



## MEMORANDUM

**From:** Williams Institute  
**Date:** September 2009  
**RE:** **North Carolina – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

### I. OVERVIEW

North Carolina law provides virtually no protection for public employees against job discrimination on the basis of gender identity or sexual orientation. No state-wide statute has been enacted in North Carolina to prohibit discrimination in employment on the basis of sexual orientation or gender identity. Also, little judicial or administrative action surrounding discrimination on the basis of sexual orientation or gender identity in the employment context or otherwise appears to exist.<sup>1</sup>

In the last five years, several attempts have been made by the North Carolina state legislature to amend the State Personnel Act to include prohibitions of discrimination on the basis of sexual orientation and gender identity or expression for state employees. These bills have never made it out of committee. Similar bills that would have added these protections for only employees of the North Carolina General Assembly have also stalled in committee.

In 2007, when the State Personnel Commission approved a new EEO policy that included sexual orientation, the new policy was quickly rejected by the state Rules Review Commission. According to an April 2008 article in the *Citizen-Times*, “North Carolina does not ban discrimination based on sexual orientation in hiring, discipline and pay of state employees. The State Personnel Commission’s attempt to change that was rejected in January by the state Rules Review Commission as overstepping the other appointed board’s authority.”<sup>2</sup> Aside from the actions in the state legislature and agencies, several North Carolina universities and municipalities have enacted non-discrimination policies.

Documented examples of sexual orientation or gender identity discrimination by state or local government include:

- In *Hensley v. Johnston*, a case pending before the United States District Court for the Eastern District of North Carolina, a public school teacher brought suit against the Johnston County Board of Education after she was transferred from her position following complaints by a student’s parents regarding her perceived “antagonism toward a Christian belief system, her ‘alternative life views’” and her

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<sup>1</sup> See Parts II and III, *infra*.

<sup>2</sup> *Ban on Anti-Gay Discrimination Taken Off State Personnel Website*, ASHEVILLE CITIZEN-TIMES, Apr. 15, 2008, at B1.

perceived sexual orientation.<sup>3</sup> The teacher alleges that “she was the ‘target’ of discriminatory animus because she ‘did not deny that her religious beliefs did not include a view that homosexuality was a sin.’”<sup>4</sup> This case is believed to be currently undecided; no subsequent reporting of the case appears in Westlaw.<sup>5</sup>

- Anne Marie Clukey had worked for the City of Charlotte at a maintenance facility for two years before she was fired in December 2006. Clukey, who was born a male and underwent gender reassignment surgery in May 2001, claims that she was fired “because she did not conform to her supervisor’s ‘gender stereotype’.”<sup>6</sup> City Attorney Mac McCarley stated that “transgendered individuals do not have any rights under federal employment discrimination laws.”<sup>7</sup>
- John Peter Bradley, who described himself as a whistle-blower who reported official corruption while working for law enforcement in various capacities, claimed that one government official had written a letter identifying Bradley as a bisexual, and that ultimately the letter was used to harm him when he became police chief of Woodfin, North Carolina. Ruling on motions to dismiss by various defendants, the court ruled that Bradley could pursue his constitutional claims against certain named government officials sued in their individual capacities, despite Eleventh Amendment immunity, since he was seeking prospective injunctive relief. However, his claims for compensation would be barred by immunity.<sup>8</sup>
- In 1991, a gay North Carolina county deputy planning director was fired because of his sexual orientation.<sup>9</sup>

Other North Carolina state actions have deterred LGBT people from seeking public employment. For example, North Carolina criminalized private, consensual same-sex sexual behavior between adults until the law was invalidated by the Supreme Court’s decision in *Lawrence v. Texas*<sup>10</sup>. Also, in a non-employment case, *Pulliam v. Smith*, the Supreme Court of North Carolina granted modification of the existing custody arrangement under which the father previously had primary physical custody of the two

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<sup>3</sup> *Hensley v. Johnston County Bd. of Educ.*, 2007 WL 4717527, Trial Motion, Memorandum and Affidavit (E.D.N.C. Aug. 21, 2007).

<sup>4</sup> *Hensley v. Johnston County Bd. of Educ.*, 2007 WL 4717526, Trial Motion, Memorandum and Affidavit (E.D.N.C. Jul. 30, 2007).

<sup>5</sup> Based on a review of the docket for case number 5:07CV00231, the Motion to Stay All Discovery pending decision on the Motion to Dismiss was granted on September 12, 2007. The only subsequent action in the case was the filing of a Notice of Subsequently Decided Authority in support of the Motion to Dismiss on June 17, 2008.

<sup>6</sup> Franco Ordenez & Maria David, *Ex-City Worker Says She Was Fired for Sex Change*, CHARLOTTE OBS., Feb. 12, 2009, available at: <http://bit.ly/rEfNo>.

<sup>7</sup> Matt Comer, *Transgender Worker Sues Charlotte for Job Discrimination*, Q-NOTES, Feb. 12, 2009, <http://bit.ly/Oe2jA>.

