

# Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment



*the*  
**Williams**  
**INSTITUTE**

The Williams Institute, UCLA School of Law

# Project Overview



1500+ Page Report

**Appendices -- 50 Reports, One for Each State**

**15 Chapters:**

1. Sovereign Immunity
2. # of LGBT Public Employees
3. Constitutional Rights Implicated
4. SOGI & Workplace Performance
5. History of Discrimination
6. Findings by Courts and Legal Scholars
7. Findings by State and Local Governments
8. Congressional Record, 1994-Present
9. Surveys of LGBT Public Employees
10. Wage Gap Analysis
11. Administrative Complaints
12. 380+ Specific Examples
13. Voter Initiatives to Repeal/Prevent Legal Protections
14. Other Indicia of Animus
15. State Anti-Discrimination Laws and Executive Orders

# 4 Legal Chapters



1. Sovereign Immunity
2. Constitutional Rights Violations
3. Relationship of Sexual Orientation and Gender Identity to Workplace Performance
4. Analysis of State and Local Non-Discrimination Laws & Executive Orders

# 1. SOVEREIGN IMMUNITY



## The Constitution

*The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

11th Amendment

*to perfect Union, establish Justice, insure Liberty to ourselves and our Posterity, do ordain*

*shall consist of a Senate and House of Representatives, chosen by the People of the several States, and the Electors in each State, in such Manner as they shall direct, who shall have the Qualifications requisite for Senators, not less than seven Years a Citizen of the United States,*

*[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*

*When vacancies happen in the Representation from any State, the Electors in that State shall chuse another Person in the Manner prescribed in this Article.*

**SECTION 3.** *The Senate of the United States shall be composed of two Senators from each State, chosen by the Electors in that State, and the Electors in each State shall have the Qualifications requisite for Senators, not less than seven Years a Citizen of the United States, and one Year a Citizen of the State in which they shall be chosen, and shall, when elected, be Inhabitants of that State.*

*Immediately after they shall be chosen, they shall be divided as equally as may be into three Classes. The Senators of the first Class shall be chosen in the first Year, the second Class in the second Year, and the third Class in the third Year, so that one-third may be chosen every second Year, unless a Vacancy shall happen, in which Case they shall chuse another Person in the Manner prescribed in this Article.*

*No Person shall be a Senator who, when elected, shall not, when elected, be an Inhabitant of that State in which he shall be chosen.*

*The Vice President of the United States shall be chosen in the Manner provided in this Article for the Election of Senators.*

*The Senate shall chuse their other Officers, and also a President pro tempore, in the Manner provided in this Article for the Election of Senators.*

*The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.*

*Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*

*The Congress shall have power to enforce, by appropriate legislation, the provisions of this article*

Section 5, 14<sup>th</sup> Amendment

# 1. SOVEREIGN IMMUNITY



## A widespread and persistent pattern of unconstitutional discrimination against state government employees

*Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001)

- ADA
- No history and pattern of disability discrimination by state government employers shown; rational basis review applies
- Invalid abrogation– Beyond Congress’s power to enforce the 14<sup>th</sup> Amendment

*Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003)

- FMLA
- Sex discrimination receives heightened scrutiny
- Valid abrogation– within Congress’s power to enforce the 14<sup>th</sup> Amendment

*Tennessee v. Lane*, 541 U.S. 509 (2004)

- ADA
- Court access is a fundamental right
- Valid abrogation– within Congress’s power to enforce the 14<sup>th</sup> Amendment

## 2. SEVERAL CONSTITUTIONAL RIGHTS OF LGBT EMPLOYEES ARE VIOLATED WHEN THEIR STATE EMPLOYERS DISCRIMINATE AGAINST THEM



### *The Constitution*

*We the People*  
domestic Tranquility, provide for the common Defence  
and establish this CONSTITUTION for the United

*No State shall... deny to any person within its jurisdiction the equal protection of the laws.*

Section 1, 14<sup>th</sup> Amendment

*No State shall... deprive any person of life, liberty, or property without the due process of law.*

Section 1, 14<sup>th</sup> Amendment

... shall consist of a Senate and House of Representatives  
... People of the several States, and the Electors in  
...  
... been seven Years a Citizen of the United States,  
...  
... ed within this Union, according to their respective  
... Service for a Term of Years, and excluding Indians  
... e first Meeting of the Congress of the United States,  
... representatives shall not exceed one for every thirty  
... the State of New Hampshire shall be entitled to  
... six, New Jersey four, Pennsylvania eight, Delaware

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, and two Senators shall have one Vote.

