



## MEMORANDUM

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

### I. OVERVIEW

Currently, there is no state law in Kansas that prohibits employment discrimination based upon sexual orientation and gender identity.<sup>1</sup>

Attempts to pass such protection have failed. For example, in 2005, a proposed amendment to add sexual orientation to the Kansas Act Against Discrimination was introduced in the Committee on Federal and State Affairs; the amendment failed.<sup>2</sup> During a hearing on S.B. 285, an opponent stated that “homosexuals want SB 285 as government validation of their sins and to intimidate employers, landlords and the populace.” Other opponents stated “homosexuality is an atrocious sin, along with the acceptance of it,” asserting that homosexuals have vastly more sexually transmitted diseases, have lower life expectancy, and have a greater tendency to commit suicide and abuse drugs. Another opponent argued that homosexuals account for 20-33% of pedophiles.<sup>3</sup> In January 2009, a bill that would add both “sexual orientation” and “gender identity” to Kansas’s Act Against Discrimination<sup>4</sup> was presented in the Senate Federal and State Affairs Committee.<sup>5</sup>

In 2007, Governor Kathleen Sebelius signed an executive order requiring state entities to implement programs to avoid discrimination on the basis of sexual orientation.<sup>6</sup> Additionally, a few localities—Lawrence, Topeka, and Shawnee County—have passed ordinances prohibiting employment discrimination based on sexual orientation by public entities. In 2005, the Topeka ordinance was challenged by an initiative that would have overturned it and prevented the city from passing any laws protecting LGBT public employees from discrimination. The City Council of Topeka voted unanimously for the measure to overturn the anti-discrimination protection, but it was then defeated by the voters.<sup>7</sup>

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<sup>1</sup> Kan. Stat. Ann. § 44-1001 (2007).

<sup>2</sup> Telephone Interview of Kim Horp, Reference Librarian, State Library of Kan. (Jan. 23, 2009) (hereinafter “Telephone Interview”).

<sup>3</sup> Minutes, Kan. Sen. Fed. & State Affairs Comm. (Mar. 15, 2005), at 5, available at <http://bitly/12Kx95> (last visited Sept. 6, 2009).

<sup>4</sup> Scott Rothschild, *Bill Would Include Sexual Orientation and Gender Identity in State Anti-Discrimination Laws.*, LAWRENCE J. WORLD, Jan. 29, 2009, available at <http://bit.ly/zNh3w> (last visited Sept. 6, 2009).

<sup>5</sup> *Id.*; SB 169 (Kan. 2009), available at <http://www.kslegislature.org/bills/2010/169.pdf>.

<sup>6</sup> Exec. Order No. 07-24 (2007), available at <http://www.governor.ks.gov/executive/Orders/default.htm>.

<sup>7</sup> Associated Press, *Town Votes to Keep Antidiscrimination Law*, Deseret News, Mar. 3, 2005, available at <http://bit.ly/H30n4>.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity in Kansas include:

- In 2004, a Topeka resident and employee of a state agency reported that when a newly appointed supervisor arrived in the office, he harassed the employee until he took a job with another state agency. Prior to the new supervisor’s arrival, the employee had received three “Outstanding” employee evaluations, but the new supervisor constantly criticized his work. The employee then found the state discrimination office to be unreceptive to his complaint.<sup>8</sup>
- In 2003, the day after the Supreme Court issued the *Lawrence v. Texas* decision, members of the Topeka and Shawnee County public library staff ordered an employee who had been a longtime member of Parents, Families, and Friends of Lesbians and Gays to never again speak about the decision at work. In response to a letter from the ACLU, the library admitted that it cannot forbid one of its employees from talking about a Supreme Court decision while at work, and assured the ACLU that it would not restrict employees in that way.<sup>9</sup>
- In 1996 in *Miller v. Brungardt*, a school counselor, brought suit against the school district, her school's superintendent, and its vice principal after the latter allegedly made sexually inappropriate comments that included accusing her "of engaging in a lesbian relationship" with a student's mother and other "sexually explicit comments concerning lesbian behavior." When the counselor reported the vice principal's actions to the school superintendent, she was reprimanded, and the superintendent failed to take remedial action. In addressing whether, when suing individual employees of a municipality (such as the school district) under the Kansas Tort Claims Act, the plaintiff must give them notice of suit prior to its commencement, the court found that notice must be provided to municipal employees only when "the employee's actions occurred within the scope of employment." Taking plaintiff's allegations as true for the purposes of the motion, the court found that the vice-principal's harassment, characterized by school counselor as "threatening, intimidating and abusive," fell outside the scope of the vice-principal's employment. "[S]exual harassment . . . is not within the job description of any supervisor or any other worker in any reputable business."<sup>10</sup> *Miller v. Brungardt*, 916 F.Supp. 1096 (D. Kan. 1996).
- In 1995, an employee of the Kansas Air National Guard was harassed because she was perceived to be a lesbian. The first sixteen months of her employment passed without incident. Then her superiors and co-workers began harassing her. Her supervisor told her that “some people were wondering” about her sexual

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<sup>8</sup> RODDRICK COLVIN, THE EXTENT OF SEXUAL ORIENTATION DISCRIMINATION IN TOPEKA, KS 3 (2004), available at <http://www.thetaskforce.org/downloads/reports/reports/TopekaDiscrimination.pdf> (crediting the statement to “a gay Topeka resident”).

<sup>9</sup> Press Release, ACLU, Kansas Public Library Concedes That it Can’t Censor Employee for Discussing Historic Sodomy Ruling (Aug. 5, 2003), available at <http://bit.ly/Kt0QP>.

<sup>10</sup> *Miller v. Brungardt*, 916 F.Supp. 1096 (D. Kan. 1996).

orientation,” to which she responded, “No problem. Like Men.” On another occasion, she alleged her co-worker was touching his genitals while he was looking at her. In another instance, she accidentally brushed up against a co-worker while getting a cup of coffee, to which the co-worker responded, “Don't rub up against me. You're not going to come out of the closet that way.” Finally, she alleged her supervisor stated, “I would like to see what you would do if O.J. Simpson asked you out on a date,” to which she replied, “Well, he's not my type.” Then the supervisor laughed and said, “You mean your type or your gender?” Later that day, the supervisor apologized for his comment.<sup>11</sup> In 1998, the court concluded that she had not stated a *prima facie* case of hostile work environment sexual harassment. Thus, the defendant's motion for summary judgment was granted. Wible v. Widnall, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998).

- In 1991, in Jantz v. Muci,<sup>12</sup> a federal district court in Kansas found that a Kansas school teacher did have an equal protection claim actionable under 42 U.S.C. § 1983<sup>13</sup> because he had been denied a teaching position because of a principal's perception that he had “homosexual tendencies.”<sup>14</sup> The court further held that the principal was not entitled to a qualified immunity defense<sup>15</sup> and denied his motion for summary judgment. The Tenth Circuit reversed, finding that the principal was entitled to qualified immunity.<sup>16</sup> Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991); Jantz v. Muci 976 F.2d 623 (10th Cir. 1992).
- In 1987, in In re Smith,<sup>17</sup> the Supreme Court of Kansas disbarred an attorney, in part, because he had a misdemeanor conviction for consensual sodomy with an adult. In 2003, the United States Supreme Court held that it had been wrong in 1986 when it had decided, in Bowers v. Hardwick, that sodomy laws did not violate the due process clause of the U.S. Constitution. In re Smith, 757 P.2d 324 (Kan. 1988).
- In 1987, a road patrol deputy for the Saline County Sheriff's Department was fired after rumors circulated that she was a lesbian and involved in a relationship with another employee. The deputy sued, alleging violation of her First Amendment right of association. The court held that the Sheriff's Department had not infringed the Plaintiff's right of association when it discharged her. The court noted that “defendants acted to protect the public image of the Department and to maintain close working relationships internally and externally with the community. These are legitimate concerns and they provide sufficient justification

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<sup>11</sup> Wible v. Widnall, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998)

<sup>12</sup> 759 F. Supp. 1543 (D. Kan. 1991).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1545.

<sup>15</sup> *Id.* at 1552.

<sup>16</sup> 976 F.2d 623 (10th Cir. 1992). For a recitation of the relevant facts, see the summary of Jantz v. Muci, 759 F. Supp. 1543, 1543 (D. Kan. 1991).

<sup>17</sup> 757 P.2d 324 (Kan. 1988).

for the action taken against the plaintiff.”<sup>18</sup> Endsley v. Naes, 673 F. Supp. 1032 (D. Kan. 1987).

