the other employees, making it difficult for the employee to work in the office. The employee reported the co-worker's behavior to her supervisor who agreed to handle the matter formally. However, the employee's complaint was never addressed. The co-worker's harassing behavior did not stop and the employee eventually suffered a breakdown for which she had to be placed on medical leave for nearly a month. Though the employee again requested that the matter be handled formally, a warden urged her to mediate instead. The mediation failed and no further action was taken by the employer.[78] The state of Wisconsin settled with the employee in a private settlement with undisclosed terms.[79]

> Brown v. Wis. Dep't of Health & Family Serv., ERD Case No. CR200403028, EEOC Case No. 26GA401756.

On July 23, 2004, an employee of the State of Wisconsin Department of Health & Family Services filed an administrative complaint with the Equal Rights Division of the Department of Workforce Development alleging that he had been discriminated against on the basis of his sexual orientation. At the time of filing, the employee had been a Public Health Educator for the HIV/AIDS program for two years. The employee was

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[76] Chart of Annual Reports of Discrimination, 2002-07 (on file with the Williams Institute).
[77] *See* Discrimination Complaint, [Redacted] v. State of Wisconsin Dep't of Corr., Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).
[77] Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (May 3, 2006).
[78] Discrimination Complaint, [Redacted] v. State of Wisconsin Dep't of Corr., Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).
[79] Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD Case No. CR200500985 (May 3, 2006).

forced to take down a desk calendar of men in fitness clothes, while another male employee had a calendar of women in swimming suits at his desk and was not confronted. Co-workers complained that it was inappropriate for the employee to have a book about anal sex on his desk, which the employee was using to prepare for a work-related presentation about HIV transmission. One co-worker made the employee's work environment particularly difficult, often making derogatory comments to and about the employee, including calling him a "fag," "punk ass," "punk bitch," and "bitch". The co-worker also lodged complaints about the employee's work performance which were later unsubstantiated by a supervisor. The Department ultimately terminated the employee alleging that he had been "disrespectful" to a co-worker during a meeting in which he voted against an event she proposed.[80] The state of Wisconsin settled with the employee, agreeing to let him tender a letter of resignation in lieu of termination and pay his legal fees of $2,250.00 in exchange for his promise not to sue.[81]

[Redacted] v. State of Wisconsin Dep't of Corr., ERD Case No. CR 200303555 (Aug. 27, 2003).

On August 27, 2003, an employee of the State of Wisconsin Department of Corrections filed an administrative complaint with the Equal Rights Division of the Department of Workforce Development alleging that she had been discriminated against on the basis of her sexual orientation. The employee was denied training on multiple occasions by a hostile supervisor who often demeaned her.[82] She was granted a hearing, but her claim was dismissed because she failed to appear for the hearing.[83]

C. **Other Documented Examples of Discrimination**

University of Wisconsin-Whitewater

Professor Steven Albrechtsen of University of Wisconsin-Whitewater filed suit under Title VII, claiming he had suffered retaliation for complaining about sex discrimination, and claiming that as a heterosexual he suffered discrimination at the hands of the lesbians who were running his department. He also claimed that two straight women in the department were denied tenure because they were friendly with him. He asserted that the lesbians gave him a low merit pay raise and refused to allow him to teach some summer classes that he had taught in the past. University officials denied discrimination or retaliation, but the jury ruled for Albrechtsen on his retaliation charge,

[80] Discrimination Complaint, [Redacted] v. Wisconsin Department of Health & Family Services, Department of Workforce Development, Equal Rights Division, ERD No. CR 200403028 (July 23, 2004).
[81] Settlement Agreement and Release, [Redacted] v. Wisconsin Department of Health & Family Services, Wisconsin Department of Workforce Development, Equal Rights Division, ERD Case No. CR 200403028 (Mar. 7, 2006).
[82] Discrimination Complaint, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD Case No. CR 200303555 (Aug. 27, 2003).
[83] Order of Dismissal, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD Case No. CR200303555 (July 23, 2004).

awarding him $250,000 for emotional distress, $43,840 for lost income, and $150,000 for legal fees.[84]

[84] Lesbian & Gay L. Notes (Summer 2001), *available at* http://bit.ly/1OELhH.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

The Wisconsin legislature repealed the state's sodomy law in 1983.[85] There is no online legislative history available for this act.[86]