Immediately after they shall be assembled in each State, the Senators of the first Class shall take the Oath or Affirmation, and shall proceed to the Business of the Senate. The Senate shall have the sole Power to try all Impeachments, when the President of the United States is tried, the Chief Justice shall preside: and Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

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*Congress shall make no law... abridging the freedom of speech... Or the right of the people peaceably to assemble.*

1<sup>st</sup> Amendment, applied to the States through the 14<sup>th</sup> Amendment

### 3. SEXUAL ORIENTATION IS NOT RELATED TO AN INDIVIDUAL'S ABILITY TO CONTRIBUTE TO SOCIETY OR TO PERFORM IN THE WORKPLACE



- Every court and several scholars that have considered whether sexual orientation is related to one's performance on the job or in society has concluded that it is not.

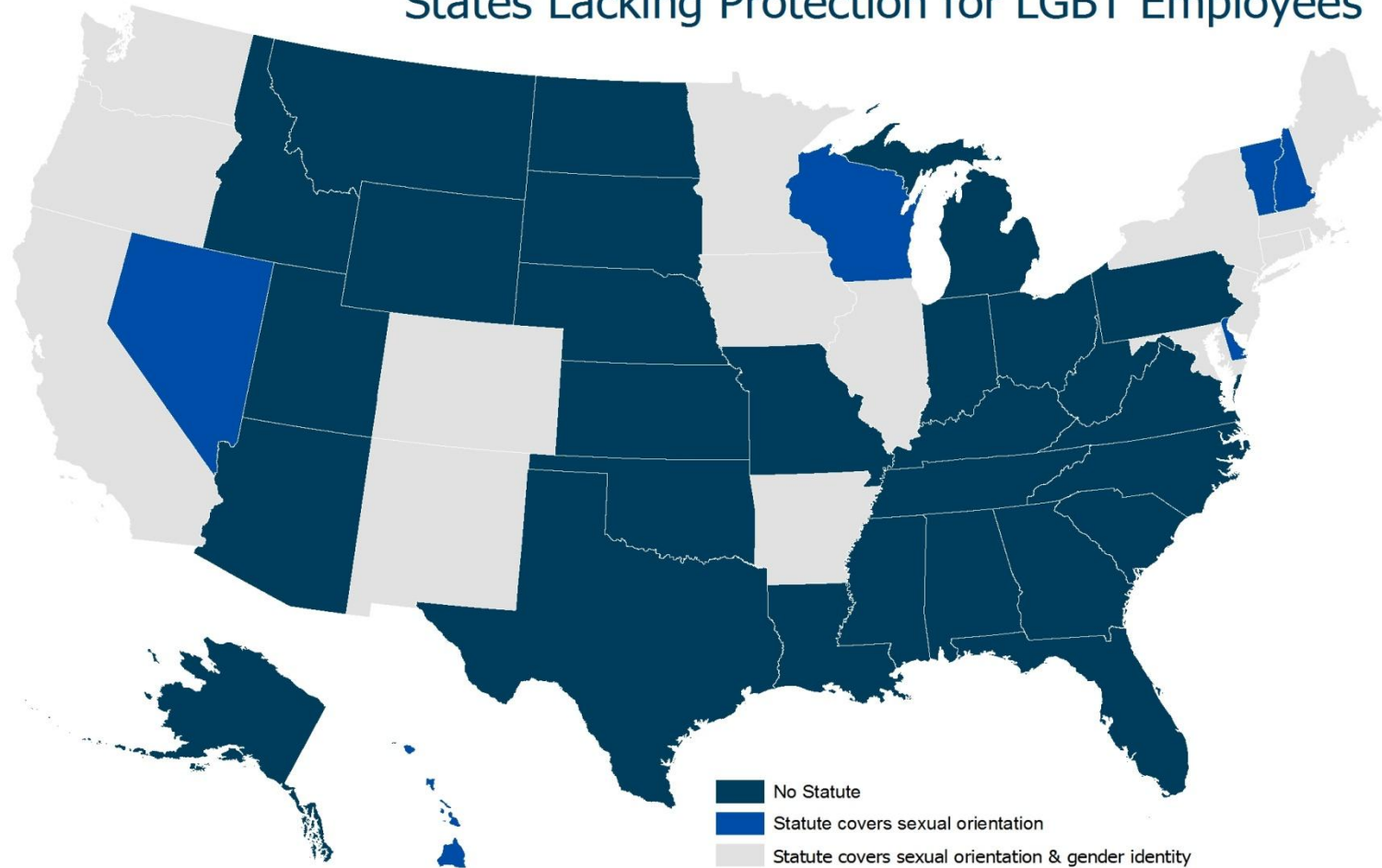


“There is no evidence that gays and lesbians do not function as effectively in the workplace or that they contribute any less to society than do their heterosexual counterparts.” (Montana supreme court, 2004. *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 455-456 (Mont. 2004) (concurring opinion)).

## 4. EXISTING STATE NON-DISCRIMINATION LAWS ARE INSUFFICIENT



### States Lacking Protection for LGBT Employees





## 4. EXECUTIVE ORDERS ARE UNSTABLE AND LACK ENFORCEMENT & ACCOUNTABILITY MECHANISMS



- 10 EOs prohibiting discrimination against state employees, in states where employees are not protected by statute
  - None provides for a private right of action
  - Only 2 impose administrative enforcement schemes
  - Only 6 confer power to investigate complaints
- EOs in 5 states have been revoked or allowed to expire during the last 15 years
  - Kentucky: enacted 2003, revoked 2006, reenacted 2008
  - Louisiana: enacted 1992, expired 1996
  - Ohio: enacted 2007, set to expire 2010
  - Iowa: enacted 1999, revoked 2010
  - Virginia: enacted 2006, revoked 2010