Another case in Kansas also shows the difficulty that LGBT people face in public employment. In 1995, in *Case v. Unified School District*,<sup>19</sup> a federal district court held that a Kansas School board had improperly removed a book from a junior and high school library because of their disapproval of the ideas in the book, thus violating the first amendment and due process rights of students and their parents. In reaching this finding, the court review the reasons that board members gave for removing the book. One board member, who voted to remove the book, stated that “homosexuality is a mental disorder similar to schizophrenia or depression.”<sup>20</sup> Another testified that it is not okay to be gay “[b]ecause engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems.”<sup>21</sup> Another testified that homosexuality was “unnatural” and the only books about homosexuality that she would find educationally suitable would be ones that say homosexuality is unhealthy.<sup>22</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>18</sup> *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 1987).

<sup>19</sup> 908 F. Supp. 864 (D. Kan. 1995).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 871.

<sup>22</sup> *Id.*

## II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

### A. State-Wide Employment Statutes

Currently, the state of Kansas has not enacted laws to protect sexual orientation and gender identity from employment discrimination.<sup>23</sup>

### B. Attempts to Enact State Legislation

On January 29, 2009, SB 169 was presented in the Senate Federal and State Affairs Committee.<sup>24</sup> This bill would amend the Kansas Act Against Discrimination to include “sexual orientation or gender identity.”<sup>25</sup> The bill was formally introduced to the Senate by the Federal and State Affairs Committee on February 2, 2009.<sup>26</sup> The Senate then referred the bill back to the Senate Committee for hearings.<sup>27</sup> The Senate Committee conducted a hearing regarding SB 169 on February 12, 2009.<sup>28</sup> It passed the bill on March 19, 2009, but the Senate referred it back to the same Senate Committee on March 23, 2009.<sup>29</sup>

At the February 12, 2009 hearing on SB 169, Maggie Childs, Chair of the Kansas Equality Coalition, presented a policy brief, entitled “The Extent of Sexual Orientation Discrimination in Topeka, KS,”<sup>30</sup> to the Senate Federal and State Affairs Committee.<sup>31</sup> The brief reported the results of a survey conducted from October of 2003 through January of 2004. One hundred twenty one (121) gay, lesbian, and bisexual residents of Topeka participated in the survey. The results suggest a history of discrimination based on sexual orientation or gender identity in Topeka, including:

1. 16% of respondents reporting that they were denied employment;
2. 11% reporting that they were denied a promotion;
3. 18% reporting that they were overlooked for additional responsibilities at work;
4. 15% reporting that they were fired; and
5. 35% reporting that they had received harassing letters, e-mails, or faxes at work that were

“all based on the respondent’s sexual orientation or gender identity.”<sup>32</sup> Furthermore, 47% of respondents reported that

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<sup>23</sup> KAN. STAT. ANN. § 44-1001 (2007).

<sup>24</sup> Rothschild, *supra* note 4.

<sup>25</sup> S.B. 169 (Kan. 2009).

<sup>26</sup> Kansas Legislature Bill Tracking, <http://bit.ly/13MnRN> (last visited Feb. 4, 2009).

<sup>27</sup> *Id.*

<sup>28</sup> Minutes, Kan. Sen. Affairs Comm. (Feb. 12, 2009) (hereinafter “Minutes”).

<sup>29</sup> Kansas Legislature Bill Tracking, *available at* <http://www.kslegislature.org/legsrv-billtrack/searchBills.do> (last visited Jul. 14, 2009).

<sup>30</sup> Colvin, *supra* note 8, at 2.

<sup>31</sup> Minutes, *supra* note 28.

<sup>32</sup> Colvin, *supra* note 8.

they had to conceal their sexual orientation or gender identity to protect their jobs. The report concluded, and 89% of respondents agreed, that a comprehensive nondiscrimination law that includes sexual orientation and gender identity could help to alleviate the pervasive discrimination in employment.”

On March 2, 2005, during the 2005 Kansas Legislative Session, Senate Bill 285 (“SB 285”) was introduced in the Committee on Federal and State Affairs.<sup>33</sup> This bill would have amended the Kansas Act Against Discrimination to include “sexual orientation.”<sup>34</sup> In particular, the proposed language stated:

“The practice or policy of discrimination against individuals in employment relations, in relation to free and public accommodations in housing by reason of race, religion, color, sex, disability, national origin, or ancestry or sexual orientation or in housing by reason of familial status is a matter of public concern to the state since such discrimination threatens not only the rights and privileges of the inhabitants of the state of Kansas but menaces the institutions and foundations of a free democratic state. It is hereby declared to be the policy of the state of Kansas to eliminate and prevent discrimination in all employment relations, discrimination, segregation, or separation in all places of public accommodations covered by this act, and to eliminate and prevent discrimination, segregation or separation in housing. It is also declared to be the policy of this state to assure equal opportunities and encouragement to every citizen regardless of race, religions, color, sex, disability, national origin or, ancestry or sexual orientation, in securing and holding, without discrimination, employment in any filed of work or labor for which a person is properly qualified, to assure equal opportunities for all persons within this state to full and equal public accommodations, and to assure equal opportunities in housing without distinction on account of race, religion, color, sex, disability, familial status, national origin, or ancestry or sexual orientation....”<sup>35</sup>

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<sup>33</sup> Telephone Interview, *supra* note 2.

<sup>34</sup> Kan. S.B. 285 (Kan. 2005).

<sup>35</sup> *Id.*

SB 285 defined “sexual orientation” as “actual or perceived heterosexuality, homosexuality or bisexuality.”<sup>36</sup> The bill would have allowed those facing discrimination to file a complaint with the Kansas Human Rights Commission.<sup>37</sup>

On March 15, 2005, the Senate Committee on Federal and State Affairs held a hearing regarding SB 285. The bill’s co-sponsor, Jim Yonally, pointed out that SB 285 would not give a preferred status to people based on their sexual orientation, but would instead give the group protection from discrimination, just as the Kansas Act Against Discrimination already did for other groups.<sup>38</sup>

Approximately ten people spoke in favor of the measure at the Senate Committee hearing, including Steve Brown, President of the Gay, Lesbian, Bisexual, and Transgendered Caucus, who argued that in order for Kansas to attract talented workers, it would have to show that it does not allow discrimination on the basis of sexual orientation.<sup>39</sup> Opposing the Kansas bill prohibiting employment discrimination on the basis of sexual orientation were several members of the Westboro Baptist Church. One opponent stated “homosexuals want SB 285 as government validation of their sins and to intimidate employers, landlords and the populace.” Other representatives of the Church stated “homosexuality is an atrocious sin, along with the acceptance of it,” asserting the following “dangers” of homosexuality: 1) homosexuals have vastly more sexually transmitted diseases; 2) have lower life expectancy; and 3) have a greater tendency to commit suicide and abuse drugs. Another Westboro representative drew attention to claims that homosexuals make up 1 to 3% of the population, but account for 20-33% of pedophiles.<sup>40</sup> SB 285 died in Committee, likely because it was introduced toward the end of the 2005 legislative session.<sup>41</sup>

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

#### **1. Executive Orders**

On August 31, 2007, Governor Kathleen Sebelius issued an Executive Order prohibiting discrimination and harassment in state employment on account of “race, color, gender, sexual orientation, gender identity, religion, national origin, ancestry, age, military or veteran status, or disability status.”<sup>42</sup> In the order, Governor Sebelius noted that the policy “places the State of Kansas in line with approximately 90% of Fortune 500 companies that have implemented similar diversity policies.”<sup>43</sup> The policy applies to all state employees under the Governor’s jurisdiction. The Office of the Governor of Kansas

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<sup>36</sup> *Id.*

<sup>37</sup> Minutes, Kan. Senate Fed. & State Affairs Comm. Minutes (Mar. 15, 2005), at 2, *available at* <http://bit.ly/12Kx95> (last visited Sept. 6, 2009).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2-3.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> Telephone Interview, *supra* note 2.

<sup>42</sup> Kan. Exec. Order No. 07-24 (2007).

