



## 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.<sup>1</sup> 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.<sup>2</sup>
- 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

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<sup>1</sup> N.M. STAT. ANN. § 28-1-7.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>
- 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.<sup>7</sup> 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.<sup>8</sup>
- 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)

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<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> 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.<sup>9</sup> On August 20, 2006, the Human Rights Division determined, based on its own investigation, that 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.<sup>10</sup>

- 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.<sup>11</sup> 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.<sup>12</sup>
- 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 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,

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<sup>9</sup> 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).

<sup>10</sup> 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).

<sup>11</sup> 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).

<sup>12</sup> 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.<sup>13</sup>

- 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.<sup>14</sup>

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.<sup>15</sup> 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<sup>16</sup> 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.<sup>17</sup>

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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<sup>13</sup> 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).

<sup>14</sup> *Docket: Discrimination*, ANNUAL UPDATE 50, 54 (ACLU 2006).

<sup>15</sup> N.M. Exec. Order 2003-010 (Apr. 9, 2003) (Gov. Bill Richardson).

<sup>16</sup> N.M. STAT. ANN. § 24-7A-5.

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> According to the legislature, “sexual orientation means heterosexuality, homosexuality or bisexuality, whether real or perceived.”<sup>20</sup> 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.”<sup>21</sup>

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]”.<sup>22</sup> 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.<sup>23</sup> Additionally, the bill explicitly prohibits all persons, employers or organizations from implementing quotas based on sexual orientation or gender identity.<sup>24</sup> 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.<sup>25</sup> In contrast, the Act bars employers with as few as four or more employees from discriminating against most other protected groups.<sup>26</sup> Thus, the Act extends greater protection to these other groups than to employees who experience sexual orientation or gender identity discrimination. Second, public and

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<sup>18</sup> N.M. STAT. ANN. § 28-1-7.

<sup>19</sup> *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.

<sup>20</sup> N.M. STAT. ANN. § 28-1-2(P).

<sup>21</sup> § 28-1-2(Q).

<sup>22</sup> § 28-1-7(A).

<sup>23</sup> § 28-1-7.

<sup>24</sup> § 28-1-7.2.

<sup>25</sup> § 28-1-7 (A)(2).

<sup>26</sup> §§ 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.<sup>27</sup> Third, the Act does not bar religious institutions or organizations from discriminating in employment or renting practices based on sexual orientation or gender identity.<sup>28</sup> 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.<sup>29</sup> 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...”<sup>30</sup>

## 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.<sup>31</sup> 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.<sup>32</sup> If the director finds probable cause, then he or she must first attempt to settle the matter through a process of “persuasion and conciliation.”<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup>

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

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<sup>27</sup> § 28-1-7 (A)-(E). The bona fide occupational qualification exception applies to all protected categories under the New Mexico Human Rights Act.

<sup>28</sup> § 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.

<sup>29</sup> §§ 28-1-9 (A),(D).

<sup>30</sup> §§ 28-1-9 (E).

<sup>31</sup> § 28-1-10 (A).

<sup>32</sup> § 28-1-10 (B).

<sup>33</sup> § 28-1-10 (C).

<sup>34</sup> § 28-1-10 (J).

<sup>35</sup> § 28-1-10 (E).

<sup>36</sup> § 28-1-10 (J).

then produce evidence of a legitimate, nondiscriminatory reason for its action, which the employee may rebut as “pretext.”<sup>37</sup>

## 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,<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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.”<sup>42</sup> 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.”<sup>43</sup>

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.”<sup>44</sup> 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.”<sup>45</sup> 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?”<sup>46</sup> 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.<sup>47</sup> To attract support for their position, some members of the Senate conjured

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<sup>37</sup> See *Garcia-Montoya v. State Treasurer’s Office*, 130 N.M. 25 (N.M.2001).

<sup>38</sup> S.B. 28 (N.M. 2003).

<sup>39</sup> See S.B. 91 (1991); N.M. H.B. (1993); H.B. 277 (N.M. 1999); H.B. 360 (N.M. 2001).