<sup>8</sup> *Bradley v. North Carolina Dept. of Transp.*, 286 F. Supp. 2D 697 (W.D.N.C. 2003).

<sup>9</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>10</sup> 539 U.S. 558 (2003).

children, based on the father’s “active homosexuality.”<sup>11</sup> The Court considered that “activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct” and having “a party for homosexuals at the home,” among other findings, support the trial court’s finding that “the active homosexuality of [Smith]... is detrimental to the best interest and welfare of the two minor children.”<sup>12</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>11</sup> *Pulliam v. Smith*, 501 S.E.2d 898, 899 (N.C. 1998).

<sup>12</sup> *Id.* at 901-02, 904.

## II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

### A. State-Wide Employment Statutes

Currently, the state of North Carolina has not enacted laws to protect sexual orientation and gender identity from employment discrimination.

### B. Attempts to Enact State Legislation

S.B. 843 was filed on March 24, 2009 and referred the next day to the Committee on the Judiciary, where no further action has been taken to date. The bill would amend the nondiscrimination and equal opportunity provisions of the State Personnel Act<sup>13</sup> to cover “sexual orientation,” which is defined as “actual or perceived heterosexuality, homosexuality, or bisexuality, or a person’s gender-related identity or expression.”<sup>14</sup>

The bill would establish each of the following actions by State employers on account of the employee’s sexual orientation as an “unlawful State employment practice”: (i) denial of promotion, transfer, or training; (ii) demotion, reduction in force, or termination of an employee in retaliation for the employee’s opposition to an alleged discrimination; and (iii) harassment in the workplace. The bill defined “sexual orientation” to mean “actual or perceived heterosexuality, homosexuality, or bisexuality, or gender-related identity or expression.” Pursuant to the bill’s definition of sexual orientation, the administrative grievance procedures of the State Personnel Act would have been made applicable to denial of equal opportunity on the basis of both sexual orientation and gender identity.

Several substantially similar bills were filed in other North Carolina legislative sessions, including S.B. 1007<sup>15</sup> in 2003, H.B. 1203<sup>16</sup> in 2005, S.B. 1534<sup>17</sup> in 2007, and H.B. 1789<sup>18</sup> also in 2007. These bills were referred to various committees where no further action was taken.

H.B. 924<sup>19</sup> was introduced on April 7, 2003; the bill was referred to the Committee on State Government, but the committee defeated the bill by one vote.<sup>20</sup> The bill would have amended the State Personnel Act to include sexual orientation, gender

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<sup>13</sup> N.C. GEN. STAT. ANN. § 126-16 (2008).

<sup>14</sup> S.B. 843, 2009-2010 Gen. Assem., Reg. Sess. (N.C. 2009).

<sup>15</sup> S.B. 1007, 2003-2004 Gen. Assem., Reg. Sess. (N.C. 2003) (this version left the term “sexual orientation” undefined).

<sup>16</sup> H.B. 1203, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

<sup>17</sup> S.B. 1534, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007) (this version also included provisions clarifying the General Assembly’s personnel policies as described *infra*).

<sup>18</sup> H.B. 1789, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007) (this version also included provisions clarifying the General Assembly’s personnel policies as described *infra*).

<sup>19</sup> H.B. 924. (N.C. 2003).

<sup>20</sup> Press Release, N.C. Family Policy Council, House Committee Defeats “Sexual Orientation” Bill (Apr. 30, 2003), *available at* <http://bit.ly/167OkR>.

identity, and gender expression in the list of classifications expressly covered by the equal employment opportunity provisions.<sup>21</sup>

S.B. 1113<sup>22</sup> was filed in 2005 and subsequently referred to the Committee on State and Local Government, but no further action was taken. The bill would have established that “The General Assembly shall not discriminate in any of its personnel policies, practices or benefits on the basis of race, religion, color, national origin, age, sex, sexual orientation, or disability.” The bill did not define ‘sexual orientation’.

S.B. 1534<sup>23</sup> and H.B. 1789<sup>24</sup> were both introduced in 2007; these bills would have amended the General Assembly’s personnel policy prohibiting discrimination to include ‘sexual orientation’ as a protected class, and amended state nondiscrimination and equal employment opportunity provisions of the State Personnel Act to include protection for ‘sexual orientation’ at the same time. Both bills defined ‘sexual orientation’ to include gender-related identity and expression. The bills were referred to the Committee on the Judiciary and the Committee on State Personnel, respectively, but no further action was taken.

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

### **1. Executive Orders**

The Governor’s website provides access to all executive orders issued by the current governor. Based on a review of the executive orders available on the Governor’s website as of December 2008, none protect against discrimination on the basis of sexual orientation or gender identity. Although Executive Order 5 established an Equal Employment Opportunity policy, the policy does not protect sexual orientation or gender identity.<sup>25</sup>

### **2. State Government Personnel Regulations**

#### State Personnel Commission

On June 22, 2007, the State Personnel Commission approved an Equal Employment Opportunity Policy which would have expanded the factors covered by the existing equal employment opportunity policy to include sexual orientation. According to the Minutes of the June 22, 2007 meeting of the State Personnel Commission, “Sexual orientation is currently included in most university EEO plans and some agency EEO plans. By including sexual orientation in this rule, the EEO planning process will be

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<sup>21</sup> H.B. 924, 2003-2004 Gen. Assem., Reg. Sess. (N.C. 2003).

