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**Documenting Discrimination Based on Sexual
Orientation and Gender Identity in State
Employment**

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

This report addresses whether there has been a widespread and persistent pattern of unconstitutional discrimination by state governments on the basis of sexual orientation and gender identity. This finding will support Congress in exercising its authority under Section 5 of the 14th amendment to provide a private right of action for damages under H.R. 3017, the Employment Non-Discrimination Act of 2009 (“ENDA”), to state government employees who have suffered discrimination.

This report is the result of research conducted during 2008 and 2009 by the Williams Institute.¹ In addition, ten different law firms assisted with the project, with offices and attorneys from across the country.² Also making contributions were scholars and experts from a number of academic disciplines, including history, political science, economics, sociology, and demography. The research resulted in a set of reports on employment law and discrimination on the basis of sexual orientation and gender identity for each of the fifty states, which are included as Appendices to this report. Based on these fifty state reports, plus additional studies conducted by the William Institute, literature reviews, and research projects conducted by the firms, we drafted and reviewed the following papers, presented here as a series of chapters summarizing the research findings. Based on this analysis, we conclude that:

- 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.

These conclusions are based on the following findings:

¹ The principal co-investigators were Brad Sears, Executive Director of the Williams Institute, Professor Nan Hunter, Georgetown Law Center, and Christy Mallory, Williams Institute Law Fellow.

² Alston & Bird LLP, Bryan Cave LLP, Dewey & LeBeouff LLP, DLA Piper LLP, Irell & Manella LLP, Kirkland & Ellis LLP, Latham & Watkins LLP, Manatt, Phelps & Phillips, LLP, Mayer Brown LLP, O'Melveny & Myers LLP.

State governments are the largest in employer in every state. There are over 400,000 LGBT state employees.

- According to data from the 2007 American Community Survey, over 6.2 million Americans are state employees. In every state, the state government is the largest employer.
- Using data from the 2000 Census and the 2002 National Survey of Family Growth, in September 2009, the Williams Institute estimates that there are approximately 418,000 LGBT state government employees in the United States.
- There are also an estimated 585,000 local government employees, for a total of slightly more than 1 million state and local LGBT employees. There are just under 7 million LGBT private employees and just over 200,000 LGBT people working for the federal government.

Courts and legal scholars have concluded that sexual orientation is not related to an individual's ability to contribute to society or perform in the workplace.

- We document 15 federal and state courts and a number of legal scholars that have concluded that sexual orientation is not related to an individual's ability to contribute to society or perform in the workplace. Every court that has considered this criteria when determining whether sexual orientation is a suspect class has reached the same conclusion.
- For example, in 2008, the Connecticut Supreme Court found that “the characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.”³
- Similarly, in 2004, a justice on the Montana Supreme Court, found that “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.”⁴

When state employers discriminate against LGBT people in the workplace, a cluster of constitutional rights are implicated, including those protected by the Equal Protection Clause, the First Amendment, and the Due Process Clause.

- **Courts have found that discrimination by state employers on the basis of sexual orientation violates the Equal Protection Clause. For example,**

³ *Id.* at 432.

⁴ *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 455-456 (Mont. 2004) (concurring opinion).

- A railroad ticket agent sued the Long Island Railroad, a state employer, for failing to address sexual orientation harassment in the workplace. In 2006, a U.S. District Court, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans*,⁵ denied the Railroad's summary judgment motion and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.⁶ The ticket agent alleged that he was referred to by several people in the office as a "f***** faggot" and "a queer."
- In 2001, a lesbian brought an action against her former employer, a hospital district, for wrongful termination based on sexual orientation alleging state and federal equal protection clause violations. She and her immediate supervisor, Nan Miguel, were both terminated for opposing the hospital's discriminatory treatment of her. The director of the radiology department made several derogatory comments, including calling her a "f***** faggot" a "f***** dyke" and a "queer." The Washington Court of Appeals held that she had raised material issues of fact with respect to whether the hospital and the doctor were "state actors" for her federal claims and remanded the case for trial.⁷ The hospital eventually settled with Davis for \$75,000.⁸
- In 1995, Justice Sotomayor, then a judge for the Southern District of New York, denied a motion to dismiss a case where the plaintiff had been fired from his job as a prison kitchen worker because he was gay. Criticizing the defendants' argument that removing the plaintiff was rationally related to preserving mess hall security, Sotomayor stated that a "person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security." She also rejected the defendants' qualified immunity defense, stating that "the constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law."⁹
- **Courts have also found that discrimination against LGBT people violates the Equal Protection Clause when employers engage in impermissible discrimination on the basis of sex and sex stereotyping. For example,**
 - A Legislative Editor for the Georgia General Assembly's Office of Legislative Counsel was fired after she was diagnosed with gender identity disorder and began appearing (upon a doctor's orders) at work as a woman prior to undergoing gender reassignment surgery. Since 2005, she had

⁵ 517 U.S. 620 (1996).

⁶ *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).

⁷ *Miguel v. Guess*, 112 Wn. App. 536, (Wash. Ct. App. 2002); *Miguel v. Guess*, 51 P.3d 89 (Wash. Ct. App. 2002).

⁸ ACLU, *Following ACLU Lawsuit, Lesbian Illegally Fired from Washington Hospital Received Generous Settlement* (Oct. 8, 2003), <http://www.aclu.org/lgbt/discrim/12359prs20031008.html>.

⁹ *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

been responsible for editing proposed legislation and resolutions for the Georgia Assembly. In 2009, in rejecting the state's motion to dismiss, a U.S. District Court ruled that the editor's complaint "clearly states a claim for denial of equal protection" under the 14th Amendment on alternative theories of discrimination on the basis of sex and a medical condition.¹⁰ The court summarized the grounds for termination as, "In the view of Glenn's employers, gender transition surgery and presentation as a woman in the workplace would be seen as immoral... and would make other employees uncomfortable."¹¹ The court held that "Unequal treatment fails even the most deferential equal protection review when the disadvantage imposed is born of animosity toward the class of persons affected," quoting the Supreme Court's opinion in *Romer v. Evans*^{12, 13}.

- Two 16-year-old twin brothers who were subject to "a relentless campaign of harassment by their male co-workers," sued the city they were working for, alleging intentional sex discrimination.¹⁴ The plaintiffs alleged that their harassment included being called "queer" and "fag," comments such as, "[a]re you a boy or a girl?" and talk of "being taken 'out to the woods'" for sexual purposes. One plaintiff wore an earring and was subject to more ridicule than his brother, and was once asked whether his brother had passed a case of poison ivy to him through intercourse. The verbal taunting turned physical when a co-worker grabbed one of the plaintiff's genitals to determine "if he was a girl or a boy." When the plaintiffs failed to return to work, supervisors terminated their employment. The Seventh Circuit noted that "a homophobic epithet like 'fag,' ... may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation." The court found that a "because of" nexus between the allegedly proscribed conduct and the victim's gender could be inferred "from the harassers' evident belief that in wearing an earring, [the brother] did not conform to male standards."¹⁵
- A housing and nuisance inspector for the Bureau of Development Services of Portland settled her lawsuit based on sexual orientation and sex stereotyping harassment for \$150,000 after her Title VII claim survived summary judgment in a U.S. District Court.¹⁶ At work, she did not wear makeup, had short hair and wore men's clothing. Her supervisors made

¹⁰ *Glenn v. Brumby*, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009).

¹¹ *Id.*

¹² *Romer v. Evans*, 517 U.S. 620 (1996).

¹³ *Glenn*, 2009 U.S. Dist. LEXIS 54768.

¹⁴ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998). The U.S. Supreme Court vacated and remanded to the Seventh Circuit for further consideration in light of *Oncale v. Sundowner Offshore Services*.

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

¹⁵ *Id.*

¹⁶ LESBIAN & GAY L. NOTES (Dec. 2004), *available at* <http://www.qrd.org/qrd/usa/legal/lgl/12.04>.

remarks such as that her shirt looked “like something her father would wear” and “are you tired of people treating you like a bull dyke[?]” She also alleged her co-workers harassed her, calling her a “bitch,” saying loudly that they were “surrounded by all these fags at work,” and asking her “would a woman wear a man’s shoes?” In holding for the inspector, the court noted that, for the purpose of Title VII analysis, it was irrelevant whether or not the harassers were motivated by plaintiff’s sexual orientation, as sexual orientation, alone, is not actionable under Title VII. However, the court held that gender stereotyping “constitutes actionable harassment.”¹⁷

- **Courts have held in a number of cases that discrimination against LGBT public employees has also infringed on the First Amendment rights of expression and association. For example,**
 - In 2007, a volleyball coach was awarded \$5.85 million in damages in her discrimination suit against Fresno State University after the University refused to renew her contract. The coach had alleged that this was a result of her advocacy of gender equity in the funding of women’s sports as well as her perceived sexual orientation.¹⁸
 - Paul Scarbrough, a director/superintendent of schools for the Morgan County School Board, was not selected to continue in his position because of the public outrage that resulted after he was invited to speak at a convention hosted by a church with predominantly gay and lesbian members. At the time, Scarbrough was unaware that the church had a predominately gay and lesbian congregation. He was ultimately unable to accept the invitation, however, approximately a month later, a newspaper published an article announcing—incorrectly—that he would be a speaker at the convention. After this article ran, school board members began receiving criticisms regarding him. In response, he provided written statements to two newspapers explaining the inaccuracies of the article and noting that he did not endorse homosexuality, but he would not refuse to associate with LGBT people. When Scarbrough was then not selected by the school board to continue as Superintendent/Director, he sued and won a judgment from the U.S. Court of Appeals for the Sixth Circuit.¹⁹
- **In addition, some of the examples of discrimination include cases where employees Due Process Rights are violated, both their right to adequate procedures prior to being terminated, and substantive due process rights of liberty in intimate association and privacy recognized by the Supreme Court in *Lawrence v. Texas*.**

¹⁷ *Fischer v. City of Portland*, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).

¹⁸ LESBIAN & GAY L. NOTES (Summer 2007).

¹⁹ *Scarbrough v. Morgan County Bd of Educ.*, 470 F.3d 250 (6th Cir. 2007).

- A state employee of a community college in Delaware was fired on the basis of a same-sex sexual harassment claim. He filed suit alleging he was denied a proper pre-termination hearing on the charges. A jury awarded that he be reinstated to his teaching position and \$134,081 in back pay.²⁰
- In 1995, an applicant for police department job filed a right to privacy action against a police official. She alleged that during her application for a job as a police officer, she was asked, "What exactly are your sexual practices and preferences?" The District Court held that such inquiries had, indeed, violated her right to privacy, but that the police official was entitled to qualified immunity. On appeal, the Second Circuit reasoned that since the conduct had occurred in 1995, a reasonable official would not have known the conduct was constitutionally proscribed.²¹
- An administrator of the City of Petersburg's Community Diversion Incentive Program was fired in 1986 for refusing to answer questions about her sexual orientation as part of a city background check. She had already been in her position for three years when asked to complete the questionnaire. When she refused, she was suspended but then reinstated because the City Manager determined that her position did not require a background check. However, at the same time he changed city policy to require her to have one. When she again refused, she was terminated. In 1990, the 4th Circuit relied upon *Bowers v. Hardwick* in holding that she had no right to privacy with respect to this information although it did note that the relevance of this information was "uncertain".¹⁹ In 2003, the United States Supreme Court held that *Bowers v. Hardwick* was wrong when it was decided in 1986.²²

Beginning with purges of thousands of LGBT employees from public employment in the 1950s and 60s, LGBT people have experienced a long history of explicit and pervasive discrimination by federal, state, and local government employers. Moreover, state laws, including sodomy laws and morality requirements for state-issued occupational licenses, provided the basis for extensive discrimination against LGBT employees in the public and private sectors.

- The “Lavender Scare” was a part of the anti-communist campaigns during the 1950s and 60s, during which the federal government fired thousands of LGBT federal employees and denied jobs to tens of thousands of more. For example, the State Department dismissed over twice as many employees for being suspected homosexuals as being suspected communists. During this period, the “loyalty oaths” required by the federal government of all employees and contractors, which included questions about homosexuality, spread to state,

²⁰ *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

²¹ *Eglise v. Culpin*, 2000 WL 232798, at *1 (2d Cir. Feb. 28, 2000).

²² *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

local, and private employers, eventually impacting as much as 20% of the U.S. workforce.

- Federal agencies could deny LGBT people employment until 1975, when the Civil Service Commission issued guidelines prohibiting sexual orientation, but not gender identity, discrimination. Federal agencies still had policies of denying security clearance to LGBT people until the 1990s. The Department of Defense, the Secret Service, and the FBI still had discriminatory security clearance policies until 1995, when President Clinton issued an Executive Order barring the federal government from denying security clearance simply on the basis of sexual orientation.
- Purges of state and local public employees during the 1950s and 1960s, similar to the Lavender Scare, have been documented across the country, including in California, Florida, Idaho, Iowa, Oklahoma, Massachusetts, North Carolina, and Texas. For example, beginning in 1958, a Florida legislative investigation committee known as the “Johns Committee,” interrogated 320 suspected gay men and lesbians over a five year period. Countless state employees, teachers, hospital workers, and others lost their jobs as a result. Near the end of its tenure, the Johns Committee announced that it had revoked seventy-one teachers’ certificates with sixty-three more cases pending; fourteen professors had been removed from state universities with nineteen cases pending; and thirty-seven federal employees had lost their jobs, while fourteen state employees faced removal in pending cases. State laws and policies explicitly prohibiting LGBT people from public employment continued in some states until the 1990s, including in Oklahoma, New York, South Carolina, and West Virginia.
- State sodomy laws were also used to deny jobs to LGBT employees in the public and private sector. The mere potential that an applicant or employee could violate a state sodomy statute was sufficient grounds to deny employment. The substantial obstacle that state sodomy laws created for LGBT people in obtaining employment was recognized by the Supreme Court in *Lawrence v. Texas*, when it overturned the remaining sodomy laws in the United States. This direct burden that state sodomy laws placed on employment opportunities for LGBT people was also recognized by the highest courts in Arkansas, Maryland, Massachusetts, Minnesota, Montana, and Tennessee when they overturned state sodomy laws.
- One of the areas where sodomy laws presented almost insurmountable barriers to openly LGBT people in public employment was law enforcement. Federal, state and local law enforcement agencies adopted policies stating that it was incompatible for LGBT people, as actual or potential felons, to serve in law enforcement. Explicit discriminatory policies ranged from those in Dallas, Texas successfully challenged in the 1980s and 90s to a policy prohibiting employment of officers in Puerto Rico who even associated with homosexuals

that was not overturned until 2001. The legacy of this history of discrimination is clearly demonstrated in Chapter 12 of this report. Over 40% of the almost 400 examples of discrimination against state and local employees presented in Chapter 12 involve law enforcement and corrections officers.

- Morality requirements for state-issued occupational licenses also provided a substantial barrier to LGBT people in public and private employment. Under these requirements, set by state law, LGBT people in dozens of professions, ranging from lawyers, teachers, and doctors to pilots, realtors, and hairdressers, were considered immoral and had their licenses either denied or revoked. This form of discrimination had a disproportionate impact on public employees: a 2006 survey revealed that over 40% of public employees in the United States are in professions requiring professional licenses.
- One sector where discrimination in state-issued occupational licenses has had the biggest impact is education. Explicit state laws or policy statements that LGBT people could not receive state teaching credentials date from those of California and Florida in the 1950s to a West Virginia Attorney General Opinion in 1983 stating that that homosexual teachers were “immoral” and an Oklahoma law barring LGBT people from teaching that was not repealed until 1989. The legacy of this form of discrimination is also clearly demonstrated in Chapter 12: over 27% of the almost 400 documented examples of discrimination involve employees of public schools and universities.

Courts have unanimously found that LGBT people have experienced a long history of discrimination.

- Every state and federal court that has substantively considered whether sexual orientation is a suspect class has held that LGBT people have faced a long history of discrimination. In addition, dozens of legal scholars have reached the same conclusion. In making these determinations, many of these courts and scholars have explicitly considered employment discrimination by public employers, including state, local, and federal government employers.
- Judicial opinions from appellate courts in seven states - including six of those states’ highest courts - have all agreed that LGBT people have faced a long history of discrimination, no matter how they ultimately ruled on whether sexual orientation is a suspect classification.
- For example, in 2008, Maryland’s highest court found that “[h]omosexual 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”²³

²³ *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007).

and that “homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society.”²⁴

- Similarly, in 1995, the Sixth Circuit concluded, “Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.”²⁵

Based on their own research, many state and local government officials have also concluded that LGBT people have faced widespread discrimination in public employment.

- A number of state and local elected officials, legislative bodies, and special commissions have issued findings of widespread discrimination against LGBT people in their jurisdictions, including discrimination in public employment. We document 29 examples of such findings from 17 different states.
- For example, in May 2007 when the governor of Ohio issued an executive order prohibiting discrimination in state employment based on sexual orientation and/or gender identity,²⁶ the order included the finding that the “[i]nformation compiled by the Ohio Civil Rights Commission documents ongoing and past discrimination on the basis of sexual orientation and/or gender identity in employment-related decisions by personnel at Ohio agencies, boards and commissions.”
- Similarly, when the governor of Alaska issued an administrative order in 2002 prohibiting sexual orientation discrimination in state employment,²⁷ the order stated that it was “in recognition of the findings concerning perceived institutional intolerance in state agencies set out in the final report of the Governor’s Commission on Tolerance.”²⁸
- And when the governor of Oregon issued an executive order in 1988 prohibiting sexual orientation discrimination, it was accompanied by a statement that, “Although existing law may require equality in state employment or services, some homosexual employees or applicants for state services are afraid to assert their rights because they fear discrimination if they make their sexual orientation public. This order is intended to reduce that fear

²⁴ *Id.* at 610.

²⁵ *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261, 264 n.1 (6th Cir. 1995) (quoting trial court findings), *rev’d and vacated* by 54 F.3d 261 (6th Cir. 1995), *cert. granted, judgment vacated*, 518 U.S. 1001 (1996).

²⁶ Ohio Exec. Order No. 2007-10S (May 17, 2007), *available at* <http://www.wright.edu/admin/affirm/ExecutiveOrder2007-10S.html> (last visited Feb. 1, 2009).

²⁷ Alaska Admin. Order No. 195 (Mar. 5, 2002), *available at* <http://gov.state.ak.us/admin-orders/195.html> (last visited Sept. 21, 2009).

²⁸ *Id.*

by making it clear that the Governor expects state officials and agencies not to discriminate.”²⁹

For the past fifteen years, Congress has consistently reviewed evidence of employment discrimination by public employers when considering ENDA.