<sup>40</sup> K.C. Mason, *Coalition Sets Legislative Goals*, ALBUQUERQUE J., Dec. 11 2000, at 1.

<sup>41</sup> Thom Cole, *Gay-Rights Bill May Be Shelved*, ALBUQUERQUE J., Jan 14, 1995, at D3.

<sup>42</sup> *Id.*

<sup>43</sup> 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).

<sup>44</sup> Deborah Baker, *House Kills Gay Rights Bill*, A.P., Mar. 8, 1999.

<sup>45</sup> Mark Hummels, *Gay Discrimination Legislation Voted Down in House*, SANTA FE NEW MEXICAN, Feb. 16, 2001.

<sup>46</sup> Deborah Baker, *Senate Endorses Gay Rights Legislation*, A.P., Feb. 26, 2003.

<sup>47</sup> *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.”<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> In contrast, employers with just four or more employees may not discriminate on the basis of the other protected categories.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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.”<sup>55</sup> 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.<sup>56</sup>

## **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

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<sup>48</sup> Steve Terrell, *Gay-Rights Bill Passes Senate*, SANTA FE NEW MEXICAN, Feb. 27, 2003, at A1.

<sup>49</sup> Kate Nelson, *Stop-and-Go Senate Slogs Through Gay Rights Bills*, ALBUQUERQUE TRIB., Feb. 27, 2003, at A7.

<sup>50</sup> Elizabeth Gettelman, *Rights Change Makes Claims Tougher*, SANTA FE NEW MEXICAN, Jun. 18, 2003, at B1.

<sup>51</sup> 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.

<sup>52</sup> Kate Nash, *Richardson Signs Sex-Discrimination Bill*, ALBUQUERQUE J., Mar. 11, 2004, at D3.

<sup>53</sup> Holmes, *supra* note 51.

<sup>54</sup> Shea Andersen, *GOP Petition Aims to Halt Gay-Rights Bill*, ALBUQUERQUE TRIB., June 6, 2003, at A2.

<sup>55</sup> Anderson, *supra* note 54.

<sup>56</sup> Holmes, *supra* note 51.

“sexual preference.”<sup>57</sup> 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.<sup>58</sup>

## 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.<sup>59</sup>

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.<sup>60</sup> The State Personnel Act, however, contains no language prohibiting sexual orientation or gender identity discrimination.<sup>61</sup>

## 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.<sup>62</sup>

### D. Local Legislation

No cities or towns in New Mexico currently have comprehensive ordinances prohibiting sexual orientation or gender identity discrimination.<sup>63</sup> 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

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<sup>57</sup> N.M. Exec. Order No. 15 (1985) (Gov. Toney Anaya).

<sup>58</sup> N.M. Exec. Order No. 10 (2003) (Gov. Bill Richardson).

<sup>59</sup> See NM ADMIN. CODE § 9.1.1.1 – 9.1.1.18.

<sup>60</sup> N.M. ADMIN. CODE § 1.7.5.9. (Recruitment).

<sup>61</sup> N.M. STAT. ANN. § 10-9-1.

<sup>62</sup> N.M. Att’y Gen. Op. No. 3 (2004).

<sup>63</sup> 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....”<sup>64</sup> 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.<sup>65</sup>

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.”<sup>66</sup>

## 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....”<sup>67</sup> 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 Tucumcari states that “[t]he city provides equal employment opportunity ... and will not discriminate on the basis of ... sex (gender, sexual orientation and pregnancy)....”<sup>68</sup>

## 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....”<sup>69</sup>

## 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.”<sup>70</sup>

## 6. **City of Portales**

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<sup>64</sup> City of Albuquerque Exec. Instruction No. 6 (1997) (Mayor Jim Baca).

<sup>65</sup> Memorandum of Understanding between City of Albuquerque and Albuquerque Hum. Rts. Bd. (2003).