<sup>22</sup> S.B. 1113, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

<sup>23</sup> S.B. 1534, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).

<sup>24</sup> H.B. 1789, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).

<sup>25</sup> Archive of N.C. Exec. Orders, <http://bit.ly/PueG09> (last visited Sept. 6. 2009).

standardized allowing for common factors between all agencies and universities.”<sup>26</sup> However, it was also acknowledged that this new policy would only expand the opportunity for internal agency grievances, but would not provide a right for such claims to proceed to the Office of Administrative Hearings and the State Personnel Commission, as would other claims of discrimination pursuant to employee grievance procedures, because such a right could only be established by legislative action.

This attempt to revise the equal opportunity employment policy, however, was later rejected by the state Rules Review Commission. According to an article on April 15, 2008 in the *Citizen-Times*, “North Carolina does not ban discrimination based on sexual orientation in hiring, discipline and pay of state employees. The State Personnel Commission’s attempt to change that was rejected in January by the state Rules Review Commission as overstepping the other appointed board’s authority.”<sup>27</sup> Therefore, the Equal Employment Opportunity Policy, as currently stated on the Office of State Personnel website, provides that the policy applies only to “race, color, religion, sex, national origin, age or disability.”<sup>28</sup>

#### North Carolina Housing Finance Agency

The North Carolina Housing Finance Agency has a policy which provides “all employees and applicants for employment with equal employment opportunities, without regard to race, color, religion, creed, gender, sexual orientation, national origin, age, disability, political affiliation, or any other protected status.”<sup>29</sup> Please note that the details of this policy were not readily available, but this statement can be found on the agency’s website.

#### University Policies

The University of North Carolina at Chapel Hill (a public university) established a policy on non-discrimination which provides that “The University of North Carolina at Chapel Hill does not discriminate in offering equal access to its education programs and activities or with respect to employment terms and conditions on the basis of an individual’s race, color, gender, national origin, age, religion, creed, disability, veteran’s status, sexual orientation, gender identity or gender expression.”<sup>30</sup> This policy applies to all students and employees, including faculty, post doctoral scholars and student-employees. The policy prohibits the following actions in the employment context on the basis of any protected status mentioned above: (i) failing or refusing to hire or

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<sup>26</sup> Minutes of State Personnel Commission Teleconference Meeting (June 22, 2007), <http://bit.ly/g4S4u> (last visited Sept. 6, 2009).

<sup>27</sup> *Ban on Anti-Gay Discrimination Taken Off State Personnel Website*, ASHEVILLE CITIZEN-TIMES, Apr. 15, 2008, at B1.

<sup>28</sup> See North Carolina Office of State Personnel, Equal Opportunity Employment Policy, <http://bit.ly/H4zw6> (last visited Sept. 6, 2009).

<sup>29</sup> See North Carolina Housing & Finance Agency Website, <http://bit.ly/3FZ1y> (last visited Sept. 6, 2009).

<sup>30</sup> The University of North Carolina at Chapel Hill Policy Statement on Non-Discrimination (2007) <http://bit.ly/4wEhJL> (last visited Sept. 6, 2009). There is no indication as to when “sexual orientation” was added to this policy.

discharging any individual, or otherwise discriminating against any individual with respect to compensation, terms, conditions or privileges of employment; and (ii) limiting, segregating, or classifying employees or applicants for employment in any way which would deprive them of employment opportunities or otherwise adversely affect their employment status.

The University of North Carolina at Charlotte (a public university) established a policy on January 25, 1991 which provides that “The University of North Carolina at Charlotte believes that educational and employment decisions should be based on the abilities and qualifications of individuals and should not be based on irrelevant factors, including personal characteristics, that have no connection with academic abilities or job performance. Among the traditional factors which are generally ‘irrelevant’ are race, sex, religion, disability, and national origin. It is the policy of The University of North Carolina at Charlotte that the sexual orientation of an individual be treated in the same manner.”<sup>31</sup>

The University of North Carolina at Greensboro (a public university) established a policy of non-discrimination on the basis of sexual orientation, effective November 1, 1996, which provides, “The University of North Carolina at Greensboro regards discrimination on the basis of sexual orientation to be inconsistent with its goal of providing an atmosphere in which students, faculty and staff may learn, work and live. The University of North Carolina at Greensboro values the benefits of cultural diversity and pledges to students, prospective students, faculty, staff and the public that it will defend pluralism in the academic community and welcomes all men and women of good will without regard to sexual orientation.”<sup>32</sup>

The University of North Carolina at Asheville (a public university) established a policy of equal employment opportunity which provides that “UNC Asheville will not discriminate against students, applicants, or employees on the basis of race, color, religion, sex, sexual orientation, national origin, age, disability, political affiliation, or any other legally protected status with respect to all terms, conditions or privileges of University-sponsored activities, employment, and the use of University facilities.”<sup>33</sup>

North Carolina State University (a public university) established a policy of non-discrimination with regard to sexual orientation which provides that “an individual’s sexual orientation is another factor which is not relevant to educational and employment decisions.”<sup>34</sup>

### 3. **Attorney General Opinions**

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<sup>31</sup> University of North Carolina, Charlotte, Policy Statement #98 Sexual Orientation, <http://bit.ly/12hffg> (last visited Sept. 6, 2009).