<sup>43</sup> *Id.*

issued a press release on August 31, 2007 regarding Executive Order No. 07-24. The release, entitled “Executive Order embraces diversity, prevents discrimination,” quoted Governor Kathleen Sebelius’ as saying: “...like any successful business, we need to make sure all our employees are treated with dignity and respect, and that the doors of employment are open to all.”<sup>44</sup>

## 2. State Government Personnel Regulations

The Kansas Department of Motor Vehicles has issued regulations that its security clearance requirements “shall not be used to discriminate on the basis of race, color, national origin, religion, sex, disability, age, veteran’s status, or sexual orientation.”<sup>45</sup>

The University of Kansas has adopted a nondiscrimination policy with respect to university employees that prohibits the university from discriminating on the basis of “sexual orientation, marital status, and parental status” and extends to employment practices, including conditions of employment.<sup>46</sup> Furthermore, the university commits to provide an equal opportunity in employment to all qualified individuals regardless of “sexual orientation, marital status or parental status.”<sup>47</sup>

Kansas State University has also adopted a nondiscrimination policy with respect to university employees. The university is “committed to nondiscrimination on the basis of ... sexual orientation, gender identity.. or other non-merit reasons” in employment decisions.<sup>48</sup>

### D. Local Legislation

#### 1. City of Lawrence

The campaign for gay, lesbian and bisexual equal rights in Lawrence began as early as 1986 when the City Commission refused to recognize Gay and Lesbian Awareness Week.<sup>49</sup> In 1988, following pressure from the group Citizens for Human Rights in Lawrence, the City Commission voted on whether to amend their City Code’s anti-discrimination provision to include “sexual orientation.” The proposed amendment failed by a vote of 3 to 2.<sup>50</sup> After this defeat, various equal rights groups began an initiative known as “Simply Equal” to rally support for the City Code amendment.<sup>51</sup>

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<sup>44</sup> Press Release, Office of the Governor, Executive Order Embraces Diversity, Prevents Discrimination, (Aug. 31, 2007), *available at* <http://bit.ly/3pyWOi>.

<sup>45</sup> KAN. ADMIN. REG. § 92-52-15(2008).

<sup>46</sup> UNIV. OF KAN. NON-DISCRIMINATION POLICY (2003), *available at* <http://bit.ly/1wSVR1> (last visited Sept. 6, 2009).

<sup>47</sup> *Id.*

<sup>48</sup> Kan. State Univ. Notice of Non-Discrimination (2008), <http://bit.ly/E30Va> (last visited Sept. 6, 2009).

<sup>49</sup> MARCELO VILELA, CHANGING THE FACE OF LAWRENCE SIMPLY EQUAL FIVE YEARS LATER (Liberty Press 2000) *available at* <http://www.libertypress.net/index.php>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



In November 1994, the Simply Equal supporters went before the City Commission with their proposal to amend the City Code to include “sexual orientation.”<sup>52</sup> Four of the five commissioners were divided, and one vote was undecided.<sup>53</sup> The Commission ordered a “study session” in January 1995, in which each side would present their arguments for 15 minutes.<sup>54</sup> However, the Commission remained undecided even after the January session.<sup>55</sup> Soon after this session, three of the five seats on the Commission were up for re-election, and the Simply Equal initiative became a campaign to elect commissioners who would support their amendment.<sup>56</sup> The group was successful, and on April 25, 1995, immediately following the elections, the City Commission voted 3-2 to approve Ordinance 6658. This effectively added “sexual orientation” to the City Code’s anti-discrimination provision and gave the Human Relations Commission the authority to investigate discrimination against homosexuals in housing, employment and public accommodations.<sup>57</sup> The second reading of the ordinance was likewise approved on May 2, 1995.<sup>58</sup>

On May 8, 1995, the ordinance became effective upon its publication in the *Lawrence Journal World*.<sup>59</sup> The Simply Equal initiative was the first to succeed in Kansas, making Lawrence the only city that had prohibited discrimination on the basis of sexual orientation.<sup>60</sup>

## 2. City of Topeka

The issue of discrimination based on sexual orientation and gender identity was first raised in Topeka on July 16, 2002 when the group Concerned Citizens of Topeka approached the City Council.<sup>61</sup> Specifically, the group submitted a report for council review of a Human Relations Commission Ordinance which would include “sexual orientation or gender, identity or expression” as a protected class in the city’s policy of discrimination. Following the presentation, the Deputy Mayor referred the proposal to the Committee of the Whole.<sup>62</sup> On November 16, 2004, the Topeka City Council adopted Ordinance 18347, amending Section 86-114 of the Topeka City Code to prohibit discrimination on the basis of sexual orientation by a Topeka official, department head, agent or employee of Topeka.<sup>63</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; Minutes, Lawrence City Comm’n (Apr. 25, 1995) (on file with Lawrence City Clerk).

<sup>58</sup> Vilela, *supra* note 49; Minutes, Lawrence City Comm’n (May 2, 1995) (on file with Lawrence City Clerk).

<sup>59</sup> Vilela, *supra* note 49.

<sup>60</sup> *Id.* LAWRENCE CODE §10-101 (2008).

<sup>61</sup> Minutes, Topeka City Council (July 16, 2002), <http://bit.ly/3Rnrse> (last visited Sept. 6, 2009) (hereinafter “Topeka Minutes” ([date])).

<sup>62</sup> *Id.*

<sup>63</sup> TOPEKA ORD. 18347 (2004), available at <http://bit.ly/Df4sa>.

Despite this step forward, Ordinance No. 18380, sponsored by the Westboro Baptist Church, a longtime conservative force in Kansas, was introduced to the City Council on January 18, 2005.<sup>64</sup> Ordinance No. 18380 called for an election to be held on March 1, 2005 to vote on an ordinance that would prohibit the city of Topeka, its Boards and Commissions from enacting, adopting, enforcing or administering any ordinance, regulation, rule or policy that provides homosexual, lesbian, or bisexual orientation or gender identity or expression a protected status or any other preferential treatment.<sup>65</sup> This ordinance would not affect private employers. The City Council unanimously passed and approved Ordinance 18380 on January 25, 2005.<sup>66</sup>

On March 1, 2005, Ordinance 18380 went to the polls and failed, 14,360 no's to 12,880 yes's.<sup>67</sup>

### 3. County of Shawnee

On July 21, 2003, the Shawnee County Commission unanimously passed Shawnee County Resolution 2003-108, which bans discrimination based on sexual orientation in county employment.<sup>68</sup> In response to allegations that the measure was part of a "homosexual agenda," Chairman Vic Miller stated that no one had asked him to introduce the measure, but that he felt it was appropriate given the recent decision of *Lawrence v. Texas*.<sup>69</sup> Prior to the 2003 resolution, the Shawnee County Commission had attempted to pass a similar resolution in 2002. However, that resolution, which would have added gay, lesbian, and transgender to its non-discrimination policy, was rejected in a 5 to 4 vote.<sup>70</sup>

#### E. Occupational Licensing Requirements

A non-comprehensive search of Kansas State occupational licensing boards revealed that there are multiple licensing requirements and/or regulations that reference "moral standards," "moral character", and "good character."<sup>71</sup> The occupations include clinical

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<sup>64</sup> Topeka Minutes (Jan. 25, 2005), available at <http://bit.ly/OQULi> (last visited Sept. 6, 2009).

<sup>65</sup> TOPEKA ORD. 18380 (2005), available at <http://bit.ly/JsfEf>.

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

<sup>67</sup> Telephone Interview with Elizabeth Ensley, Shawnee County Election Comm'r (Jan. 26, 2009).

<sup>68</sup> LESBIAN & GAY L. NOTES 144 (Sept. 2003), available at <http://bit.ly/2CkMZT>; Mike Hall, *County Adds Sexuality to Clause*, TOPEKA CAPITAL-J., July 22, 2003, available at <http://bit.ly/36tLh9>.

<sup>69</sup> Hall, *supra* note 68; SHAWNEE COUNTY CODE § 10-207 (2006).

<sup>70</sup> Cindy Friedman & Dean Elzinga, *Newswrap*, THIS WAY OUT, Sept. 14, 2002, available at <http://bit.ly/yuEeM>.

<sup>71</sup> State licensing boards that have been reviewed include: Kan. Real Estate Comm'n, <http://www.accesskansas.org/krec> (last visited Sept. 6, 2009); Kan. Bd. of Healing Arts, <http://www.ksbha.org> (last visited Sept. 6, 2009); Kan. Behavioral Sci. Reg. Bd., <http://www.ksbsrb.org> (last visited Sept. 6, 2009); Kan. Bd. Acc., <http://www.ksboa.org> (last visited Sept. 6, 2009); Kan. Dep't of Health and Env't, <http://www.kdheks.gov> (last visited Sept. 6, 2009); Kan. Dep't of Ed., <http://www.ksde.org> (last visited Sept. 6, 2009); Kan. Bureau of Invest., <http://www.kansas.gov/kbi> (last visited Sept. 6, 2009); Kan. Dental Bd., <http://www.accesskansas.org/kdb> (last visited Sept. 6, 2009); Kan. Bd of Emer. Med. Serv., <http://www.ksbems.org> (last visited Sept. 6, 2009); Kan. Bd. of Nurs., <http://www.ksbn.org> (last visited Sept. 6, 2009); and Kan. Bd. of Pharm., <http://www.kansas.gov/pharmacy> (last visited Sept. 6, 2009).

social workers, marriage and family therapists, clinical professional counselors,<sup>72</sup> psychologists,<sup>73</sup> adult care home administrators,<sup>74</sup> attorneys,<sup>75</sup> certified public accountants,<sup>76</sup> private detectives,<sup>77</sup> dentists,<sup>78</sup> car salespersons and manufacturers,<sup>79</sup> title agents,<sup>80</sup> water conditioning contractors,<sup>81</sup> court reporters,<sup>82</sup> county officers and employees,<sup>83</sup> viatical settlement providers and brokers,<sup>84</sup> retailers of alcohol,<sup>85</sup> athlete agents,<sup>86</sup> notaries,<sup>87</sup> appraisers,<sup>88</sup> embalmers and funeral directors,<sup>89</sup> psychologists,<sup>90</sup> key officers and employees in gaming, racetrack, and lottery enterprises,<sup>91</sup> retailers of tobacco products,<sup>92</sup> veterinarians,<sup>93</sup> optometrists,<sup>94</sup> barbers,<sup>95</sup> mediators,<sup>96</sup> and law enforcement officers.<sup>97</sup>

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<sup>72</sup> Kan. Behav. Sci. Reg. Bd., <http://www.ksbsrb.org> (last visited Sept. 6, 2009).

