

LGBTQ Policy Journal

Volume IV
2013 - 2014

All views expressed in the *LGBTQ Policy Journal at the Harvard Kennedy School* are those of the authors or interviewees only and do not represent the views of Harvard University, the John F. Kennedy School of Government at Harvard University, the staff of the *LGBTQ Policy Journal at the Harvard Kennedy School*, the advisory board, or any associates of the journal.

©2014 by the President and Fellows of Harvard College. All rights reserved. Except as otherwise specified, no article or portion herein is to be reproduced or adapted to other works without the expressed written consent of the editors of the *LGBTQ Policy Journal at the Harvard Kennedy School*.

ISSN# 2160-2980

Editor-in-Chief	Albert J. Lee
Managing Editors	Crosby Burns Allister Chang
Editors	Susanna Berkouwer Bryann DaSilva Alfredo Guerra Needham Hurst Lyell Sakaue Andrea Titus
Finance Chair	Patrick Tighe
Publisher	Martha Foley
Faculty Advisor	Richard Parker

Advisory Board

National Gay and Lesbian Task Force	Rea Carey
Human Rights Campaign	Jeff Krehely
John F. Kennedy School of Government at Harvard University	Timothy McCarthy
American Progress	Winnie Stachelberg
Mi Familia Vota Education Fund	CucVu

Acknowledgements

The Editorial Board of the *LGBTQ Policy Journal* would like to recognize the following individuals and organizations for their advisory and/or monetary support of this fourth edition:

The David Bohnett Foundation
Shorenstein Center on Media, Politics and Public Policy
Women and Public Policy Program
Kennedy School Student Government
John Hoag
Christine Houston
Desiree Flores
Martha Foley
Professor Timothy McCarthy
Professor Richard Parker
Members of the *LGBTQ Policy Journal* Advisory Board

(16 September 2012).

113 DSM/INT/14 (9 September 2012); DSM/INT/15 (9 September 2012).

114 For example, UHAI-EASHRI (East African Sexual Health and Rights Initiative).

115 DSM/PLT/05 (14 July 2012); DSM/INT/08 (8 September 2012); DSM/INT/16 (9 September 2012); DSM/INT/27 (16 September 2012).

116 DSM/INT/16 (9 September 2012).

117 DSM/PLT/05 (14 July 2012).

118 DSM/PLT/04 (14 July 2012); DSM/INT/07 (8 September 2012); DSM/INT/19 (16 September 2012).

Discrimination Against State and Local Government LGBT Employees

An Analysis of Administrative Complaints

By Christy Mallory and Brad Sears

ABSTRACT

This article documents evidence of recent discrimination against lesbian, gay, bisexual, and transgender (LGBT) public sector workers by analyzing employment discrimination complaints filed with state and local administrative agencies. We present information about 589 complaints of sexual orientation and gender identity discrimination filed by public sector workers in 123 jurisdictions. We find that discrimination against LGBT people in the public sector is pervasive and occurs nearly as frequently as discrimination in the private sector, and at rates similar to discrimination based on sex and race. Currently, no federal law prohibits discrimination against LGBT people, and most states do not have laws prohibiting such discrimination.

INTRODUCTION

There are slightly more than 1 million lesbian, gay, bisexual, and transgender (LGBT) people working for state and local governments in the United States, and approximately 200,000 LGBT federal civil service employees.¹ LGBT people employed in the public sector have faced a long history of discrimination in the workplace dating back to at least the 1940s.² Currently, LGBT people continue to face severe, and even violent, harassment and discrimination in government workplaces.³

Legal protection from discrimina-

tion for these employees remains an incomplete and complicated patchwork. Currently, no federal law explicitly prohibits discrimination based on sexual orientation or gender identity. However, the Supreme Court has interpreted Title VII of the Civil Rights Act of 1964—prohibition on sex discrimination—to protect against discrimination based on sex stereotypes, and several lower courts and the U.S. Equal Employment Opportunity Commission (EEOC) have interpreted the provision to also prohibit discrimination based on gender identity.⁴ These interpretations have allowed some LGBT employees to bring

successful cases under Title VII. LGBT employees of state and local governments have also found some protection under the U.S. Constitution, but, to date, courts have applied only rational basis review to employment decisions based on sexual orientation—the most lenient form of scrutiny. However, one federal circuit court decision suggests that gender identity discrimination, like sex discrimination, is to receive a more rigorous form of review.⁵ At the state level, most states do not have statutes prohibiting sexual orientation or gender identity discrimination.⁶

In those states and localities that have laws explicitly prohibiting discrimination against LGBT people, data on the number of complaints filed under such laws shows that employees are using the laws to seek remedies for discrimination they experience at work.⁷ Additionally, two studies by the Williams Institute demonstrated that when the number of complaints is adjusted for the number of people with a particular minority trait, the rate of complaints filed alleging sexual orientation discrimination in employment is nearly as high as the rate of complaints filed by women and people of color on the basis of sex or race.⁸

The current study updates past research on employment discrimination complaints filed with state and local administrative agencies by LGBT people who work for state or local governments. The study is based on a survey of 20 states and 201 localities that had sexual orientation and gender identity nondiscrimination laws as of June 2009. Of these jurisdictions, 123 responded to the survey and provided information about 589 complaints filed by public sector employees. In states and localities that provided information about a final administrative decision reached in the case, favorable outcomes

for the employees resulted in an average of 12 percent of the state filings and 19 percent of the local filings. When we adjust the number of complaints for the relevant population, using a methodology similar to the Williams Institute studies,⁹ we find that sexual orientation filings with state agencies are slightly lower but similar for employees in the public sector when compared to the private sector.

Several factors suggest that the actual rate of workplace discrimination against LGBT people may be higher than what was found in the analysis. First, we found evidence that some state and local agencies lack the resources and staff necessary to effectively enforce nondiscrimination laws. Second, LGBT people may be hesitant to file complaints because of a perception of judicial unresponsiveness. Third, LGBT people may choose not to file complaints in order to avoid further “outing” themselves in the workplace. Finally, research suggests that many of these matters are handled internally before formal legal enforcement procedures become necessary.