<sup>32</sup> University of North Carolina, Greensboro, Statement of Nondiscrimination on the Basis of Sexual Orientation, <http://bit.ly/xQm4b> (last visited Sept. 6, 2009).

<sup>33</sup> University of North Carolina, Asheville, Human Resources Website, <http://www.unca.edu/hr/jobs.html> (last visited Sept. 6, 2009).

<sup>34</sup> North Carolina State University, Sexual Orientation Policy Statement, Reg. 04.29.03, <http://bit.ly/21wj6B> (last visited Sept. 6, 2009).

Based on non-exhaustive research, no attorney general opinions were issued in relation to employment discrimination on the basis of sexual orientation or gender identity. However, the current Attorney General, in response to an inquiry from Greensboro, stated that it is within the authority of localities to enact non-discrimination ordinances covering sexual orientation or gender identity for their city or county.<sup>35</sup>

#### D. Local Legislation

The ordinances for every county/municipality in North Carolina are available in an online database.<sup>36</sup> Although an exhaustive search of every local ordinance available through this resource was not conducted, according to a press release by Equality NC Project, as of December 3, 2001, the cities of Raleigh, High Point, Chapel Hill, Carrboro, and Durham<sup>37</sup> had non-discrimination policies covering municipal employees that included sexual orientation.<sup>38</sup> Since 2001, at least four other cities—Bessemer City, Boone, Greensboro, and Winston Salem—added sexual orientation to their non-discrimination ordinances along with four counties—Durham, Guilford, Mecklenburg, and Orange.<sup>39</sup> Asheville, Boone, Carrboro, Chapel Hill, and Orange County also prohibit gender identity discrimination in employment by local ordinance.

1. **City of Raleigh**

The Code of Ordinances for the City of Raleigh provides for the establishment of the Human Relations Commission to conduct “those activities which promote human dignity, equal opportunity and harmony among the many different citizens who make up the population of the City . . . without regard to race, color, creed, gender, age, sexual orientation, or national origin.”<sup>40</sup> The Code of Ordinances for the City of Raleigh also establishes a policy of non-discrimination which provides that “The policy of the City of Raleigh is and shall be to oppose any discrimination on account of age, handicap, sex, race, color, creed, sexual orientation, or national origin in any aspect of modern life.”<sup>41</sup> It further states that “The City Manager is directed to establish such policies as will insure that there is no discrimination in any function or area of City government.”

2. **Town of Chapel Hill**

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<sup>35</sup> Email from Don Rosenthal to Brad Sears, the Williams Institute (Mar. 9, 2010 5:30:00 PST) (on file with the Williams Institute).

<sup>36</sup> Online Archive of Municipal Codes, <http://bit.ly/g4u11> (last visited Sept. 6, 2009).

<sup>37</sup> Note that although the City of Durham was included in the press release, based on a search of the current ordinances for the City of Durham, there is no such ordinance currently in place.

<sup>38</sup> Jo Wyrick, *New Poll: N.C. Opposes Discrimination on Sexual Orientation*, EQUALITY NC, Dec. 3, 2001, <http://www.tgender.net/taw/misc/ncpoll.html> (last visited Sept. 6, 2009).

<sup>39</sup> Equality North Carolina, Local LGBT-Friendly Policies, <http://www.equalitync.org/issues/local> (last visited Mar. 9, 2010).

<sup>40</sup> RALEIGH CODE § 4-3002 (2008).

<sup>41</sup> RALEIGH CODE § 4-1004 (2008).

The Code of Ordinances for the Town of Chapel Hill establishes an employment policy providing that “The policy of the town is to foster, maintain, and promote equal employment opportunity. The town shall select employees on the basis of applicant’s qualifications for the job . . . without regard to age, sex, race, color, religion, non-job-related disability, national origin, sexual orientation, gender identity, gender expression, or marital status.”<sup>42</sup> According to an Equality N.C. press release, on Monday, May 10, 2004 Chapel Hill Town Council became the “first in [the] state to protect [the] transgender community from discrimination . . . [having] voted unanimously to add gender identity and gender expression to its non-discrimination policies.”<sup>43</sup>

**E. Occupational Licensing Requirements**

None.

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<sup>42</sup> CHAPEL HILL CODE § 14-28 (2007).

<sup>43</sup> Press Release, Nat’l Gay & Lesbian Task Force, Equality NC Celebrates Historic Change in Chapel Hill Policy (May 12, 2004), *available at* <http://bit.ly/ItdrW>.