<sup>66</sup> Summary Minutes, City of Albuquerque, Charter Rev. Task Force (Oct. 16, 2008).

<sup>67</sup> SANTA FE CODE OF ORD., Art. II (Policy Statements) § 2.02 (Human and Civil Rights).

<sup>68</sup> TUCUMCARI MUNI. CODE §2.64(1).

<sup>69</sup> HOBBS PERSONNEL MANUAL § 2.56.020.

<sup>70</sup> 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.”<sup>71</sup>

## 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.”<sup>72</sup>

### E. **Occupational Licensing Requirements**

Almost all occupational licenses in New Mexico require that the applicant be of “good moral character.”<sup>73</sup>

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<sup>71</sup> PORTALES CODE OF ORD. § 19-11(a).

<sup>72</sup> PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 89 (1997 ed.).

<sup>73</sup> 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.<sup>74</sup> 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.”<sup>75</sup>

##### 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,

<sup>74</sup> 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).

<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

#### 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.<sup>79</sup> 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.<sup>80</sup>

#### 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.<sup>81</sup> On August 20, 2006, the Human Rights Division determined, based on its own investigation, that there was probable cause to support

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<sup>76</sup> 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).

<sup>77</sup> 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).

<sup>78</sup> 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).

<sup>79</sup> 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).

<sup>80</sup> 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).

<sup>81</sup> 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.<sup>82</sup>

#### 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.<sup>83</sup> 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.<sup>84</sup>

#### 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.<sup>85</sup>

### **C. Other Documented Examples of Discrimination**

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<sup>82</sup> 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).

<sup>83</sup> 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).

<sup>84</sup> 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).

<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup>

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<sup>86</sup> 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).

<sup>87</sup> *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.<sup>88</sup> 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."<sup>89</sup>

Both Albuquerque and Santa Fe have local hate crime ordinances covering crimes motivated by "gender" and "sexual orientation."<sup>90</sup> In addition, Santa Fe prohibits discrimination in housing based on gender, sexual orientation, and familial status.<sup>91</sup>

##### 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.<sup>92</sup>

##### 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."<sup>93</sup>

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<sup>88</sup> Lou Chibbaro, *Richardson Claims Best Record on Gay Issues*, WASH. BLADE, Dec. 21, 2007.

<sup>89</sup> 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.

<sup>90</sup> See ALBUQUERQUE CODE OF ORD. § 12-2-27; SANTA FE CODE OF ORD. § 16-4.1.

<sup>91</sup> See SANTA FE CODE OF ORD. § 26-4.2.

<sup>92</sup> See N.M. ADMIN. CODE § 6.60.9.9 (B)(2).

<sup>93</sup> N.M. STAT. ANN. § 24-7A-5.

The New Mexico Administrative Code prohibits discrimination based on sexual orientation by health care insurers and hospitals.<sup>94</sup>

#### 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.”<sup>95</sup>

Under New Mexico law, any individual or married couple may petition to adopt.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup>

##### 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.<sup>99</sup> By executive order, same-sex partners of state employees receive health insurance benefits during their

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<sup>94</sup> See N.M. ADMIN. CODE § 7.7.2.19 (A)(1)(a); N.M. ADMIN. CODE § 13.10.13.22 (A)(2).

<sup>95</sup> 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).

<sup>96</sup> N.M. STAT. ANN. § 32A-5-11.

<sup>97</sup> Chibbaro, *supra* note 88.

<sup>98</sup> H.B. 9 (N.M. 2008); see Human Rights Campaign, Laws: New Mexico HB 9, <http://bit.ly/a3tJZ> (last visited Sept. 6, 2009).

<sup>99</sup> 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.<sup>100</sup> Under the New Mexico Retiree Health Care Act, only *wives* of state employees continue to get health benefits post-retirement.<sup>101</sup>

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<sup>100</sup> See *Levitt v. N.M. Retiree Health Auth.*, CV-2007-01048 (Pl. Complaint filed Dec.10, 2007).

<sup>101</sup> See *id.*