PRIOR RESEARCH ON SEXUAL ORIENTATION AND GENDER IDENTITY ADMINISTRATIVE COMPLAINTS

Administrative filing data on sexual orientation and gender identity employment discrimination complaints has been collected twice by the U.S. Government Accountability Office (GAO).¹⁰ In 2002, GAO collected 4,788 complaints of sexual orientation and gender identity employment discrimination filed with administrative agencies in eleven states and the District of Columbia.¹¹ The time period for which the data was available varied by state but averaged 6.6 years. In 2009, GAO collected

4,946 complaints of sexual orientation and gender identity employment discrimination filed with administrative agencies in twenty states and the District of Columbia from 2006 to 2008.¹² These numbers include complaints filed by public and private sector employees.

In 2009, the UCLA-RAND Center for Law and Public Policy gathered data on all employment discrimination complaints filed with California’s Department of Fair Employment and Housing between 1997 and 2008.¹³ The study found 6,317 complaints of sexual orientation discrimination—1.8 percent of all employment discrimination complaints filed during that period.¹⁴

In 1996, researchers Norma M. Riccucci and Charles W. Gossett published a study focused on sexual orientation discrimination in public sector employment.¹⁵ They gathered a total of 809 complaints filed under 9 state statutes or executive orders, and 67 complaints filed under local ordinances.¹⁶ Though the research was focused on discrimination against state and local government employees, in many instances, the agencies were unable to separate out complaints filed by private sector employees or to separate employment discrimination complaints from housing or public accommodations complaints.¹⁷

Two studies by researchers at the Williams Institute demonstrated that when the complaint rate is adjusted for the relevant population, the rate of complaints filed alleging sexual orientation discrimination in employment is nearly as high as the rate of complaints filed on the basis of sex or race.¹⁸

METHODOLOGY

Using Riccucci and Gossett’s survey methodology, we updated their administrative data collection. In 2008-2009, we contacted the agencies responsible

for enforcing nondiscrimination statutes in twenty of the twenty-one states that then offered statutory protection from sexual orientation and/or gender identity discrimination. An exception was made for Delaware because its statutory protection had not gone into effect at the time the study was conducted. We also contacted 201 city and county agencies in localities with nondiscrimination ordinances prohibiting sexual orientation and/or gender identity discrimination in employment. The inquiries were made over a period of approximately ten months, from September 2008 through June 2009.¹⁹

Using the data gathered in the survey, we then replicated the methodology of two Williams Institute studies²⁰ to determine the population-adjusted complaint rate for LGB people working in the public sector. This analysis allowed us to compare the rate of discrimination against LGB employees in the private sector to the rate of discrimination against LGB employees in the public sector. We were not able to do a population-adjusted analysis of gender identity complaints due to the lack of available data.

For our analysis, we included only those states that had at least one full year of data between 2003 and 2007 for complaints filed by state and local employees and for complaints filed by employees in all sectors. We included data only for years during which a state’s sexual orientation nondiscrimination statute had been in effect for the full year; for this reason, no data from Iowa was included. We also excluded data from Oregon, which had been collected after the nondiscrimination statute was passed by the legislature but before it went into effect.

State agencies were unable to separate local employee complaints from total complaints filed in California

for the years 2003 through 2007 and in New York in 2007, but did separate those filed by state employees. We included all nonstate employee discrimination complaints as private complaints for California because the small number of local government employees compared to private sector employees (local employees are only 12 percent of private sector employees) suggests that it would be unlikely that the rate of local employee complaints would have a significant impact on the complaint rate for private sector employees. For 2007 in New York, we reported the number of state employee complaints provided by the agency for that year and used the average number of local employee complaints filed in the previous four years to estimate the number of complaints filed by local employees in 2007. We subtracted these two figures from the total number of complaints filed in order to estimate the number of complaints filed by private sector employees that year. For each state, we then calculated an average annual number of complaints per protected group for 2003 to 2007.

To calculate the population-adjusted rates for each state, we divided the average number of complaints filed annually by LGB state and local employees in a state, by the LGB state and local workforce in the state. While no existing surveys provide precise estimates of the size of the LGB workforce in the public and private sectors, estimates of employment patterns of the LGB population can be derived by extrapolating information from nationally representative data sources.

Analyzing data from several population-based surveys, Gary J. Gates estimated that 3.5 percent of adults in the United States identify as LGB.²¹ Applying this 3.5 percent figure to all adults implies that there are approximately 8.2

million LGB adults in the United States. We estimated how many of these 8.2 million LGB adults work for state or local governments in each state using data from the U.S. Census Bureau. Data from the Census Bureau's American Community Survey (2005-2007) provides information about individuals in same-sex couples (those who identify as either as "husbands/wives" or "unmarried partners" on the Census form), including whether they work for federal government, state government, local government, or a private sector employer. Using this data, we determined what percentage of all individuals in same-sex couples work in each of these sectors, in each state. Assuming that single LGB individuals have the same distribution and employment patterns as individuals in same-sex couples, we then applied these percentages to the total number of LGB adults in the U.S. (8.2 million) to estimate the size of the LGB workforce in federal government, state government, local government, and the private sector in each state.

We then divided the average number of complaints filed annually by LGB state and local government employees, by the LGB state and local government workforce in each state. We did the same for complaints made by private sector employees. We then multiplied each of those figures by 10,000 to generate population-adjusted complaint rates for the public and private sector. Thus, the adjusted rates represent the number of discrimination complaints per 10,000 LGB workers in each sector. For California, we included private sector and local employees in the underlying population used to calculate the adjusted complaint rate for the private sector because that data could potentially include complaints by local employees. To determine a national rate, we combined the rates of all the states,

weighting each state's population-adjusted rates by the proportion of the relevant workforce in that state. The proportion of the relevant workforce in a given state is calculated by dividing the number of employees in the relevant workforce of that state by the total number of employees in the relevant workforce of all states included in this study.

FINDINGS

Survey Responses

State Agencies

Thirteen state administrative agencies responded to the survey, providing

a record of 460 complaints filed on the basis of sexual orientation or gender identity by state or local employees from 1999 through 2007 (see Table 1). At least 265 of these complaints were filed by state employees (see Table 2). Five state agencies explicitly refused to provide data in response to the survey; two other state agencies did not respond to the survey (see Table 3).