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

#### A. Case Law

##### 1. State and Local Government Employees

Hensley v. Johnston County Bd. of Educ., 2007 WL 4717527 (E.D.N.C. Aug. 21, 2007).

In *Hensley v. Johnston County Board of Education*, Pamela Hensley brought suit in the United States District Court for the Middle District against the Johnston County Board of Education (the “Board of Education”), based on First Amendment freedom of speech and Fourteenth Amendment equal protection violations, following the Board of Education’s decision to transfer Hensley to another teaching position.<sup>44</sup> According to the Plaintiff’s Memorandum of Law Opposing Defendants’ Motion to Dismiss, the decision to transfer Hensley was based in part on her perceived sexual orientation. The decision to transfer Hensley came after a student’s parents complained to the school principal and Board of Education about what they perceived to be Hensley’s “antagonism toward a Christian belief system, her ‘alternative life views’, and her perceived ‘shortcomings’ associated with her [visual] disability.” These complaints arose after Hensley taught evolution to her class based on materials obtained from a curriculum seminar focused on teaching the topic of evolution in science classes which had been approved by the school’s principal. The parents claimed that their child’s grades had been lowered arbitrarily because the child voiced religious opposition to the evolution material.

According to Defendant’s Memorandum of Law in Support of Motion to Dismiss, “Hensley alleges that she was the ‘target’ of discriminatory animus because she ‘did not deny that her religious beliefs did not include a view that homosexuality was a sin.’”<sup>45</sup> Following the parents’ complaints, the school conducted an investigation and found no evidence to support their allegations regarding their child’s grades. However, the principal of the school inquired as to Hensley’s sexual orientation and the Board of Education subsequently transferred Hensley to a newly established position teaching remedial classes. This case is currently undecided, the Court having ordered a stay of discovery on September 12, 2007 pending decision on defendant’s motion to dismiss.<sup>46</sup>

Barbagallo & Yost v. Potter, 2005 WL 2460725 (M.D.N.C. 2005).

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<sup>44</sup> *Hensley v. Johnston County Bd. of Educ.*, 2007 WL 4717527, Trial Motion, Memorandum and Affidavit (E.D.N.C. Aug. 21, 2007).

<sup>45</sup> *Hensley v. Johnston County Bd. of Educ.*, 2007 WL 4717526, Trial Motion, Memorandum and Affidavit (E.D.N.C. Jul. 30, 2007).

<sup>46</sup> Based on a review of the docket for case number 5:07CV00231, the Motion to Stay All Discovery Pending Decision on the Motion to Dismiss was granted on September 12, 2007. The only subsequent action in the case was the filing of a Notice of Subsequently Decided Authority in support of the Motion to Dismiss on June 17, 2008.

In *Barbagallo & Yost v. Potter*, Judith Barbagallo and Nancy Yost (“Plaintiffs”) brought suit against John Potter, the Postmaster General for the U.S. Postal Service (Eastern Area) (the “Postmaster”) based on claims of unlawful hostile work environment and retaliation for Equal Employment Opportunity (“EEO”) actions in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>47</sup> Plaintiffs claimed that they had been harassed on the basis of their perceived sexual orientation and retaliated against based on their EEO actions. According to Plaintiffs’ Response to Defendant’s Motion to Dismiss, Plaintiffs had been taunted day after day, being consistently referred to as “lesbians” and “queers” because they did not conform to female gender stereotypes.<sup>48</sup> They filed EEO claims leading to administrative hearings based on charges of sexual harassment, arguing that comments about their sexual preference were based on gender-based stereotypes. After exhausting the administrative process, Plaintiffs brought suit in the United States District Court for the Middle District of North Carolina. However, the case was dismissed because the statute of limitations had run, as the complaint was filed 91 days after receiving the “right to sue” letter following the administrative appeal process, rather than within the requisite 90 days.<sup>49</sup>

*Bradley v. North Carolina Dep’t of Transp.*, 286 F. Supp. 2D 697 (W.D.N.C. 2003).

John Peter Bradley, who described himself as a whistle-blower who reported official corruption while working for law enforcement in various capacities, claimed that one government official had written a letter identifying Bradley as a bisexual, and that ultimately the letter was used to harm him when he became police chief in Woodfin, North Carolina. Ruling on motions to dismiss by various defendants, the court ruled that Bradley may pursue his constitutional claims against certain named government officials sued in their individual capacities, despite Eleventh Amendment immunity, since he was seeking prospective injunctive relief. However, his claims for compensation would be barred by immunity.<sup>50</sup>

## 2. Private Employees

None.

### B. Administrative Complaints

Section 126-34 of the North Carolina General Statutes establishes the grievance appeal procedures for career State employees.<sup>51</sup> According to that Section, “any career State employee having a grievance arising out of or due to the employee’s employment . . . shall submit a written complaint to the employee’s department or agency.” Following such complaint, the department or agency is provided 60 days to take “appropriate

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<sup>47</sup> *Barbagallo v. Potter*, 2005 WL 2460725, at \*1 (M.D.N.C. 2005).