B. Housing & Public Accommodations Discrimination

The same 1982 law that amended the employment discrimination statutes to include sexual orientation also amended the equal housing laws to include sexual orientation as a protected class.[87] Wisconsin law prohibits sexual orientation discrimination in housing, but it does not prohibit gender identity discrimination.[88] Wisconsin law also requires local laws with respect to housing to be at least as protective as the state law, which means they must prohibit housing discrimination based on sexual orientation.[89] There are two municipalities, Madison[90] and Milwaukee,[91] that have expanded their anti-discrimination housing ordinances to include gender identity as a protected class. Further, Wisconsin has a law that expressly prohibits sexual orientation discrimination by housing authorities for elderly people.[92]

The 1982 law also amended the public accommodations law to include sexual orientation as a protected class. Wisconsin law prohibits the following discrimination based on sexual orientation by a public place of accommodation or amusement: (a) charging a higher price; (b) giving preferential treatment; and (c) advertising as a place of public accommodation where any of the facilities will be denied to individuals because of their sexual orientation.[93] The city of Madison has broadened its public accommodations anti-discrimination law to include gender identity as a protected class.[94]

C. HIV/AIDS Discrimination

[85] *See* Wis. Act 17, Sess. Laws 37 (1983), *available at* http://bit.ly/Mg6tw.
[86] Microfiche, Wis. Leg. Ref. Bureau (available by telephone at (608) 266-7040 upon requesting "drafting record" for "Wis. Act 17, Sess. Laws 37 (1983)").
[87] *See* Wis. Sess. Laws ch. 112, 901.
[88] WIS. STAT. §§ 106.50(1) and 106.50(1m)(h).
[89] WIS. STAT. §§ 66.1011(1)-(2).
[90] MADISON CODE § 39.03(4).
[91] MILWAUKEE CODE § 109-41.
[92] WIS. STAT. § 66.1213(3).
[93] WIS. STAT. §§ 106.52(3)(a)1-3.
[94] MADISON CODE § 39.03(5).

In 1985, Wisconsin passed a law making it illegal for an employer to require employees to take an HIV test as a condition of employment or to offer benefits and privileges to employees that take an HIV test.[95]

Research located a couple of published HIV employment discrimination cases where the complainants believed they were being discriminated against because of their sexual orientation.

In *Racine Unified School District v. Labor and Industrial Review Commission*,[96] the Racine school board enacted and published a policy that "excluded" all HIV positive staff from regular attendance at work and placed HIV positive employees on either sick leave or a leave of absence.[97] The teacher's union brought a claim under the WFEA for discrimination based on sexual orientation and handicap. The union argued that the policy would have a disparate impact on homosexuals. In agreeing with the union, the administrative law judge relied up on the following facts: (a) seventy-three percent of persons with AIDS are homosexual and bisexual males; (b) one school board member was quoted in a local newspaper as saying he voted for the policy because "he did not believe that homosexuals should be allowed to teach in the Racine Unified School District;" and (c) no attempt by any school official was made to retract this statement.[98] But the court of appeals found the administrative law judge's analysis insufficient to support a disparate impact theory, thereby ruling that the policy did not discriminate based on sexual orientation.[99] However, the court did find that the policy discriminated based on handicap.[100]

In *Hazelton v. State Personnel Commission*,[101] the Wisconsin Army National Guard involuntarily transferred Hazelton to standby reserve after he tested positive for HIV.[102] Hazelton had served for 27 years, and this action prevented him from eligibility for retirement benefits.[103] Hazelton brought a claim under the WFEA for discrimination based on sexual orientation and handicap. The court did not reach the merits of his claim, however, because it found that the federal policy that the Wisconsin Army National Guard was enforcing against Hazelton preempted the WFEA.[104]

D. **Hate Crimes**

[95] WIS. STAT. § 103.15 (1985).
[96] *Racine*, 476 N.W.2d at 707.
[97] *Racine*, 476 N.W.2d at 712.
[98] *Racine*, 476 N.W.2d at 718.
[99] *Racine*, 476 N.W.2d at 719.
[100] *Racine*, 476 N.W.2d at 722-723.
[101] *Hazelton*, 505 N.W.2d at 793.
[102] *Hazelton*, 505 N.W.2d at 795.
[103] *Hazelton*, 505 N.W.2d at 795.
[104] *Hazelton*, 505 N.W.2d at 798.