Although gender identity complaints were requested from all agencies, we did not receive a report of any gender identity discrimination complaint filed by a state or local employee at the state level. Only one state, New Mexico, noted that it had received two complaints of gender identity discrimination, but both were filed by

Table 1 — Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation or Gender Identity by Public Sector Employees Against State and Local Governments Combined

	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total
California	+	16*	22*	23*	27*	24*	22*	26*	23*	183
Iowa	*	*	*	*	*	*	*	*	3	3
Maine	*	*	*	*	*	*	0	5	7	12
Minnesota	4	5	2	4	8	3	4	0	2	32
Nevada	0	2	4	3	3	3	3	4	5	27
New Jersey	2	1	1	2	1	1	4	5	1	18
New Mexico	*	*	*	*	4	7	8	8	4	31
New York	*	*	*	*	18	24	21	26	10*	99
Oregon	*	*	*	*	*	*	*	*	2	2
Rhode Island	0	1	0	0	0	0	2	2	0	5
Vermont	+	+	+	1	2	2	0	3	2	10
Washington	*	*	*	*	*	*	*	3	4	7
Wisconsin	+	+	+	3	11	3	5	5	4	31
Total	6	25	29	36	74	67	69	87	67	460

* No statutory protection in the given year

+ Data not available

× State complaints only

	1999	2000	2001	2002	2003	2004	2005	2006	2007
State	State	State	State	State	State	State	State	State	State
	Local								
California	+	16	22	23	27	24	22	26	23
	+	+	+	+	+	+	+	+	+
Maine	*	*	*	*	*	*	0	2	2
	*	*	*	*	*	*	0	3	5
Minnesota	2	1	0	1	3	1	0	0	1
	2	4	2	3	5	2	4	0	1
New Jersey	2	0	0	0	1	0	2	2	0
	0	1	1	2	0	1	2	3	1
New Mexico	*	*	*	*	1	3	4	5	1
	*	*	*	*	3	4	4	3	3
New York	*	*	*	*	2	5	5	2	10
	*	*	*	*	16	19	16	24	+
Oregon	*	*	*	*	*	*	*	*	1
	*	*	*	*	*	*	*	*	1
Vermont	+	+	+	1	2	2	0	2	0
	+	+	+	+	+	+	0	0	1
Washington	*	*	*	*	*	*	*	1	2
	*	*	*	*	*	*	*	2	2
Wisconsin	+	+	+	1	5	1	2	3	2
	+	+	+	2	6	2	3	2	2

Table 2 — Breakdown of Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation or Gender Identity by Public Sector Employees Against State and Local Governments

State	State Employee Response
Colorado	At time of request, protection too recently enacted to have compiled and maintained data in a way that made release feasible.
Connecticut	Limited data provided.
Hawaii	Refused to provide data because of confidentiality requirement in nondiscrimination law (Haw. Rev. Stat. § 368-4).
Illinois	Unable to provide because Commission does not create or maintain the information requested.
Maryland	Legal Department would not provide the information because it would require them to look up every case. When caller asked if there was a formal request procedure, Legal Department told caller to write a letter to the Executive Director. Executive Director did not respond to the request.
Massachusetts	No response.
New Hampshire	No response.

Table 3 — Responses and Inaction of State Enforcement Agencies that Did Not Provide Data

employees in the private sector. Three states—Maine, Minnesota, and Washington—indicated that gender identity complaints, if any, were included in their sexual orientation complaint data, and they could not separate out any such complaints. Similarly, California codes complaints of gender identity discrimination as complaints of sex discrimination and was unable to separate out the number of complaints filed on the basis of gender identity for that reason.

Five states provided information about the disposition of complaints for at least some period of time and for at least some complaints filed within that period. When evaluating complaint dispositions for the state complaints, we considered settlements and findings of probable cause to be successful outcomes. For those complaints where the agency had already reached a known disposition (eighty-four total), the rates of successful outcomes in these five states were: 50 percent (Oregon), 31 percent (New Mexico), 25 percent (Wisconsin), 13 percent (New York),

and 0 percent (California) (see Table 4). Although there were no successful outcomes in California, many complainants in California requested an immediate right-to-sue (61 percent of complaints filed where there was a known disposition), in order to have their claim heard in court rather than through the administrative process. The average rate of successful outcomes for all cases with known dispositions across the five states that provided such data was 24 percent (see Table 4). The average rate of successful outcomes for cases with known dispositions in the four states other than California was 30 percent.²²

Local Agencies

Of the 201 local agencies contacted, 105 cities and counties responded.²³ Twenty-five reported that they had received 138 complaints filed on the basis of sexual orientation (131 complaints) or gender identity (7 complaints) by public sector employees (see Tables 5 and 6).²⁴ Several agencies in large metropolitan areas failed to respond,

Table 4 — Dispositions of Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation or Gender Identity by Public Sector Employees Against State Governments

State	Period	Settlement	No Probable Cause or Other Dismissal	Probable Cause	Other Administrative*	Unavailable	% Successful Outcomes ^o
California	2005 – 2007	0	14	0	28*	29	0%
New Mexico	2003 – 2007	3	8	1	1	1	31%
New York	2003 – 2007	2	12	0	1	9	13%
Oregon	2007	1	0	0	1	0	50%
Wisconsin	2002 – 2007	2	6	1	3	2	25%

* Cases closed in absence of a merit decision, settlement, or other defined category

^x Includes 26 requests for immediate right-to-sue

^o Based on settlement and probable cause outcomes among all cases with available dispositions.

including those in New York City, San Francisco, and Chicago. Sixteen localities explicitly refused to provide data in response to the survey (see Table 7).