<sup>73</sup> *Id.*

<sup>74</sup> KAN. STAT. ANN. § 65-3503 (2007); Kan. Dep't of Health & Env't, <http://www.kdheks.gov> (last visited Sept. 6, 2009).

<sup>75</sup> Kan. Sup. Ct. Rule 702 (2007).

<sup>76</sup> KAN. STAT. ANN. § 1-302 (2007); Kan. Bd. of Acc., *supra* note 71.

<sup>77</sup> KAN. STAT. ANN. § 75-7b01, *et seq.* (2007) (Kan. Private Detective Licensing Act).

<sup>78</sup> KAN. STAT. ANN. § 65-1426 (2007); KAN. STAT. ANN. § 65-1421, *et seq.* (2007) (Kan. Dental Practices Act).

<sup>79</sup> KAN. STAT. ANN. § 8-2410 (2007).

<sup>80</sup> KAN. STAT. ANN. § 8-2605 (2007).

<sup>81</sup> KAN. STAT. ANN. § 12-3602 (2007).

<sup>82</sup> KAN. STAT. ANN. § 12-3602 (2007).

<sup>83</sup> KAN. STAT. ANN. § 19-4318 (2007).

<sup>84</sup> KAN. STAT. ANN. § 40-5004 (2007).

<sup>85</sup> KAN. STAT. ANN. § 41-2702-3 (2007).

<sup>86</sup> KAN. STAT. ANN. § 41-2702-3 (2007).

<sup>87</sup> KAN. STAT. ANN. § 53-118 (2007).

<sup>88</sup> KAN. STAT. ANN. § 58-4118 (2007).

<sup>89</sup> KAN. STAT. ANN. § 65-1751 (2007).

<sup>90</sup> KAN. STAT. ANN. § 74-5324 (2007).

<sup>91</sup> KAN. STAT. ANN. § 74-8751 (2007).

<sup>92</sup> KAN. STAT. ANN. § 79-3304 (2007).

<sup>93</sup> KAN. STAT. ANN. § 47-824 (2007).

<sup>94</sup> KAN. STAT. ANN. § 65-1505 (2007).

<sup>95</sup> KAN. STAT. ANN. § 65-1812 (2007).

<sup>96</sup> Kan. Sup. Ct. Rule 902 (2007).

<sup>97</sup> KAN. STAT. ANN. § 74-5605 (2007).

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

#### A. Case Law

##### 1. State & Local Government Employees

Wible v. Widnall, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998).

In *Wible*,<sup>98</sup> Plaintiff Leasa H. Wible filed suit against Sheila E. Widnall, in her capacity as Secretary of the Department of the Air Force, alleging violations of Title VII arising out of her employment with the Kansas Air National Guard. This matter was before the court on defendant's motion for summary judgment.<sup>99</sup> Plaintiff Leasa H. Wible began her employment with the Kansas Air National Guard in September 1993. The first sixteen months of the plaintiff's employment passed without incident. According to the plaintiff, her superiors and co-workers began harassing her in late 1994. Specifically, the plaintiff claimed that her supervisor told her that "some people were wondering" about her sexual orientation," to which Wible responded, "No problem. Like Men." On another occasion, Wible alleged her co-worker was touching his genitals while he was looking at her. In another instance of alleged harassment, Wible brushed up against a co-worker while getting a cup of coffee, to which the co-worker responded, "Don't rub up against me. You're not going to come out of the closet that way." Finally, Wible alleged that her supervisor stated, "I would like to see what you would do if O.J. Simpson asked you out on a date," to which Wible replied, "Well, he's not my type." According to Wible, the supervisor laughed and said, "You mean your type or your gender?" Later that day, the supervisor apologized for his comment.<sup>100</sup>

The court concluded that Wible had not stated a *prima facie* case of hostile work environment sexual harassment. Thus, the defendant's motion for summary judgment was granted on the plaintiff's hostile work environment claim. Moreover, the court concluded that the plaintiff had failed to produce evidence from which a reasonable jury could conclude that the defendant retaliated against her for complaining about the alleged harassment. Thus, the court granted the defendant's motion for summary judgment on the plaintiff's retaliation claim.<sup>101</sup>

Miller v. Brungardt, 916 F.Supp. 1096 (D. Kan. 1996).

Jane Miller, a school counselor, brought suit against the school district, her school's superintendent, and its vice principal after the latter allegedly made sexually inappropriate comments that included accusing her "of engaging in a lesbian relationship" with a student's mother and other "sexually explicit comments concerning lesbian behavior." When Miller reported the vice principal's actions to the school superintendent, she was allegedly reprimanded, and the superintendent failed to take remedial action.

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<sup>98</sup> *Wible v. Widnall*, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998).

<sup>99</sup> *Id.* at 1.

<sup>100</sup> *Id.* at \*2-\*4.

<sup>101</sup> *Id.* at \*11-\*12.

Plaintiff made claims of sexual harassment, retaliatory discharge, and intentional infliction of emotional distress.

In addressing whether, when suing individual employees of a municipality (such as the school district) under the Kansas Tort Claims Act, the plaintiff must give them notice of suit prior to its commencement, the court found that notice must be provided to municipal employees only when “the employee’s actions occurred within the scope of employment” since the municipal employer would then be held liable for the acts of the employee.

Taking plaintiff’s allegations as true for the purposes of the ruling on defendants’ motion to dismiss, the court found that the vice-principal’s lesbian-baiting, characterized by plaintiff Miller as “threatening, intimidating and abusive,” fell outside the scope of the vice-principal’s employment. “[S]exual harassment . . . is not within the job description of any supervisor or any other worker in any reputable business.” Thus, the notice requirement did not attach to Miller’s claim of intentional infliction of emotional distress against the vice-principal.<sup>102</sup>

Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991); Jantz v. Muci 976 F.2d 623 (10th Cir. 1992).

In *Jantz v. Muci*,<sup>103</sup> plaintiff Vernon Jantz brought this action under 42 U.S.C. § 1983, alleging a violation of his right to equal protection. The plaintiff alleged that he was denied by the defendant, then-school principal Cleofas Muci, employment as a public school teacher on the basis of Muci’s perception that Jantz had “homosexual tendencies.” The defendant moved for summary judgment.<sup>104</sup> In support of his claim, Jantz relied on the testimony of Sharon Fredin (Muci’s secretary) and William Jenkins (the coordinator of social studies at Wichita North). Fredin acknowledged in her deposition that during the 1987-88 school year she “made the offhand comment” to Muci that Jantz reminded her of her husband, whom she believed to be a homosexual. Jenkins testified that when he asked why Jantz was not hired for the new position, Muci told him it was because of Jantz’s “homosexual tendencies.”<sup>105</sup>

The court held Jantz had articulated a claim which, if proven at trial, would be a violation of his constitutional rights under 42 U.S.C. § 1983.<sup>106</sup> The court further held that Muci was not entitled to a qualified immunity defense.<sup>107</sup> Accordingly, the court denied defendant’s motion for summary judgment with respect to those issues.

The Court of Appeals for the Tenth Circuit reversed the decision of the district court and remanded for entry of summary judgment in favor of the principal in both his individual and official capacities.<sup>108</sup> In particular, the court held that the principal in his

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<sup>102</sup> *Miller v. Brungardt*, 916 F.Supp. 1096 (D.Kan.,1996).

<sup>103</sup> 759 F. Supp. 1543 (D. Kan. 1991).

<sup>104</sup> *Id.* at 1543.

<sup>105</sup> *Id.* at 1545.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1552.