- Direct victims of such discrimination have testified at Congressional hearings; legal scholars have presented specific cases and scholarship on the history of such discrimination; social scientists have presented survey data documenting such discrimination; LGBT rights organizations have submitted reports and expert testimony documenting such discrimination; and members of Congress have shared specific examples and spoken more generally about such discrimination.
- In total, over 67 specific examples of employment discrimination on the basis of sexual orientation or gender identity by public employers have been presented to Congress from 1994 to 2007, including discrimination involving 13 state employees, 28 local employees, and 26 federal employees.

On surveys, LGBT public employees consistently report high rates of discrimination and harassment in the workplace.

- We reviewed studies documenting over 80 surveys of LGBT employees about their experiences of discrimination that either were conducted with just public employees, or where a substantial portion of those surveyed were public employees. The majority of these surveys were conducted with just LGBT employees of state governments.
- These surveys provide compelling evidence that discrimination against LGBT state government employees, as well as other public sector workers, is serious, pervasive and continuing. They also indicate that the patterns and level of employment discrimination based on sexual orientation and gender identity by state employers is similar to that of private employers. Examples include:
 - One in five LGB public sector employees in the 2008 General Social Survey reported being discriminated against on the basis of their sexual orientation.
 - A 2009 survey of over 640 transgender employees, 11% of whom were public employees, found that 70% reported experiencing workplace discrimination on the basis of gender identity.

²⁹ Or. Exec. Order No. EO-87-20 (Feb. 12, 1988), *available at* <http://extension.oregonstate.edu/internal/sites/default/files/documents/civil-rights/EO-87-20.pdf> (last visited Sept. 21, 2009).

- A 2009 survey of more than 1,900 LGBT employees of state university systems nationwide found that more than 13% had experienced discriminatory treatment or harassment *during the past year alone*.
- In a 2009 survey of LGBT public safety officers published in *Police Quarterly*, 22% reported experiencing discrimination in promotions, 13% in hiring, and 2% reported being fired because of their sexual orientation or gender identity.
- A 2008 Out & Equal survey reported that 36% of lesbians and gay men were closeted at work.

Analysis of the wages of LGB employees compared with heterosexual employees provides further evidence of discrimination in the public sector.

- If, after controlling for factors significant for determining wages such as education, a wage gap exists between people who have different personal characteristics, such as sexual orientation, economists typically conclude that the most likely reason for the wage gap is discrimination. More than twelve 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 just at public employees. Together, the studies find that LGB government employees earn 8% to 29% less than their heterosexual counterparts.
- One of these studies finds that men in same-sex couples who are state employees earn 8% to 10% less than their married heterosexual counterparts.
- These studies of wages suggest that sexual orientation discrimination in state government is similar to that in the private sector and other public employment.

Complaints filed with administrative agencies also document a widespread and persistent pattern of discrimination against LGBT people by state and local government employers.

- During 2009, the Williams Institute collected data about complaints from state and local administrative agencies charged with enforcing prohibitions against sexual orientation and gender identity discrimination. Although we requested data from 20 state and 203 local agencies, many did not respond, even after repeated requests.

- The agencies that did respond provided us with 430 administrative complaints of sexual orientation and gender identity discrimination by state and local employers between 1999 and 2007 from 18 different states.
- Although not all states could provide us with data distinguishing between state and local government defendants, at least 265 of these were filed by employees of state government agencies.
- Five states provided us information about the dispositions of the claims made by state employees. For four of these states, the combined rate of positive administrative outcomes for the complaints, such as findings of probable cause of discrimination or settlements, averaged 30%. For the fifth state, California, 61% of complainants sought an immediate right to sue letter, which often indicates they have already found counsel to take their cases to court. A review of the dispositions of complaints made to local enforcement agencies found a similar rate of favorable outcomes (23%).
- Scholarship shows that the number of administrative filings most likely significantly under-represents the frequency of employment discrimination experienced by LGBT state and local workers. Several academic studies demonstrate that state and local administrative agencies often lack the resources, knowledge, enforcement mechanisms and willingness to accept sexual orientation and/or gender identity discrimination complaints.
- Supporting this scholarship, of the 36 city and county agencies that responded to the 2009 Williams Institute study with data, two incorrectly referred such complainants to the United States Equal Employment Opportunity Commission even though no federal law prohibits sexual orientation discrimination, one incorrectly said the city did not prohibit such discrimination, one incorrectly said there was no administrative enforcement mechanism for such complaints, five said they did not have the resources to enforce such claims and referred callers to their state administrative agency, and three said they lacked the resources to provide the requested data.

There are over 380 documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local employers, 1980 to the present.

- We compiled a set of documented examples of discrimination based on sexual orientation and gender identity from court opinions, administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books.
- This record demonstrates that discrimination is widespread in terms of quantity, geography, and occupations. The quantity compares favorably to

that of past records of public employment discrimination supporting civil rights legislation, particularly so in light of the size of the LGBT workforce.

- Geographically, the examples reach into every state except North Dakota, which has a small state population and state government workforce. The LGBT public employees discriminated against work for every branch of state government: legislatures, judiciaries, and the executive branch.
- In many of these cases, courts have found violations of rights to equal protection, free expression, and privacy, as well as the impermissible use of sex stereotypes. There are also cases where plaintiffs lose because judges rule that, in the absence a law like ENDA, state and federal law do not provide a remedy.
- In none of these cases do employers assert that sexual orientation or gender identity impacts an employee's performance in the workplace. To the contrary, among the examples are many public servants have received awards, commendations, and excellent work evaluations.
- The irrationality of this discrimination is vividly indicated by the harassment that many of these workers have been subjected to. Here is a very limited sense of what they are called in the workplace: an officer at a state correctional facility in New York, "pervert" and "homo;" a lab technician at a state hospital in Washington, a "dyke;" an employee of New Mexico's Juvenile Justice System, a "queer." There are countless examples of the use of the words "fag" and "faggot" in the report.
- The examples of workplace harassment also frequently include physical violence. For example, a gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her that said God wanted her to die. Frequently, when employees complain about this kind of harassment, they are often told that it is of their own making, and no action is taken.
- These 380-plus documented examples should in no way be taken as a complete record of discrimination against LGBT people by state and local governments. Based on our research, and on other scholarship, we have concluded that these examples represent just a fraction of the actual discrimination.
 - First, our record does not even completely capture all of the documented instances. For example, of the twenty state enforcement agencies we contacted, only six made available redacted complaints

for us to review. Moreover, 117 of the local agencies never provided any type of response to our requests.

- Second, as noted above, several academic studies have shown that state and local administrative agencies often lack the resources, knowledge and willingness to consider sexual orientation and gender identity discrimination complaints. Similarly, legal scholars have noted that courts and judges have often been unreceptive to LGBT plaintiffs and reluctant to write published opinions about them, reducing the number of court opinions and administrative complaints that we would expect to find.
- Third, many cases settle before an administrative complaint or court case is filed. Unless the parties want the settlement to be public, and the settlement is for a large amount, it is likely to go unreported in the media or academic journals.
- Fourth, LGBT employees are often reluctant to pursue claims for fear of retaliation or of outing themselves further in their workplace. For example, in a study published this month by the Transgender Law Center, only 15% of those who reported that they had experienced some form of discrimination had filed a complaint.
- Finally, and perhaps most important, numerous studies have documented that as many one-third of LGBT people are not out in the workplace. They try to avoid discrimination by hiding who they are.

Statements by some state and local government officials provide further evidence of animus towards LGBT people.

- The Supreme Court has recognized that irrational discrimination is often signaled by indicators of bias, and bias is unacceptable as a substitute for legitimate governmental interests.³⁰ As Justice O’Connor stated in her concurring opinion in *Lawrence v. Texas*, 539 U.S. 558, 580-82 (2003): “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.”
- Drawing from the 50 state reports attached, we document comments made by state legislators, governors, judges, and other state and local policy makers and officials which reflect animus towards LGBT people.

³⁰ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001).

- These include statements that LGBT people are mentally ill, pedophiles, wealthy, terrorists, Nazis, condemned by God, immoral, and unhealthy. Often, these statements are made while the speakers are opposing state or local laws that would prohibit discrimination on the bases of sexual orientation and gender identity or endorsing laws to repeal or prevent the enactment of such protections.
- Such statements are likely to both deter LGBT people from seeking state and local government employment, and cause them to be closeted if they are employed by public agencies. In addition, these statements often serve as indicia of why laws extending legal protections to LGBT people are opposed or repealed.

Over 120 ballot measures have sought to repeal or prevent laws prohibiting discrimination on the basis of sexual orientation or gender identity.

- One marker of the animus directed towards LGBT Americans is the proliferation of attempts to use state and local ballot measures to repeal or preclude protection against employment discrimination based on sexual orientation or gender identity. In this analysis we do not include ballot measures to repeal or prevent the extension of marriage to same-sex couples.
- Ballot initiatives aimed at preventing the LGBT population from gaining legal protection from discrimination in the workplace began as attempts to repeal specific legislation or executive orders. Over time, an increasing number of these campaigns have attempted to block future laws to prohibit discrimination.
- Updating prior scholarship, we documented 120 such ballot measures from 1974 to 2009. Most of these, 92, were at the local level, with 28 at the state level. While the ballot measures were proposed in eighteen different states, most were in Oregon, Michigan, Maine, Washington, Florida, and California.
- One hundred and fifteen of these measures sought to repeal prohibitions of discrimination against LGBT people, prevent or inhibit such prohibitions from being passed, or even mandate discriminatory or stigmatizing treatment of LGBT people. Of these ballot measures, 50% passed.
- In 1996, the United States Supreme Court declared unconstitutional Colorado's Amendment 2, which would have repealed several local anti-discrimination laws in the state and two statewide protections and made the passage of such protections in the future require another amendment to the Colorado constitution. Writing for the Court in *Romer v. Evans*, Justice Kennedy stated that the amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to

legitimate state interests.”³¹ He concluded that it was “a denial of equal protection of the laws in the most literal sense.”³² Thus, in the Court's opinion, Amendment 2's scope was too expansive to rationally relate to any acceptable state purpose.³³

- Since the Supreme Court decision in 1996, there have been nearly two dozen such initiatives introduced around the country, with the latest occurring in Gainesville, Florida, in February 2009.

State statutes and executive orders do not adequately address employment discrimination against state employees on the basis of sexual orientation and gender identity.

- Twenty-nine states do not have anti-discrimination statutes that prohibit sexual orientation discrimination, and 38 do not have statutes that explicitly prohibit gender identity discrimination.
- Of the states that do have anti-discrimination statutes that prohibit discrimination on these bases:
 - Three do not prohibit discrimination on the basis of *perceived* sexual orientation;
 - Five either do not provide for compensatory damages or subject such damages to caps that are lower than ENDA's; and
 - Five do not provide for attorney's fee's, and another five only provide for them if the employee files a court action as opposed to an administrative action.
- In 10 other states that do not offer statutory protection for sexual orientation or gender identity, gubernatorial executive orders prohibit discrimination on either or both bases against state employees. However, these orders provide little enforcement opportunities and lack permanency:
 - None of these orders provide for a private right of action;
 - Only 6 confer any power to actually investigate complaints; and
 - Executive orders in Kentucky, Louisiana, Iowa, and Ohio have been in flux during the last 15 years and the constitutionality of Virginia's is currently in dispute.

³¹ *Id.* at 632.

³² *Romer v. Evans*, 517 U.S. 620, 633 (1996).

³³ *Id.*



Chapter 1: Estimates of LGBT Public Employees

According to data from the 2007 American Community Survey, over 6.2 million Americans are state employees. In every state, the state government is the largest employer.¹ On average, state governments have six times as many employees as the next largest employer in each state, and three times as many employees as the combined workforce of the next four largest employers in the state.

For example, the State of North Carolina government employs over a quarter million people. The next four employers in the state are Duke University, Nortel Networks, Wake Forest Baptist University Medical Center, and Duke University Hospital. Combined, these four employers employ just fewer than 40,000 people. Similarly, the State of Alabama employs over 113,000 people, while the next four largest employers in the state, Honda, UAB Hospital, UAB Healthfinder, and the Alabama Power Company employ approximately 22,000 people. Table 3-B summarizes these comparisons for each state.

Using data from the 2000 Census and the 2002 National Survey of Family Growth, the Williams Institute estimates that as of September 2009, there are approximately 418,000 LGBT state government employees in the United States and 585,000 local government employees, totaling slightly more than 1 million state and local LGBT employees. There are just under 7 million LGBT private employees and just over 200,000 LGBT people working for the federal government.

¹ According to www.careeronestop.org as of August 6, 2009

While no existing surveys provide precise estimates of the size of the LGBT workforce in the public and private sectors, estimates of the employment patterns of the LGBT population can be derived by extrapolating information from two nationally representative data sources. The National Survey of Family Growth, conducted in 2002, asked the sexual orientation of men and women aged 18-44 and found that 4.1 percent identified as gay, lesbian, or bisexual.² Applying the 4.1 percent figure to all adults implies that there are approximately 9 million LGBT adults in the United States. Note that because the National Survey of Family Growth does not ask questions about transgender status, it is not possible to estimate the size of the transgender population. As such, these numbers conservatively estimate the size of the LGBT workforce. Data from the US Census Bureau provides employment information about same-sex “unmarried partners.” These are same-sex couples who identified one partner as either a “husband/wife” or an “unmarried partner.” Data from the American Community Survey (2005-2007) provides a state-level distribution of individuals in same-sex couples by their type of employment: private or public (local, state, and federal).³ Assuming that the estimated 9 million LGBT adults share similar employment patterns to and distribute across states in the same pattern as do same-sex couples, then an estimate can be made for the size of the LGBT workforce employed in the private sector along with those in local, state, and federal government employment. The results of these analyses are presented in Table 3-A.

These estimates help to explain why this report includes many documented examples of discrimination by state and local employers against LGBT people in California and New York,

² Mosher, William D., Anjani Chandra, and Jo Jones, Division of Vital Statistics, CDC. 2005. “Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002.” Advance Data from Vital and Health Statistics 362.

³ Special analyses conducted by Gary J. Gates, PhD, Williams Institute, UCLA School of Law, using the United States Census American Community Survey (2005-2007) Public Use Microdata Sample files.

but fewer examples in states like Montana, North Dakota, and Wyoming. Over 30 percent of all estimated LGBT state and local employees in the United States live in California and New York, while under one half of one percent live in Montana, North Dakota, and Wyoming combined.

| Table 3-A. Estimated lesbian, gay, bisexual, and transgender workforce | | | | | |
|--|-----------|---------|--------|---------------|---------|
| | Private | Local | State | Local & State | Federal |
| Alabama | 65,426 | 2,556 | 1,289 | 3,844 | 2,508 |
| Alaska | 12,476 | 4,360 | 1,650 | 6,010 | 444 |
| Arizona | 164,051 | 12,402 | 10,417 | 22,819 | 2,637 |
| Arkansas | 34,452 | 1,634 | 4,070 | 5,704 | 1,681 |
| California | 1,099,035 | 130,489 | 62,496 | 192,985 | 27,383 |
| Colorado | 155,046 | 13,873 | 6,476 | 20,349 | 3,889 |
| Connecticut | 88,928 | 5,988 | 3,477 | 9,464 | 879 |
| Delaware | 21,301 | 1,098 | 1,534 | 2,632 | 1,030 |
| District of Columbia | 44,124 | 976 | 999 | 1,975 | 9,009 |
| Florida | 530,009 | 31,052 | 20,705 | 51,758 | 12,412 |
| Georgia | 245,912 | 13,247 | 15,244 | 28,490 | 7,666 |
| Hawaii | 28,449 | 937 | 1,182 | 2,120 | 3,278 |
| Idaho | 15,193 | 254 | 1,750 | 2,003 | 576 |
| Illinois | 304,475 | 20,618 | 14,487 | 35,105 | 7,843 |
| Indiana | 141,662 | 9,503 | 10,253 | 19,756 | 1,462 |
| Iowa | 48,265 | 931 | 2,030 | 2,961 | 61 |
| Kansas | 42,847 | 3,275 | 2,816 | 6,091 | 509 |
| Kentucky | 68,855 | 5,538 | 4,553 | 10,091 | 972 |
| Louisiana | 61,608 | 6,145 | 4,611 | 10,756 | 2,231 |
| Maine | 57,838 | 1,483 | 2,607 | 4,090 | 2,135 |
| Maryland | 134,441 | 10,505 | 7,888 | 18,393 | 25,023 |
| Massachusetts | 186,004 | 10,749 | 7,166 | 17,915 | 4,990 |

| | | | | | |
|----------------|---------|--------|--------|--------|--------|
| Michigan | 158,533 | 12,300 | 8,036 | 20,336 | 3,567 |
| Minnesota | 126,071 | 11,641 | 9,953 | 21,595 | 3,133 |
| Mississippi | 17,160 | 1,242 | 1,743 | 2,986 | 167 |
| Missouri | 130,068 | 10,739 | 7,250 | 17,989 | 2,862 |
| Montana | 14,882 | 1,766 | 1,292 | 3,058 | - |
| Nebraska | 25,029 | 2,019 | 1,437 | 3,456 | 518 |
| Nevada | 61,277 | 3,692 | 2,326 | 6,018 | 705 |
| New Hampshire | 44,977 | 5,779 | 1,672 | 7,451 | 71 |
| New Jersey | 193,781 | 16,345 | 13,961 | 30,306 | 2,315 |
| New Mexico | 61,996 | 8,132 | 5,671 | 13,803 | 5,174 |
| New York | 512,939 | 57,440 | 34,750 | 92,190 | 8,413 |
| North Carolina | 167,317 | 13,003 | 10,224 | 23,226 | 1,996 |
| North Dakota | 256 | 109 | - | 109 | 148 |
| Ohio | 232,043 | 24,172 | 15,827 | 39,999 | 4,466 |
| Oklahoma | 48,340 | 3,178 | 7,791 | 10,970 | 3,796 |
| Oregon | 114,018 | 13,597 | 11,271 | 24,868 | 2,511 |
| Pennsylvania | 248,510 | 16,268 | 8,146 | 24,413 | 6,294 |
| Rhode Island | 29,938 | 2,941 | 1,495 | 4,436 | 663 |
| South Carolina | 78,842 | 3,130 | 6,351 | 9,481 | 1,858 |
| South Dakota | 4,251 | 1,021 | 380 | 1,401 | - |
| Tennessee | 105,327 | 3,968 | 4,073 | 8,041 | 3,210 |
| Texas | 483,181 | 39,923 | 25,864 | 65,787 | 7,927 |
| Utah | 45,545 | 2,495 | 7,730 | 10,224 | 1,130 |
| Vermont | 22,248 | 844 | 870 | 1,714 | 267 |
| Virginia | 149,006 | 13,645 | 4,379 | 18,024 | 17,328 |
| Washington | 206,324 | 14,402 | 21,150 | 35,552 | 6,166 |

| | | | | | |
|---------------|-----------|---------|---------|-----------|---------|
| West Virginia | 18,472 | 2,873 | 818 | 3,692 | 1,436 |
| Wisconsin | 93,984 | 9,943 | 15,582 | 25,525 | 1,359 |
| Wyoming | 4,014 | 645 | - | 645 | - |
| TOTAL | 6,948,729 | 584,866 | 417,740 | 1,002,606 | 206,098 |

Table 3-B. Number of State Employees Compared to Next Largest Employers (by number of employees) in State

| State | Total State Employees 2007 ⁴ | 2nd Largest Employer in State ⁵ | Number of Employees | 3rd Largest Employer in State | Number of Employees | 4th Largest Employer in State | Number of Employees | 5th Largest Employer in State | Number of Employees | Ratio of State Employees to Employees of Next 4 Employers |
|----------|---|--|---------------------|-------------------------------|---------------------|-------------------------------|---------------------|-------------------------------|---------------------|---|
| Alabama | 113,356 | Honda | 6,000 | UAB Hospital | 6,000 | UAB Healthfinder | 5,520 | Alabama Power Company | 5,000 | 5 |
| Alaska | 28,822 | Anchorage International Airport | 9,000 | Fort Wainwright | 6,100 | Uni Sea Inc. | 5,000 | US Army National Guard | 4,000 | 1 |
| Arizona | 120,242 | Phoenix Sky Harbor International Airport | 9,618 | Intel Corp | 8,000 | General Dynamics C4 Systems | 7,000 | Pulte Building Systems | 6,000 | 4 |
| Arkansas | 85,857 | Wal-Mart Stores | 13,300 | Baptist Health Medical Center | 10,001 | Baptist Health | 7,500 | O K Industries Inc | 5,500 | 2 |

⁴ Data from 2007 American Community Survey, analysis by the Williams Institute at UCLA School of Law, September 5, 2009.