The average rate of successful outcomes among complaints where a

known disposition had been reached was 19 percent.²⁵ Successful outcomes ranged from findings of probable cause by the administrative agency to settlements and the recovery of damages by the complainant after litigation (see

Locality	Period*	Number	Basis	Disposition
Tucson, AZ	2004 – 2009	1	1 sexual orientation	1 withdrawn by complainant
Berkeley, CA	2004 – 2009	4	4 sexual orientation	3 discrimination found 1 unsubstantiated
City of Los Angeles, CA	1999 – 2009	9*	9 sexual orientation	Not available
San Jose, CA	2006 – 2009	9	9 sexual orientation	7 unsubstantiated 2 substantiated
Hartford, CT	2002 – 2009	1	1 sexual orientation	1 currently under review
Gainesville, FL	Not available	1	1 sexual orientation	1 pending
Miami Beach, FL	Not available	1	1 sexual orientation	Not available
Tampa, FL	1995 – 2009	1	1 sexual orientation	1 no reasonable cause
Atlanta, GA	2002 – 2009	12	12 sexual orientation	12 no probable cause
Louisville, KY	Not available	1	1 sexual orientation	1 unsubstantiated
Cincinnati, OH	Not available	3	3 sexual orientation	1 sustained 1 not sustained ^o 1 offender disciplined and moved to resolve
Columbus, OH	Not available	2	2 sexual orientation	2 no probable cause
Portland, OR	2000 – 2009	7	6 sexual orientation 1 gender identity	3 unsubstantiated 3 substantiated 1 withdrawn
Providence, RI	2005 – 2008	5	5 sexual orientation	3 no probable cause 2 probable cause
Harrisburg, PA	Not available	5	5 sexual orientation	2 withdrawn 1 no probable cause 1 administrative closure 1 unknown closure

Table 5 — Administrative Complaints Filed with Local Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by City Employees Against City Governments

* "2009" means approximately May 1, 2009—date on which data requests were made
^x There may also have been complaints of gender identity discrimination filed, however these are coded as sex discrimination and the number cannot be ascertained from the record kept by City of Los Angeles
^o Though the complaints was not sustained in the city administrative process, the employee filed a complaint in court and prevailed

Table 5 — continued

Locality	Period*	Number	Basis	Disposition
Philadelphia, PA	1982 – 2009	40	35 sexual orientation	5 substantiated
			5 gender identity	1 settlement
				13 unsubstantiated
				3 withdrawn
				2 right to sue
				8 other administrative closure
				1 unknown
Pittsburgh, PA	1990 – 2009	6	6 sexual orientation	2 withdrawal of complaint 2 withdrawal with benefits 2 no probable cause
Seattle, WA	2000 – 2009	3	3 sexual orientation	2 withdrawal without benefits 1 no cause
Spokane, WA	Not available	1	1 sexual orientation	1 no discrimination
Tacoma, WA	Not available	1	1 sexual orientation	1 no probable cause
Milwaukee, WI	Not available	1	1 gender identity	Not available
Total		114		

Table 6 — Administrative Complaints Filed with Local Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by County Employees Against County Governments

* "2009" means approximately May 1, 2009—date on which data requests were made

Locality	Period*	Number	Basis	Disposition
Santa Cruz County, CA	Not available	1	1 sexual orientation	1 withdrawn and filed in court where complainant recovered monetary damages
Miami-Dade County, FL	2003 – 2009	3	3 sexual orientation	2 settlement 1 no probable cause
Pinellas County, FL	Not available	1	1 sexual orientation	1 resolved through mediation
King County, WA	1987 – 2009	19	19 sexual orientation	10 no reasonable cause
				2 administrative closure (filed in court)
				1 withdrawn to litigate
				1 withdrawn with settlement
				2 prefinding settlement
				2 no jurisdiction
				1 administrative closure (failure to cooperate)
Total		24		

Locality	City or County Employee Response
San Diego, CA	Information requested is confidential.
San Mateo County, CA	County does not track the information requested.
Breckenridge, CO	Human Resources employee “not at liberty to discuss” the number of filings based on sexual orientation, but if there were complaints, the Colorado Civil Rights Commission would handle them, rather than the city.
Lake Worth, FL	Due to lack of city resources, city will not compile data.
Indianapolis, IN	EEOC handles complaints by city employees against the city.
Cedar Rapids, IA	Complaints against the city are referred to the Iowa Civil Rights Commission.
Davenport, IA	Complaints against the city are referred to the Iowa Civil Rights Commission.
Covington, KY	Complaints are referred to the Kentucky Commission on Human Rights.
Portland, ME	No established body to oversee administrative process so only civil action enforcement is available.
Prince Georges County, MD	Information requested is confidential.
Amherst, MA	Due to budget constraints, City will not compile the data.
Cambridge, MA	Complaints are referred to the Massachusetts Commission Against Discrimination.
Boston, MA	City lacks resources to handle the complaints so they are referred to the Massachusetts Commission Against Discrimination.
Kansas City, MO	EEOC handles complaints by city employees against the city.
Albany County, NY	Records cannot be sorted as requested.
Salt Lake City, UT	Caller was referred to the Utah Antidiscrimination & Labor Division (UALD). Director of UALD told caller that there was no protection for sexual orientation in employment at any level within the state. Director maintained this position even after caller mentioned Salt Lake City ordinance prohibiting discrimination based on sexual orientation in city employment—City Code ch. 2, art. 53 § 35.

Table 7 — Responses Given by City and County Agencies that Refused to Provide Data

Tables 5 and 6).²⁶ Another 3 percent sought an immediate right-to-sue letter or withdrew the complaint to litigate the claim in court (see Tables 5 and 6).

Population-Adjusted Complaint Rates

The rate of discrimination complaints filed by LGB state and local employees was slightly lower than, but similar to, that of filings by LGB employees in the private sector: 3.0 per 10,000 LGB public sector employees compared with 4.1 per 10,000 LGB

private sector employees (see Table 8).

For eight of the eleven states, we were able to compare complaints filed by state employees with those filed by local employees (see Table 9). The rates were similar, with 2.8 sexual orientation complaints filed for every 10,000 state LGB employees and 3.2 filed for every 10,000 local LGB employees.