<sup>108</sup> 976 F.2d 623 (10th Cir. 1992).

individual capacity was entitled to qualified immunity. The court found that the principal did not have final authority under Kansas law to hire teachers, which rested in the school board. The court also found that the school board retained the right to review hiring decisions made by the principal, so there was no delegation of policymaking authority.<sup>109</sup>

In re Smith, 757 P.2d 324 (Kan. 1988).<sup>110</sup>

The Supreme Court of Kansas conducted a disciplinary proceeding against Harry D. Smith, an attorney, and disbarred him. Two complaints were brought against Smith in 1987 and they were consolidated for hearing before a panel of the Kansas Board for Discipline of Attorneys, which found that all the charges in the complaints were true and unanimously recommended that Smith be disbarred.<sup>111</sup> Exhibits used in evidence before the panel included the journal entries of four cases. One case involved a misdemeanor conviction for worthless checks and two others involved Smith's failure to file an accounting for a proceeding in which he was a conservator and conversion for his own use of funds from estates. The fourth case dealt with Smith's Class B misdemeanor conviction for sodomy. The court did not explain what actions led to the charge and conviction for sodomy.<sup>112</sup> The decision focused mainly on the misuse of funds and his conduct involving dishonesty, fraud, deceit or misrepresentation. However, the court noted that the evidence fully established the misdemeanor convictions and that respondent had failed to appear. Therefore the court ordered that Harry D. Smith was disbarred from the practice of law in Kansas.<sup>113</sup>

Endsley v. Naes, 673 F. Supp. 1032 (D. Kan. 1987).

Plaintiff, a road patrol deputy for the sheriff's department, was fired after rumors circulated that she was a lesbian and that she was involved in a lesbian relationship with another employee. She sued, alleging sex discrimination under Title VII and violation of her First Amendment right of association. The court held that the Sheriff's Department had not infringed on Plaintiff's First Amendment right of association when it discharged her because of rumors of a homosexual relationship between her and another female deputy. The court noted that "defendants acted to protect the public image of the Department and to maintain close working relationships internally and externally with the community. These are legitimate concerns and they provide sufficient justification for the action taken against the plaintiff."<sup>114</sup>

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<sup>109</sup> *Id.* at 631.

<sup>110</sup> 757 P.2d 324 (Kan. 1988).

<sup>111</sup> *Id.* at 325.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 326.

<sup>114</sup> *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 1987).

## 2. Private Employees

Plakio v. Congregational Home, Inc., No. 93-4222-SAC, 1995 U.S. Dist. LEXIS 7088 \*1 (D. Kan. 1995).

In *Plakio*,<sup>115</sup> at issue was defendant's motion to amend the pretrial order to add the issue of whether same-sex sexual harassment is actionable under Title VII.<sup>116</sup> Four days after the pretrial order was entered, the defendant filed a motion for summary judgment arguing, *inter alia*, that the plaintiff did not state a sexual harassment claim because same-gender sexual harassment is not actionable under Title VII.<sup>117</sup>

The court first noted that “[c]ourts that have rejected same-gender sexual harassment claims have concluded that Title VII prohibits discrimination on the basis of gender and not any harassment that has sexual overtones.” However, the court ultimately denied the defendant's motion to amend, as it determined that the pretrial order already encompassed the issue that defendant sought to add.<sup>118</sup>

James v. Ranch Mart Hardware, 881 F. Supp. 478, 480 (D. Kan. 1995).

In *James v. Ranch Mart Hardware*,<sup>119</sup> Barbara Renee James, an anatomically male transsexual, alleged sex discrimination under Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000(e) *et seq.*, and the Kansas Act Against Discrimination (“KAAD”), Kan. Stat. Ann. § 44-1001 *et seq.* More specifically, plaintiff claimed that Ranch Mart Hardware, Inc., terminated her employment under circumstances in which “a similarly situated female, living and working full time as a male,” would not have been terminated.<sup>120</sup> Ranch Mart moved for summary judgment.

The court began its analysis by noting that it previously determined that James could not state an actionable claim under Title VII or the KAAD for employment discrimination based upon transsexualism, because plaintiff did not fall within a protected class.<sup>121</sup> Consistent with that holding, the court dismissed all claims that plaintiff suffered unlawful discrimination based on transsexualism. The court allowed plaintiff to proceed with the limited claim that Ranch Mart fired her for being a male transsexual when it would not have fired her for being a female transsexual.<sup>122</sup> However, the court also granted defendant's motion for summary judgment on that claim, finding

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<sup>115</sup> No. 93-4222-SAC, 1995 U.S. Dist. LEXIS 7088 \*1 (D. Kan. 1995).

<sup>116</sup> *Id.* at \*1.

<sup>117</sup> *Id.* at \*2.

<sup>118</sup> *Id.* at \*3 - 4\*.

<sup>119</sup> 881 F. Supp. 478, 480 (D. Kan. 1995).

<sup>120</sup> *Id.* at 480.

<sup>121</sup> *Id.* at 481-82.

<sup>122</sup> *Id.* at 481 n4.

that Ranch Mart had advanced a facially nondiscriminatory reason for plaintiff's termination, that is, her failure to report for work.<sup>123</sup>

Goeffert v. Beech Aircraft Corp., No. 92-1609-PFK, 1994 U.S. Dist. LEXIS 5381 (D. Kan. 1994).

In *Geofert*,<sup>124</sup> plaintiff Larry Budenz brought this action pursuant to Title VII of the Civil Rights Act, alleging sexual harassment and retaliation.<sup>125</sup> Defendant moved for summary judgment.

Cynthia Goeffert worked for Beech Aircraft Corporation, and was a member of the International Association of Machinists and Aerospace Workers from April, 1989 until her termination in October, 1991. In August of 1991, she was promoted to crew chief in department 419 at Beech, and began to work the second shift at Beech, which ran from 3:36 P.M. to 12:06 A.M. Goeffert was the only female crew chief in department 419; all of her supervisors were men. During her employment, Goeffert consistently received satisfactory or above average performance evaluations. Immediately prior to her promotion, Darrell Lewis told her that she should "leave all your personal stuff at home." Goeffert took Lewis's comment to refer to her sexual orientation. Goeffert was a lesbian.<sup>126</sup> In October of 1991, Goeffert complained that co-workers made kissing sounds in the direction of Goeffert and another female employee.<sup>127</sup>

The court concluded that the alleged conduct was not so pervasive that it affected a term or condition of Goeffert's employment.<sup>128</sup> The court further found that defendant had articulated a legitimate, nondiscriminatory business reason for Goeffert's termination. Accordingly, the court granted the defendant's motion for summary judgment.

Carreno v. Local Union No. 226, Case No. 89-4083-S, 1990 U.S. Dist. LEXIS 13817 (D. Kan. 1990).

In *Carreno v. Local Union No. 226*,<sup>129</sup> plaintiff, J. Mario Carreno ("Carreno" or "plaintiff"), brought this sexual harassment action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.*, and the Kansas Act Against Discrimination, Kan. Stat. Ann. 44-1001, *et seq.*, alleging that defendants Shelley Electric and Local 226 discriminated against him because of his sex, resulting in his constructive discharge from employment with Shelley Electric.<sup>130</sup>

Carreno was a 39-year-old male licensed as a journeyman electrician. Beginning in July 1986, plaintiff began to suffer harassment from co-workers on the jobsite. This

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<sup>123</sup> *Id.* at 482.

<sup>124</sup> No. 92-1609-PFK, 1994 U.S. Dist. LEXIS 5381 (D. Kan. 1994).

<sup>125</sup> *Id.* at \*1.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*2 - 3.

<sup>128</sup> *Id.* at 16.

<sup>129</sup> Case No. 89-4083-S, 1990 U.S. Dist. LEXIS 13817 (D. Kan. 1990).

<sup>130</sup> *Id.* at \*1.



harassment was directed at plaintiff's nontraditional lifestyle. In 1980 plaintiff divorced his wife and began living with another man in a homosexual relationship. The incidents of harassment directed at plaintiff included derogatory comments such as "Mary" and "faggot." Similar incidents of harassment continued over the next year while the plaintiff worked for various employers.<sup>131</sup>

The issue before the court was whether a homosexual male could recover under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, and KAAD, for constructive discharge as a result of verbal and physical harassment directed at him by co-workers who disapprove of his homosexual lifestyle.<sup>132</sup> The court followed Ninth Circuit precedent, finding that because the harassment complained of was not based upon the plaintiff's sex, but rather was based upon his sexual orientation, the plaintiff failed to allege a prima facie case for sexual discrimination under Title VII of the Civil Rights Act of 1964, as amended, or under the Kansas Act Against Discrimination. Therefore, the court granted defendants' motions for summary judgment.<sup>133</sup>

### **B. Administrative Complaints**

The Kansas Human Rights Commission accepts and investigates complaints pursuant to the Kansas Act Against Discrimination, which prohibits discrimination based on race, religion, color, sex, disability, national origin, or ancestry.<sup>134</sup> This Commission has issued various regulations. In its "Guidelines on Discrimination Because of a Disability," Section 21-34-20, titled "Exceptions to the definitions of disability," states that the term "disability" does not include transvestism, transexualism, gender identity disorders not resulting from physical disorders or other sexual disorders."<sup>135</sup>

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

#### State Agency

A Topeka resident and employee of a state agency reported that when a newly appointed supervisor arrived in the office, he harassed the employee until he took a job with another state agency. Prior to the new supervisor's arrival, the employee had received three "outstanding" employee evaluations, but the new supervisor constantly criticized his work. The employee then found the state discrimination office to be unreceptive to his complaint.<sup>136</sup>

#### Topeka & Shawnee County Public Library

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<sup>131</sup> *Id.* at \*3.