⁵ Data for the next four largest employers from www.careeronestop.org as of August 6, 2009.

| | | | | | | | | | | |
|--------------------|---------|--|--------|-------------------------------|--------|--------------------------------------|--------|------------------------------------|--------|---|
| California | 630,562 | 32nd Naval Station | 42,951 | Riverside City Council | 39,001 | Cintas The Uniform People | 28,000 | Nestle Confection & Snacks | 20,000 | 5 |
| Colorado | 93,848 | Allstate Insurance Corporation | 17,000 | Lockheed Martin Space Systems | 10,000 | Peterson Air Force Base | 9,286 | Alpine Access Inc | 7,500 | 2 |
| Connecticut | 69,690 | Foxwoods Resort Casino | 11,000 | Aetna Inc. | 10,000 | Pratt & Whitney | 9,000 | Yale University | 9,000 | 2 |
| Delaware | 29,417 | Christiana Health Care System (Newark) | 7,000 | US 436 Military Airlift Wing | 7,000 | Christina Health System (Wilmington) | 3,800 | Mountaire Farms-Delaware Inc | 3,310 | 1 |
| Florida | 251,358 | Pensacola NAS | 15,000 | Florida Hospital Orlando | 14,000 | Orlando Regional Healthcare | 14,000 | Baptist Health South Florida | 10,000 | 5 |
| Georgia | 211,100 | Fort Benning | 32,000 | Fort Stewart | 20,000 | Robins Air Force Base | 19,000 | Emory University | 15,001 | 2 |
| Hawaii | 63,001 | Queen's Medical Center | 3,500 | Tripler Army Medical Center | 2,826 | Bank of Hawaii | 2,500 | Bank of Hawaii Corp | 2,100 | 6 |
| Idaho | 37,924 | Micron Technology | 10,000 | US Air Force Base | 5,231 | Mountain Home Air Force Base | 5,000 | St. Luke's Regional Medical Center | 4,533 | 2 |
| Illinois | 211,985 | Abbott Laboratories | 18,000 | MR Refund CPA | 15,000 | Allstate Corp | 13,000 | Allstate Insurance Co. | 13,000 | 4 |

| | | | | | | | | | | |
|------------------|---------|--|--------|---|--------|---|-------|--|-------|---|
| Indiana | 102,735 | Delphi Electronic s & Safety | 8,000 | Peyton Manning Children's Hospital | 7,000 | St. Vincent Hospital | 7,000 | Clarian Health Partners Inc | 6,500 | 4 |
| Iowa | 79,170 | Principal Financial Group | 10,000 | Rockwell Collins Inc | 7,000 | Blank Children's Hospital | 6,000 | Mercy Medical Center | 5,600 | 3 |
| Kansas | 80,775 | Spirit Aero Systems | 21,000 | Fort Riley | 12,500 | Van Enterprises | 6,000 | Via Christi St. Joseph Hospital | 5,000 | 2 |
| Kentucky | 123,790 | Fort Campbell City Offices | 23,227 | Norton Psychiatric Center | 10,000 | Cincinatti Internationa l Airport | 7,050 | Army National Guard | 7,000 | 3 |
| Louisiana | 118,541 | Ochsner Clinic Foundatio n | 10,000 | Northrop Grumman Ship Systems | 6,000 | Tulane University | 5,000 | W K Pierremont Health Center | 4,001 | 5 |
| Maine | 24,414 | Children's Miracle Network | 6,000 | Maine Medical Center | 5,000 | Maine General Health Medical Center | 3,200 | Eastern Maine Medical Center | 2,800 | 1 |
| Maryland | 121,145 | US Goddard Space Flight Center | 15,000 | Godard Space Flight Center | 11,000 | National Aeronautics Space ADM | 9,600 | Northrop Grumman Electronic Systems | 9,500 | 3 |
| Mass. | 118,892 | Massachu setts General Hospital | 14,000 | Brigham & Women's Hospital | 10,000 | Technical Futures Inc | 9,000 | Laboratory for Nuclear Science | 8,540 | 3 |

| | | | | | | | | | | |
|----------------------|---------|--------------------------------------|--------|------------------------------------|--------|----------------------------|--------|---|--------|---|
| Michigan | 173,314 | Rehabilitation Institute of Michigan | 19,000 | General Motors Technical Center | 17,096 | Detroit Receiving Hospital | 16,400 | Spectrum Health Rehabilitation & Sports | 15,000 | 3 |
| Minnesota | 100,143 | 3M Company | 12,200 | Fairview University Medical Center | 8,000 | Ameriprise Financial | 7,000 | Fairview University Medical | 7,000 | 3 |
| Mississippi | 96,566 | Northrop Grumman Ship Systems | 10,000 | Blair E. Batson Hospital-Child | 8,000 | Nissan North America | 6,300 | Beau Rivage Resort & Casino | 4,000 | 3 |
| Missouri | 130,819 | Barnes-Jewish Hospital | 9,000 | St. John's Hospital | 8,000 | St. Louis University | 7,500 | ABM Industries Inc. | 7,000 | 4 |
| Montana | 28,875 | Aageson Farm | 3,000 | Heart Center-St. Vincent | 3,000 | Malmstrom Air Force Base | 3,000 | St. Vincent Healthcare | 2,400 | 3 |
| Nebraska | 46,985 | First Data Corp | 7,000 | Mutual of Omaha Insurance Company | 5,233 | BryanLGH Medical Center | 5,000 | Cabela's | 4,675 | 2 |
| Nevada | 37,190 | Bellagio Hotel | 10,000 | US Air Force Base | 9,185 | MGM Grand Las Vegas | 9,000 | Pulte Homes | 8,000 | 1 |
| New Hampshire | 23,288 | Dartmouth Hitchcock Medical Center | 6,000 | Gang of Printers | 4,500 | Dartmouth College | 3,500 | UA Local 788 Marine Pipefitter | 3,500 | 1 |
| New Jersey | 175,735 | Virtua Health | 70,001 | Sanofi-Aventis US LLC | 11,000 | Continental Airlines | 8,000 | Hackensack Medical Center | 7,999 | 2 |

| | | | | | | | | | | |
|-----------------------|---------|-------------------------------------|--------|------------------------------------|--------|---|--------|-------------------------------------|--------|---|
| New Mexico | 63,918 | Los Alamos National Laboratory | 7,200 | Presbyterian Hospital | 7,000 | Lovelace Medical Group | 5,000 | Intel Corp. | 3,600 | 3 |
| New York | 384,657 | Lincoln Hospital | 35,000 | Harris Corp. | 20,000 | Merrill Lynch & Co. Inc. | 15,000 | Catholic Health Services | 13,500 | 5 |
| North Carolina | 261,774 | Duke University | 10,000 | Nortel Networks | 10,000 | Wake Forest University Baptist Medical Center | 10,000 | Duke University Hospital | 8,648 | 7 |
| North Dakota | 24,749 | Meritcare | 6,400 | Merit Care Health System | 4,300 | Altru Clinics | 3,200 | Children's Hospital Meritcare | 3,000 | 1 |
| Ohio | 181,805 | Procter & Gamble | 15,000 | Arcelormittal | 12,000 | Cleveland Clinic Foundation | 10,000 | Honda of America Manufacturing Inc. | 10,000 | 4 |
| Oklahoma | 112,709 | Tinker Air Force Base | 22,000 | Integris Baptist Medical Center | 10,000 | Blue Baron Energy | 7,500 | St. Francis Health System | 7,000 | 2 |
| Oregon | 81,351 | Harry & David | 6,700 | Intel Corp | 6,300 | Parkinson's Disease Association | 6,000 | Hewlett-Packard | 5,500 | 3 |
| Pennsylvania | 196,420 | Federal Government General Services | 20,000 | Philadelphia International Airport | 20,000 | Motorola Inc. | 12,000 | Highmark Inc. | 11,746 | 3 |

| | | | | | | | | | | |
|-----------------------|---------|-----------------------------------|--------|---------------------------------------|--------|--|--------|---------------------------------|--------|---|
| Rhode Island | 21,260 | Rhode Island Hospital | 6,000 | Met Life | 3,200 | Women & Infants Hospital of Rhode Island | 2,750 | Air National Guard- 143 Airlift | 2,500 | 1 |
| South Carolina | 133,673 | US Department of Energy | 14,000 | Computer Sciences Corp | 11,000 | Chest Pain Center of Greenville | 7,500 | Children's Hospital-Greenville | 7,500 | 3 |
| South Dakota | 18,835 | Avera McKennan Hospital | 4,600 | Ellsworth Air Force Base | 4,500 | Sanford Medical Center | 4,000 | Citibank South Dakota | 3,200 | 1 |
| Tennessee | 110,012 | Vanderbilt Eskind Diabetes Clinic | 20,000 | Vanderbilt University Medical | 18,000 | Eastman Chemical Co. | 8,000 | Alluvion Securities | 7,000 | 2 |
| Texas | 490,284 | Alcon Manufacturing | 35,000 | Dell Inc. | 21,000 | Lockheed Martin Corp | 10,500 | Electronic Data Systems | 10,500 | 6 |
| Utah | 67,076 | Army National Guard Headquarters | 4,000 | Discover Financial Services | 4,000 | Intermountain Medical Center | 4,000 | C R England Inc. | 3,301 | 4 |
| Vermont | 15,666 | Fletcher Allen Health Care | 5,000 | Allen Fletcher Health Care-Pediatrics | 5,000 | Killington Resort | 2,197 | Killington Resort Villages | 2,000 | 1 |
| Virginia | 160,593 | Northrop Grumman Newport News | 16,335 | VCU Health System | 7,001 | Philip Morris | 6,500 | Inova Fairfax Hospital-Children | 6,000 | 4 |
| Washington | 182,897 | Seattle Tacoma Airport | 21,000 | Microsoft Corp. | 20,000 | Boeing Employee Tennis Club | 10,000 | Tacoma General Hospital | 8,500 | 3 |

| | | | | | | | | | | |
|----------------------|-----------|----------------------------------|---------|------------------------|---------|-----------------------------------|---------|--|---------|---|
| West Virginia | 51,186 | Charleston Area Medical Center | 4,200 | FBI | 3,000 | Charleston Area Medical Center | 2,600 | Mountaineer Race Track & Resort | 2,500 | 4 |
| Wisconsin | 106,441 | Kohler Co | 8,152 | Gundersen Lutheran Inc | 6,000 | Columbia St. Mary's | 5,000 | General Mitchell International Airport | 5,000 | 4 |
| Wyoming | 15,784 | Cheyenne Regional Medical Center | 1,800 | US Air National Guard | 1,500 | United Medical Center Home Health | 1,400 | Wyoming Medical Center | 1,200 | 3 |
| Total | 6,210,629 | | 710,184 | | 489,474 | | 380,303 | | 335,654 | 3 |



Chapter 2: Congressional Abrogation of State Sovereign Immunity under Section 5 of the 14th Amendment

This report provides documentation of a widespread and persistent pattern of unconstitutional discrimination by state employers on the basis of sexual orientation and gender identity. This documentation is required for Congress to properly abrogate state sovereign immunity and to allow state employees who have suffered discrimination a private right of action under the Employment Non-Discrimination Act (ENDA). The following chapters are organized around specific types of evidence that the United States Supreme Court has cited when considering other non-discrimination statutes and determining if a widespread pattern of unconstitutional discrimination by state governments exists.

This chapter summarizes the criteria that the Supreme Court will use in determining whether Congress has appropriately exercised its authority under Section 5 of the Fourteenth Amendment, the application of those criteria to ENDA, and the specific types of evidence it has deemed relevant for Congress to consider in determining whether a widespread pattern of unconstitutional discrimination by state governments exists.

I. Predicate Requirements

Congress has the power to abrogate state sovereign immunity in order to provide a private right of action for damages against States when it enacts anti-discrimination legislation pursuant to Section 5 of the Fourteenth Amendment.¹ However, the exercise

¹ *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

of that power is not automatically valid. The Supreme Court has outlined a series of criteria under which it will assess whether Congress has overstepped its authority by creating liability for a large category of State conduct that is not unconstitutional.²

To draw the line between permissible and impermissible enactments, the Court has fashioned a multi-stage inquiry involving two threshold predicate requirements, the second of which triggers a series of subsidiary tests.³ The essence of these tests is an assessment of whether the remedial legislation is congruent and proportional to the constitutional violation, or threat of violation, by the States. Relevant factors include the clarity of the violation, the existence of a widespread pattern of unconstitutional actions, and the degree to which the legislation under consideration is targeted to remedy or prevent the aspects of State conduct that are unconstitutional.

The Supreme Court has “recognized ... that Congress may abrogate the States’ Eleventh Amendment immunity when it both unequivocally intends to do so and ‘act[s] pursuant to a valid grant of constitutional authority.’”⁴ The unequivocal intention prong of this test is clearly met by Section 11(a) of HR 3017 (ENDA).⁵ Thus for ENDA, as for other statutes in which Congress was similarly explicit,⁶ the first predicate test is easily satisfied.

The determinative question for the Supreme Court in evaluating the validity of the abrogation clause in ENDA will be whether Congress was “acting pursuant to a valid

² *Bd. Of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

³ *Garrett*, 531 U.S. at 369-74; *Kimel*, 528 U.S. at 86-91.

⁴ *Garret*, 531 U.S. at 363 (quoting *Kimel*, 528 U.S. at 73).

⁵ Section 11(a) states: “Abrogation of State Immunity—A State shall not be immune under the 11th Amendment to the Constitution from a suit brought in a Federal court of competent jurisdiction for a violation of this Act.” Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 11(a) (2009).

⁶ See e.g., *Lane*, 541 U.S. at 518.

grant of constitutional authority.” To answer this question, the Court has relied on the following considerations:

1. The scope of Congress’ legislative authority in invoking Section 5;
2. The scope of the constitutional right at issue in the particular enactment;
3. Whether Congress has identified a history and pattern of unconstitutional action relevant to that enactment; and
4. Whether the remedy enacted by Congress is congruent and proportional to the targeted violation.

The first of these inquiries – the scope of Congressional authority to invoke Section 5 in order to create a remedy enforceable against the States – is the same regardless of the particular enactment in question. The assessments made as to the other three factors will vary depending on the legislative record compiled for each piece of legislation.

II. Scope of Congressional Authority under Section 5

In *City of Boerne v. Flores*,⁷ the Supreme Court recognized that Section 5 authorizes Congress to adopt “[l]egislation which deters or remedies constitutional violations.” In *Garrett*, the Court elaborated on this principle: “Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence.”⁸ Congress’s explicit power under Section 5 “to enforce” Section 1 “includes the authority *both to remedy and to deter violations of rights* guaranteed [by the Constitution] by prohibiting a

⁷ 521 U.S. 507, 518 (1997).

⁸ *Garrett*, 531 U.S. at 365.

somewhat broader swath of conduct, including that which is not forbidden by the Amendment's own text.”⁹

The Court has cautioned that Congress “may not enforce a constitutional right by changing what the right is.”¹⁰ However, Congress does “have a wide berth in devising appropriate remedial and preventive measures for unconstitutional actions.”¹¹ Under the *deterrence* component of its authority, Congress has the power “to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.”¹²

When exercising its *remedial* authority to prohibit conduct by the States that clearly would constitute violation of a right protected under the Constitution, Congress's own constitutional capacity to act is unquestioned. Writing for a unanimous Court in the most recent Section 5 case, Justice Scalia noted that “[w]hile members of this Court have disagreed regarding the scope of Congress's ‘prophylactic’ enforcement powers..., no one doubts that § 5 grants Congress the power to ‘enforce ... the provisions’ of the Amendment by creating private remedies against the States for *actual* violations of those provisions.”¹³

The objective of prohibiting employment discrimination by the States based on sexual orientation or gender identity is well within the broad *scope* of Congress's Section 5 authority to remedy constitutional violations. Whether such legislation would in fact be a valid *exercise* of that authority depends on the answers to the remaining three questions, which address whether the record before Congress demonstrates that a pattern of such

⁹ *Id.* (emphasis added).

¹⁰ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹¹ *Lane*, 541 U.S. at 520.

¹² *Id.*

¹³ *United States v. Georgia*, 546 U.S. 151, 158 (2006) (emphasis in the original).

violations has occurred and is continuing to occur, and whether ENDA is properly structured, given the nature of those violations, to achieve its objective without unduly infringing on State sovereignty.

III. **Constitutional Rights Needing Protection**

The “first step” in ascertaining whether there is a valid exercise of authority is “to identify with some precision the scope of the constitutional right” that Congress is seeking to enforce.¹⁴ With regard to ENDA, Congress must identify which constitutional rights protected by the Fourteenth Amendment justify legislation to end workplace discrimination based on sexual orientation and gender identity.