<sup>48</sup> *Barbagallo v. Potter*, 2004 WL 2236268, Trial Motion, Memorandum and Affidavit, (W.D.N.C. Sept. 3, 2004).

<sup>49</sup> *Barbagallo*, 2005 WL 2460725, at \*3.

<sup>50</sup> *Bradley v. North Carolina Dep’t. of Transp.*, 286 F. Supp. 2d 697 (W.D.N.C. 2003).

<sup>51</sup> N.C. GEN. STAT. ANN. § 126-34 (2008).

remedial action.” If the employee is not satisfied with the department or agency’s response, that employee has the right to appeal directly to the State Personnel Commission.

Pursuant to Section 126-37 of the North Carolina General Statutes, “appeals involving disciplinary action, alleged discrimination or harassment... shall be conducted in the Office of Administrative Hearings.”<sup>52</sup> The Administrative Law Judge shall make a recommendation and the State Personnel Commission shall then render a final decision which is subject to judicial review.

Note that, although sexual orientation and gender identity are not included in the State’s non-discrimination policy, this grievance procedure would still apply to any attempts to raise grievances on those bases. Also, note that, based on a review of the State Personnel Commission’s website, records of employee grievance proceedings do not appear to be available online.

### C. Other Documented Examples of Discrimination

#### City of Charlotte

In 2009, Anne Marie Clukey filed a claim against the City of Charlotte for employment discrimination on the basis of sexual orientation and gender identity. Clukey, now 60 years old, was born a male and had gender reassignment surgery in May 2001. In December 2006, Clukey was fired from her position as a city operations assistant at a City maintenance facility. According to one account of the court papers, Clukey claims that her supervisor became “hostile” with her after finding out that she was transgender and had passed her over for a promotion despite Clukey’s three years of prior managerial experience and over 40 years of automotive maintenance experience. When Clukey reported to management that she believed her supervisor had overlooked her qualifications, her supervisor retaliated by writing her up on “unsupported reprimands.” She claims she was fired because she had had gender reassignment surgery. Clukey, who previously lived in Portland, Maine, noted that she had “never had a problem like this before in other places I’ve lived.”<sup>53</sup>

Although the City has not yet filed a formal response to Clukey’s claim, City Attorney Mac McCarley has spoken to the press, indicating that the City intends to deny liability.

#### County Department

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<sup>52</sup> N.C. GEN. STAT. ANN. § 126-37 (2008).

<sup>53</sup> Franco Ordonez & Maria David, *Ex-City Worker Says She Was Fired for Sex Change*, CHARLOTTE OBS., Feb. 12, 2009, available at: <http://bit.ly/rEfNo>.

In 1991, a gay North Carolina county deputy planning director was fired because of his sexual orientation.<sup>54</sup>

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<sup>54</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).

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

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

##### **A. Criminalization of Same-Sex Sexual Behavior**

North Carolina General Statutes Section 14-177 provides that the commission of “the crime against nature, with mankind or beast” is punishable as a felony.<sup>55</sup> However, this law was no longer valid after the U.S. Supreme Court decision in *Lawrence v. Texas*. Prior to this decision in 2003, the ACLU estimated that nearly 400 people were prosecuted under the law in the year 2000.<sup>56</sup> S.B. 560 was introduced before the 2005 Session of the North Carolina General Assembly on March 15, 2005. The bill would have amended the crime against nature law with regard to sodomy, in order to comply with the decision in *Lawrence*, but this bill was not passed.<sup>57</sup>

##### **B. Housing & Public Accommodations Discrimination**

Based on non-exhaustive research, no housing regulations have been enacted regarding sexual orientation or gender identity discrimination.

##### **C. Hate Crimes**

House Bill No. 1322 was filed in the 2005 Session of the North Carolina General Assembly on April 19, 2005.<sup>58</sup> The bill was referred to the Committee on Rules, Calendar, and Operations of the House, but no further action was taken. The bill would have established stronger punishment for offenses committed “with animosity based upon ethnicity, gender, age, sexual orientation, or disability.” This enhanced punishment would have included crimes “committed because of the victim’s real or perceived race, color, religion, nationality, gender, sexual orientation, disability, age, or country of origin.” The bill would have defined “sexual orientation” as “actual or perceived heterosexuality, homosexuality, or bisexuality, or a person’s gender-related identity or expression.”

Several substantially similar bills were also filed in previous sessions of the North Carolina General Assembly, including H.B. 1631<sup>59</sup> in 2007, S.B. 485<sup>60</sup> in 2005, S.B.

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<sup>55</sup> N.C. GEN. STAT. ANN. § 14-177 (2001).

<sup>56</sup> Press Release, ACLU, Bill Would Repeal North Carolina Sodomy Law (Mar. 14, 2001), *available at* <http://bit.ly/1NDb2I>.

<sup>57</sup> S.B. 560, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

<sup>58</sup> H.B. 1322, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

<sup>59</sup> H.B. 1631, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).

<sup>60</sup> H.B. 485, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

736<sup>61</sup> in 2003, S.B. 392<sup>62</sup> in 2001, and H.B. 1085<sup>63</sup> in 1997. Each was referred to the appropriate committee, but no further action was taken.