<sup>132</sup> *Id.* at \*6.

<sup>133</sup> *Id.* at \*7 and \*10.

<sup>134</sup> Kansas Human Rights Commission, Filing a Complaint, <http://khrc.net/complaint.html> (last visited Sept. 6, 2009).

<sup>135</sup> KAN. ADMIN. REG. § 21-34-20 (2008).

<sup>136</sup> Colvin, *supra* note 8.

The day after the U.S. Supreme Court decided *Lawrence v. Texas*<sup>137</sup>, members of the Topeka and Shawnee County public library staff ordered an employee who had been a longtime member of *Parents, Families, and Friends of Lesbians and Gays* to never again speak about the decision at work. In response to a letter from the ACLU, the Topeka and Shawnee County public library admitted that it could forbid one of its employees from talking about the Supreme Court's decision in *Lawrence* while at work and assured the ACLU that it would not restrict it or any other employee in that way.<sup>138</sup>

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<sup>137</sup> 539 U.S. 558 (2003).

<sup>138</sup> Press Release, ACLU, *Kansas Public Library Concedes That it Can't Censor Employee for Discussing Historic Sodomy Ruling* (Aug. 5, 2003), available at <http://www.aclu.org/lgbt/discrim/11870prs20030805.html>.

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

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

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

Despite the Supreme Court's ruling in *Lawrence* and the Kansas Supreme Court's subsequent ruling in *State v. Limon*,<sup>139</sup> Kansas' sodomy law remains on the books.<sup>140</sup> Kansas' sodomy law criminalizes: "sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal."<sup>141</sup>

On February 5, 2002, the Topeka City Council passed and approved Ordinance 17789, amending City of Topeka Code Section 54-133 to prohibit prostitution or sodomy within the corporate limits of the city, as well as the solicitation of either.<sup>142</sup> This ordinance was introduced to the City Council by Mayor Felker on December, 11, 2001.<sup>143</sup>

City of Topeka v. Movsovit, No. 77,372 (Kan. Apr. 24, 1998).

In *Movsovit*,<sup>144</sup> a man convicted of solicitation of sodomy, in violation of City of Topeka Code Section 54-133, appealed the district court's affirmation of his municipal court conviction. He challenged the constitutionality of the ordinance and of its underlying authority, Kan. Stat. Ann. 21-3505. The court upheld both the ordinance and the statute. The court found that sodomy and the solicitation of sodomy are not fundamentally protected rights and that protecting public morality is a rational basis for the ordinance and the statute under the Equal Protection Clause.<sup>145</sup>

State v. Limon, 122 P.3d 22 (Kan. 2005).

In *State v. Limon*,<sup>146</sup> the Supreme Court of Kansas held Kansas' "Romeo and Juliet" statute to be unconstitutional, applying the Supreme Court's reasoning in *Lawrence v. Texas*. The statute provided less penalties for sex with a minor when: 1) the victim is of 14 or 15; 2) the offender is less than nineteen years of age and less than 4

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<sup>139</sup>122 P.3d 22 (Kan. 2005) (declaring Kansas's sodomy law unconstitutional).

<sup>140</sup> KAN. STAT. ANN. § 21-3505 (2007).

<sup>141</sup> *Id.*

<sup>142</sup> TOPEKA ORD. 17789, available at [http://www.topeka.org/cityclerk/ordinances/17789-prohibiting\\_prostitution\\_or\\_sodomy.pdf](http://www.topeka.org/cityclerk/ordinances/17789-prohibiting_prostitution_or_sodomy.pdf) (last visited Sept. 6, 2009); Topeka Minutes (Feb. 5, 2005) available at <http://bit.ly/pVaHk> (last visited Sept. 6, 2009).

<sup>143</sup>Topeka Minutes (Dec. 11, 2001), <http://bit.ly/pv5UW> (last visited Sept. 6, 2009).

<sup>144</sup> *City of Topeka v. Movsovit*, No. 77,372 (Kan. Apr. 24, 1998) (unpublished).

<sup>145</sup> *Id.*

<sup>146</sup> *Limon*, 122 P.3d at 22.

years older than the victim; and 3) the victim and offender are members of the opposite sex.<sup>147</sup> Upon review, the Kansas Supreme Court recognized the statute's discriminatory classification and applied the rational basis test. The court concluded that the statute did not pass rational basis scrutiny under the United States and Kansas Constitution, stating that the Romeo and Juliet statute is a "broad, overreaching, and undifferentiated status-based classification which bears no rational relationship to legitimate State interests."<sup>148</sup>

State of Kansas v. Blomquist, 178 P.3d 42 (Kan. Ct. App. 2008).<sup>149</sup>

Here, the defendant was convicted of aggravated indecent liberties with a child, aggravated criminal sodomy, and aggravated indecent solicitation of a child. He appealed. The court held that the prosecutor's arguments, questions and presentation of evidence alleging defendant's homosexuality were analogous to prosecutorial appeals to passion, prejudice, and fear. Therefore the prosecutor's conduct was improper. The court found that "the prosecutor framed the State's case around the allegation that William [Blomquist] was a homosexual."<sup>150</sup> The court found "that it was unreasonable for the State to assume that a sexual desire for children is among those desires which define a homosexual orientation."<sup>151</sup> The court further found that "[g]iven the 'prejudicial character' of homosexuality ... the prosecutor's conduct ... was analogous to prosecutorial appeals to passion, prejudice and fear."<sup>152</sup> The court also found that Blomquist was deprived of a fair trial by prosecutorial misconduct and by cumulative error so it reversed the convictions and remanded the case for a new trial.<sup>153</sup>

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

Smith v. Mission Assoc. Ltd., 225 F. Supp.2d 1293 (D. Kan. 2002).<sup>154</sup>

The plaintiffs brought claims for housing discrimination under the Fair Housing Act and Civil Rights Act, as well as defamation and outrage. The claims were mainly based on hostile housing due to racial discrimination. However, the court noted various insults were made about one of the plaintiff's sexual orientation. For example, the on-site property manager told one of the plaintiffs that he was "gay" and told a gay tenant to "hit on" him. Someone also wrote "Rick is gay. ½ black too!" on a blackboard in the complex's leasing office.<sup>155</sup>

The court held that sexual orientation claims are not actionable under the Fair Housing Act or §1982.<sup>156</sup> The court found that the comments were sufficient to

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<sup>147</sup> *Id.* at 24.

<sup>148</sup> *Id.* at 38.

<sup>149</sup> 178 P.3d 42 (Kan. Ct. App. 2008).

<sup>150</sup> *Id.* at 46.

<sup>151</sup> *Id.* at 50.

<sup>152</sup> *Id.* (internal citation omitted).

<sup>153</sup> *Id.* at 53.

<sup>154</sup> 225 F. Supp.2d 1293 (D. Kan. 2002).

<sup>155</sup> *Id.* at 1297.

<sup>156</sup> *Id.* at 1299.

overcome summary judgment as to the state defamation claim, though they were not sufficient to overcome a motion for summary judgment on the state claim of outrageous conduct.<sup>157</sup>

Title VII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, applies to housing in Kansas.<sup>158</sup> Discrimination is prohibited in the sale, rental and financing of dwellings, and in other housing-related transactions, based on the race, color, national origin, religion, sex, familial status or disability of those seeking housing.<sup>159</sup> Sexual orientation is not a protected class.

### C. HIV/AIDS Discrimination

Kansas Administrative Regulation Section 28-1-26 regulates the confidentiality of information regarding individuals with HIV infection.<sup>160</sup> In particular, it mandates each public health agency appoint an HIV confidentiality officer and sets out requirements for maintenance of HIV confidential information.<sup>161</sup>

Paramo v. Smith, 1992 U.S. Dist LEXIS 4126 (D. Kan. 1992).