By using data from a study by the Williams Institute for eight of the eleven states,²⁷ we are able to compare complaints filed by LGB employees in all sectors with those filed on the basis of race and sex. When comparing sexual

State	Sexual Orientation – State and Local	Sexual Orientation – Private
California	4.3 (state only)	5.9 (private and local)
Maine	14.9	3.4
Minnesota	1.7	1.8
Nevada	6.5	5.4
New Jersey	0.9	0.9
New Mexico	5.1	6
New York	2.8	2.7
Rhode Island	2	1.2
Vermont	10.6	0.8
Washington	1.2	0.3
Wisconsin	2.4	6.7
All	3	4.1

Table 8 — Population-Adjusted Complaint Rates (per 10,000) for Sexual Orientation Discrimination Complaints Filed by State and Local Government Employees and Private Sector Employees, 2003-2007

State	Sexual Orientation – State	Sexual Orientation – Local
California	4.3	NA
Maine	8.2	25.1
Minnesota	1.1	2.2
Nevada	NA	NA
New Jersey	0.8	0.9
New Mexico	6.2	4.3
New York	1.5	3.6
Rhode Island	NA	NA
Vermont	15	6.7
Washington	1.1	1.5
Wisconsin	1.9	3.3
All	2.8	3.2

Table 9 — Population-Adjusted Complaint Rates (per 10,000) for Sexual Orientation Discrimination Complaints Filed by State Government Employees and Local Government Employees, 2003-2007

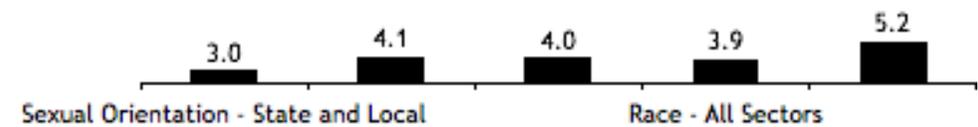


Figure 1 — National Population-Adjusted Complaint Rates Per 10,000

orientation complaints in all states against those based on race and sex, the population-adjusted rates for all three groups were similar: 4.0 for every 10,000 LGB employees; 3.9 for every 10,000 people of color employees; and 5.2 for every 10,000 female employees (see Figure 1, Table 10).

DISCUSSION

Data provided by the states and localities that responded to our survey show that sexual orientation and gender identity discrimination is continuing

to occur in state and local government employment. Our population-adjusted analysis of this data indicates that employment discrimination against LGB people in the public sector is almost as prevalent as it is in the private sector (3 complaints per 10,000 LGB public sector workers and 4.2 complaints per 10,000 LGB private sector workers, across states). This finding is fairly consistent across states. Only Maine, which has a smaller population, stood out in having a pattern that was significantly different. Maine had a higher population-adjusted rate for state and

State	Sexual Orientation – State	Sexual Orientation – Local	Sexual Orientation – State & Local
California	4.3	NA	4.3 (state only)
Maine	8.2	25.1	14.9
Minnesota	1.1	2.2	1.7
Nevada	NA	NA	6.5
New Jersey	0.8	0.9	0.9
New Mexico	6.2	4.3	5.1
New York	1.5	3.6	2.8
Rhode Island	NA	NA	2
Vermont	15	6.7	10.6
Washington	1.1	1.5	1.2
Wisconsin	1.9	3.3	2.4
All	2.8	3.2	3

Sexual Orientation – Private	Sexual Orientation – All Sectors	Race – All Sectors
5.9 (private and local)	5.9	3.5
3.4	4.1	20.8
1.8	1.8	5
5.4	5.5	NA
0.9	0.9	1
6	5.8	NA
2.7	2.7	4.4
1.2	1.3	3.9
NA	NA	NA
0.3	0.4	1.4
6.7	5.8	25.9
4.2	4	3.9

Table 10 — Population-Adjusted Complaint Rates (per 10,000) for Complaints Filed on the Basis of Sexual Orientation, Race, or Sex, by Employment Sector, 2003-2007

local employees. However, the high rate might reflect the limited data available (only two years).

Our analysis also indicates that the frequency of discrimination against LGB employees is similar in state and local government employment, but state filings are slightly lower (2.8 complaints per 10,000 LGB state government workers and 3.2 complaints per 10,000 LGB local government workers, across states). Although the data is limited, this pattern of fewer complaints filed by state employees was seen when comparing the data in six out of the eight states that provided data. Vermont, the only state with two different enforcement agencies—one that handles complaints against the state and one that handles all other complaints—was the only state with a sizeable departure from this pattern. Possibly differences in the effectiveness, outreach, and education efforts of the separate agencies in Vermont may have contributed to its different complaint rates.

We also found fairly high percentages of successful outcomes in four of the five states for which we had information about complaint dispositions. One state, California, reported no successful outcomes in the available data. In Gary Blasi and Joseph Doherty’s analysis of sexual orientation discrimination complaints filed in California by employees in all sectors, they found that 6.6 percent of cases resulted in a successful outcome—a rate lower than what we found for any other state.²⁸ This could be because complainants with strong claims are likely to seek an immediate right-to-sue in order to take their complaints straight to court rather than proceed through the administrative system. Almost two-thirds of the known dispositions in the data we received from California were immediate right to sues (61 percent). Blasi and Doherty found a similar rate of right to sues (59 percent) when they looked at complaints filed on the basis of sexual orientation by employees in

all sectors.²⁹ A request for an immediate right to sue letter often means that the complainant has an attorney willing to take his or her case.³⁰

Our findings suggest that the rate of successful outcomes in state and local discrimination cases may be higher in recent years than in the years prior to 1996 for which Riccucci and Gossett collected data. Both our study and the Riccucci and Gossett study found that the rate of successful outcomes was significantly higher at the local level than at the state level. Riccucci and Gossett found only three successful outcomes among the 226 state-level complaints they gathered which had known dispositions (1.3 percent).³¹ Of the fifty-one local agency complaints with known dispositions, eight (16 percent) resulted in a successful outcome.³² We found a much higher rate of successful outcomes. In our study, 12 percent of state-level complaints resulted in a successful outcome. This calculation includes California data where most (61 percent) of

the known dispositions were immediate right-to-sues. If California data is not included in this calculation, the rate of successful outcomes was 30 percent. At the local level, 19 percent of complaints resulted in a successful outcome.