# 11 Chapters Documenting Discrimination

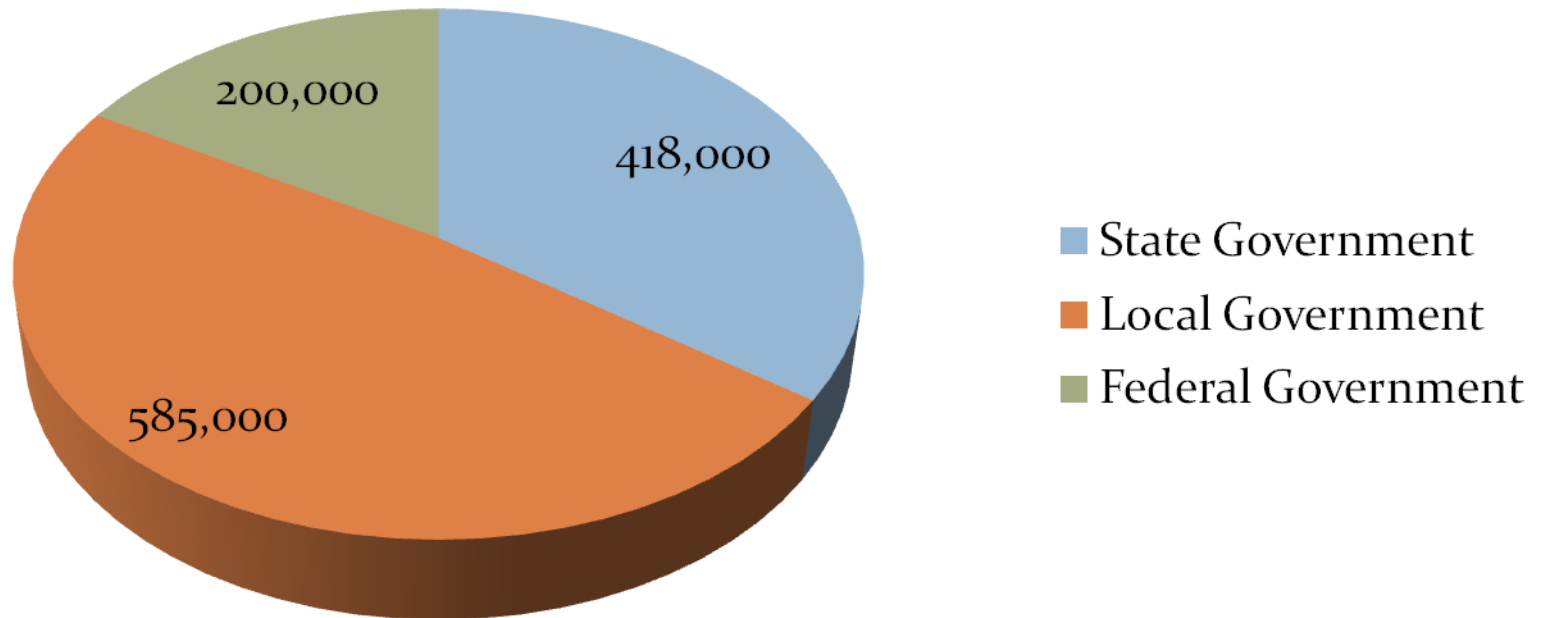


1. LGBT Public Sector Workforce
2. History of Discrimination
3. Findings of Discrimination by Courts and Legal Scholars
4. Findings of Discrimination by State and Local Government Officials
5. Prior ENDA Congressional Record
6. Surveys
7. Wage Gap Analysis
8. Administrative Complaints
9. Specific Examples of Discrimination
10. Anti-LGBT Voter Initiatives
11. Other Indicia of Animus by State and Local Government Officials

# 1. HOW MANY LGBT PEOPLE IN THE U.S. WORK IN THE PUBLIC SECTOR?



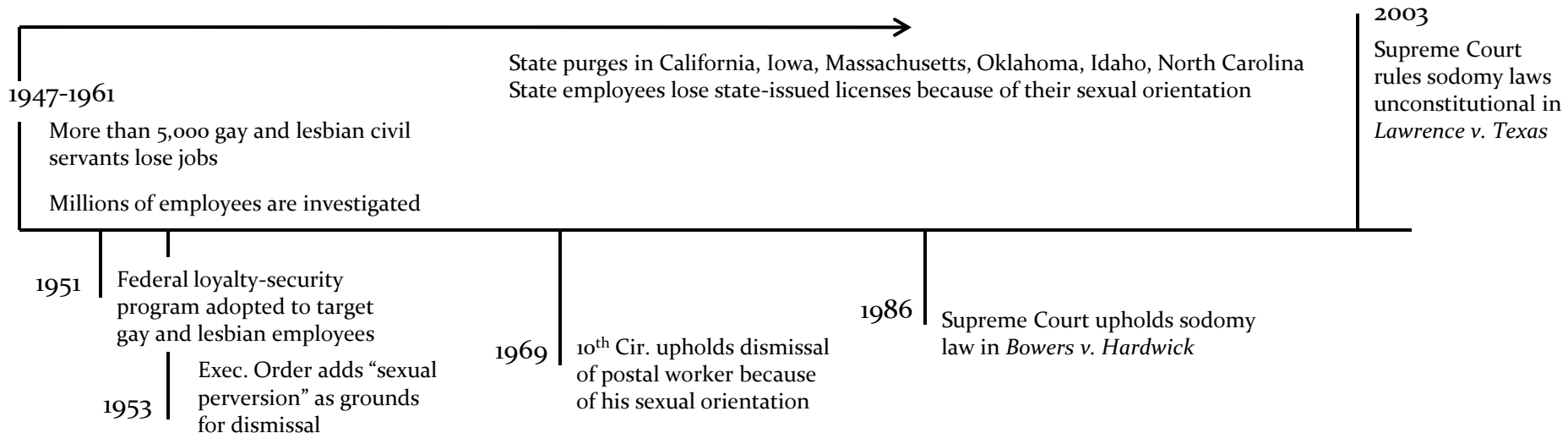
## Public Sector LGBT Employees, by Type of Employer



## 2. HISTORY OF DISCRIMINATION



- Purges of Federal and State Employees
- Loyalty and Morality Tests
- Sodomy Laws
- Moral Fitness Requirements



### 3. COURTS AND LEGAL SCHOLARS HAVE FOUND THAT LGBT PEOPLE HAVE EXPERIENCED A LONG HISTORY OF DISCRIMINATION IN THE U.S.



Judicial opinions from appellate courts in 7 states - including 6 from those states' highest courts

“Homosexual persons have been the object of societal prejudice by private actors as well as by the judicial and legislative branches of federal and state governments....homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society.” (Maryland, 2007. *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007).)