To a greater extent than for most civil rights bills, the constitutional rights in need of protection by ENDA are multi-faceted and multi-dimensional. ENDA is centrally designed to prohibit violations of the Equal Protection Clause. However, the facets of equal protection law implicated by ENDA include not only the characteristics that the bill enumerates – sexual orientation and gender identity – but also discrimination based on sex, especially the form of sex discrimination apparent in the gender stereotyping line of cases. The overlap between sex discrimination and ENDA is most strongly evident from the emerging judicial consensus that discrimination based on gender identity is itself a form of sex discrimination.¹⁵

¹⁴ *Garrett*, 531 U.S. at 365; *Lane*, 541 U.S. at 522.

¹⁵ See e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (finding that gender was a motivating factor in attack on a transsexual); *Higgins v. New Balance Shoe Co.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (supporting the view that a male employee mocked for his stereotypically feminine characteristics could state a cause of action for sex discrimination under Title VII); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999) (reversing dismissal of Title VII sex discrimination claim where male employee had

In addition to the multiple sides of this one constitutional guarantee (the right to equal protection under law), the full dimensions of the constitutional protection provided by ENDA include two additional, independent guarantees – the right to due process of law and the expression rights ensured by the First Amendment.

The Supreme Court has ruled that LGBT Americans have a right to engage in intimate consensual sexual activity between adults.¹⁶ Such conduct falls within the liberty protected by the Due Process Clause of the Fourteenth Amendment.¹⁷ At the time *Lawrence* was decided, such activity had already been legalized in three-quarters of the states.¹⁸ Long before *Lawrence*, courts had ruled that the federal government could not justify negative employment actions as based on the individual’s “immorality” or participation in “immoral conduct.”¹⁹ Similarly, State governments may not penalize employees for engaging in homosexual conduct unrelated to job performance without violating rights protected under the Due Process Clause.

In addition, discriminatory employment practices against LGBT job applicants and employees have included questions about their sexual orientation and behaviors in violation of their privacy rights protected under the Due Process Clause. The constitutional right to privacy protects an individual’s interest—“in avoiding disclosure of personal matters”—absent a compelling government interest.²⁰ The more intimate or

been harassed in an effort to debase his masculinity); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reversing dismissal of claim of sex discrimination under Equal Credit Opportunity Act by male refused service because he was not dressed in masculine attire); *Glenn v. Brumby*, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.C. Cir. 2008).

¹⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁷ *Id.* at 578.

¹⁸ *Id.* at 559.

¹⁹ *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

²⁰ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

personal the information, the more justified is the expectation that it will not be subject to public scrutiny.²¹

LGBT Americans also have the same entitlement as other Americans to the protections of the procedural component of the Due Process Clause. Most public sector employees are not subject to the employment-at-will doctrine, and cannot be fired at the whim of the employer. Rather, a government employee is entitled to notice of the proposed action and a meaningful opportunity to respond before a decision is rendered by an impartial decision-maker.²² When the desire to accelerate or hush up the firing of gay and transgender employees corrupts the proper process for severance of an employee, the individual's procedural due process rights are violated.²³

Lastly, the infringement of rights to expression and association has been central to discrimination based on sexual orientation and gender identity. Most clearly, state employees who speak out on issues of LGBT rights or associate with gay or transgender persons may not constitutionally be penalized by firing or other measures.²⁴ As long as 30 years ago, a state supreme court held that employees' "coming out" speech was protected by the First Amendment as political expression.²⁵ When a gay employee self-identifies, any punitive employment action by a state actor based on that speech inevitably implicates both First and Fourteenth Amendment issues.

The protection of each of these individual rights constitutes an independent constitutional ground for Congress to include within ENDA a private right of action for

²¹ *Frat. Ord. of Police, Lodge 5 v. Philadelphia*, 812 F.2d 105, 112-113 (3d Cir.1987).

²² *Cleveland Bd of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Slochower v. Bd. of Educ., City of New York*, 350 U.S. 551, 555-56 (1956).

²³ *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁴ *Pickering v. Board of Education*, 391 U.S. 563 (1968).

²⁵ *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

State government employees. The chapter on Constitutional Rights Violated by Employment Discrimination Based on Sexual Orientation or Gender Identity, *infra*, explicates in greater detail the analysis underlying the “variety of basic constitutional guarantees”²⁶ that require enactment of ENDA for their enforcement.

IV. **History and Pattern of Unconstitutional Action by State Employers**

The content of the legislative record will be central to judicial assessment of ENDA’s abrogation of state sovereign immunity. Whether Congress validly exercises its Section 5 power in the effort to end employment discrimination by the States “is a question that ‘must be judged with reference to the historical experience which it reflects.’”²⁷ Where Congress responds to a “history and pattern” of constitutional violations by States,²⁸ its power to enact prophylactic legislation is at its strongest. Of special concern is that the historical record documents a genuine pattern rather than isolated examples.²⁹

The Supreme Court has recognized that Congress can take into account a variety of different types of evidence, including “judicial findings” and “statistical, legislative and anecdotal evidence” to determine whether a history and pattern of unconstitutional action exists when passing legislation to protect groups from discrimination.³⁰ These include:

²⁶ *Lane* 541 U.S. at 522.

²⁷ *Lane*, 541 U.S. at 523 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

²⁸ *Garrett*, 531 U.S. at 368.

²⁹ *Id.* at 370-71.

³⁰ *Lane*, 541 U.S. at 529 n.17, 529 (summarizing evidence considered by Court in *Hibbs*).

- The size of the population that Congress seeks to protect, to provide a context for considering the number of examples of discrimination;³¹
- The history of discrimination against the protected group by state governments, including state laws and policies that explicitly limited the employment opportunities of the protected group;³²
- Findings by courts that widespread discrimination exists against the protected class;³³
- Reports and findings by state governments documenting the prohibited discrimination;³⁴
- Congressional findings of discrimination by state governments in the text of the statute being enacted;³⁵
- Expressions of concern about discrimination by state governments in the legislative history of the statute, including findings in Committee Reports and statements and examples provided by individual members of Congress;³⁶
- Testimony before Congress from the those who have suffered discriminatory treatment;³⁷
- Statistical data³⁸ and surveys documenting discrimination, from government as well as non-government sources, including quantitative

³¹ *Garrett*, 531 U.S. 356, 370.

³² *Hibbs*, 538 U.S. at 729; *Lane*, 541 U.S. at 524 n. 7-9 and accompanying text.

³³ *Hibbs*, 538 U.S. 730 (“It can hardly be doubted that...women still face pervasive, although at times more subtle, discrimination in the job market.”(citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973))).

³⁴ *Kimel*, 528 U.S. at 89.

³⁵ *Lane*, 541 U.S. at 529.

³⁶ *Lane*, 541 U.S. at 521-22; *Garrett*, 531 U.S. at 371; *Kimel*, 528 U.S. at 89.

³⁷ *Hibbs*, 538 U.S. at 731 n.4; *Lane*, 541 U.S. at 527, 529.

data showing disparities in employment benefits between the protected group and other employees;³⁹

- 50-state surveys of discriminatory polices and practices;⁴⁰
- Judicial findings of unconstitutional discrimination against the protected group,⁴¹ both in the specific area protected by the legislation as well as in other contexts;⁴²
- Specific examples of discrimination collected from a variety of sources,⁴³ including anecdotal accounts of discrimination not submitted directly to Congress;⁴⁴
- Conclusions by experts based on data they have collected or reviewed and their experience; and⁴⁵
- Analysis of the shortcoming of existing state laws and polices addressing the discrimination that Congress intends to remedy or prevent.⁴⁶

In compiling this record, Congress may consider constitutional violations by non-state governmental actors as well. The Supreme Court has recognized “that evidence of constitutional violations on the part of non-state governmental actors is relevant to the § 5 inquiry,”⁴⁷ and has included within that zone of recognition evidence of discrimination by

³⁸ *Lane*, 541 U.S. at 529.

³⁹ *Hibbs*, 538 U.S. at 730 (citing Bureau of Labor Statistics Data that more private-sector employees have maternity leave polices than paternity leave policies); *Lane*, 541 U.S. at 527 (citing report by the U.S. Civil Rights Commission for the percentage of public services and programs in state-owned buildings that are inaccessible to people with disabilities).

⁴⁰ *Hibbs*, 538 U.S. at 730 n.3.

⁴¹ *Lane*, 541 U.S. at 529.

⁴² *Lane*, 541 U.S. at 524-525 n. 10-14 and accompanying text.

⁴³ *Lane*, 541 U.S. at 526, 527.

⁴⁴ *Lane*, 541 U.S. at 529.

⁴⁵ *Hibbs*, 538 U.S. at 730 n.3, 731, 731 n. 4, 732.

⁴⁶ *Lane*, 541 U.S. at 526.

⁴⁷ *Lane*, 541 U.S. at 527 n.16.

the private sector,⁴⁸ federal employers,⁴⁹ and local government agencies.⁵⁰ Consideration of local government examples is warranted for many reasons. There is often great similarity in occupational categories between state and local government employers, and the patterns of discrimination – both historically and currently -- are accordingly similar. At least one state – Hawai'i - classifies schoolteachers as state employees.⁵¹ And directly on point for Section 5 cases, many jobs with local government agencies have been found to be part of state government when courts have adjudicated disputes over immunity. The Ninth Circuit has ruled that under California law, local school districts are state agencies for purposes of Eleventh Amendment immunity.⁵² Similarly, sheriffs employed at the county level are often treated as state employees for Eleventh Amendment purposes.⁵³

⁴⁸ See, e.g., *Hibbs*, 538 U.S. at 730 n.3 and accompanying text (“While this and other material described leave policies in the private sector, a 50 state survey also before Congress demonstrated that ‘The proportion and construction of leave policies available to public sector employers differs little from those offered private sector employers.’”); see also *Lane*, 541 U.S. 509. ; *Hibbs*, 538 U.S. at 745-746 (Kennedy, J., dissenting)(Congress’s consideration of evidence of discrimination by private entities may be relevant for Section 5 analysis where discrimination in private sector is ‘parallel’ to discrimination by state governments.).

⁴⁹ *Hibbs*, 538 U.S. at 732 (relying on a study of federal employers to draw the conclusion that “where state law and policies were not facially discriminatory, they were applied in discriminatory ways.”); see also *id.* at 748 (Kennedy, J., dissenting)(“A history of discrimination on the part of the Federal government may, in some situations, support an inference of similar conduct by the States”); *Lane*, 541 U.S. at 527 n. 16 (“Moreover, what THE CHIEF JUSTICE calls an ‘extensive legislative record documenting States’ gender discrimination in employment leave policies” in *Nevada Dep’t of Human Resources v. Hibbs*, in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States. Indeed, the evidence before the Congress that enacted the FMLA related primarily to the practices of private sector employers and the Federal Government”)(citation omitted).

⁵⁰ See e.g., *Lane*, 541 U.S. at 527 (“Congress itself heard testimony from person with disabilities who described the physical inaccessibility of *local* courthouses. . . . And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and *local* governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.”) (emphasis added). See also, *id.* at 527 n. 16 (“[The] argument [in the dissent] relies on the mistaken premise that a valid exercise of Congress’ § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves. . . . [M]uch of the evidence in *South Carolina v. Katzenbach*, 383 U.S. 301, 312– 315 (1966), to which THE CHIEF JUSTICE favorably refers . . . involved the conduct of county and city officials, rather than the States.”).

⁵¹ Hawaii Department of Education, Introduction, Organization, http://doe.k12.hi.us/about/intro_org.htm.

⁵² *Belanger v. Madera Unif. Sch. Dist.*, 936 F.2d 248, 253 (9th Cir. 1992).

⁵³ *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (en banc) (county sheriff in Georgia “is an arm of the State, not Clinch County, in establishing use-of-force policy at the jail and in training and disciplining

In the face of persistent discrimination, the existence of other laws already protecting against the same evils does not detract from Congressional authority.⁵⁴ As the data contained in this report demonstrate, State laws and the general Section 1983 cause of action have been insufficient to solve the problem of widespread violations of the constitutional rights of gay and transgender State employees. When Congress is “confront[ing] a ‘difficult and intractable proble[m],’ where previous legislative attempts had failed,”⁵⁵ Congress is within its constitutional authority to adopt “added prophylactic measures” to address the problem.⁵⁶

V. **Whether ENDA is Congruent and Proportional to the Targeted Violations**

The Court has required that Congress calibrate its response to the nature and extent of the constitutional violations by State actors that it has documented. The more serious, widespread and persistent the constitutional violations are, the more flexibility Congress has under Section 5 in fashioning legislation to prohibit them. But especially when Congress enacts prophylactic legislation – “prohibit[ing] conduct which is not itself unconstitutional” – “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁵⁷

In *Garrett*, for example, the Court found that the Americans with Disabilities Act (ADA) swept too broadly both in scope and in remedy. Using the rational basis test

his deputies in that regard”); *Lancaster v. Monroe County*, 116 F.3d 1419, 1429 (11th Cir. 1997) (county jailers in Alabama “are state officials entitled to Eleventh Amendment immunity when sued in their official capacities”); *see also Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996) (sheriffs in South Carolina are arms of the State); *Wilkerson v. Hester*, 114 F. Supp. 2d 446, 464-465 (W.D.N.C. 2000) (sheriffs in North Carolina are arms of the State).

⁵⁴ *City of Boerne*, 521 U.S. at 526.

⁵⁵ *Hibbs*, 538 U.S. at 737 (2003) (citation omitted),

⁵⁶ *Id.* at 731.

⁵⁷ *Lane*, 541 U.S. at 518, 520.

applied to discrimination based on disability, the Court found that the States, acting as employers, could constitutionally choose to prefer hiring persons who would not require workplace alterations, in order to achieve a legitimate interest in conserving financial resources.⁵⁸ The Court found that the ADA’s remedies included extensive accommodation requirements, of the sort not required under Equal Protection law.⁵⁹ In *Hibbs*, by contrast, the Court ruled that the Family Medical Leave Act narrowly targeted the fault line – work-family balance issues – where extensive gender stereotyping had occurred.⁶⁰

ENDA’s remedies are less extensive than those in other anti-discrimination laws, in large part because the bill explicitly disallows disparate impact claims,⁶¹ and prohibits “preferential treatment” and quotas.⁶² Further, it explicitly does not require the construction of new or additional facilities by employers,⁶³ the treatment of unmarried couples as married couples for purposes of employment benefits,⁶⁴ or the collection of statistics on actual or perceived sexual orientation or gender identity.⁶⁵ As a result, ENDA’s intervention in workforce management – including State government employment practices – is narrowly limited to prohibiting the kinds of facially discriminatory actions that are the most flagrantly unconstitutional.

With regard to money damages, ENDA provides for the same caps that exist in Title VII and to which the States as employers are already subject.⁶⁶ It does not provide

⁵⁸ *Garrett*, 531 U.S. at 372-73.

⁵⁹ *Id.*

⁶⁰ *Hibbs*, 538 U.S. at 736-737.

⁶¹ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 4(g) (2009).

⁶² *Id.* at § 4(f).

⁶³ *Id.* at § 8(a)(4).

⁶⁴ *Id.* at § 8(b).

⁶⁵ *Id.* at § 9.

⁶⁶ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

for punitive damages in suits against state employers.⁶⁷ Finally, it requires state employees to exhaust all administrative remedies before bringing an action for money damages in court and that such complaints be filed in a timely manner.⁶⁸

Conclusion

In a series of cases, the Supreme Court has developed a roadmap to guide Congressional acts, taken in the exercise of Congress's authority under Section 5 of the Fourteenth Amendment, that abrogate the sovereign immunity of the States. Under this set of criteria, Congress must develop a substantial record documenting the nature and extent of the constitutional violations that it is seeking to remedy and deter. In the next chapter, we elaborate in greater detail on how the constitutional standards described *supra* should be applied to ENDA. The remaining chapters of this report provide more than sufficient documentation of constitutional violations to satisfy the criteria established by the Court in its Section 5 jurisprudence.

⁶⁷ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 11(d)(1) (2009).

⁶⁸ *Id.* at §§ 10, 10(b); Title VII of the Civil Rights Act of 1964 § 706, 42 U.S.C. §§ 2000e *et seq.* (1964), amended by The Civil Rights Act of 1991, 42 U.S.C. § 1981a.



Chapter 3: Constitutional Rights Violated by Employment Discrimination Based on Sexual Orientation or Gender Identity

As described more fully in Chapter 1, *supra*, one of the criteria stated by the Supreme Court for determining whether Congressional abrogation of State sovereign immunity is valid is the scope of the constitutional rights at issue.

Discrimination in public sector employment based on sexual orientation or gender identity implicates three separate and independent constitutional provisions:

- the Equal Protection Clause of the Fourteenth Amendment,
- the Due Process Clause of the Fourteenth Amendment, including both its liberty and procedural dimensions,
- and the First Amendment.

Implicit in the question of whether actions by state governments have been unconstitutional is the question of which standard should be used to evaluate such actions.¹ In its analysis under the Equal Protection Clause, the Supreme Court has clearly set the standard for some characteristics either at heightened scrutiny (race and sex, for example) or at rational basis review (age and disability, for example).² For sexual orientation and gender identity, the Court has not definitively identified which Equal Protection standard of review should be utilized. Under even the lowest standard,

¹ *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001).

² ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 671, 782 (2006).

however, *employment* discrimination on those grounds has repeatedly been found to be unconstitutional under the Equal Protection Clause.³

The standard of review question is easier for those constitutional rights implicated in ENDA that arise under the Due Process Clause or the First Amendment. Parallel to the equal protection case law involving heightened scrutiny, the enforcement of “basic rights” under these two Constitutional provisions leads to searching judicial scrutiny, at least as stringent as that accorded to sex-based classifications.⁴ As a result, what is effectively heightened scrutiny, whether explicit or not, applies to all the instances of discrimination that would fall within ENDA’s purview, which grants greater leeway to Congress in its assessment of the pattern of unconstitutional discrimination by state employers.⁵

³ See *infra* note 23.

⁴ *Tennessee v. Lane*, 541 U.S. 509, 529 (2004).

⁵ *Hibbs*, 538 U.S. at 736.

I. Equal Protection

(A) Discrimination based on sexual orientation

The bedrock principle of Equal Protection doctrine is that “all persons similarly situated should be treated alike.”⁶ The leading case in which the Supreme Court has applied that command to discrimination against gay people is *Romer v. Evans*.⁷ In *Romer*, the Supreme Court invalidated an amendment to the Colorado constitution that both rescinded all civil rights coverage for gay Coloradans and also created a special rule that in order to enact new anti-discrimination protection covering sexual orientation in the future, proponents would have to persuade voters to adopt another amendment to the state constitution, rather than rely on the normal process for enacting a state statute. The Court found that the sweep of the amendment across many facets of daily life – including employment - “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”⁸

In its penultimate paragraph, the Court unequivocally states that discrimination based on sexual orientation, divorced from any legitimate purpose, violates the Constitution:

⁶ *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

⁷ 517 U.S. 620 (1996).