Two caveats to note are that, first, for some states, Riccucci and Gossett’s data included complaints filed by private sector workers and in arenas other than employment, while our data was strictly limited to public sector employment. It is possible that this difference could have an impact on the rate of successful outcomes. Second, due to variations in how outcomes were reported by the agencies, we likely categorized cases differently than Riccucci and Gossett.³³ Applying our methodology to Riccucci and Gossett’s data results in a higher successful outcome rate than they reported.³⁴

While our research shows that LGBT people are using state and local nondiscrimination laws, several factors suggest that this record of administra-

tive filings understates the pervasiveness of discrimination against LGBT people. These factors are mostly related to the capacity of often underfunded state or local enforcement agencies or to the nature of the discrimination.

First, enforcement agencies may not be able to effectively handle complaints of sexual orientation or gender identity discrimination. Survey responses from enforcement agencies that were unable to provide complaint data indicate that local agencies in particular face limited budgets, insufficient training for staff, and generally lack resources necessary to effectively enforce nondiscrimination laws. Two local agencies that responded to our survey stated that they referred all complaints to the U.S. Equal Employment Opportunity Commission (EEOC), even though there is no federal statute that explicitly prohibits discrimination based on sexual orientation or gender identity.³⁵ Similarly, two localities said that they referred complaints to the state agency that handles employment discrimination complaints, even though the states' (Kentucky and Utah) nondiscrimination statutes do not include sexual orientation or gender identity. Five other localities, in states where state law covers sexual orientation and gender identity, noted that they referred complaints to state administrative agencies, suggesting that they did not have enough resources to enforce claims. One local agency incorrectly said that the city did not provide protection from sexual orientation discrimination. Another said that there was no administrative enforcement mechanism for such complaints and callers had to file in court. Additionally, four localities and two states indicated that they could not compile the data because of limited or inadequate resources, and ninety-six local agencies, almost half of those con-

tacted, never responded in any manner to repeated phone calls, e-mails, letters, and formal requests for information. If these agencies do not have enough resources to compile data or to respond to inquiries, they may not have enough resources to effectively enforce claims.

Other researchers have reported similar experiences with enforcement agencies when studying administrative complaints of sexual orientation or gender identity discrimination. Rodrick A. Colvin concluded that a lack of committed and skillful enforcement staff partially explained why he found fewer complaints of sexual orientation or gender identity discrimination than he expected, given the extent of discrimination reported in surveys.³⁶ Similarly, in their review of public sector discrimination, Riccucci and Gossett found that many state and local laws lacked effective enforcement practices.³⁷ Moreover, approximately 50 percent of the local agencies contacted did not respond at all to their requests for information, a rate of nonresponse similar to what we found.³⁸

Second, LGBT people may be hesitant to file complaints due to a perception of judicial unresponsiveness. In an early review of sexual orientation-based employment discrimination cases, Rhonda Rivera noted that gay and lesbian people "know that a fair shake in the court system is remote."³⁹ Rivera pointed to several homophobic comments courts made prior to 1985 that could explain why gay and lesbian people might be reluctant to bring their claims in front of a judge or jury.⁴⁰ More recent examples from South Dakota,⁴¹ Delaware,⁴² and Mississippi⁴³ demonstrate that some judges are still hostile toward LGBT people.

Third, LGBT people may also be hesitant to file complaints out of fear that they will publicly "out" themselves

by doing so.⁴⁴ Surveys have routinely shown that many employees are not "out" in the workplace; often because they fear discrimination.⁴⁵ Surveys also show that employees who are more open about their sexual orientation in fact report higher percentages of discrimination.⁴⁶ The fear of discrimination could be particularly acute where an employee of one state or local department is required to file a complaint with another department operated by the same state or local government—in smaller cities, these departments may even be located in the same building.

Fourth, fewer complaints may be filed than expected given the extent of discrimination because the matter may be resolved before formal legal procedures become necessary. A 2002 study assessed the effectiveness of nondiscrimination laws that include sexual orientation or gender identity by surveying employment attorneys who had personally handled such cases. The attorneys reported that in all situations but one, the claims were settled before going to court and, in most situations, were settled via letters and negotiation.⁴⁷

Survey data corroborate the existence of underreporting. For example, the Minnesota State Bar Association Survey found that 67 percent of employees who had experienced employment discrimination or harassment based on their sexual orientation or gender identity did not report the incident.⁴⁸ Transgender respondents to the Good Jobs NOW! survey disclosed similar rates of nonreporting with only 12 percent of those discriminated against filing a complaint of any kind and only 3 percent having done so with an agency that had the authority to enforce a nondiscrimination law.⁴⁹

CONCLUSION

LGBT employees who work for state and local governments continue to face discrimination in the workplace. Complaints of sexual orientation and gender identity discrimination filed with state and local administrative agencies provide one source of documented evidence of discrimination against LGBT people. Our analysis of these complaints shows that discrimination against public sector LGBT employees is pervasive. LGB employees of state and local governments are filing complaints under state nondiscrimination laws almost as frequently as LGB employees in the private sector. The rate at which LGB people file complaints under these laws is similar to the rate at which women and people of color file complaints under sex and race nondiscrimination laws. Our analysis also shows that the record of administrative complaints we compiled likely understates the actual rate of discrimination against LGBT people.

Christy Mallory is senior counsel at the Williams Institute. Her research is focused on state-level laws and policies across the United States that impact LGBT people and same-sex couples.

Brad Sears is the executive director and Roberta A. Conroy Scholar of Law and Policy at the Williams Institute, and assistant dean of the UCLA School of Law. His research is primarily focused on discrimination against LGBT people in the workplace and HIV discrimination in health care. He has taught courses on sexual orientation and gender identity law, disability law, and U.S. legal and judicial systems at the UCLA School of Law and Harvard Law School.

ENDNOTES

1 Sears, Brad, Nan D. Hunter, and Christy Mal-lory. Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment. Williams Institute, September 2009, 1-1.

2 Ibid., 5-2-5-34.

3 Ibid., 12-1-12-189.

4 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Schroer v. Billington, 577 F. Supp. 2d. 293 (D.D.C. 2008); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Macy v. Holder, Appeal No. 0120120821 (EEOC 20 April 2012).