Wisconsin's hate crimes law covers sexual orientation, but it does not extend to gender identity.[105] One recent case involved a gay University of Wisconsin-Platteville student who had been verbally and physically assaulted by two men because of his sexual orientation.[106] The case recently became the first anti-gay case to settle that was brought under the civil provision in the hate crime law.[107] The terms of the settlement are undisclosed

E. Education

In 1985, Wisconsin passed a law that protects its students from being denied admission to any public school or participation in any curricular, extra-curricular, pupil services or recreational activity because of their sexual orientation among other factors.[108] In 1990, Wisconsin passed a law that prohibits sexual orientation discrimination in the

In *Nabozny v. Podlesny*,[109] a public school student in Ashland, Wisconsin was subjected to repeated harassment and physical abuse because he was gay.[110] The teachers' and administrators' complete failure to respond to the abuse, despite repeated warnings and attempts to obtain their assistance, resulted in the student's successful § 1983 action brought on equal protection grounds.[111] The court found that the student introduced sufficient evidence to show that the school officials' discriminatory behavior was motivated by his homosexuality.[112] The evidence included a statement by one school official that the student should expect to be harassed because he is gay. The court reached the merits of the equal protection claim and found that there was no "rational basis for permitting one student to assault another based on the victim's sexual orientation."[113]

F. Health Care

An adult may designate his or her same-sex partner to have the authority to make medical decisions on his or her behalf through the state's power of attorney for healthcare law.[114] Adults can also designate their same-sex partners as approved visitors at a hospital or healthcare facility under Wisconsin's patient visitation law.[115]

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[105] WIS. STAT. § 939.645.
[106] *See supra* note 10.
[107] *See* Press Release, Lambda Legal, Lambda Legal Reaches Settlement on Behalf of University of Wisconsin Student Who Suffered Violent Anti-Gay Attack (Mar. 24, 2008), *available at* http://bit.ly/141nln.
[108] WIS. STAT. § 118.13 (1985).
[109] 92 F.3d 446 (7th Cir. 1996).
[110] *Nabozny*, 92 F.3d at 451-452.
[111] *Nabozny*, 92 F.3d at 460.
[112] *Nabozny*, 92 F.3d at 457.
[113] *Nabozny*, 92 F.3d at 458.
[114] WIS. STAT. § 155.10
[115] WIS. STAT. § 146.95.

G. **Parenting**

Wisconsin courts do not typically consider the sexual orientation of a petitioner for custody of a child. A court must determine the best interest of the child, and the statute provides numerous factors to guide the court in making its decision.[116] The petitioner's sexual orientation is not one of the factors. In *Dinges v. Montgomery*,[117] the court gave no weight to the homosexuality of a parent because there was no evidence that it was harmful to the child.[118]

Wisconsin courts will allow a former same-sex partner to petition for visitation where there is no biological or legal relationship to the child. In *In re H.S.H.K.*,[119] the Wisconsin Supreme Court held that a court can award visitation to anyone with a parent-like relationship to the child so long as it is in the best interest of the child.[120] The court also identified the elements necessary to have a parent-like relationship in Wisconsin.[121] The court held that a former same-sex partner could petition for visitation even though the state visitation statute was originally intended for dissolution of marriage cases.[122] The court determined that the legislature did not intend for the statute to be the exclusive means for the court to order visitation, and the court discussed the history of the Wisconsin courts' power to grant visitation.[123] The court held that a "circuit court has equitable power to hear a petition for visitation when it determines that the petitioner has a parent-child like relationship and a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."[124]

Any unmarried adult can adopt a child under Wisconsin law.[125] It is unclear if a same-sex couple could jointly petition to adopt, but the Wisconsin Supreme Court did rule, in *In re Angel*,[126] that a same-sex partner cannot petition to adopt the adopted child of his or her partner. Because the statute only allows adoption of minors whose parents' parental rights have been terminated, the court ruled that the parental rights of both parents must be terminated before a minor is eligible for adoption.[127] This means that if one same-sex partner has adoptive rights, then his or her parental rights would have to be terminated before his or her partner could adopt the minor. This case suggests that petitions for adoption are not jointly available to unmarried couples.