⁸ *Id.* at 634.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, [and also] its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.⁹

Courts and scholars have debated whether this language signals the adoption of heightened scrutiny.¹⁰ Regardless of whether it does, its teaching for the evaluation of instances of employment discrimination is clear. In order for adverse employment actions by state actors based on sexual orientation to be valid, they must, at a minimum, be “directed to [an] identifiable legitimate purpose or discrete objective.”

Justice O'Connor elaborated on the meaning of the Court's opinion in *Romer* in her concurring opinion in *Lawrence v. Texas*.¹¹ In *Lawrence*, she diverged from her colleagues on the Court in concluding that the Texas sodomy law was unconstitutional

⁹ *Id.* at 635.

¹⁰ See, e.g., *Lofton v. Sec'y of the Dep't of Children & Family Svcs*, 358 F.3d 804, 815-817 (2004); *Lofton v. Sec'y of the Dep't of Children & Family Svcs*, 377 F.3d 1275, 1285-1296 (denial of a rehearing en banc) (Barkett, J., dissenting)(Anderson J., dissenting); Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L. J. 885, 885-86 (2000-2001).

¹¹ 539 U.S. 558 (2003).

because it violated the Equal Protection Clause, rather than because it infringed the liberty interests protected by the Due Process Clause, as five Justices held in the Opinion of the Court.¹² Justice O'Connor's opinion explained why her Equal Protection Clause analysis did not apply the traditional and highly deferential form of rational basis review:

We have consistently held ... that some objectives, such as "a bare ... desire to harm a politically unpopular group," are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.¹³

Justice O'Connor concluded that the statute at issue in *Lawrence* had precisely that effect:

Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else...¹⁴

Justice O'Connor then went on to explicate why the justification asserted by Texas – enforcement of its preferred belief regarding morality – was invalid as a matter of law when applied to discrimination against a group of persons:

¹² Although the opinion of the Court is based on the Due Process Clause, the language of the decision emphasizes themes of equality as well, because the statute being struck down criminalized the same conduct for same-sex partners that was lawful for different-sex partners. Thus the Court was presented with state action that *selectively* infringed liberty. *Lawrence v. Texas*, 539 U.S. 558, 562-63, 572-74 (2003).

¹³ *Lawrence*, 539 U.S. at 580 (internal citations omitted).

¹⁴ *Id.* at 581.

Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.... A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.¹⁵

Thus, unlike discrimination based on age, which the Supreme Court has several times upheld using a traditional rational basis standard of review,¹⁶ the Court has *struck down* the use of sexual orientation as a legitimate basis for classification, using language that is, at the least, an unusually powerful form of rational basis review.¹⁷ The doctrinal status of sexual orientation today is reminiscent of how the Court initially approached sex discrimination in the 1970's¹⁸: first by striking down a state statute while using the language of rationality review to achieve an outcome normally requiring much stricter

¹⁵ *Id.* at 582, 585.

¹⁶ *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

¹⁷ Under traditional rational basis review, a classification is upheld if the Court can, retrospectively, imagine any situation in which the law's application could be legitimate. *Heller v. Doe*, 509 U.S. 312, 323-326 (1993). Whatever is going on in the sexual orientation cases, it is clearly not the utilization of this highly deferential form of rational basis review.

¹⁸ This trajectory is documented in the papers of the Justices. Nan D. Hunter, *Twenty-First Century Equal Protection: Making Law in an Interregnum*, 7 GEO. J. GENDER & L. 141, 153-56 (2006).

scrutiny.¹⁹ Later, the effort to muster a majority to treat sex as a suspect classification fell short;²⁰ and the Court ultimately settled on an intermediate standard.²¹ Given the state of the current case law, Congress should reject the dichotomous all-or-nothing approach of having to choose between traditional rational basis analysis and suspect class analysis, and instead utilize either the heightened scrutiny standard applied to sex discrimination or the heightened rational basis standard proposed by Justice O'Connor in *Lawrence*.²²

The Equal Protection case law applicable to employment demonstrates two fundamental points: first, that, even today, discrimination against LGBT state and local government employees continues; and second, that even utilizing a rational basis test, such discrimination is unconstitutional. As documented throughout the pages of this report, from the “lavender scare” purges to the present, the instances of anti-gay state government job discrimination (and the very similar examples in the context of local government) have lacked an “identifiable legitimate purpose or discrete objective.”²³ The facts of some examples are inflected with a degree of animus that crosses the line into violence.²⁴

¹⁹ *Reed v. Reed*, 404 U.S. 71 (1971).

²⁰ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

²¹ *Craig v. Boren*, 429 U.S. 190 (1976).

²² The Connecticut Supreme Court adopted the sex discrimination level of scrutiny as the correct measure of sexual orientation classifications under that state’s constitution. *Kerrigan v. Comm’r of Pub. Health*, 289 Conn. 135 (2008).

²³ *Miguel v Guess*, 51 P.3d 89 (Wn. Ct. App. 2002); *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (E.D.N.Y. 2006); *Sorrenti v. City of New York*, 851 N.Y.S.2d 61 (N.Y. Sup. Ct. 2007); *Lovell v. Comsewogue Sch. Dist.*, 2005 WL 1398102 (E.D.N.Y. 2005); *Emblen v. Port Authority of New York/New Jersey*, 2002 WL 498634 (S.D.N.Y. 2002); *Glover v. Williamsburgh Local School Dist. Bd. Of Educ.*, 20 F.Supp.2d 1160 (S.D. Ohio 1998); *Weaver v. Nebo Sch. Dist.*, 29 F.Supp.2d 1279 (D. Utah 1998).

²⁴ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf> (California Highway Patrol officer Thomas Figenshu was subjected to extreme harassment based on his sexual orientation which included a co-worker urinating in his locker); Lambda Legal, All Cases: *Grobeson*

For example:

- A railroad ticket agent sued the Long Island Railroad, a state employer, for failing to address sexual orientation harassment in the workplace. In 2006, a U.S. District Court, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans*,²⁵ denied the Railroad's summary judgment motion and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.²⁶ The ticket agent alleged that he was referred to by several people in the office as a "f***** faggot" and "a queer."
- In 2001, a lesbian brought an action against her former employer, a hospital district, for wrongful termination based on sexual orientation alleging state and federal equal protection clause violations. She and her immediate supervisor were both terminated for opposing the hospital's discriminatory treatment of her. The director of the hospital's radiology department made several derogatory comments, including calling her a "f***** faggot" a "f***** dyke" and a "queer." The Washington Court of Appeals held that she had raised material

v. *City of Los Angeles*, <http://www.lambdalegal.org/in-court/cases/grobesson-v-city-of-los-angeles.html> (last visited Sept. 5, 2009) (police officer's co-workers refused to back him up in life-threatening situations); Negotiated Settlement and General Release, *Colle v. City of Millville*, D. Conn., Civil Action No. 07-5834 (police officer refused back up because of his sexual orientation when a woman he was apprehending bit his finger to the bone); GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Nov. 26, 2007) (on file with GLAD) (transgender correctional officer was slammed into a concrete wall by a co-worker because of her gender identity).

²⁵ 517 U.S. 620 (1996).

²⁶ *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (2006 E.D.N.Y.).

issues of fact with respect to whether the hospital and the doctor were “state actors” for her federal claims and remanded the case for trial.²⁷ The hospital eventually settled with her for \$75,000.²⁸

- In *Jantz v. Muci*, a federal district court found that a Kansas school teacher had an equal protection claim actionable under 42 U.S.C. § 1983 because he had been denied a teaching position because of a principal’s perception that he had “homosexual tendencies.” The court noted that “homosexual orientation alone does not impair job performance, including the job of teaching in public schools” and concluded that the decision was “arbitrary and capricious in nature”-- failing even under rational basis review.²⁹
- In 1995, Justice Sotomayor, then a judge for the Southern District of New York, denied a motion to dismiss a case where the plaintiff had been fired from his job as a prison kitchen worker because he was gay. Criticizing the defendants’ argument that removing the plaintiff was rationally related to preserving mess hall security, Sotomayor stated that a "person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security." She also rejected the defendants’ qualified immunity defense, stating that the "The

²⁷ *Miguel v. Guess*, 51 P.3d 89 (Wash. Ct. App. 2002).

²⁸ ACLU, *Following ACLU Lawsuit, Lesbian Illegally Fired from Washington Hospital Received Generous Settlement* (Oct. 8, 2003), <http://www.aclu.org/lgbt/discrim/12359prs20031008.html>.

²⁹ *Jantz v. Muci*, 759 F. Supp. 1543, 1543 (D. Kan. 1991). The court further held that the principal was not entitled to a qualified immunity defense and denied his motion for summary judgment. The Tenth Circuit reversed, finding that the principal was entitled to qualified immunity. *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992).

constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law."³⁰

Whether the courts' reasoning on the question of the applicable standard is motivated by the knowledge that much discrimination against LGBT people is impermissibly motivated by animus and hostility toward a group, or whether multiple courts have concluded that anti-gay discrimination in the ordinary exchanges of daily life is presumptively irrational is, in the end, irrelevant. Under *any* interpretation of these cases and under *either* standard of review, workplace discrimination against LGBT Americans must be found unconstitutional.

(B) Discrimination based on gender stereotyping and on sex

In addition to and overlapping with sexual orientation discrimination, LGBT people have suffered job discrimination based on gender stereotyping and on sex. As noted above, sex-related discrimination is subject to heightened review. In *United States v. Virginia*, the Court held that the Virginia Military Institute's denial of admission to women violated the federal constitutional prohibition of sex-based discrimination.³¹ The Court explained that to defend "gender-based government action," the state "must demonstrate an 'exceedingly persuasive justification' for that action."³² Significantly, the Court held that the justification must not rely on sex stereotypes, or "overbroad generalizations about the different talents, capacities, or preferences of males and

³⁰ *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. 1995).

³¹ 518 U.S. 515, 519 (1996).

³² *Id.* at 531.

females.”³³ The Court has also made clear that individuals have a right under the Equal Protection Clause to be free of sex-based discrimination in public employment.³⁴

Because of the existence of Title VII, only a small number of employment discrimination claims involving sex bias are brought as constitutional claims. However, courts routinely treat the substantive criteria of factually similar Title VII and constitutional claims interchangeably.³⁵ Since the Supreme Court decided *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989), Title VII law has recognized that an employee who suffers job discrimination because of a failure to conform to gender stereotypes can assert a viable claim under Title VII. Discrimination based on gender stereotypes also violates the Constitution’s guarantee of equal protection.³⁶

There is much overlap between discrimination on the basis of sexual orientation and gender identity and discrimination on the basis of gender atypicality. Professor Andrew Koppelman has noted that everyday experience teaches “that the stigmatization of the homosexual has something to do with the homosexual’s supposed deviance from traditional sex roles.”³⁷ Koppelman reviewed a substantial amount of experiential, sociological, psychological, historical, and legal evidence on this question, and concluded: “The two stigmas, sex inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other. There is nothing

³³ *Id.* at 533.

³⁴ *Davis v. Passman*, 442 U.S. 228, 234-35 (1979).

³⁵ *See, e.g., Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988); *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986).

³⁶ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-26 (1982)

³⁷ Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234 (1994).

esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles.”³⁸

In a book-length article that appeared in the *California Law Review*, Professor Francisco Valdes also analyzed the conflation of gender and sexual orientation.³⁹ Like Koppelman, Valdes devoted substantial attention to sociological and historical research, and concluded that “social and sexual gender typicality was and is associated clinically and normatively with heterosexuality, while social or sexual gender atypicality was and is associated with homosexuality (and bisexuality).”⁴⁰ Numerous other scholars have pointed to the same phenomenon.⁴¹ As Professor Valdes wrote, “discrimination putatively based on sexual orientation is in concept and practice tightly intertwined with gender discrimination.”⁴²

For transgender persons who have changed their gender identification from one sex to the other, the overlap between gender identity discrimination and sex discrimination is even more profound than for lesbian, gay and bisexual persons. As one author has noted, “discrimination against transgender...employees is per se a form of sex-stereotyping

³⁸ *Id.* at 235.

³⁹ See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 87-90 (1995).

⁴⁰ *Id.* at 135.

⁴¹ In addition to Koppelman and Valdes, see, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1 (1995); Erin E. Goodsell, *Toward Real Workplace Equality: Nonsubordination and Title VII Sex-Stereotyping Jurisprudence*, 23 WIS. J. L. GENDER & SOC’Y 41 (2008); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 N.W. U. L. REV. 205 (2009); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988); and Anthony E. Varona and Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM & MARY J. WOMEN & L. 67 (2000).

⁴² *Id.* at 335.

discrimination...The issue of discrimination against transgender employees cuts to the core of what a ‘gender stereotype’ is.”⁴³ Discrimination against transgender individuals

is rooted in the same stereotypes that have fueled unequal treatment of women, lesbian, gay, bisexual people and people with disabilities – i.e., stereotypes about how men and women are “supposed” to behave and about how male and female bodies are “supposed” to appear. For the most part, in other words, anti-transgender discrimination is not a new or unique form of bias, but rather falls squarely within the parameters of discrimination based on sex, sexual orientation and/or disability.⁴⁴

When government employers discriminate based on gender stereotypes, regardless of the employee’s LGBT status, sex-based discrimination is implicated. This occurs often in the workplace. Stereotypes about whether a male is masculine enough or a female is feminine enough have been widely used as the basis for excluding LGBT people from employment.

However, instead of recognizing this overlap, many courts have instead tried to parse out whether discriminatory comments are referencing an employee’s sexual orientation or gender identity, and therefore are not actionable, or whether the comments

⁴³ Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562 (2007).

⁴⁴ Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 38 (2000).

reflect sex stereotyping, and therefore are actionable. Courts have noted that because of the very high degree of inter-relationship between the two this not an easy task.⁴⁵

Currently the case law is divided on whether courts will recognize that gay or transgender individuals can even state a claim for Title VII sex stereotype discrimination, or whether the judges will reject Title VII sex stereotype claims based on a litigant's sexual orientation or gender identity status. The early case law uniformly denied relief to gay and transgender plaintiffs.⁴⁶

Since the Supreme Court's decision in *Price Waterhouse*, some lower federal courts have begun to recognize the overlap between either sexual orientation or gender identity discrimination and sex stereotype discrimination. Indeed, this better reasoned understanding now governs in many circuits and district courts.⁴⁷ For example, the Sixth Circuit Court of Appeals found in *Smith v. City of Salem* that a transgender fire department employee was subjected to impermissible sex discrimination under Title VII based on nonconformity with gender stereotypes.⁴⁸ The court held that "discrimination against a plaintiff who is transsexual – and therefore fails to act and/or identify with his

⁴⁵ See, e.g., *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1065 n. 5 (7th Cir. 2003) ("We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes."). See, also, *Prowel v. Wise Business Forms, Inc.*, --- F.3d ---, 2009 WL 2634646, at *2 (3d Cir. Aug. 28, 2009)

⁴⁶ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979); and *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977).

⁴⁷ In addition to the Sixth and Seventh Circuit cases discussed in the text, comparable decisions by appellate courts involving private sector employers or non-employment contexts include *Prowel*, 2009 WL 2634646; *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (Pregerson, J., concurring); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).

⁴⁸ 378 F.3d 566, 575 (6th Cir. 2004).

or her gender – is no different from Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”⁴⁹

A year later, the Sixth Circuit again recognized actionable sex stereotype discrimination against a transgender public employee. In *Barnes v. City of Cincinnati*, Barnes filed suit against the City of Cincinnati after he was demoted from his position as a police officer.⁵⁰ Barnes was living as a woman outside of work and sometimes came to work with make-up, arched eyebrows, and a manicure.⁵¹ At the precinct, one of Barnes's supervisors told him he was not sufficiently masculine, and another official informed Barnes that he “needed to stop wearing makeup and act more masculine.”⁵² After being placed on probation, superiors told Barnes that he would fail probation for not acting masculine enough; in fact, Barnes became the only officer to fail probation over a three-year period.⁵³ Explaining that Title VII protects against discrimination based on gender stereotypes regardless of the transgender status of the employee, the court held that Barnes had produced sufficient evidence at trial to establish a Title VII sex stereotype claim.

In *Doe v. City of Belleville*, two brothers who worked in a city public maintenance crew were taunted for what co-workers apparently perceived as feminine characteristics, including wearing an earring. Subjected to “a relentless campaign of harassment by their

⁴⁹ *Id.*

⁵⁰ 401 F. 3d 729 (6th Cir. 2005).

⁵¹ *See id.* at 734.

⁵² *Id.* at 735.

⁵³ *See id.*

male co-workers,” they sued the city alleging intentional sex discrimination.⁵⁴ The plaintiffs alleged that their harassment included being called “queer” and “fag,” comments such as, “[a]re you a boy or a girl?” and threats of “being taken ‘out to the woods’” for sexual purposes.⁵⁵ The brother who wore the earring was subject to more ridicule, and was once asked whether his brother had passed a case of poison ivy to him through intercourse.⁵⁶ The verbal taunting turned physical when a co-worker grabbed one of the boy’s genitals to determine “if he was a girl or a boy.”⁵⁷ When the plaintiffs failed to return to work, supervisors terminated their employment.⁵⁸ The Seventh Circuit noted that “a homophobic epithet like ‘fag,’...may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation.”⁵⁹ The court found that a “because of” nexus between the allegedly proscribed conduct and the victim’s gender could be inferred “from the harassers’ evident belief that in wearing an earring, [the brother] did not conform to male standards.”⁶⁰

Federal district courts have reached similar decisions as to the cognizability of a sex stereotyping claim by gay or transgender plaintiffs. For example:

⁵⁴ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998). The U.S. Supreme Court vacated and remanded to the Seventh Circuit for further consideration in light of *Oncale v. Sundowner Offshore Services*, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

⁵⁵ *Id.* at 566-567.

⁵⁶ *Id.* at 567.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 593 n.27.

⁶⁰ *Id.* at 576.

- In *Fischer v. City of Portland*, the plaintiff was a lesbian city inspector who wore masculine attire.⁶¹ At work, she did not wear makeup, had short hair and wore men’s clothing. Her supervisor subjected her to harassing comments based on both gender stereotypes and sexual orientation, including that her shirt looked “like something her father would wear” and saying “are you tired of people treating you like a bull dyke[?]”.⁶² Her co-workers also made multiple harassing comments based on both gender stereotypes and sexual orientation, including calling her a “bitch,” saying loudly that they were “surrounded by all these fags at work,” and asking her “would a woman wear a man’s shoes?”⁶³ In holding that the employee could proceed with her Title VII claim, the court determined that the sex stereotype claim was not precluded by the fact that the harassers might also have been motivated by sexual orientation bias.⁶⁴
- In *Schroer v. Billington*,⁶⁵ the court not only denied a motion to dismiss, but also ruled after trial that the Library of Congress was liable under Title VII for its discrimination against a transgender woman. The court found that the plaintiff prevailed on two legal theories: direct or disparate treatment sex discrimination and sex stereotype discrimination. Testimony at trial established that the negative reaction to the plaintiff resulted from her not

⁶¹ 2004 WL 2203276, at *7 (D. Or. 2004).