#### 4. STATE OFFICIALS HAVE FOUND THAT LGBT PEOPLE HAVE EXPERIENCED A LONG HISTORY OF DISCRIMINATION IN THE U.S.



## 29 Examples from 17 States

“Currently in Idaho a person can be fired from their job simply because they are gay or because someone thinks they are gay. . . . This legislation will end decades of discrimination against men and women in every part of Idaho and set a tone for the state making clear that it is wrong to fire someone from a job, refuse to promote or fairly compensate someone, for no other reason than that they gay.” Idaho Senate, 2008

## 5. IN PRIOR CONSIDERATIONS OF ENDA, CONGRESS HAS DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION



67 specific examples of discrimination against public sector employees presented between 1994 and 2007

- 13 state employees
- 14 teachers
- 12 public safety officers
- 2 other local
- 26 federal employees

## 6. IN RESPONSE TO SURVEYS, LGBT PUBLIC EMPLOYEES CONSISTENTLY REPORT HIGH RATES OF DISCRIMINATION AND HARASSMENT IN THE WORKPLACE



Over 80 surveys show that discrimination against public sector LGBT employees is widespread and persistent.

- In 2008, **one in five** LGB public sector employees surveyed reported being discriminated against on the basis of their sexual orientation.
- In 2009, **70% of transgender employees** surveyed reported experiencing workplace discrimination on the basis of gender identity.
- In 2009, **more than 13%** of LGBT employees of state universities surveyed reported experiencing discriminatory treatment or harassment ***during the past year alone.***
- In a 2009, **22%** of public safety officers surveyed reported experiencing discrimination in promotions, **13%** in hiring, and **2%** reported being fired because of their sexual orientation or gender identity.
- In 2008, **36%** of lesbians and gay men surveyed reported that they are ***closeted at work.***