F. **Recognition of Same-Sex Couples**

1. **Marriage, Civil Unions & Domestic Partnership**

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[116] WIS. STAT. § 767.41(5).
[117] 1993 WL 388288 (Wis. Ct. App. 1993).
[118] *Dinges*, 1993 WL 388288 at *3.
[119] 533 N.W.2d 419 (Wis. 1995).
[120] *In re H.S.H.K.*, 533 N.W.2d at 421.
[121] *In re H.S.H.K.*, 533 N.W.2d at 421.
[122] *In re H.S.H.K.*, 533 N.W.2d at 424-425.
[123] *In re H.S.H.K.*, 533 N.W.2d at 430-434.
[124] *In re H.S.H.K.*, 533 N.W.2d at 435.
[125] WIS. STAT. § 48.82(1)(b).
[126] 516 N.W.2d 678, 680 (Wis. 1994).
[127] *In re Angel*, 516 N.W.2d at 683.

In November 2006, Wisconsin voters approved a constitutional amendment banning same-sex marriage.[128] The amendment further states that "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."[129] Accordingly, Wisconsin does not recognize same-sex marriages or civil unions undertaken in other states.[130]

Wisconsin passed a domestic partnership law that was signed by the Governor on June 29, 2009 and went into effect on August 3, 2009.[131] The newly created domestic partnership status confers limited legal protections, including inheritance and survivor protections, family and medical leave, immunity from testifying akin to spousal immunity, and medical, hospital, and visitation rights. According to the May 6, 2009 opinion from the Wisconsin Legislative Council, domestic partnerships provide couples with only 43 legal protections while marriage provides over 200. As such, it concluded that the domestic partnerships "do not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s.13." Nevertheless, a conservative group called "Wisconsin Family Action" filed a petition with the Wisconsin Supreme Court challenging the domestic partnership status as being "substantially similar to that of marriage." The Wisconsin Supreme Court has not yet ruled on whether it will hear the challenge.

2. Benefits for State Employees

In 1992, in *Phillips v. Wisconsin Personnel Commission*,[132] a state employee brought an action against the Department of Health and Social Services claiming discrimination based on sexual orientation and marital status under the WFEA because her partner was being denied health benefits that the spouses of married employees received. The court dismissed her complaint while noting that the basis of her complaint was really a challenge to the state's marriage laws rather than a claim of sexual orientation employment discrimination.[133]

Part of that same bill passed in 2009 to provide for domestic partnerships also amends the state budget to grant such domestic partnership benefits to state employees.[134]

[128] WIS. CONST. Art. XIII, § 13; *see also* Turner, *supra* note 1 at 91.
[129] WIS. CONST. Art. XIII, § 13.
[130] WIS. STAT. § 765.04(1).
[131] Assem. B. 75 (Wis. 2009).
[132] 482 N.W.2d 121 (Wis. Ct. App. 1992).
[133] *Phillips*, 482 N.W.2d at 221-222; non-exhaustive research of electronic sources found no appeals of this decision.
[134] Assem. B. 75 (Wis. 2009).

the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Wyoming – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Wyoming, the least populous state in the United States, currently has no laws that prohibit employment discrimination based on sexual orientation or gender identity. Legislation was introduced in 2009 that would add sexual orientation to the list of enumerated classes that are currently protected against employment discrimination, but the bill would not extend such protections to gender identity.

According to several press reports, gay and lesbian Wyomingites tend to be extraordinarily private about their sexual orientation, in part, out of fear. As former U.S. Senator Alan Simpson put it, "Wyoming is not the most remarkable place for the tolerance of homosexuality."[1] State representative Mike Massie of Laramie told a reporter that there is a "touch of homophobia in the Wyoming legislature."[2] As one *Time Magazine* article reported, a gay man who recently relocated to Wyoming with his same-sex partner "'didn't expect that people in Wyoming would be as closeted as they are'. . . . One reason is that gay bashings still occur. Not long ago, [the man reported], a gay couple w[as] assaulted in a bar in a rural part of Wyoming. One of the victims had to see a doctor for bruised ribs and cartilage damage. But the men didn't file a police report. 'I suspect it has to do with them not wanting to out themselves to the police . . . They were embarrassed to say they were gay."[3] The author also "met a lesbian couple who have lived in the same Casper home for 21 years and yet have never spoken openly with the neighbors about their love for each other. Instead, they let people think they are just roommates." According to the reporter, "Wyoming has constructed an entire culture around the fraught military concept known as 'Don't ask, don't tell.' Nearly every Wyomingite I met used that phrase, or a version of it, with respect to homosexuality. 'People have an open mind but a closed mouth here,'" said former Senator Simpson.[4]