5 Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

6 Twenty-one states and the District of Columbia do prohibit sexual orientation discrimination by statute—seventeen states and DC prohibit gender identity discrimination as well. National Gay and Lesbian Task Force. State Nondiscrimination Laws in the U.S. 21 June 2013.

7 U.S. General Accounting Office (GAO). “Sexual Orientation-Based Employment Discrimination: States’ Experience with Statutory Prohibitions.” GAO, 9 July 2002; GAO. “Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data.” GAO, 1 October 2009; Blasi, Gary, and Joseph W. Doherty. California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 50. UCLA-RAND Center for Law and Public Policy, 2010, 27; Riccucci, Norma M., and Charles W. Gossett. “Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience.” American Review of Public Administration 26(2): 175-200, June 1996.

8 Badgett, M.V. Lee, Christopher Ramos, and Brad Sears. Evidence of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity: Complaints Filed with State Enforcement Agencies 1999-2007. Williams Institute, November 2008, 1; Rubenstein, William B. “Do Gay Rights Laws Matter?: An Empirical Assessment.” Southern California Law Review 75: 90, 2001.

9 Badgett, Ramos, and Sears, Evidence of Employment Discrimination, 2-3; Rubenstein, “Gay Rights Laws,” 76-87.

10 Employment Nondiscrimination Act of 2001, Senate Bill 1284, 107th Congress, 2001; Employment Nondiscrimination Act of 2009, Senate Bill 1584, 111th Congress, 2009.

11 GAO, “Sexual Orientation-Based Employment Discrimination.”

12 GAO, “Sexual Orientation and Gender Identity Employment Discrimination.”

13 Blasi and Doherty, California Employment Discrimination Law, 27.

14 Ibid.

15 Riccucci and Gossett, “Employment Discrimination in State and Local Government.”

16 Ibid., 183-184.

17 Ibid.

18 Badgett, Ramos, and Sears, Evidence of Employment Discrimination, 2-3; Rubenstein, “Gay Rights Laws,” 76-87.

19 Agencies that did not provide data, or a reason for refusing to provide data, upon first contact were contacted approximately four additional times. Contacts were made by phone, through e-mail, or by written request sent through regular mail.

20 Badgett, Ramos, and Sears, Evidence of Employment Discrimination, 2-3; Rubenstein, “Gay Rights Laws,” 76-87.

21 Gates, Gary J. How Many People Are Lesbian, Gay, Bisexual and Transgender? Williams Institute, April 2011, 1.

22 The multistate rate was calculated by averaging the individual state successful outcome rates.

23 Ninety-six localities did not respond to the survey: Scottsdale, Arizona; Long Beach, California; Los Angeles County, California; Oakland, California; San Francisco, California; Arvada, Colorado; New Haven, Connecticut; Stamford, Connecticut; Rehoboth Beach, Delaware; Wilmington, Delaware; Broward County, Florida; Gulfport, Florida; Key West, Florida; Monroe County, Florida; Orlando, Florida; Palm Beach, Florida; Sarasota, Florida; West Palm Beach, Florida; Decatur, Georgia; DeKalb County, Georgia; Bloomington, Illinois; Chicago, Illinois; Cook County, Illinois; DeKalb, Illinois; Peoria, Illinois; Springfield, Illinois; Urbana, Illinois; Bloomington, Indiana; Lafayette, Indiana; Michigan City, Indiana; Terre Haute, Indiana; Tippecanoe County, Indiana; Lawrence, Kansas; Jefferson County, Kentucky; Lexington-Lafayette County, Kentucky; Lexington, Kentucky; Brookline, Massachusetts; Malden, Massachusetts; Newburyport, Massachusetts; Worcester, Massachusetts; Baltimore, Maryland; Howard County, Maryland; Montgomery County, Maryland; Rockville, Maine; Castine, Maine; Falmouth, Maine; Hallowell, Maine; Orono, Maine; Westbrook, Maine; Ann Arbor, Michigan; Detroit, Michigan; East Lansing, Michigan; Flint, Michigan; Grand Rapids, Michigan; Hamtramck, Michigan; Huntington Woods, Michigan; Kalamazoo, Michigan; Traverse City,

Michigan; Ypsilanti, Michigan; Duluth, Minnesota; Moorhead, Minnesota; St. Paul, Minnesota; Columbia, Missouri; St. Louis, Missouri; Albuquerque, New Mexico; Buffalo, New York; Ithaca, New York; New York City, New York; Onondaga County, New York; Peekskill, New York; Rochester, New York; Tompkins County, New York; Westchester County, New York; Chapel Hill, North Carolina; Raleigh, North Carolina; Cleveland, Ohio; Dayton, Ohio; Beaverton, Oregon; Benton County, Oregon; Hillsboro, Oregon; Lake Oswego, Oregon; Multnomah County, Oregon; Allentown, Pennsylvania; Easton, Pennsylvania; Lancaster, Pennsylvania; Lansdowne, Pennsylvania; Scranton, Pennsylvania; York, Pennsylvania; Brookings, South Dakota; Dallas, Texas; Alexandria, Virginia; Arlington County, Virginia; Burlington, Vermont; Morgantown, West Virginia; Dane County, Wisconsin; Madison, Wisconsin.

24 Sixty-four localities reported that they had received no complaints: Birmingham, Alabama; Phoenix, Arizona; Cathedral, California; Costa Mesa, California; Davis, California; Laguna Beach, California; Sacramento, California; City of Santa Cruz, California; Santa Monica, California; West Hollywood, California; Aspen, Colorado; Boulder, Colorado; Crested Butte, Colorado; Fort Collins, Colorado; Telluride, Colorado; Oakland Park, Florida; St. Petersburg, Florida; Ames, Iowa; Bettendorf, Iowa; Council Bluffs, Iowa; Des Moines, Iowa; Carbondale, Illinois; Champaign, Illinois; Evanston, Illinois; Normal, Illinois; Fort Wayne, Indiana; Topeka, Kansas; New Orleans, LA; Somerville, Massachusetts; Bangor, Maine; Bar Harbor, Maine; Long Island, Maine; South Portland, Maine; Grand Ledge, Maine; Saugatuck, Michigan; Minneapolis, Minnesota; Woodbury, Minnesota; Boone County, Missouri; University City, Missouri; Albany, New York; Nassau County, New York; Syracuse, New York; Athens, Ohio; Toledo, Ohio; Yellow Springs, Ohio; Ashland, Ohio; Bend, Oregon; Corvallis, Oregon; Eugene, Oregon; Lincoln City, Oregon; Salem, Oregon; Erie County, Pennsylvania; New Hope, Pennsylvania; Swarthmore, Pennsylvania; Austin, Texas; El Paso, Texas; Fort Worth, Texas; Houston, Texas; Charlottesville, Virginia; Virginia Beach, Virginia; Burien, Washington; Olympia, Washington; Vancouver, Washington; Charleston, West Virginia.