## 7. WAGES OF LGB EMPLOYEES ARE LOWER THAN WAGES OF HETEROSEXUAL EMPLOYEES IN THE PUBLIC SECTOR

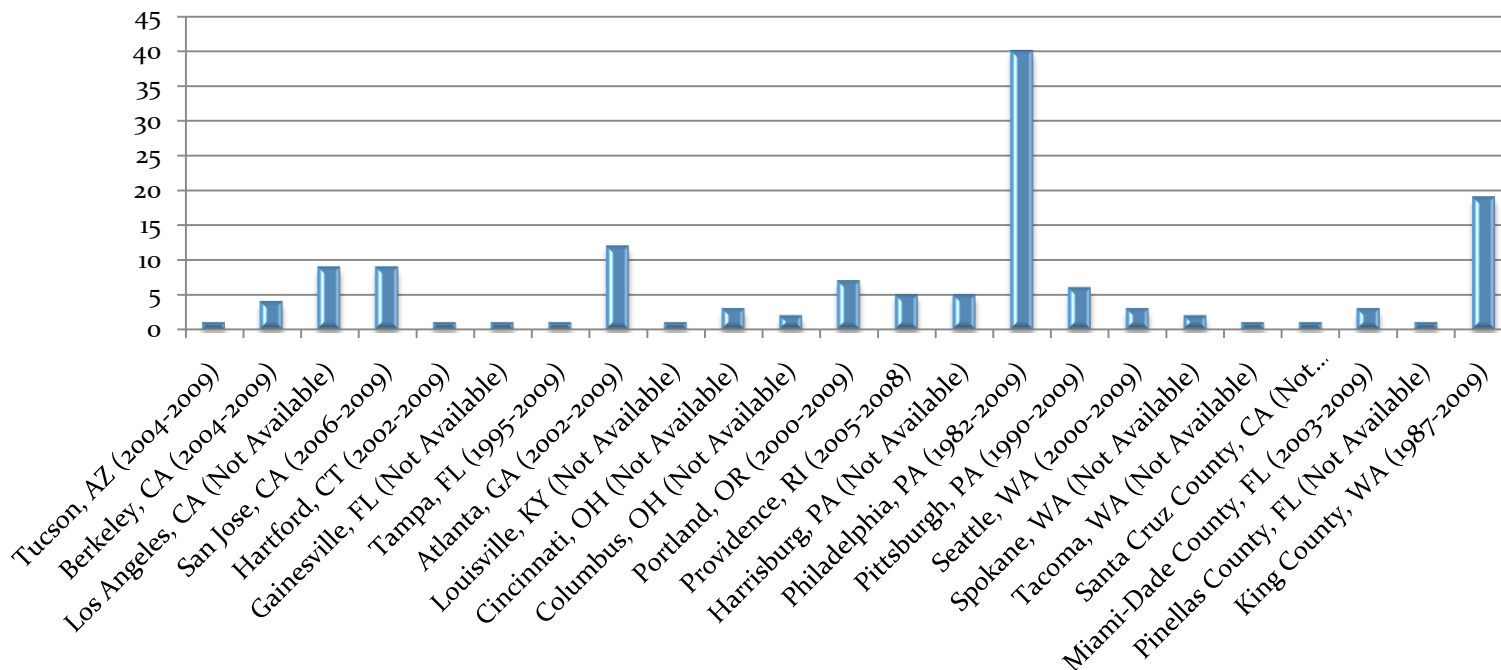


- More than 12 studies have shown a **significant wage gap**, ranging from 10% to 32%, for gay men when compared to heterosexual men.
- Two recent studies have found similar wage gaps when looking solely at public employees. Together, the studies find that LGB government employees earn **8% to 29% less** than their heterosexual counterparts.
- One of these studies found that men in same-sex couples who are state employees earn **8% to 10% less** than their married heterosexual counterparts.

## 8. COMPLAINTS FILED WITH ADMINISTRATIVE AGENCIES DOCUMENT A PATTERN OF DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENT EMPLOYERS



- Data requested from 20 state and 203 local agencies
- 11 state agencies provided 430 complaints from 1999-2007; 23 local agencies provided 147 complaints
- Combined rate of positive outcomes (settlement and probable cause) averaged 30% (state) and 23% (local)
- 81 local agencies never responded to requests for the data