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Wyoming include:

- Two lesbian school administrators from the Sheridan County School District who were terminated after a student complained that they had been seen "holding

[1] Matthew Van Dusen, *Simpson Advocates Tolerance, Gay Rights*, CASPER STAR-TRIB., May 13, 2003, http://www.trib.com/articles/2003/05/11/news/wyoming/963cc49b5a3d1b8c97c49165031193bc.txt.
[2] Steve Lopez, *To be Young and Gay in Wyoming*, 152 TIME 17, Oct. 26, 1998, at 38.
[3] John Cloud, *The New Face of Gay Power*, 162 TIME 15, Oct. 5, 2003, at 52.
[4] *Id*.

hands and walking into a Victoria's Secret store."[5] The superintendent then spoke to the women individually about the allegations, angrily stating that he "knew all about" them. The women were known to be a couple. The following year the school underwent a reorganization and both of their positions were eliminated. The women then applied to several job openings but were not selected for any of them. They filed suit alleging violation of their equal protection rights on the basis of sexual orientation. Following a trial on the merits, the jury found that the school superintendent had unconstitutionally discriminated against the women, awarding them $160,515 in damages. On appeal, the 10th Circuit held that the superintendent was not the final policymaker for the district and, thus, the district could not be liable for his actions. The Circuit court further concluded that in 2003 discrimination on the basis of sexual orientation was not clearly established to be unconstitutional - as *Bowers v. Hardwick*[6] had not been overturned - and, therefore, qualified immunity protected the superintendent from personal liability. Milligan-Hitt v. Bd. of Tr. of Sheridan County Sch. Dist. No. 2, 523 F.3d 1219 (10th Cir. 2008).

- An employee of the Wyoming Department of Family Services who alleged gender discrimination based on comments made by a supervisor about her perceived lesbianism. She originally framed her claim as one of discrimination and retaliation under Title VII of the Civil Rights Act, alleging that she was subjected to a hostile work environment because of her supervisors' misapprehension that she was gay. She subsequently altered her claim to allege that she was discriminated against "because her personal characteristics did not conform to those that her supervisors believed to be appropriate for a woman in society."[7] The District Court granted summary judgment to defendants, holding that "[s]exual orientation is conspicuously and intentionally absent from the list of protected categories under Title VII," and that "[r]ecasting allegations of homophobia as 'sex stereotyping' does not of itself bring the action under the purview of the Civil Rights Act."[8] The Tenth Circuit affirmed the decision, and the U.S. Supreme Court denied the employee's writ of *certiorari*.[9] Brockman v. Wyoming Dep't of Family Serv., 478 U.S. 186 (1986).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

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[5] *Milligan-Hitt v. Bd. of Tr. of Sheridan County Sch. Dist. No. 2*, 523 F.3d 1219 (10th Cir. 2008).
[6] 478 U.S. 186 (1986).
[7] *Brockman v. Wyoming*, No. 00-cv-0087-B, slip. op. (D. Wyo. May 9, 2001).
[8] *Id.*
[9] *Brockman v. Wyoming*, 342 F.3d 1159, 1169 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004).

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Wyoming has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[10]

B. Attempts to Enact State Legislation

For the first time in January 2009, a joint group of state members of the House of Representatives and Senators introduced a bill in the Wyoming state legislature that would prohibit "discrimination based on sexual orientation" in employment.[11] The bill would amend the current employment discrimination act to provide that "It is a discriminatory or unfair employment practice: (i) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment against, a qualified disabled person or any person otherwise qualified, because of age, sex, sexual orientation, race, creed, color, national origin, ancestry or pregnancy."[12] As of February 2, 2009, the bill had not been considered in committee.

C. Executive Orders, State Government Personnel Regulations, and Attorney General Opinions

1. Executive Orders

None. [13]

2. State Government Personnel Regulations

The Wyoming Department of Employment Labor Standards office oversees issues related to state employees. The standards provide, in pertinent part, as follows:

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[10] *See* WYO. STAT. ANN. § 27-9-105 (2007)

> ("It is a discriminatory or unfair employment practice: (i) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment against, a qualified disabled person or any person otherwise qualified, because of age, sex, race, creed, color, national origin, ancestry or pregnancy.").