#### D. Education

On June 30, 2009, the Governor of North Carolina signed the School Violence Prevention Act, S. 526, requiring each local school administrative unit to adopt a policy preventing bullying or harassing behavior by December 31, 2009. The act defines bullying or harassing behavior as including “acts reasonably perceived as being motivated by any actual or perceived differentiating characteristic, such as . . . gender, . . . gender identity, . . . sexual orientations, . . . or by association with a person who has or is perceived to have one or more of these characteristics.” The act requires that each local policy include a “definition of bullying or harassing behavior no less inclusive than that set forth in this Article.”<sup>64</sup>

A previous attempt to pass this legislation was H.B. 1366, filed in the 2007 Session of the General Assembly.<sup>65</sup> The bill reached various stages in the committee review process, eventually ending up in the Conference Committee on July 18, 2008, but no further action was taken. The bill would have enacted the School Violence Prevention Act to require that each “local school administrative unit” adopt a policy prohibiting bullying or harassing behavior in order to provide “a safe and civil environment in school.” According to the bill,

Bullying or harassing behavior includes, but is not limited to, acts reasonably perceived as being motivated by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, gender identity or expression, physical appearance, sexual orientation, or mental, physical, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics.<sup>66</sup>

The bill would have required that policies adopted by the administrative units must prohibit such behavior and establish appropriate remedial actions and consequences for a person committing acts of bullying or harassment.

Notwithstanding this prior unsuccessful attempt by the General Assembly to enact anti-bullying legislation, approximately 20 per cent of school districts had adopted strong anti-bullying policies that protect students from harassment on the basis of sexual orientation and/or gender identity. According to Equality North Carolina’s survey of

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<sup>61</sup> S.B. 736, 2003-2004 Gen. Assem., Reg. Sess. (N.C. 2003).

<sup>62</sup> S.B. 392, 2001-2002 Gen. Assem., Reg. Sess. (N.C. 2001).

<sup>63</sup> H.B. 1085, 1997-1998 Gen. Assem., Reg. Sess. (N.C. 1997).

<sup>64</sup> The act was written to add the School Violence Prevention Act as a new article 29B to subchapter 6 of the education code at N.C. GEN. STAT. ANN. § 115C-407.5 *et seq.*

<sup>65</sup> H.B. 1366, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).

<sup>66</sup> *Id.*

North Carolina public school system policies, 24 of North Carolina's 115 public school systems have implemented such policies with regard to sexual orientation, eight of which also protect students on the basis of gender identity or expression.<sup>67</sup> The list of particular school systems is available in the news article describing the Equality North Carolina survey.

#### E. Health Care

H.B. 1223 was filed in the 1997 Session of the General Assembly.<sup>68</sup> The bill was referred to the Committee on Insurance - Subcommittee on Health, but no further action was taken. The bill would have established the North Carolina Family Health Care Act to provide comprehensive health care for all residents of North Carolina. The program would have allowed residents to receive services from health care providers through enrollment in the State plan or in a private Accountable Health Plan, with such private providers being subject to certain conditions of participation. According to the bill, "as a condition of participation in the Program, no Accountable Health Plan may refuse to enroll or serve any eligible individual because of that individual's economic status, health history, preexisting health condition, age, sex, race, national origin, ancestry, sexual orientation, disability, ethnicity, or religion."

A substantially similar bill was filed as H.B. 572 in 1993.<sup>69</sup> The bill failed in the House and was postponed indefinitely on July 5, 1994.

H.B. 4 was filed in the 1993 Session of the General Assembly on January 28, 1993.<sup>70</sup> The bill would have enacted the Health Care Access and Cost Control Act, providing that "appropriate health services should be available within an integrated system, to all residents of the State, regardless of health condition, age, sex, sexual orientation, race, geographic location, employment, or economic status." The bill failed in the House and was postponed indefinitely on July 5, 1994.

A substantially similar bill was filed as H.B. 1458 in the 1991 Session of the General Assembly on June 2, 1992.<sup>71</sup> The bill failed in the House and was postponed indefinitely on July 24, 1992.

The Ethical Principals of Conduct for Substance Abuse Professionals licensed in North Carolina provides that "The substance abuse professional shall consider the issue of discrimination against clients or professionals based on race, religion, age, sex, handicaps, national ancestry, sexual orientation or economic condition, but in all cases the professional shall not discriminate on any basis prohibited by federal or state law."<sup>72</sup>

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<sup>67</sup> Equality North Carolina, *ENC Survey: Most NC Students Lack Effective Protection from Bullying* (Jul. 20, 2007), <http://www.equalitync.org/news1/20070720> (last visited Sept. 6, 2009).

<sup>68</sup> H.B. 1223, 1997-1998 Gen. Assem., Reg. Sess. (N.C. 1997).

<sup>69</sup> H.B. 572, 1993-1994 Gen. Assem., Reg. Sess. (N.C. 1993).