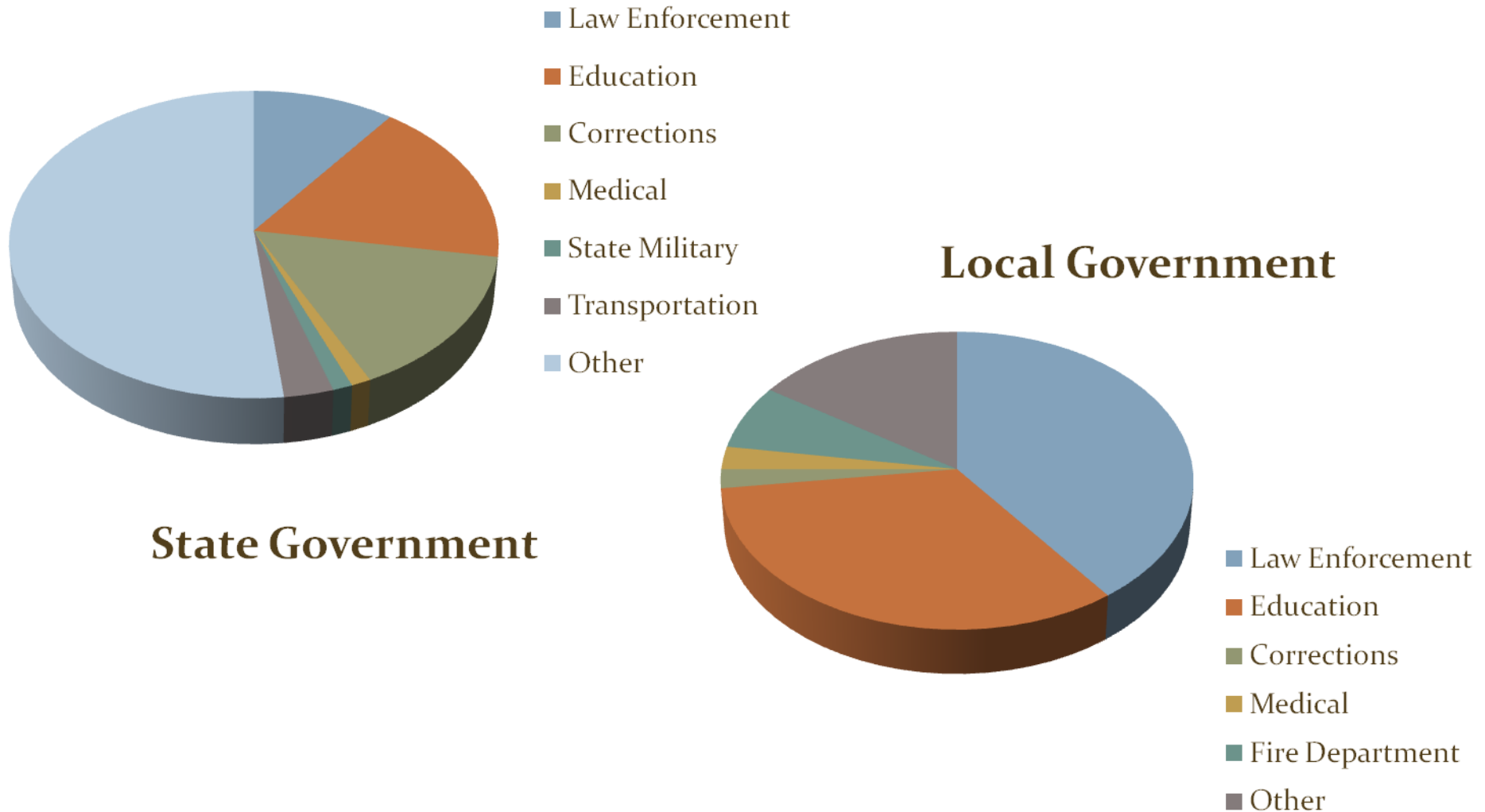


# 9. THERE ARE MORE THAN 380 DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY BY STATE AND LOCAL EMPLOYERS FROM 1980 TO THE PRESENT.



- Examples come from court opinions, administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books.
- Examples come from every state except North Dakota.
- The LGBT employees discriminated against work for every branch of state government: legislatures, judiciaries, and the executive branch.
- The examples of workplace harassment also frequently include physical violence.

# 9. BREAKDOWN OF LGBT PUBLIC SECTOR EMPLOYEES REPRESENTED IN THE 380 DOCUMENTED EXAMPLES, BY OCCUPATION



## 9. THE 380 EXAMPLES REPRESENT JUST A FRACTION OF THE ACTUAL DISCRIMINATION AGAINST PUBLIC SECTOR LGBT EMPLOYEES



- Factors suggesting that the actual rate of discrimination exceeds the number of documented examples:
  - Only 6 state agencies made available redacted complaints for us to review. 81 of the local agencies contacted never responded to our requests.
  - State and local administrative agencies unable and unwilling to consider complaints.
  - Courts and judges unreceptive to LGBT plaintiffs and reluctant to write published opinions about them.
  - LGBT employees reluctant to pursue claims for fear of retaliation or of outing themselves further in the workplace.
  - As many as one-third of LGBT people are not out in the workplace.

## 10. STATEMENTS BY STATE AND LOCAL GOVERNMENT OFFICIALS PROVIDE FURTHER EVIDENCE OF ANIMUS TOWARD LGBT PEOPLE



*“We have consistently held...that some objectives, such as ‘a bare...desire to harm a politically unpopular group,’ are not legitimate state interests. ... Moral disapproval of this group [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”*

(O’Connor, J., concurring in *Lawrence v. Texas*)

“a sickness...an uncontrolled passion similar to that which would cause someone to rape.”