⁶² *See id.*

⁶³ *See id.* at *8.

⁶⁴ *See id.* at *11.

⁶⁵ 577 F. Supp.2d 293 (D.D.C. 2008). In July 2009, the Department of Justice announced that it would not appeal the ruling. See ACLU press release available at <http://www.aclu.org/lgbt/transgender/40092prs20090701.html>.

fitting gender stereotypes because she transitioned, and thus the court found that there was "compelling evidence that the Library's hiring decision was infected by sex stereotypes."⁶⁶ Secondly, the court held that discrimination based on gender transition is literally discrimination based on sex because gender identity is a component of sex, and therefore discrimination based on gender identity is sex discrimination. The *Schroer* court reasoned that just as discrimination against converts from one to faith to another is discrimination based on religion, so too discrimination against transgender persons is sex discrimination.⁶⁷

- In *Glenn v. Brumby*, a legislative editor for the Georgia General Assembly's Office of Legislative Counsel was fired after she was diagnosed with gender identity disorder and began appearing at work as a woman (pursuant to a doctor's orders) prior to undergoing gender reassignment surgery.⁶⁸ Since 2005, she had been responsible for editing proposed legislation and resolutions for the Georgia Assembly. A federal district court summarized the grounds for termination as, "in the view of Glenn's employers, gender transition surgery and presentation as a woman in the workplace would be seen as immoral... and would make other employees uncomfortable."⁶⁹ In rejecting the state's motion to dismiss, the court ruled that the editor's complaint "clearly states a claim for denial of equal protection" under the

⁶⁶ *Id.* at 305.

⁶⁷ *Id.* at 306-07.

⁶⁸ *Id.*

⁶⁹ *Id.*

Fourteenth Amendment on alternative theories of discrimination on the basis of sex and a medical condition.⁷⁰ The court noted that “it is now well-established in federal law that discrimination based on the failure of an individual to conform to sexual stereotypes is a form of sex discrimination.”⁷¹ The court then held that the plaintiff had met the burden of showing that she was treated differently based on her gender identity disorder and her failure to conform to sex stereotypes.⁷²

- In *Kastl v. Maricopa County Community College District*⁷³, Estrella Mountain Community College (EMCC) required plaintiff, who was diagnosed with gender identity disorder and was transitioning from male to female, to use the men's restroom until such time as she provided proof that she did not have male genitalia, and subsequently terminated her upon her refusal to comply with this directive. The court denied EMCC's motion to dismiss, reasoning that “[t]he presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification.”⁷⁴

Despite this emerging trend in the case law toward allowing Title VII claims by gay and transgender plaintiffs to go forward, there continue to be numerous and recent examples

⁷⁰ *Glenn v. Brumby*, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009).

⁷¹ *See id.* at *6.

⁷² *See id.* at *7.

⁷³ Case No. 02-1531, 2004 WL 2008954 (D. Ariz. June 3, 2004).

⁷⁴ 2004 WL 2008954 at *2.

of courts refusing to recognize a sex discrimination claim if the plaintiff is gay or transgender. For example: in *Etsitty v. Utah Transit Authority*, a transgender state employee of the Utah Transit Authority was fired after she began living openly as a woman as part of the sex reassignment process.⁷⁵ The Transit Authority claimed that the termination stemmed from concerns that other employees would complain about the plaintiff's restroom usage, despite the fact that no complaints had actually been made. The Tenth Circuit refused to apply Title VII's prohibition on sex stereotype discrimination to a transsexual plaintiff, holding that any discriminatory treatment stemmed from the plaintiff's transsexual status rather than from gender stereotypes.⁷⁶ Three similar results in district courts involve state or local government employees.⁷⁷

- In *Trigg v. New York City Transit Authority*, a city employee was subjected to a number of comments by his supervisor implicating both sexual orientation and sex stereotypes.⁷⁸ The supervisor used anti-gay slurs, but also told the employee to do tasks in a “more manly” way and “with more strength.”⁷⁹ The court rejected the employee's Title VII gender stereotyping claim because it found that sexual orientation, rather than sex stereotyping, was the “*sine qua non*” of the claim.⁸⁰ The court, therefore, allowed the sexual

⁷⁵ 502 F.3d 1215 (10th Cir. 2007).

⁷⁶ *See, id.*, at 1224.

⁷⁷ Other examples of courts that have found a loophole to prevent gay or transgender public employees from bringing a sex stereotyping claim include *Shermer v. Illinois Department of Transportation*, 937 F.Supp. 781 (C.D.Ill.1996), *Byars v. Jamestown Teachers Assoc.*, 195 F. Supp. 2d 401 (W.D.N.Y. 2002), *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002), *Haladay v. Thurston County Fire Dist. No. 1*, 2005 WL 3320861 (W.D.Wash. Dec 7, 2005), and *Brockman v. Wyoming*, No. 00-cv-0087-B, slip. op. (D. Wyo. May 9, 2001).

⁷⁸ Case No. 99-CV-4730, 2001 WL 868336 (E.D.N.Y. July 26, 2001).

⁷⁹ *Id.* at *3.

⁸⁰ *See id.* at *6.

orientation discrimination against the employee to foreclose otherwise actionable sex stereotype discrimination.

- In *Cash v. Illinois Division of Mental Health*, an employee of a state home for the developmentally disabled was subjected to hostile treatment based on both sex stereotypes and perceived sexual orientation.⁸¹ The employee was accused of being a closeted homosexual, was subjected to simulated sex acts, and was called a “he/she.”⁸² The federal district court rejected the employee’s Title VII claim because it failed to see the gender stereotyping dimensions of the treatment, and the Seventh Circuit Court of Appeals affirmed.⁸³
- In *Martin v. New York State Department of Correctional Services*, a gay male employee at a state correctional facility was subjected to co-workers’ harassing sexual and sexual orientation-based comments.⁸⁴ After supervisors failed to take action, the employee brought suit. Rejecting the Title VII sex stereotyping claim, the court expressed the need to avoid “bootstrapping” sexual orientation discrimination claims of discrimination under Title VII and concluded that the plaintiff had not shown discriminatory treatment based on his actual or perceived masculinity.⁸⁵

⁸¹ 209 F.3d 695 (7th Cir. 2000).

⁸² *See id.* at 697.

⁸³ *See id.* at 697-98.

⁸⁴ 224 F. Supp. 2d 434, 441 (N.D.N.Y. 2002).

⁸⁵ *See id.* at 446-47.

These decisions and others like them leave lesbians and gay men facing discrimination based on sex stereotypes with no remedy under Title VII. The passage of ENDA is necessary to ensure that lesbians and gay men subjected to sex stereotype discrimination in employment are able to seek redress.

In sum, as to Equal Protection analysis, given the open nature of U.S. Supreme Court jurisprudence on the question of which constitutional standard is correct for sexual orientation classifications, Congress may properly conclude that heightened scrutiny is the most appropriate metric for assessing the validity of employment actions that discriminate against LGBT persons. Alternatively, Congress may choose to apply rational basis review under the Fourteenth Amendment's Equal Protection Clause as the better path. Under *either* approach, workplace discrimination based on sexual orientation or gender identity is unconstitutional. Moreover, a significant portion of the instances of sexual orientation and gender identity discrimination documented in this report are, under law, also forms of sex discrimination, and *require* application of heightened scrutiny.

II. Due Process

Adverse employment actions against LGBT public employees can violate the rights protected by the Due Process Clause of the Fourteenth Amendment in several ways. First, employee's liberty and privacy interests are violated when they are discriminated against in public employment for engaging in same-sex relationships

outside of the workplace that are protected by the Due Process Clause. Second, LGBT public employees have been subjected to invasive and harassing questions in the workplace about their sexuality that violate their privacy rights protected by the Due Process Clause. Finally, animosity towards LGBT people has led state employers to terminate LGBT employees without providing them with adequate notice and a meaningful opportunity to respond as required by the procedural requirements of the Due Process Clause.

A. Liberty and Privacy

Public employers that terminate employment based on an individual's "immoral conduct" alone or exercise of his or her right to form an intimate relationship violate an employee's liberty and privacy interests protected by the Due Process Clause. Most public employees have a constitutional property interest in not losing their jobs for arbitrary reasons.⁸⁶ As early as 1969 federal employees won an important legal victory when the D. C. Circuit ruled on Due Process grounds that they could not be fired based on "immoral conduct" unless the conduct affected the individual's job performance.⁸⁷ As the court explained,

[T]he Commission[']s discretion in determining what reasons may justify removal of a federal employee ... is not unlimited. The Government's

⁸⁶ See *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.9 (1970), dictum followed in *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972); *Slochower v. Board of Higher Education, City of New York*, 350 U.S. 551, 555-56 (1956).

⁸⁷ *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees: it forbids all dismissals which are arbitrary and capricious. These constitutional limits may be greater where, as here, the dismissal imposes a ‘badge of infamy,’ disqualifying the victim from any further Federal employment, damaging his prospects for private employ, and fixing upon him the stigma of an official defamation of character. The Due Process Clause may also cut deeper into the Government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections. Whatever their precise scope, these due process limitations apply even to those whose employment status is unprotected by statute.⁸⁸

Despite the decision in *Norton*, many State employers continued to consider “immoral conduct” – often defined in practice as homosexuality or transgender status – as a ground for firing or not hiring an individual. For example:

- In *Holt v. Rapides Parish School Board*, a tenured teacher and coach for women's sports teams at a public high school in Louisiana was fired on suspicion of being a lesbian. The teacher was suspected of having an inappropriate relationship with a student, who was actually the daughter of her cousin, with whom she had a close

⁸⁸ *Id.* at 1163-64 (internal citations omitted). Congress codified the nexus requirement established by *Norton* in 5 U.S.C. § 2302(b)(10), which provides that federal managers may not “discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others.”

familial relationship. After being discharged on a 5-4 vote, the teacher filed suit and the trial judge found in her favor. The appeals court affirmed the trial court's decision, finding that the charges against her "are replete with insinuations and innuendos" and "the Board's case is seriously lacking in evidence, much less the 'substantial evidence' required to support the Board's actions." The court concluded that the School Board's decision "was arbitrary and an abuse of discretion," and assessed the School Board the full costs of the appeal.⁸⁹

- In *Dawson v. State Law Enforcement Division*, an employee of the South Carolina State Law Enforcement Division ("SLED") alleged that he was constructively discharged because of his perceived sexual orientation – after allegations that he had slept with a co-worker's husband and was then harassing the co-worker at work.⁹⁰ The employee denied the allegations, but the court found that the truth or falsity of the basis upon which the employee was discharged "neither enhances nor diminishes" his claim, because the fact that the employee was gay alone was sufficient to justify his termination.⁹¹ The Court stated that it was not willing to extend the right of privacy to include homosexual conduct because such "activity clearly bears no relationship to marriage, procreation, or family life"⁹² and held that homosexual conduct is not protected under the due process clause of the Fourteenth Amendment.⁹³ The Court also stated that "the constitutional right of

⁸⁹ *Holt v. Rapides Parish Sch. Bd.*, 1996 WL 709720 (La. Ct. App. Dec. 11, 1996).

⁹⁰ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *1-2 (D.S.C. April 6, 1992).

⁹¹ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *5.

⁹² *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *6.

⁹³ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *1-2.

privacy and free association do not preclude a law enforcement agency from inquiring into an officer's off-duty same-sex relationships."⁹⁴

- In 1993, a public high school in Byron Center, Michigan hired a teacher to revive its music program.⁹⁵ The teacher was a tenured music teacher described by many as one of the best teachers on staff.⁹⁶ Two years later in 1995, after the teacher successfully revitalized the Center's music program, he and his partner planned a commitment ceremony.⁹⁷ Before the event took place, someone at the high school learned of the commitment ceremony and spread word to staff, parents and students. At a school board meeting, a few parents demanded that the music teacher be fired. The school board did not take immediate action, but issued a statement that, "The board firmly believes that homosexuality violates the dominant moral standard of the district's community. Individuals who espouse homosexuality do not constitute proper role models as teachers for students in this district" and warned the teacher that they would "investigate and monitor" the situation.⁹⁸ In the months that followed the board meeting, many parents removed their children from the teacher's class and he became the center of media attention. While the teacher struggled to maintain his classroom for the remainder of the school year, he ultimately relented at the end of the school year and entered into a settlement agreement with the school district: he agreed not to sue or seek

⁹⁴ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *5, citing *Walls v. Petersburg*, 895 F.2d 188 (4th Cir.1990).

⁹⁵ Christine Yared, *Where Are the Civil Rights for Gay and Lesbian Teachers*, 24 HUM. RTS. 3 (ABA 1997), available at <http://www.abnet.org/irr/hr/yared.html>.

⁹⁶ *Id.*

⁹⁷ Jill Smolowe, et al., *The Unmarrying Kind*, TIME, Apr. 29, 1996, available at <http://www.time.com/time/printout/0,8816,984469.00.html>; Yared, *supra* note 93.

⁹⁸ Yared, *supra* note 93.

employment in the district in exchange for one-year's salary, health benefits and a letter of reference.⁹⁹ Five months later, he collapsed, went into a coma and died days later at the age of thirty-two. A forensic pathologist concluded that his died from a congenital malfunctioning heart valve, adding that this condition was typically not fatal, but the stress from his public struggle may have contributed to his death.¹⁰⁰

- In *Woodard v. Gallagher*, a deputy sheriff brought suit in 1992 after he was constructively terminated because of his sexual orientation and a jury found in his favor. The court then, in analyzing the sheriff's right to privacy claim, noted that "none of his actions could be construed so as to bring disrepute or dishonor to the Sheriff's office...[the "homosexual conduct"] occurred away from and unrelated to his job and was within his personal private life. There was no evidence that his job or public life was affected in any respect by such conduct." The court concluded that the use of facts known to the office by way of accidental discovery and sheriff's self-revelation in response to confidential questions "as a basis to discharge him" violated his right to privacy.¹⁰¹

In 2003, in striking down the Texas sodomy statute, the Supreme Court further clarified that LGBT public employees could not be fired because employers viewed their private relationships as immoral. In *Lawrence v. Texas*, the Supreme Court quoted and adopted as "correct" a passage from Justice Stevens' dissent in *Bowers v. Hardwick*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Woodard v. Gallagher*, 59 Emp. Prac. Dec. (CCH) ¶ 41, 652, 1992 WL 252279 (Fla. Cir. Ct. 1992).

which stated in part that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹⁰² By invalidating sodomy laws, the Court’s holding eliminated the basis in law for much of the “immorality” cited by public employers as justification for firing or not hiring LGBT workers. More directly, the opinion in *Lawrence* accords constitutional protection to the individual’s liberty interest in forming an intimate relationship with a same-sex partner. Governmental actions that terminate employment based on the individual’s exercise of her right to form such a relationship are properly subject to heightened scrutiny.¹⁰³

Since *Lawrence* also held that *Bowers v. Hardwick*,¹⁰⁴ the decision it reversed, was incorrect when it was decided in 1986,¹⁰⁵ it in effect held that adverse employment decisions based on state sodomy laws dating back to at least 1986 had violated the liberty interests of LGBT employees.¹⁰⁶ Until 2003, sodomy laws served as a central reason for LGBT people staying in the closet and artificially crippling their potential in the workplace.¹⁰⁷ The nature of the link between sodomy laws and employment discrimination was succinctly stated by Professor Patricia Cain, who wrote that “[s]o long as gay men and lesbians were presumed to engage in acts of criminal sodomy, employers

¹⁰² *Lawrence*, 539 U.S. at 577-578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).

¹⁰³ *Witt v. Dep’t of Air Force*, 527 F.3d 806 (9th Cir. 2008).

¹⁰⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986)

¹⁰⁵ *Lawrence v. Texas*, 539 US. 558, 578 (2003).

¹⁰⁶ This is not to say that states would be liable for such for such decisions, since they could argue that properly relied on the *Bowers* decision, but the state’s immunity based on *Bowers* does not mean that LGBT employees constitutional rights were not, in fact, violated.

¹⁰⁷ WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003 (2008).

could argue that they should not be forced to hire criminals.”¹⁰⁸ State governments used this argument to deny employment and licensing with particular frequency in the fields of education and law enforcement.

The link between sodomy laws and job discrimination was so widespread and pervasive that it was relied on by the Supreme Court in *Lawrence* and by numerous state courts in overturning sodomy laws. Chapter 3 provides an in-depth look at the relationship between sodomy laws and discrimination against LGBT employees in public employment. Here are a few examples of such discrimination presented to the Supreme Court in *Lawrence*:

- In the 1990s, the Dallas Police Department had a policy of denying jobs to LGB applicants who had engaged in violations of the state’s sodomy law, without regard to whether they had ever been charged with, or convicted of, any crime. By contrast, the department did not disqualify from consideration heterosexual applicants who engaged in oral or anal sex.¹⁰⁹

¹⁰⁸ Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1588 (1993).

¹⁰⁹ Amicus Brief of Constitutional Law Professors at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *City of Dallas v. England*, 846 S.W.2d 957, 958 (Tex. Ct. App. 1993)).

- Also in the 1990s, the state attorney general of Georgia was able to rescind a job offer to an attorney who had received excellent evaluations as a summer intern because she participated in a religious marriage ceremony with another woman.¹¹⁰
- In 2002, the Texas Homosexual Conduct Law was used to justify opposition to the candidacy of an openly gay justice of the peace. As one member of the candidate's own party argued, "whether you like it or not, there is a state law that prohibits sodomy in the state of Texas, and having a judge who professes to have a lifestyle that violates state law ... is wrong."¹¹¹
- In the pre-*Lawrence* landscape, "individuals *convicted* of violating consensual sodomy statutes can find their ability to pursue their careers sharply curtailed by state licensing laws that deny individuals with criminal convictions, even convictions for misdemeanors like § 21.06, the right to practice certain professions. In Texas, for example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d)."¹¹²

¹¹⁰ *Id.* at 16, citing *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (finding rescission of job offer justified because of the mere *existence* of a sodomy law, when she could be *presumed* to be violating the state law against homosexual sodomy).

¹¹¹ Amicus Brief of the American Bar Association at 13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Penny Weaver, *Pro-Gay Danburg Ousted by Wong*, HOUSTON VOICE, Nov. 8, 2002, at 1).