[11] H.R. 203, 2009 Leg. Sess. (Wyo. 2009) (the bill would also prohibit discrimination on the basis of sexual orientation in juror qualification, enjoyment of public accommodations and facilities, the right to life, liberty, pursuit of happiness or the necessities of life, employment, participation on veterans' commission and education).

[12] *Id.*

[13] *See, e.g.*, Wyoming State Library Executive Order Archive, http://will.state.wy.us/sis/wydocs/execorders.html (last visited Sept. 3, 2009) (Wyoming Executive Order 2000-4 prohibits "discrimination or harassment related to an individual's race, religion, color, sex, national origin, age or disability" but does not include sexual orientation or gender identity.)

Any person claiming to be aggrieved by a discriminatory or unfair employment practice may, personally or through his attorney, make, sign and file with the department within six (6) months of the alleged violation a verified, written complaint in duplicate which shall state the name and address of the person, employer, employment agency or labor organization alleged to have committed the discriminatory or unfair employment practice, and which shall set forth the particulars of the claim and contain other information as shall be required by the department. The department shall investigate to determine the validity of the charges and issue a determination thereupon.[14]

3. **Attorney General Opinions**

None. [15]

D. **Local Legislation**

None.

E. **Occupational Licensing Requirements**

Although many professional commissioning boards may deny and revoke occupational licenses for issues involving "moral turpitude" after providing the subject a fair hearing, most of these statutes require a criminal conviction involving "moral turpitude." [16]

[14] WYO. STAT. ANN. § 27-9-106 (2005).
[15] *See, e.g.*, Wyoming Attorney General Bruce A Salzburg Archive of Formal Opinions, http://attorneygeneral.state.wy.us/98forma2.htm (last visited Sept. 3, 2009).
[16] *See, e.g.*, WYO. STAT. ANN. § 33-30-212 (1997).

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

1. State and Local Government Employees

Milligan-Hitt v. Bd. of Tr. of Sheridan County Sch. Dist. No. 2, 523 F.3d 1219 (10th Cir. 2008).

Two lesbians, who were known to be a couple, filed suit against the Sheridan County school board and two high-ranking administrative officials under 42 U.S.C. § 1983 and the Fourteenth Amendment for allegedly violating the equal protection clause by discriminatorily - on the basis of their sexual orientation - denying them positions to which they applied at the school.[17] The factual predicate involves a 2002 incident in which the women accompanied a school field trip from Wyoming to Montana. Upon their return, the superintendent allegedly received "a complaint from parents who told him that their daughter had seen the couple holding hands and walking into a Victoria's Secret store." The superintendent then allegedly spoke to the women individually about the allegations, angrily stating that he "knew all about" them, which made them feel as though their jobs could be in jeopardy.

The following year the school underwent a reorganization that involved moving and eliminating several administrative positions, including the ones that the plaintiffs held. The women then applied to several job openings but were not selected for any of them. The women claimed that various individuals, "through the superintendent's office, manipulated the hiring selection process . . . to ensure that [plaintiffs] were deprived of future employment as administrators in the District, and they did this because of [plaintiffs'] sexual orientation."

Following a trial on the merits, the jury found that the school superintendent had unconstitutionally discriminated against the women, awarding $160,515 in damages for the superintendent's conduct against the school district but not against the superintendent himself. Both parties appealed, requiring the Tenth Circuit to decide the scope of municipal liability and qualified immunity under § 1983. The three-judge panel reversed the district court's ruling, holding that the superintendent was not the final policymaker for the district and, thus, the district could not be liable for his actions. The Circuit court further concluded that in 2003 discrimination on the basis of sexual orientation was not clearly established to be unconstitutional - as *Bowers v. Hardwick*[18] had not been overturned - and, therefore, qualified immunity protected the superintendent from personal liability.

[17] 523 F.3d 1219 (10th Cir. 2008).
[18] 478 U.S. 186 (1986).

Brockman v. Wyoming Dep't of Family Serv., 478 U.S. 186 (1986).