25 The multilocality rate was calculated by averaging the individual locality successful outcome rates.

26 We considered the following dispositions to be successful outcomes: finding of discrimination, complaint substantiated, complaint sustained, offender disciplined and moved to resolve, finding of probable cause, settlement, withdrawal with benefits, withdrawn and filed in court where

complainant received monetary damages, prefinding settlement, withdrawn with settlement, moved to resolve, finding of probable cause, set sustained, motion for which we have data, the victim received their claim hearing.

27 Badgett, Ramos, and Sears, Evidence of Employment Discrimination, 4.

28 E-mail from Joseph W. Doherty, director, Empirical Research Group, UCLA School of Law, to authors, 29 August 2012. (On file with authors.)

29 Ibid.

30 Blasi and Doherty, California Employment Discrimination Law, 36.

31 Riccucci and Gossett, “Employment Discrimination in State and Local Government,” 184.

32 Ibid.

33 It appears from the tables in the study that Riccucci and Gossett considered only “successful conciliations” to be successful outcomes for employees in their study. Riccucci and Gossett, “Employment Discrimination in State and Local Government,” 183-184. By contrast, we considered a wider range of dispositions to be successful outcomes for the employees (see Table 4 and accompanying text).

34 If Riccucci and Gossett had applied our methodology to their data, they would have determined that 16 percent of state and 25 percent of local complaints resulted in a successful outcome for the employee.

35 At the time of the study, the EEOC had not yet interpreted Title VII’s prohibition on sex discrimination to also prohibit discrimination based on gender identity.

36 Colvin, Rodrick A. “Improving State Policies Prohibiting Employment Discrimination Based on Sexual Orientation.” Review of Public Personnel Administration 20(2): 5-19, April 2000.

37 Riccucci and Gossett, “Employment Discrimination in State and Local Government,” 182.

38 Ibid.

39 Rivera, Rhonda R. “Queer Law: Sexual Orientation Law in the Mid-Eighties—Part I.” University of Dayton Law Review 10: 459, 1984-1985.

40 Ibid.

41 In 1992, the South Dakota Supreme Court wrote in a published opinion: “Until such a 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 stopped from contaminating these children . . . Her conduct is pres-

ently harmful to these children. . . . There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. . . . [E]ven the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement.” *Chicoine v. Chicoine*, 479 N.W.2d 891, 896-97 (S.D. 1992) (J. Henderson, concurring).

42 In 1997, a judge in Delaware 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.” In dismissing the case, he told the parties, “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.” *Lambda Legal. “First Known Judicial Misconduct Complaint Based on Sexual Orientation Involves Domestic Abuse Case.”* *Lambda Legal*, 20 June 1996.

43 A Mississippi judge wrote in 2004, in response to an article in the *George County Times* on the expansion of rights for gay couples in other states, “[I]n my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.” *Mississippi Commission on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1008 (Miss. 2004).

44 Riccucci and Gossett, “Employment Discrimination in State and Local Government,” 185.

45 Harris Interactive and Out & Equal Workplace Advocates. *Out & Equal Workplace Culture Report: Survey of Workplace Attitudes 2002-2008.* Out & Equal Workplace Advocates, 2008, 17-18; *Lambda Legal and Deloitte Financial Services. 2005 Workplace Fairness Survey.* *Lambda Legal*, April 2006, 4.

46 Sears, Brad, and Christy Mallory. *Documented Evidence of Discrimination and Its Effects on LGBT People.* Williams Institute, July 2011, 1.

47 Colvin, Roddrick A., and Norma M. Riccucci. “Employment Non-Discrimination Policies: Assessing Implementation and Measuring Effectiveness.” *International Journal of Public Administration* 25(1): 95-108, 2002.

48 Minnesota State Bar Association Task Force on Diversity in the Profession. *2005 Self-Audit for Gender and Minority Equity: A Research Study of Minnesota Law Firms, Non-Firm Employers and Individual Lawyers.* September 2006.

49 Transgender Law Center. *An Examination of Discrimination Against Transgender Americans in*

the Workplace: Hearing before the Subcommittee on Health, Employment, Labor and Pensions, 110th Congress 81, 26 June 2008.

Progressive or Regressive?

An In-Depth Policy Analysis of the Decision to Include Gender Identity in the Federal Hate Crimes Law

By Lisa Mottet

Part I: Understanding the Critique

This paper comprises Part I of a two-part multimedia series by Lisa Mottet on this topic. Part II will be published online in Summer 2014 and will be available on the LGBTQ Policy Journal Web site.

ABSTRACT

The decision to advocate for, and achieve, the inclusion of the term “gender identity” in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act has been criticized by some scholars and activists as a mistake in strategy for the transgender movement. This article first examines the reasoning and strategies of transgender advocates behind adding gender identity to this legislation. It then analyzes the following critiques of the hate crimes law: that people of color and those with low income are likely to be targeted by these laws for prosecution; that hate crimes laws increase the resources available to law enforcement, empowering them to do more harm to marginalized communities; that sentence enhancement makes those imprisoned leave prison with increased rage and thus more likely to commit more violent crimes; that hate crimes laws do not result in a decrease in hate crimes; and that supporting these laws lends credibility to law enforcement as an appropriate societal response to crime in general, as opposed to law enforcement being viewed as a perpetrator of crimes itself.