In *Paramo*,<sup>162</sup> an HIV-positive prisoner at the Leavenworth U.S. Penitentiary complained that he was segregated upon his initial entrance to the prison, which he claimed made his HIV status clear to the staff and other prisoners. The court held that “segregation of HIV-positive of AIDS-afflicted inmates has been upheld repeatedly against challenges premised on constitutional grounds.”<sup>163</sup> While the court accepted the gravity of his concerns due to the “near-certainty that plaintiff has been identified by both staff and other inmates as HIV-positive,” the court said the mental distress caused by this did not entitle him to relief because the limited isolation upon his initial entry to the prison was supported by legitimate goals and institutional security.<sup>164</sup>

Perkins v. Kansas Dep’t of Corr., 165 F.3d 803 (10th Cir. 1999).

In *Perkins*,<sup>165</sup> an HIV positive prisoner appealed a district court’s dismissal of his civil rights action seeking redress for, *inter alia*, being required to wear a face mask whenever he left his cell and being denied outdoor exercise for more than nine months. Perkins claimed that he had suffered from AIDS since 1993 and was, at the time of the action, segregated while imprisoned. While incarcerated, Perkins became angry with two of the prison guards and spat on them in the prison yard. As a result, Perkins was

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<sup>157</sup> *Id.* at 1304.

<sup>158</sup> SEDGWICK COUNTY FAIR HOUSING, HOW THE FAIR HOUSING ACT APPLIES TODAY (2003), available at <http://bit.ly/M0EDp> (last visited Sept. 6, 2009).

<sup>159</sup> *Id.*

<sup>160</sup> KAN. ADMIN. REG. § 28-1-26 (2008).

<sup>161</sup> *Id.*

<sup>162</sup> *Paramo v. Smith*, 1992 U.S. Dist LEXIS 4126 (D. Kan. 1992).

<sup>163</sup> *Id.* at \* 6.

<sup>164</sup> *Id.* at \*11 - 12.

<sup>165</sup> *Perkins v. Kansas Dep’t of Corr.*, 165 F.3d 803 (10th Cir. 1999).

required to wear a face mask that covered his entire head whenever he left his cell. Guards also forbid him to exercise outside his cell. Perkins alleged that this treatment was demoralizing and further weakened his immune system. Perkins alleged a violation of his due process rights and Eighth Amendments rights. On appeal, the Tenth Circuit concluded that plaintiff's complaint presented facts from which a fact finder could infer both that prison officials knew of a substantial risk of harm to plaintiff's well-being resulting from the lengthy denial of outdoor exercise and that they disregarded that harm. The court concluded that the district court erred in dismissing plaintiff's Eighth Amendment claim regarding the face mask, as it failed to order defendants to prepare a report as to whether the face mask was simply a punishment for his HIV status, given that "prison officials may not punish plaintiff for being an HIV carrier."<sup>166</sup>

#### D. Hate Crimes

The Kansas Hate Crimes Law was amended in 2002 to address crimes that are "motivated entirely or in part by ... sexual orientation of the victim or ... by the defendant's belief or perception, entirely or in part, of the... sexual orientation of the victim whether or not the defendant's belief or perception was correct."<sup>167</sup> On September 10, 2002, the City Council of Topeka passed and approved Ordinance 17885, which mirrored the State of Kansas's Hate Crimes Law.<sup>168</sup> Likewise, the Municipal Code of Wichita includes an "Ethnic Intimidation or Bias Crimes" section, which criminalizes the violation of certain city ordinances "by reason of any motive or intent relating to, or any antipathy, animosity or hostility based ... sexual orientation... of another individual or group of individuals."<sup>169</sup> However, on February 2, 1993, this section of the Wichita Code was amended and repealed by Ordinance 41-937.<sup>170</sup>

#### E. Education

During a trial in U.S. District Court regarding the Olathe school district's banning of a lesbian-themed book from its high school library, Olathe school board president Robert Drummond, a psychologist, testified that homosexuality is both a mental disorder and a sin.<sup>171</sup> Drummond was one of the three board members who voted to remove *Annie On My Mind* by Nancy Garden from three high schools in 1994.<sup>172</sup>

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<sup>166</sup> *Id.* at 810.

<sup>167</sup> KAN. STAT. ANN. § 21-4716 (2007).

<sup>168</sup> TOPEKA ORD. 17885, <http://bit.ly/15H34Z> (last visited Sept. 6, 2009).

<sup>169</sup> 5 WICHITA CODE Chapter 5 § 5.01.010 (2008). This provision was added to the City Code by Ordinance 41-204. WICHITA ORD. 41-204 (1990).

<sup>170</sup> WICHITA ORD. § 41-937 (1993). Ordinance § 41-937 merely amended those city ordinances referenced in Ordinance No. 41-204 and removed the "police reporting" section from the former ordinance.

<sup>171</sup> PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 59-60 (1995 ed.).

<sup>172</sup> *Id.*

On May 11 2008, the Wichita Board of Education voted unanimously to revise Policy No. 1464, titled “Pupil Behavior,” to prohibit bullying on the basis of “sexual orientation.”<sup>173</sup> Efforts to revise the school district policy began in 2007.<sup>174</sup>

Case v. Unif. Sch. Dist. No. 233, 908 F. Supp. 864 (D. Kan. 1995).

In *Case*,<sup>175</sup> students of a junior and senior high school, and their parents, brought suit seeking an injunction to compel reinstatement on school library shelves of a novel depicting fictional romantic relationship between two teenage girls. The court held that the school district had violated the free expression right of current students by denying access to a book based upon their personal disapproval of its ideas and that the due process rights of the students and their parents had not been violated.

The school board members testified as to why they voted as they did on the motion to remove the book. Board member Richard Marriott voted to remove the book because he was offended by the book’s “glorification of the gay lifestyle,”<sup>176</sup> and he believed that if the Board allowed the book to remain on the shelf, the community would have perceived that the Board of Education endorsed or approved of “a homosexual lifestyle.”<sup>177</sup> Robert Drummond, another Board member who voted to remove the book, stated, “that homosexuality is a mental disorder, immoral, and contrary to the teachings of the Bible and the Christian church” and that “homosexuality is a mental disorder similar to schizophrenia or depression.”<sup>178</sup> Board member Ronald Hinkle – who also voted to remove the book –thought the book was not realistic “[b]ecause it didn’t deal with some of the practicalities that homosexuals have to deal with and face. Again, in reference to potential disease, potential death [sic]. It just didn’t even address those issues, let alone broken relationships with family, friends, et cetera.”<sup>179</sup> Hinkle further testified that it is not okay to be gay “[b]ecause engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems.”<sup>180</sup> Board member Janet Simpson voted to remove the book because “the book was objectionable because “it was promoting a very unhealthy lifestyle.”<sup>181</sup> She testified that homosexuality was “unnatural” and the only books about homosexuality that she would find educationally suitable would be ones that say homosexuality is unhealthy.<sup>182</sup> Two members of the Board voted against the removal. The court determined that the Board removed the book because they disagreed with ideas expressed in the book and that factor was the substantial motivation in their

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<sup>173</sup> Press Release, Gay & Lesbian Alliance Against Defamation, Kansas School Board Votes to Protect Gay Students (May 14, 2008), *available at* <http://bit.ly/nLsbo> (last visited Sept. 6, 2009) (hereinafter “Press Release”); Wichita Pub. Sch. Bd. of Ed. Policies, <http://wichita.usd259.net/policies> (last visited Sept. 6, 2009).

<sup>174</sup> Press Release, *supra* note 173.

<sup>175</sup> 908 F. Supp. 864 (D. Kan. 1995).

<sup>176</sup> *Id.* at 870.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 871.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

decision, and that therefore their decision was unconstitutional under *Board of Ed. v. Pico*.<sup>183</sup>

Theno v. Tonganoxie Unif. Sch. Dist., 377 F. Supp. 2d 952 (D. Kan. 2005).

In *Theno*,<sup>184</sup> the district court reaffirmed its denial of the school district's summary judgment motion on plaintiff's claim that it violated Title IX by acting deliberately indifferent to Plaintiff's harassment.<sup>185</sup> The court found that the harassers' conduct was actionable as sex-based discrimination, not sexual-orientation based discrimination, as it was based on the Plaintiff's failure to conform to gender stereotypes.<sup>186</sup> The conduct at issue included phrases like "fag," "likes to suck cock," "masturbates with fish," "how was it fag?" and "Look, I'm Dylan, my name is Jack. I jack off." Harassing conduct included one harasser putting string cheese in his mouth and stating "I'm Dylan sucking a dick" and two boys saying "Look, Dylan was here" after spitting on the bathroom wall to imply that the plaintiff had masturbated and ejaculated in the bathroom.<sup>187</sup> The court noted that the case showed that the harassment of the plaintiff was

"pervasively comprised of crude sexual gestures, innuendos, teasing, and name calling....[which] contributed to a sexually charged hostile environment that appeared to have been motivated by his peers' belief that he failed to conform to stereotypical gender expectations for a teenage boy their community. Motivated by his failure to conform to those expectations, they used his sexuality to denigrate his masculinity."<sup>188</sup>

The district court further found that the plaintiff had shown a genuine issue as to whether the school district was indifferent to the harassing behavior. The court pointed to evidence that the harassers parents were not called, the harassers were not given detentions or suspensions, the harassment went on for years without appropriate discipline sufficient to deter future harassers, that the school district's meager discipline of talking to the harassers was insufficient, and that the student body was aware of the lack of meaningful discipline of the harassers.