A state employee alleging, *inter alia*, gender discrimination based on comments made by a supervisor about the employee's perceived lesbianism, which she denied. Ms. Brockman originally framed her claim as one of discrimination and retaliation under Title VII of the Civil Rights Act, alleging that she was subjected to a hostile work environment because of her supervisors' misapprehension that she was gay. She subsequently altered her claim to allege that she was discriminated against "because her personal characteristics did not conform to those that her supervisors believed to be appropriate for a woman in society."[19] The District Court granted summary judgment to defendants, holding that "[s]exual orientation is conspicuously and intentionally absent from the list of protected categories under Title VII," and that "[r]ecasting allegations of homophobia as 'sex stereotyping' does not of itself bring the action under the purview of the Civil Rights Act."[20] The Tenth Circuit affirmed the decision, and the U.S. Supreme Court denied the employee's writ of *certiorari*.[21]

2. **Private Employees**

None.

B. **Administrative Complaints**

None.

C. **Other Documented Examples of Discrimination**

None.

[19] No. 00-cv-0087-B, slip. op. (D. Wyo. May 9, 2001).
[20] *Id.*
[21] 342 F.3d 1159, 1169 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

1. Sodomy Laws

Wyoming repealed its sodomy law in 1977.

B. Hate Crimes

Wyoming does not have a hate crimes law that extends to sexual orientation and gender identity. Following the brutal murder of Matthew Shepard, however, *see infra* Part IV, the Wyoming Legislature introduced several bills defining certain attacks motivated by a victim's identity, including sexual orientation, as "biased-motivated" or hate crimes.[22] None of these legislative attempts has been successful.

One of the most startling and widely publicized hate crimes against LGBT people in the United States involves the 1998 slaying of Matthew Shepard, an openly gay University of Wyoming student. Shortly after midnight on October 7, 1998, in Laramie, Wyoming, 21-year-old Matthew met two men in a bar who offered to give him a ride. Subsequently, he was robbed, pistol whipped, tortured, tied to a fence in a rural area and left to die. A bicyclist discovered Mr. Shepherd 18 hours later in a coma with a smashed skull. Matthew never regained consciousness and was pronounced dead on October 12, 1998.

At trial, the two defendants attempted to use a "gay panic defense," asserting that they were driven to temporary insanity by alleged sexual advances by Matthew. The defendants' then-girlfriends testified that the two defendants intentionally targeted Mr. Matthew because he was gay. The defendants were convicted of murder.

C. Education

The University of Wyoming ("UW"), a publicly-funded state university with its primary campus in Laramie, has an equal employment opportunity/diversity program. Pursuant to this program, the University states that it "is committed to equal opportunities for all persons in all facets of the University's operations" and that:

[22] H.R. 117, 1999 Leg. Sess. (Wyo. 1999); S. 84, 1999 Leg. Sess. (Wyo. 1999); H.R. 132, 1999 Leg. Sess. (Wyo. 1999); S. 46, 2002 Leg. Sess. (Wyo. 2002).

> "[t]he University's policy has been, and will continue to be, one of nondiscrimination, offering equal opportunity to all employees and applicants for employment on the basis of their demonstrated ability and competence without regard to such matters as race, color, religion, sex, national origin, disability, age, veteran status, sexual orientation or political belief."[23]

The UW College of Law further prohibits "[a]ny employer that discriminates for the purposes of hiring on the basis of race, color, religion, national origin, gender, sexual orientation, marital status, age or disability" from using the facilities and services of the law school's Career Services Office.[24] (This policy was suspended with respect to the military in response to the Solomon Amendment, which allows the Secretary of Defense to deny federal grants to institutions of higher education if they prohibit or prevent military recruitment on campus.[25])

D. **Health Care**

Under Wyoming law, a same-sex partner may make medical decisions for his or her incapacitated partner pursuant to a Wyoming statute that permits "an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available" to act as surrogate.[26] The statute, however, only affords the same-sex partner surrogate decision-making rights if one of the spouse, adult children, parents, adult siblings, grandparent or grandchildren are not "eligible to act".[27]

An adult may designate his or her same-sex partner as having the authority to make medical decisions on their behalf through a power of attorney.[28] The power must be in writing and signed by the principal or by another person in the principal's presence and at the principal's expressed direction. It should be either notarized or witnessed by two individuals.

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[23] University of Wyoming, Laramie, Univ. Reg. 3, Rev. 2, June 12, 2007, http://www.uwyo.edu/generalcounselsupport/UniRegs/3,%20rev%202.doc (last visited Sept. 3, 2009).