<sup>70</sup> H.B. 4, 1993-1994 Gen. Assem., Reg. Sess. (N.C. 1993).

<sup>71</sup> H.B. 1458, 1991-1992 Gen. Assem., Reg. Sess. (N.C. 1991).

<sup>72</sup> 21 N.C. ADMIN. CODE § 68.0502 (2008).

## F. Parenting

In *Pulliam v. Smith*, former wife Pulliam filed an action seeking modification of the existing custody arrangement under which father Smith had primary physical custody of their two minor children. The Supreme Court of North Carolina granted exclusive custody of the two minor children to the mother based on the father's homosexual relationship and "active homosexuality."<sup>73</sup> The following findings of fact were considered by the Court: (i) Smith was in a homosexual relationship with Tom Tipton, who lived in Smith's home; (ii) they often held hands and kissed on the cheek and on the lips in front of the children; (iii) they had engaged in oral sex while the children were present in the home; (iv) the bedroom of the two children was directly across the hall from Tipton and Smith's bedroom; (v) they had a "party for homosexuals at the home" to celebrate their one-year anniversary; (vi) they have gone on several occasions to "an establishment that caters to homosexuals;" (vii) Tipton keeps pictures in his bedroom of "drag queens" which are "not under a lock, and it is possible for the children to gain access to the pictures;" and (viii) the children had observed Tipton and Smith sleeping in the same bed.<sup>74</sup>

Based on its assessment of these facts, the trial court found that "the activity of [Smith] will likely create emotional difficulties for the two minor children." Moreover, the trial court concluded that these facts indicated "improper influences" and that "the active homosexuality of [Smith] and his involvement with [Tipton]... is detrimental to the best interest and welfare of the two minor children."<sup>75</sup> The trial court ordered that primary physical custody be granted to the mother. In affirming the lower court, the Supreme Court of North Carolina concluded that

activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct while acknowledging this conduct to them, allowing the children to see unmarried persons known by the children to be sexual partners in bed together, keeping admittedly improper sexual material in the home... support the trial court's findings of "improper influences" which are "detrimental to the best interest and welfare of the two minor children."<sup>76</sup>

Accordingly, the Court affirmed the grant of exclusive custody to the mother.

The dissenting opinion of Justice Webb stated that "the district court found only that [Smith] is a practicing homosexual and this creates an unfit and improper environment for the children."<sup>77</sup> According to the dissent, there was not substantial

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<sup>73</sup> *Pulliam v. Smith*, 501 S.E.2d 898, 899 (N.C. 1998).

<sup>74</sup> *Id.* at 901.

<sup>75</sup> *Id.* at 902.

<sup>76</sup> *Id.* at 904.

<sup>77</sup> *Id.* at 905.

evidence to support such a conclusion. Rather, the dissent argued that there had been virtually no showing that Smith's actions had adversely affected the children. The dissent stated, "I believe the evidence shows only that [Smith] is a practicing homosexual without showing any harm has been inflicted on the children by this practice."

## **G. Recognition of Same-Sex Couples**

### **1. Marriage, Civil Unions & Domestic Partnership**

Section 51-1.2 of the North Carolina General Statutes, effective June 20, 1996, provides that "Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina."<sup>78</sup> With regard to Section 51-1 of the North Carolina General Statutes, which states "A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry,"<sup>79</sup> the Attorney General released an opinion that North Carolina can refuse to recognize same-sex marriages performed in other states.<sup>80</sup> In a separate opinion, the Attorney General indicated that the full faith and credit clause of the U.S. Constitution would not require North Carolina to recognize same-sex marriages that are performed legally in other states.<sup>81</sup>

### **2. Benefits**

In 2000, an Orange County court upheld a challenge to the Chapel Hill and Carrboro's extensions of benefits to domestic partners of local government employees. The court found, in accordance with the Attorney General's response to Greensboro<sup>82</sup>, that it is within the authority of local governments to make such decisions for their cities.<sup>83</sup>

## **H. Other Non-Employment Sexual Orientation & Gender Identity Related Laws**

The Ethical Guidelines for Social Workers licensed in North Carolina provides that "Social workers shall not practice, facilitate, or collaborate with any form of discrimination on the basis of race, sex, sexual orientation, age, religion, socioeconomic status, or national origin."<sup>84</sup>

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<sup>78</sup> N.C. GEN. STAT. ANN. § 51-1.2 (2008).

<sup>79</sup> N.C. GEN. STAT. ANN. § 51-1 (2008).

<sup>80</sup> N.C. Att'y Gen. Op. 1996 WL 925102 (1996).

<sup>81</sup> N.C. Att'y Gen. Op. 1996 WL 925099 (1996).

<sup>82</sup> Email from Don Rosenthal to Brad Sears, the Williams Institute (Mar. 9, 2010 5:30:00 PST) (on file with the Williams Institute).

<sup>83</sup> *Godley v. Town of Chapel Hill and Town of Carrboro* 99 CVS 844 (Sup. Ct. Orange Co., May 16, 2000).

<sup>84</sup> 21 N.C. ADMIN. CODE § 63.0503 (2008).