¹¹² Amicus Brief of Constitutional Law Professors at 16-17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

- In January 2003, just as briefs were being filed in the *Lawrence* case, a Virginia legislator suggested that a gay person’s violations of a sodomy law could disqualify her from being a state judge.¹¹³

Based on this and other evidence of the impact of sodomy laws on public and private employment, in *Lawrence*, both the majority opinion and Justice O’Connor’s concurring opinion relied on the impact of sodomy statutes on employment as one reason that *Bowers* should be overturned:

- The majority noted that if an adult is convicted in Texas for private, consensual homosexual conduct, “the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.”¹¹⁴
- Justice O’Connor’s concurrence also noted the impact on employment, with the restrictions that would keep a homosexual from joining a variety of professions.¹¹⁵
- O’Connor also noted that “the law ‘legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.’”¹¹⁶

¹¹³ Amicus Brief of LGBT Associations at 13, n.35, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Scanlon & Halladay, *Sex Life May Be Used Against Judges*, DAILY PRESS, Jan. 15, 2003).

¹¹⁴ *Lawrence*, 539 U.S. at 576.

¹¹⁵ *Id.* at 581 (O’Connor, J., concurring) (“It appears that petitioners’ convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, e.g., Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer).”)

¹¹⁶ *Id.* at 582 (citing *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)).

As further detailed in Chapter 3, even though *Lawrence* overturned the remaining sodomy laws in the United States, their impact on employment continues today. Thirteen states still had sodomy laws on their books in 2003 when the Supreme Court declared them unconstitutional. Of those thirteen states, only the legislature of one state, Missouri, has since repealed its sodomy law statute. Efforts to repeal sodomy laws in the other states, both before and after *Lawrence*, have failed. None of the thirteen states that had sodomy laws when *Lawrence* was decided had anti-discrimination statutes prohibiting discrimination in employment on the basis of sexual orientation or gender identity. In fact, state sodomy laws have been used as a basis to argue against passing such protections.¹¹⁷

B. Workplace Inquiries that Invade LGBT Employee's Privacy

Courts have also held that LGBT employees have had their constitutional right to privacy violated by workplace inquiries about their sexuality and their relationships. A number of cases have held that public employees have a constitutional right not to be asked about their off-duty romantic relationships, sexual activities, abortions, or miscarriages absent a showing that those relationships have an impact on job performance.¹¹⁸ Similarly, LGBT public employees have a right to not be asked about their sexual orientation or sexual practices. For example:

¹¹⁷ See Chapter 3, *infra*.

¹¹⁸ *Shuman v. City of Philadelphia*, 470 F.Supp. 449, 459-459 (E.D.Pa. 1979) (“[T]here are ... matters which fall within a protected zone of privacy simply because they are private; “that is, that [they do] not adversely affect persons beyond the actor, and hence [are] none of their business.” *Ravin v. State*, 537 P.2d

- In *Eglise v. Culpin*, an applicant for police department job filed a right to privacy claim because during the application process she was asked "What exactly are your sexual practices and preferences?" The District Court held that such inquiries had violated her right to privacy, but that the police official was entitled to qualified immunity. On appeal, the Second Circuit reasoned that since the conduct had occurred in 1995, a reasonable official would not have known the conduct was constitutionally proscribed.¹¹⁹
- In *Walls v. City of Petersburg*, an administrator of the City of Petersburg's Community Diversion Incentive Program was fired in 1986 for refusing to answer questions about her sexual orientation as part of a city background check. She had already been in her position for three years when asked to complete the questionnaire. When she refused, she was suspended but then reinstated because the City Manager determined that her position did not require a background check. However, at the same time he changed city policy to require her to have one. When she again refused, she was terminated. In 1990, the Fourth Circuit relied upon *Bowers v. Hardwick* in holding that she had no right to privacy with respect to this information although it did note that the relevance of this

494 (Alaska 1976 [1975]).... These private matters do not necessarily relate to the exercise of substantive rights, but may simply constitute areas of one's life where the government simply has no legitimate interest.”). See also *Thorne v. City of El Segundo*, 726 F.2d 459, 469-470 (9th Cir. 1983), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1983) (even the government's heightened interest in the context of police officers did not justify questions concerning an applicant's off-duty sexual relations and history of abortion and/or miscarriage);

¹¹⁹ *Eglise v. Culpin*, 2000 WL 232798, at *1 (2d Cir. Feb. 28, 2000).

information was "uncertain[.]"¹²⁰ In 2003, the United States Supreme Court held that *Bowers v. Hardwick* was wrong when it was decided in 1986.¹²¹

- In 1994, three female state police trooper candidates were not hired as state troopers because of alleged inconsistencies in their polygraph examination questions concerning sexual orientation. Previously, two of them had been discriminated against at the Maryland State Police Academy. They claimed their treatment at the Academy violated the Maryland Declaration of Rights, the Equal Protection Clause, the Due Process Clause, and a Governor's Executive Order banning sexual orientation discrimination by the state government. The state settled with the two women, agreeing to the injunctive relief requested and offering the positions sought. They then successfully completed their training at the Academy, but were thereafter denied positions as state troopers, along with a third lesbian candidate.¹²²

Complaints filed by LGBT public employees with legal organizations during the past several years indicate that such invasive questions continue today.¹²³

¹²⁰ *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

¹²¹ *Lawrence v. Texas*, 539 US. 558, 578 (2003).

¹²² GAY & LESBIAN L. NOTES, (Dec. 1995), available at <http://www.qrd.org/qrd/usa/legal/lgl/1995/12.95>.

¹²³ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute) (applicant for position in South Carolina police department was not hired after she disclosed that she was a lesbian in response to a polygraph question); GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Oct. 15, 2002) (on file with GLAD) (a New Hampshire corrections department applicant was not hired after revealing she was a lesbian in response to a polygraph question); HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf>. (police department applicant was refused a position after answering that he was gay in response to a polygraph examination question. After he was terminated, he requested a copy of the polygraph report—the first statement read, “he’s gay.”).

C. Procedural Due Process

The procedural feature of the Due Process Clause requires that when the state deprives people of their property interest in their state jobs, it give them notice of the termination, reasons for the termination, and a fair opportunity to respond before a neutral decisionmaker.¹²⁴ As straightforward as this principle is, the degree of animus and fear directed toward gay and transgender employees can derail what ought to be a standardized process. For example,

- In *Bianchi v. City of Philadelphia*, a male firefighter had been subjected to a pattern of abusive harassment (including having used condoms put in his desk, urine and feces put in his firefighting gear, and receiving threatening letters) because he was perceived to be gay. After going on medical leave as a result of the harassment, he did not receive notice or a pre-termination hearing before the city blocked his return from leave and accused him of abandoning his position. While the court recognized that the actions taken against him constituted harassment, it held the harassment was not actionable under Title VII because it was based on his perceived sexual orientation and therefore was not sex discrimination. However, it also held that his procedural due process and First

¹²⁴ See *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.9 (1970); *Cleveland Bd. of Edu. v. Loudermill*, 470 U.S. 532 (1985) (Due Process Clause requires that a government employee be afforded notice and a hearing before termination coupled with the availability of appropriate post-termination procedures); *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991) (where a government employee did not have access to an impartial decision-maker at the pre-termination stage, he must be afforded impartial review at his post-termination hearing) (citing *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988), cert. denied, 489 U.S. 1081 (1989); *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987)).

Amendment claims survived summary judgment and furnished the basis for an award of more than \$1 million in damages, which was subsequently upheld by the U.S. Court of Appeals for the Third Circuit.¹²⁵

- In *McDaniels v. Delaware County Community College*, a state employee of a community college in Delaware was fired on the basis of a same-sex sexual harassment claim. He filed suit alleging he was denied a proper pre-termination hearing on the charges. A jury ordered that he be reinstated to his teaching position and awarded \$134,081 in back pay.¹²⁶
- In *Martinez v. Personnel Board*, a municipal worker had been harassed based on other employees' perception of him that he was gay and was discharged in connection with allegations that he had inappropriately sexually harassed volunteers in the department. He contested the allegations and the court determined that the city had violated his due process rights because he was not provided with the materials on which his supervisor based his decision to fire him.¹²⁷
- In *Langsbeth v. County of Elbert*, a female nurse in Colorado alleged that she was terminated in part because of her sexual orientation and was awarded \$26,950

¹²⁵ See *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002) and *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).

¹²⁶ *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

¹²⁷ *Martinez v. Personnel Bd. of the City of Loma Linda*, 2003 WL 429505 (Cal. App. 2003)

because she was not given notice and a pre-termination opportunity to be heard in violation of her due process rights. Her award was affirmed on appeal.¹²⁸

- And in *Ashlie v. Chester-Upland School District*, a transgender art teacher’s due process rights were violated when she was fired for “immorality” immediately after her transition without being afforded a pre-termination hearing.¹²⁹

III. First Amendment

The rights of expression and association guaranteed by the First Amendment are central to the ability of LGBT Americans to lead healthy, productive and honest lives, because sexual orientation and gender identity are often not visible traits. Yet the patterns of discrimination engaged in by state and local governments against LGBT workers have repeatedly violated First Amendment rights entitled to the highest level of scrutiny. State and local employees have had their First Amendment rights to free expression violated through adverse employment actions resulting from

- coming out at work,¹³⁰ even in response to direct questions;¹³¹

¹²⁸ *Langsbeth v. Cnty. of Elbert*, 916 P.2d 655 (Colo. App. 1996)

¹²⁹ *Ashlie v. Chester-Upland Sch. Dist.*, 1979 U.S. Dist. LEXIS 12516 (E.D. Pa. 1979)

¹³⁰ Discrimination against a gay person for coming out of the closet is unconstitutional because it burdens each person’s freedom of expression, a fundamental right grounded in the First Amendment. See *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) (dictum) (LGBT people’s expression of pride in their sexual orientation is expression protected against state action by the First Amendment). The state cannot condition continued employment on employees’ willingness to forego protected expression, including identity speech. *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979) (“coming out” speech by gay people is protected “political” expression); cf. *Wieman v. Updegraff*, 344 U.S. 183 (1952) (state cannot condition employment on a loyalty oath that imposes conformity of belief on employees).

- discussing or writing about major news stories dealing with LGBT rights at work such as the Supreme Court’s decision in *Lawrence v. Texas*¹³² and Colorado’s Amendment 2,¹³³
- participating in protests and marches dealing with LGBT issues,¹³⁴
- advocating for gender equity in the funding of women’s sports,¹³⁵
- wearing or displaying rainbow flags¹³⁶ or red AIDS ribbons in the workplace,¹³⁷ even when no rules prohibit such displays, and

¹³¹ See, e.g., *Curcio v. Collingswood Bd. of Educ.*, 2006 WL 1806455 (D.N.J. 2006) (gay high school teacher was issued a formal reprimand and threatened with additional disciplinary action because he truthfully responded to a student who asked him if he was gay during class); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Miller v. Weaver*, 66 P.3d 592 (Apr. 4, 2003) (tenured public school teacher and volleyball coach was removed from her coaching position by the school after admitting to a player that she was gay in response to a direct and unsolicited question).

¹³² 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> (The Topeka and Shawnee public library ordered an employee to stop speaking about the *Lawrence v. Texas* Supreme Court decision at work. In response to a letter from the ACLU, the library admitted that it could not forbid its employees from speaking about Supreme Court decisions.).

¹³³ LESBIAN & GAY L. NOTES (July/August 1994), available at <http://www.qrd.org/qrd/usa/legal/lgn/1994/07> (A University of Colorado Law School librarian was forced out of her job after publishing an article about Amendment 2 in the newsletter of the American Association of Law Libraries. The school settled the case for \$25,000.).

¹³⁴ See e.g., email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute) (In 2005, a Florida public school teacher was reprimanded by his school district after he was quoted in the local paper for disagreeing with the premature dismantling of a Gay Pride book display at the local library.).

¹³⁵ LESBIAN & GAY L. NOTES (Summer 2007) (A Fresno State University volleyball coach was awarded \$5.85 million in damages after the university failed to renew her contract because she advocated for gender equity in University sports funding.).

¹³⁶ “EMcG,” *Tell Your Story*, TOWARD EQUALITY, <http://bit.ly/zqBIU> (In 2001, a Delaware public high school teacher alleged that the school principal forced her to remove a “Safe Space” rainbow triangle sticker from her classroom door. Although the school permitted the display of stickers of other clubs and organizations, the school district did not want to appear as an advocate of “Safe Space” associated with gay people.).

¹³⁷ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 198-99* (2002 ed.) (In 2002, an openly-gay highway employee was suspended from work for three and a half days for wearing a baseball hat embroidered with a symbol of a half-red, half-rainbow-colored ribbon symbolizing the fight against AIDS. The suspension was rescinded and the employee was reimbursed for lost wages as well as attorneys fees after the employee’s union argued that town rules make no mention of hats whatsoever.).

- speaking out about the harassment they have suffered in the workplace based on sexual orientation.¹³⁸

LGBT as well as heterosexual public employees have also had their rights to free association violated. For example,

- Until 2001, a police department in San Juan, Puerto Rico had a regulation that its offices could not associated with homosexuals. In striking down the policy as violating the First Amendment, the First Circuit noted in its decision that the policy had a chilling effect on First Amendment rights even if, as the Commonwealth claimed, it was an unenforced policy.¹³⁹
- A superintendent of a school district in Tennessee was not selected to continue in his position after he was invited to speak at a convention hosted by a church with predominantly gay and lesbian members. At the time, he was unaware that the church had a predominately gay and lesbian congregation. Although he was ultimately unable to accept the invitation, a newspaper published an article announcing that he would be a speaker at the convention. In response, he provided written statements explaining the inaccuracies of the article and noting that he did not endorse homosexuality, but he would not refuse to associate with LGBT people. When he was then not selected by the school

¹³⁸ *Bianchi v. City of Philadelphia*, 183 F. Supp 2d 726, 745-47 (E.D. Pa. 2002) (finding that a firefighter's complaints concerning the workplace harassment he endured were entitled to First Amendment protection because the mistreatment was a matter of public concern and the value of the complaints was not outweighed by the Department's interest in effective functioning).

¹³⁹ *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001).

board to continue as superintendent he sued and won a judgment from the U.S. Court of Appeals for the Sixth Circuit.¹⁴⁰

LGBT employees have also had their free association rights violated for adverse employment action resulting from forming or participating in LGBT organizations,¹⁴¹ for dancing with friends of the same sex outside of work,¹⁴² for going to gay bars,¹⁴³ and participating in commitment ceremonies with their same-sex partners.¹⁴⁴

IV. Conclusion

Discrimination in public sector employment based on sexual orientation or gender identity implicates LGBT employee's constitutional rights protected by the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the

¹⁴⁰ *Scarborough v. Morgan County Bd of Educ.*, 470 F.3d 250 (6th Cir. 2007).

¹⁴¹ *Debro v. San Leandro Unif. Sch. Dist.*, 2001 U.S. Dist. LEXIS 17388 (N.D. Cal. Oct. 11, 2001) (California public high school teacher was issued a letter of censure and the school adopted a policy requiring pre-approval of discussion of "controversial issues" in the classroom after the teacher helped establish a Gay-Straight Alliance to provide support for students and to prevent harassment and thereafter mentioned the GSA to his class); MELISSA S. GREEN & JAY K. BRAUSE, *IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA* 53 (Identity Inc., 1989) (A gay youth counselor for the State of Alaska was told he could not take the youth he counseled out on "pass" to go out to movies or to shop, in order to reward them for their good behavior. The counselor learned that he was considered a risk because had been the leader of a "militant homosexual group," referring to his facilitation of a support group for young gay men and lesbians.).

¹⁴² MELISSA S. GREEN & JAY K. BRAUSE, *IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA* 53 (Identity Inc., 1989) (A lesbian employee of the Alaska Marine Highway was terminated after a co-worker saw her dancing with friends of the same sex at a bar she attended off work hours to celebrate a softball team victory.).

¹⁴³ MELISSA S. GREEN & JAY K. BRAUSE, *IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA* 53 (Identity Inc., 1989) (An applicant for a clerk-typist position with the Alaska State Troopers was asked in her interview if she was a lesbian. When she said yes, the interviewer told her that though she was well-qualified, she would only be considered if she agreed to stop going to any of the gay bars in town. Because she did not agree to the condition, she was told she would no longer be considered for the position.).

¹⁴⁴ *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (attorney's employment offer rescinded by Georgia Attorney General's Office after she made comments in front of co-workers concerning her upcoming commitment ceremony to her same-sex partner); *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 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).¹⁴⁴

Fourteenth Amendment, including both its liberty and procedural dimensions, and the First Amendment. As a result, what is effectively heightened scrutiny, whether explicit or not, applies to all the instances of discrimination that would fall within ENDA's purview, which grants greater leeway to Congress in its assessment of the pattern of unconstitutional discrimination by state employers.¹⁴⁵

¹⁴⁵ *Hibbs*, 538 U.S. at 736.



Chapter 4: Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace

Courts, individual judges, state officials, and legal scholars have repeatedly found that sexual orientation and gender identity are not related to a person’s ability to contribute to society, or in the workplace.¹ Courts and scholars have most frequently considered this question when determining whether sexual orientation is a suspect classification for purposes of equal protection analysis. In equal protection analysis, whether the classification at issue bears any relation to an individual’s ability to contribute to society is one of the core factors used in determining whether such classification should be considered “suspect.”²

For example, in 2008, when considering classifications based on sexual orientation, the Connecticut Supreme Court found that “the characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.”³ It further noted that the State of Connecticut had even conceded, and that “many other courts admit, that sexual orientation bears no relation to a person’s ability to participate in or contribute to society.”⁴ Moreover the court found that “[i]f homosexuals were afflicted with some sort of impediment to their ability to perform

¹ See *infra* at Table 4-A and 4-B.

² See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (2008), *rev’ing* 49 Conn. 135 (2008) (stating that

“the United States Supreme Court has placed far greater weight—indeed, it invariably has placed dispositive weight—on the first two factors, that is, whether the group has been the subject of long-standing and invidious discrimination and whether the group’s distinguishing characteristic bears no relation to the ability of the group members to perform or function in society”).

³ *Id.* at 432 .