[24] University of Wyoming College of Law Career Services Office 2007 Equal Opportunity Statement/Non-Discrimination Policy, http://www.uwyo.edu/lawcsosupport/docs/EqualEmploymentOpportunityStatement.pdf (last visited Sept. 3, 2009).

[25] *See* 10 U.S.C. § 983.

[26] WYO. STAT. ANN. § 35-22-406 (2007).

[27] *Id.*

[28] *Id.* at § 35-22-403.

E. Gender Identity

The state registrar of Wyoming will amend an individual's birth certificate upon receipt of a court order verifying that the individual has undergone sex-reassignment surgery and that the individual's name has been changed.[29]

F. Family

1. Custody

According to the Human Rights Campaign ("HRC"), Wyoming courts typically will not consider a parent's sexual orientation in custody and visitation determinations unless it is shown to adversely affect or harm the child(ren).[30] Research revealed only one example of a court finding such an adverse impact. In that 1995 case, the Wyoming Supreme Court concluded that a lesbian mother's sexual expression and her "intensive and unrelenting efforts to immerse the children in her alternative lifestyle, seemingly to the point of indoctrination," amounted to an adverse effect on the children.[31] The Court affirmed a trial court's imposition of severely limited visitation rights on the children's lesbian mother, including a restriction from the children seeing the mother's same-sex partner. Following the parents' initial divorce, the mother initially won primary custody of their children on the condition the she "disavow her lesbianism." After the mother began actively seeing another woman, she agreed to award custody of the children to their father but retained liberal visitation rights. The custody and visitation rights arrangement became contentious, however, because the father's new wife espoused a particularly stern religious view of homosexuality, which led to the couple seeking to restrict the children's visits with the lesbian mother.

In its opinion regarding the custody and visitation dispute, the Wyoming Supreme Court particularly criticized the lesbian mother's "ill-conceived ardor" in "insisting upon fully informing the children as to her lifestyle," including marching with the children in a gay and lesbian pride parade, involving them in the same-sex couple's commitment ceremony, and allowing them to "snuggle" in bed with her and her partner. Although the Court chastised both parents for using the children as pawns in their "lifestyle battle" it nonetheless upheld the trial court's decision to grant custody to the heterosexual father. Even though the high court made numerous statements in its opinion regarding the irrelevance of sexual orientation to the custody and visitation decision, the dissent concludes: "The record quite clearly reveals that the father and [step-mother] worked long and hard at alienating these children from their mother. They should have been held in contempt for what they have done; instead, they are, despite the spin placed on it by the majority, rewarded for their outrageous behavior."

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[29] Wyo. Rules & Regs., Dep't of Health, Vital Records Serv., Ch. 10 § 4(e) (2008).

[30] Wyoming Adoption Laws, Hum. Rts. Campaign State Law Listings, http://www.hrc.org/laws_and_elections/state_law_listing.asp?state=Wisconsin&btnG.x=13&btnG.y=8 (last visited Sept. 3, 2009); *see also* WYO. STAT. ANN. § 20-2-201 (2003) (setting forth a non-exhaustive list of factors that a court shall consider in determining the best interest of the child).

[31] *Hertzler v. Hertzler*, 908 P.2d 946, 949 (Wyo. 1995).

2. **Adoption**

Wyoming law permits "[a]ny adult person who has resided in [Wyoming] during the sixty (60) days immediately preceding the filing of the petition for adoption and who is determined by the court to be fit and competent to be a parent."[32] Although there are no specific statutory prohibitions on LGBT people with regard to adoption, it remains unclear as to whether a court would deem such a person "unfit" or "incompetent" to be a parent. Non-exhaustive research of electronic sources revealed no such examples.

G. **Recognition of Same-Sex Couples**

Wyoming defines marriage as "a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential."[33]

H. **Wyoming Code of Judicial Conduct**

The Wyoming Code of Judicial Conduct states that "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so."[34] It further states that "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section . . . does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding."[35] It also notes that "Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."[36]

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[32] WYO. STAT. ANN. § 1-22-103 (1986).
[33] WYO. STAT. ANN. § 20-1-101 (1977).
[34] WYO. CODE OF JUD. CONDUCT, Canon 3(B)(5).
[35] WYO. CODE OF JUD. CONDUCT, Canon 3(B)(6).
[36] WYO. CODE OF JUD. CONDUCT, Canon 4(A)(commentary).