“I had a cousin who died of AIDS... and deserved what he got.”

“I don't want to entice any of those people into our state. Those are the wrong kind of people.”

“A high sign of the downfall of the nation.”

“ I don’t like the way you [gay people] recruit children to your lifestyle.”

“a public health problem”

“They’re the meanest buggers I have ever seen.”

# 11. STATE AND LOCAL BALLOT MEASURES HAVE SOUGHT TO REPEAL OR PREVENT LAWS PROHIBITING SEXUAL ORIENTATION OR GENDER IDENTITY DISCRIMINATION

- We documented 120 ballot measures from 1974 to 2009
  - 92 local measures
  - 28 state measures
  - 18 different states
  - Highest concentration in Oregon, Michigan, Washington, Florida, and California
- 115 sought to **repeal** prohibitions of discrimination against LGBT people in the workplace, **prevent or inhibit** such prohibitions from being passed, or even **mandate discriminatory or stigmatizing treatment** of LGBT people.
  - Of these ballot measures, **50%** passed
- The most recent measure was introduced in Gainesville, FL in May, 2009

# CONCLUSIONS



- There is a widespread and persistent pattern of unconstitutional discrimination on the basis of sexual orientation and gender identity against state government employees;
- There is no meaningful difference in the pattern and scope of employment discrimination against LGBT people by state governments compared to the private sector and other public sector employers; and
- The list of documented examples that we have compiled far under-represents the actual prevalence of employment discrimination against LGBT people by state and local governments; and
- Existing protections for LGBT people are inadequate.



The full report is available at:

[http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports\\_ENDA.html](http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html)



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