C.T. v. Liberal Sch. Dist., 562 F. Supp. 2d 1324 (D. Kan. 2008).

In *C.T.*,<sup>189</sup> student athletes brought suit against their school district and some of its employees, alleging violation of Title IX, constitutional claims under § 1983, and state law claims. In part, the plaintiffs claimed that the school district and the employee-

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<sup>183</sup> *Board of Ed. v. Pico*, 457 U.S. 853, 863-65 (1982).

<sup>184</sup> 377 F. Supp. 2d 952 (D. Kan. 2005).

<sup>185</sup> *Id.* at 970.

<sup>186</sup> *Id.* at 974.

<sup>187</sup> *Id.* at 972-973.

<sup>188</sup> *Id.* at 1308.

<sup>189</sup> 562 F. Supp. 2d 1324 (D. Kan. 2008).



defendants were deliberately indifferent to harassment by other students. The court cited the U.S. Supreme Court holding in *Davis v. Monroe County Board of Education*,<sup>190</sup> in which the Court held that public schools could be liable for student-on-student sexual harassment “but only where the funding recipients acts with deliberate indifference to known acts of harassment in its programs or activities” and “only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>191</sup> While the court granted summary judgment for the defendants on many of the students claims, it found that the record contained sufficient facts for G.B.’s student-on-student harassment claim to withstand summary judgment. After G.B.’s allegations of sexual harassment against a volunteer coach were made public, G.B. was assaulted at school and given a black eye. A teacher was aware of the incident but did not report it to the school administration. Two other students made a death threat to G.B. Further, students daily called him names, such as “fag boy,” and said to him that “I hear you are Johnny’s little bitch” and “I hear you got butt raped by Johnny.”<sup>192</sup> There was no evidence that the students were meaningfully disciplined for the harassment and G.B. transferred to another school at the end of the school year. The court therefore denied the motion for summary judgment as to G.B.’s claim.

## F. Health Care

Kansas law does not allow a partner to give informed consent on behalf of his or her incapacitated partner.<sup>193</sup> However, an adult can designate a person in advance, including his or her partner, to be responsible for making medical decisions on his or her behalf.<sup>194</sup>

## I. Recognition of Same-Sex Couples

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

In 1996, the Kansas legislature passed a statute declaring that marriages not between members of the opposite sex are void, and that it is the public policy of Kansas to recognize as valid only those marriages from other states that are between a woman and man.<sup>195</sup> In 2005, Kansas voters approved the Kansas Defense of Marriage Amendment.<sup>196</sup> This ballot initiative amended the Kansas constitution to state that: “Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void and that “No

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<sup>190</sup> 526 U.S. 629 (1999).

<sup>191</sup> *C.T.*, 562 F. Supp.2d at 1334 (*quoting Davis*, 526 U.S. at 633).

<sup>192</sup> *Id.* at 1336.

<sup>193</sup> KAN. STAT. ANN. § 65-9474 (2007).

<sup>194</sup> Kansas HealthCare Laws, Human Rights Campaign, *available at* [http://www.hrc.org/your\\_community/9150.htm](http://www.hrc.org/your_community/9150.htm) (last visited Sept. 6, 2009) ; KAN. STAT. ANN. § 65-28, 101-65-28, 109; 58-625-58-632 (2007).

<sup>195</sup> KAN. ALS 142 (1996); Richard Cook, *Kansas’s Defense of Marriage Amendment: The Problematic Consequences of a Blanket Non-Recognition Rule on Kansas Law*, 54 KAN. L. REV. 1165, 1172 (2006).

<sup>196</sup> Cook, *supra* note 195, at 1172.

relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”<sup>197</sup>

In 2007, City Commissioners of Lawrence voted 4-1 to create a domestic partnership registry.<sup>198</sup> The registry provides the opportunity for two individuals to register their domestic partnership if: (1) they are not married to other persons; (2) they do not have another domestic partner; and (3) they are not related by blood more closely than would bar their marriage in Kansas. However, registration does not create any legal rights.<sup>199</sup> In 2007, Kansas state representative Lance Kinzer, Republican from Olathe, introduced Kansas House Bill 2299 (“HB 2299”) to prohibit cities or counties from establishing domestic partner registries.<sup>200</sup> This bill was in response Lawrence’s domestic partnership registry.<sup>201</sup> Ultimately, the bill died in Committee when the legislature adjourned on May 29, 2008.<sup>202</sup>

In re Gardiner, 42 P.3d 120 (Sup. Ct. Kan. 2002).

In *Gardiner*,<sup>203</sup> the Kansas Supreme court found that a male-to-female post-operative transsexual did not fit the definition of a “female” in the state’s marriage statute.<sup>204</sup> In the case, an intestate decedent’s son petitioned for letters of administration that would name himself as the sole heir, and claimed that marriage between his father and a post-operative male-to-female transsexual, “J’Noel,” was void. J’Noel argued that the marriage was valid under Wisconsin law and that Kansas must give full faith and credit to Wisconsin law. The marriage was valid under Wisconsin law because Wisconsin allows a person who has had sexual reassignment surgery to change his or her sexual identity in conformance with the surgery.<sup>205</sup> The court found that J’Noel “remains a transsexual, and a male for the purposes of marriage” under Kansas’s marriage statute. Therefore, as a matter of public policy, the court voided the marriage between Gardiner and J’Noel, leaving the decedent’s son as the sole heir.<sup>206</sup>

## 2. Benefits

Att’y Gen. Op. No. 2007-09 (2007).

In this opinion, the Kansas Attorney general addressed a question posed by the Kansas Insurance Department about whether the approval by the Commissioner of

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<sup>197</sup> KAN. STAT. ANN. § 23-101 (2007).

<sup>198</sup> Chad Lawhorn, *Domestic Registry Debate Set for Tonight*, LAWRENCE J. WORLD, May 22, 2009, available at <http://bit.ly/qeSMq> (last visited Sept. 6, 2009).

<sup>199</sup> LAWRENCE CODE § 10-201 (2008).

<sup>200</sup> Human Rights Campaign, *Laws: Kansas HB 229*, [http://www.hrc.org/your\\_community/9356.htm](http://www.hrc.org/your_community/9356.htm) (last visited Sept. 6, 2009) (hereinafter “HB229”); Lawhorn, *supra* note 198.

<sup>201</sup> Lawhorn, *supra* note 198.

<sup>202</sup> HB229, *supra* note 200.

<sup>203</sup> *In re Gardiner*, 42 P.3d 120 (Sup. Ct. Kan. 2002).

<sup>204</sup> *Id.* at 136.

<sup>205</sup> *Id.* at 134.

<sup>206</sup> *Id.* at 137.

Insurance of an insurance policy form providing benefits to unmarried domestic partners constitutes state recognition of a relationship prohibited by the Kansas Constitution. The Attorney General opined that approval by the Commissioner indicates only that the policy form complies with the criteria in the insurance statute and does not represent a state sanction or recognition of a constitutionally proscribed relationship. In addition, it was the Attorney General's opinion that the history of the "Marriage Amendment" indicated that it was not the intention of the legislature for it to apply to private insurance contracts.

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

### **1. Insurance Law**

The Kansas Insurance Department has issued regulations governing life and health insurance applications. Specifically, it provides that "application questions shall be formed in a manner designed to elicit specific medical information and not lifestyle, sexual orientation or other inferential information."<sup>207</sup>

### **2. Judicial Ethics**

Judicial Performance Canon 2 states that: "A judge shall refrain from speech, gestures or other conduct that could be perceived by a reasonable person as harassment based upon ... sexual orientation, and shall require the same standard of conduct of others subject to the judge's direction and control." Judicial Performance Canon 3 states, in part, that

"[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to .. sexual orientation .., and shall not permit staff, court officials and others subject to the judge's direction and control to do so; .. [a] judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon ... sexual orientation...against parties, witnesses, counsel or others."

Judicial Performance Canon 4 states, in part, that "[a] judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties."<sup>208</sup> It further states that "[t]his Section does not preclude legitimate advocacy when race, sex, religion...sexual

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<sup>207</sup> KAN. ADMIN. REG. § 40-1-36 (2008).

<sup>208</sup> Kan. Sup. Ct. Rule 601A (2007).

orientation or socioeconomic status, or other similar factors, are issues in the proceeding.”<sup>209</sup>

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<sup>209</sup> *Id.*