⁴ *Id.*

and to contribute to society, the entire phenomenon of ‘staying in the [c]loset’ and of ‘coming out’ would not exist.”⁵ Similarly, a justice on the Montana Supreme Court, in a 2004 concurring opinion, found that

“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 ... ‘We the people’ rarely pass up an opportunity to bash and condemn gays and lesbians despite the fact that these citizens are our neighbors and that they work, pay taxes, vote, hold public office, own businesses, provide professional services, worship, raise their families and serve their communities in the same manner as heterosexuals.”⁶

In addition to members of the judicial branches of state and federal government, executive branch state actors have also found that sexual orientation has no effect on an individual’s ability to perform in the workplace. For example, in March 2010, Virginia Governor Robert McDowell issued an executive directive barring state agencies from discriminating on the basis of sexual orientation, stating, “The Equal Protection Clause of the United States Constitution prohibits discrimination without a rational basis against any class of persons. Discrimination based on factors such as one’s sexual orientation...violates the Equal Protection Clause of the United States Constitution.”⁷ McDowell directed every state agency to make “hiring, promotion, compensation, treatment, discipline, and termination” decisions based only on an “individual’s job qualifications, merit, and performance.”⁸

⁵ *Id.* at 434 (quoting *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 860 F.Supp. 417, 437 (S.D.Ohio 1994)).

⁶ *Snetsinger v. Mont. Univ. Sys.*, 325 Mont. 148, 455-56 (Mont. 2004) (concurring opinion).

⁷ Va. Exec. Dir. 1 (2010).

⁸ *Id.*

In books and academic journals spanning from the mid-1980s to the present, legal scholars have reached the same conclusion.⁹ While arguments that LGBT people did not belong in the workplace because of mental illness, physical illness, immorality, or criminality were more common before the 1980s,¹⁰ by the mid-1990s, such arguments had completely vanished from academic circles. Indeed, by 1995, legal scholars frequently noted that a number of states and lower courts had concluded that sexual orientation bears “no relationship whatsoever” to an individual’s ability to perform in society.¹¹ As Harvard Law Professor Professor Lawrence Tribe concluded in 1988 in his constitutional law treatise, “homosexuality bears no relation at all to [an] individual’s ability to contribute fully to society.”¹²

In the 1960s and 70s, one justification for discriminating against LGBT teachers was concern that such teachers would be bad “role models” for students. Directly addressing this argument in 1985, the editors of the Harvard Law Review wrote that “this is simply not true.... [T]eachers have *no* influence on the future sexual identity of their students.”¹³ In support, the editors quoted an editorial written in 1978 by President Ronald Reagan, then-Governor of

⁹ See *infra* at Table 4-B.

¹⁰ See Conger, J.J. (1975). See also Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the annual meeting of the Council of Representatives. *American Psychologist*, 30, 620-651 (declassifying homosexuality as a mental illness). See also Stephen Zamansky, *Colorado’s Amendment 2 and Homosexuals’ Right to Equal Protection of the Law*, 35 B.C. L. REV. 221, 244-49 (1993).

¹¹ See, e.g., Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 354 (1995) (noting that “[a] number of lower court decisions have found that a person’s sexual orientation has no bearing on that person’s ability to contribute to society.”); E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 598-620 (1996) (finding that “[a] number of states” have found that sexual orientation bears “no relationship whatsoever” to an individual’s ability to perform in society).

¹² L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2nd Ed. 1988) § 16-33, at 1616.

¹³ Harv. L. Rev. Assoc., *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1305-1309 (1985) (emphasis added).

California. In opposing a California voter initiative that would have prohibited LGBT people from serving as public school teachers, Reagan wrote that “homosexuality is not a contagious disease like measles. Prevailing scientific opinion is that an individual's sexuality is determined at a very early age and that a child's teachers do not really influence this.” Humorously, President Reagan concluded that “as to the ‘role model’ argument, a woman writing to the editor of a Southern California newspaper said it all: ‘If teachers had such power over children[,] I would have been a nun years ago.’”¹⁴

¹⁴ Ronald Reagan, *Two Ill-Advised California Trends*, L.A. HERALD EXAMINER, Nov. 1, 1978, at A-19.

Quite simply, arguments about the ability of LGBT individuals to contribute to society or in the workplace have no legal currency today. As summarized in 1996 by Yale Law School Professor William Eskridge:

“No impartial judge, no executive officer, no respected professional, no competent senator, no unbiased observer of any scruple is willing to say that sexual orientation bears any relation to lesbian and gay people's ability to participate in and contribute to society.”¹⁵

Table 4-A below summarizes state official's orders and cases in which courts and individual judges have found that sexual orientation bears no relation to an individual's ability to contribute to society or the workplace. In addition, Table 4-B summarizes similar findings by legal scholars in law review articles and books published over the past twenty-five years.

¹⁵ WILLIAM N. ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE* 177 (Free Press 1996).

Table 4-A Determinations by State and Federal Courts and State Officials that Sexual Orientation is Unrelated to an Individual’s Ability to Contribute to Society

| State or Federal | Court or Office | Year | Citation | Analysis |
|------------------|-----------------------------|------|--|---|
| Montana | Montana Supreme Court | 2004 | <i>Snetsinger v. Mont. Univ. Sys.</i> , 325 Mont. 148, 455-56 (2004) (concurring opinion). | “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... We the people” rarely pass up an opportunity to bash and condemn gays and lesbians despite the fact that these citizens are our neighbors and that they work, pay taxes, vote, hold public office, own businesses, provide professional services, worship, raise their families and serve their communities in the same manner as heterosexuals.” <i>Id.</i> at 455-456. |
| New York | New York Supreme Court | 2006 | <i>Hernandez v. Robles</i> , 7 N.Y.3d 338, 388 (2006) (Kaye, C.J., dissenting) | “[0]bviously, sexual orientation is irrelevant to one’s ability to perform or contribute” |
| California | California Court of Appeals | 2006 | <i>In Re Marriage Cases</i> , 49 Cal.Rptr.3d 675 (Cal. 2006) (dissenting opinion), <i>review granted and superseded</i> , 149 P.3d 737 (2006), <i>rev’d</i> , 43 Cal.4th 757 (2008), <i>rehearing denied</i> , No. S147999 (June 4, 2008). | “Our state law clearly recognizes that sexual orientation is unrelated to an individual’s ability to contribute to society.” <i>Id.</i> at 756. |
| California | California Supreme Court | 2008 | <i>In re Marriage Cases</i> , 43 Cal. 4th 757 (2008). | “Our decisions make clear that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual’s ability to perform or contribute to society.” <i>Id.</i> at 843. The court quickly concludes that “[t]his rationale clearly applies to statutory classifications that mandate differential treatment on the basis of sexual orientation.” <i>Id.</i> at 843. |

| | | | | |
|------------------------|---------------------------------|------|---|--|
| Connecticut | Connecticut Supreme Court | 2008 | <i>Kerrigan v. Comm’r of Pub. Health</i> , 957 A.2d 407 (2008), <i>rev’ing</i> , 49 Conn. 135 (2008). | “[The characteristic that defines the members of this group-attraction to persons of the same sex-bears logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.” <i>Id.</i> at 432. The court further notes “that the defendant conceded, and many other courts admit, that “sexual orientation bears no relation to a person’s ability to participate in or contribute to society.” ... “[i]f homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of ‘staying in the [c]loset’ and of ‘coming out’ would not exist.” <i>Id.</i> at 434 (<i>quoting Equality Foundation</i> , 860 F.Supp. at 437). |
| Maryland | Maryland Court of Appeals | 2009 | <i>Conaway v. Deane</i> , 401 Md. 219 (Maryland Court of 2008). | “Homosexual persons are subject to unique disabilities not truly indicative of their abilities to contribute to society.” <i>Id.</i> at 609. |
| Iowa | Iowa Supreme Court | 2009 | <i>Varnum v. Brien</i> , 763 N.W.2d 862 (2009). | “[G]ay, lesbian, and bisexual persons in recent history have been the target of unequal treatment in the private and public aspects of their lives, and have been subject to stereotyping in ways not indicative of their abilities, among other things, to work and raise a child.” <i>Id.</i> at 613. |
| Federal District Court | Northern District of California | 1987 | <i>High Tech Gays v. Def. Indus. Sec. Clearance Office</i> , 668 F. Supp. 1361 (N.D. Cal 1987), <i>rev’d, in part, vacated, in part</i> , 895 F.2d 563 (9 th Cir. 1990), <i>rehearing, en banc, denied</i> , 909 F.2d 375 (9 th Cir. 1990). | “Even the Iowa Legislature had declared as “the public policy of [the] state that sexual orientation is not relevant” to societal contribution” in employment, public accommodations, housing, education, and credit practices.” <i>Id.</i> at 890-91. The court concludes that “it is clear sexual orientation is no longer viewed in Iowa as an impediment to the ability of a person to contribute to society.” <i>Id.</i> at 892. |
| Federal District Court | District of Kansas | 1991 | <i>Jantz v. Muci</i> , 759 F. Supp. 1543, 1548 (D. Kan. 1991), <i>cert. denied</i> , 508 U.S. 952 (1993);. | “[T]he fact that a person is lesbian or gay bears no relation to the person’s ability to contribute to society. Rather than somehow being enemies of American culture and values, lesbians and gay men occupy positions in all walks of American life, participate in diverse aspects of family life, and contribute enormously to many elements of American culture.” <i>Id.</i> at 1369-70. |
| | | | | Homosexuality “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities” |

| | | | | |
|------------------------|---------------------------------------|------|--|--|
| Federal District Court | Eastern District of Wisconsin | 1987 | <i>BenSHALOM v. Marsh</i> , 703 F. Supp. 1372 (E.D. Wis. 1989), <i>rev'd</i> , 881 F.2d 454 (7 th Cir. 1989). | “[I]t is also clear that a class based on homosexual orientation is defined by a trait that bears no relationship to an individual’s ability to contribute to the good of society.” <i>Id.</i> at 1379. |
| Federal District Court | Southern District of Ohio | 1994 | <i>Equal. Found. Of Greater Cincinnati, Inc. v. City of Cincinnati</i> , 860 F.Supp. 417 (S.D. Ohio 1994), <i>rev'd and vacated</i> , 54 F.3d 261 (6 th Cir. 1995), <i>cert. granted, vacated</i> , 518 U.S. 1001 (1996). | “[W]here the characteristic ... is determined by causes beyond the individual’s control and bears no relation to the individual’s ability to perform or to participate in, or contribute to, society and especially where the class has suffered a history of discrimination based on stereotyped notions of that characteristic, any legislation resting on such an irrelevant characteristic likely reflects nothing more than invidious stereotypes beyond the scope of any permissible governmental purpose.” <i>Id.</i> at 437. |
| Federal District Court | District of Columbia Court of Appeals | 1995 | <i>Dean v. D.C.</i> , 653 A.2d 307 (1995). | Majority opinion cites “powerful evidence” that gays and lesbians make positive contributions as family units” <i>Id.</i> at 345 (<i>citing Sexual Orientation and the Law</i> , 102 HARV. L. REV., at 1629). |
| Federal District Court | Eastern District of New York | 1997 | <i>Able v. U.S.</i> , 968 F.Supp. 850, <i>rev'd</i> , 155 F.3d 628 (2nd Cir. 1998). | Court compares sexual orientation to “[f]actors such as race, alienage, and national origin, for instance, ‘are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened classes are not as worthy or deserving as others.’” <i>Id.</i> at 862 (<i>quoting City of Cleburne</i> , 473 U.S. at 440). |
| Federal Circuit Court | 6th Circuit | 1995 | <i>Equal. Found. of Greater Cincinnati v. City of Cincinnati</i> , 54 F.3d 261 (6th Cir. 1995), <i>cert. granted, vacated</i> , 518 U.S. 1001 (1996). | Reciting the findings of the trial court, this court reiterates that “[s]exual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society.” <i>Id.</i> at 264 n1. |
| Federal Circuit Court | 9th Circuit | 1988 | <i>Watkins v. U.S. Army</i> , 847 F.2d 1329 (9th Cir. 1988), <i>rehearing, en banc, granted</i> , 847 F.2d. 1362 (1988), <i>opinion withdrawn on rehearing</i> , 875 F.2d 699 (1989). | “Sexual orientation plainly has no relevance to a person's ‘ability to perform or contribute to society.’” <i>Id.</i> at 1346 (<i>quoting Frontiero</i> , 411 U.S. at 686). |

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“The Equal Protection Clause of the United States Constitution prohibits discrimination without a rational basis against any classes of persons. Discrimination based on factors such as one’s sexual orientation or parental status violates the Equal Protection Clause of the United States Constitution. Therefore, discrimination against enumerated classes of persons set forth in the Virginia Human Rights Act or discrimination against any class of persons without a rational basis is prohibited.... I hereby direct that the hiring, promotion, compensation, treatment, discipline, and termination of state employees shall be based on an individual’s job qualifications, merit and performance.”

Table 4-B. Determinations by Legal Scholars That Sexual Orientation is Unrelated to an Individual’s Ability to Contribute to Society

| Author | Title | Citation / Year | Pages | Discussion |
|---------------------|--|-------------------------------|-----------------|--|
| Harris M. Miller II | <i>An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality</i> | 57 S. CAL. L. REV. 797 (1984) | 834 | The “merit to society theory is part of a larger policy approach to equal protection jurisprudence. The argument is that “the function of the [equal protection clause] is to prohibit unprincipled distributions of resources and opportunities. Distributions are unprincipled if they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another.” <i>Id.</i> at 834 (<i>quoting</i> Cass Sunstein, PUBLIC VALUES, PRIVATE INTERESTS, AND THE EQUAL PROTECTION CLAUSE, 1982 SUP.CT.REV. 127, 128, 165). Under this public values theory, because of the history of discrimination and presence of stereotypes, “courts should presume homosexuality classifications to be the product of an illegitimate motive.” <i>Id.</i> at 834. |
| Harv. L.Rev. Assoc. | <i>The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification</i> | 98 HARV. L. REV. 1285 (1985) | 1305-1309 | <p>“One common justification for dismissing or refusing to hire gay teachers is that public knowledge of a teacher’s homosexuality will disrupt the learning process. That members of the community may hate and fear gays is offered as the nexus between a teacher’s homosexuality and her unfitness to teach.” <i>Id.</i> at 1305-06. This is “simply not true.” “[T]eachers have no influence on the future sexual identity of their students.” The author also notes that the Supreme Court has expressly rejected this type of justification in the context of race.</p> <p>Quotes Former President Ronald Regan, <i>Two Ill-Advised California Trends</i>, L.A. HERALD EXAMINER, Nov. 1, 1978, at A-19 (commentary by Ronald Reagan stating that “[a]s to the ‘role model’ argument, a woman writing to the editor of a Southern California newspapers said it all: ‘If teachers had such power over children I would have been a nun years ago’”).</p> |
| Lawrence Tribe | AMERICAN CONSTITUTIONAL LAW | 2 nd Ed. 1988 | § 16-33, at 161 | “[H]omosexuality bears no relation at all to [an] individual’s ability to contribute fully to society” |

| Author | Title | Citation / Year | Pages | Discussion |
|-------------------------------------|---|------------------------------------|---------|--|
| Adrienne K. Wilson | <i>Same-Sex Marriage: A Review</i> | 17 WM. MITCHELL L. REV. 539 (1991) | 559 | <p>The “public values theory,” uses “strict scrutiny as a way to ensure that laws implement only public values.” <i>Id.</i> at 559. As such, it is the purpose of the equal protection clause to fend off “unprincipled distributions of resources and opportunities.” <i>Id.</i> at 599.</p> <p>“Distributions are unprincipled when they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another.” <i>Id.</i> at 559.</p> <p>“Distributions that discriminate against homosexuals can be considered unprincipled and therefore unconstitutionally motivated, thus triggering strict scrutiny.” <i>Id.</i> at 559.</p> |
| Major Jeffrey S. Davis | <i>Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives</i> | Military Law Review 131 (1992): | 93 | <p>“The trait of homosexual orientation does not correlate with ability to perform or contribute to society.” <i>Id.</i> at 93. The author notes that “history is replete with accounts of homosexuals who have contributed a great deal to society.” <i>Id.</i></p> |
| Renee Culverhouse & Christine Lewis | <i>Homosexuality as a Suspect Class</i> | 34 S. TEX. L. REV. 205 (1993) | 248-249 | <p>“Homosexuals today still suffer from misunderstandings concerning their natures and abilities.” <i>Id.</i> at 248. For example, “[c]ourts have considered homosexuals more of a security risk in the employment context than heterosexuals and more likely to damage the military morale-without examining the specific facts of the particular individual’s capabilities and strengths.” <i>Id.</i> at 248.</p> <p>“By lumping homosexuals into one category, regardless of individual ability or qualifications to serve, courts are denying homosexuals justice in the very way our system of government was designed to aid its citizens.” <i>Id.</i> at 249.</p> |
| Stephen Zamansky | <i>Colorado’s Amendment 2 and Homosexuals’ Right to Equal Protection of the Law</i> | 35 B.C. L. REV. 221 (1993) | 244-249 | <p>“[H]omosexuals are a productive segment of our society.” The American Psychological Association has stated that homosexuality “implies no impairment in judgment, stability, reliability or general social or vocational capabilities.” <i>Id.</i> at 247 (citing RESOLUTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION, Jan. 1975).</p> |

| Author | Title | Citation / Year | Pages | Discussion |
|---------------------|--|--|-----------|---|
| Eric A. Roberts | <i>Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation</i> | 42 DRAKE L. REV. 485 (1993) | 502 | “Sexual orientation clearly has little bearing on an individual's ability to contribute to society.” <i>Id.</i> at 502. |
| Spiro P. Fotopoulos | <i>The Beginning of the End for the Military's Traditional Policy on Homosexuals: Steffan v. Aspin</i> | 29 WAKE FOREST L. REV. 611 (1994) | 634 | “Sexual orientation has been found to bear ‘no relation to ability to perform or contribute to society.’” <i>Id.</i> at 634 (<i>quoting Meinhold v. United States Dep't of Defense</i> , 808 F. Supp. 1455, 1458 (C.D. Cal. 1993)). However, notwithstanding a lack of nexus “between homosexuality and job performance, homosexuals ‘have been the object of some of the deepest prejudice and hatred in American society.’” <i>Id.</i> at 643 (<i>quoting High Tech Gays</i> , 668 F. Supp. at 1369). |
| Nancy E. Murphy | <i>Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence</i> | 30 VAL. U. L. REV. 335 (1995) | 354 | “A number of lower court decisions have found that a person's sexual orientation has no bearing on that person's ability to contribute to society.” <i>Id.</i> at 354. In <i>Equality Foundation of Greater Cincinnati v. City of Cincinnati</i> , the court found that “sexual orientation in no way affects a person's ability to contribute to society.” <i>Id.</i> at 360, (<i>quoting Equality Foundation</i> , 860 F.Supp. at 437). |
| E. Gary Spitko | <i>A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process</i> | 18 U. HAW. L. REV. 571 (1996) | 598 - 620 | “Sexual orientation classifications merit heightened equal protection scrutiny because gays and lesbians have suffered a long history of discrimination despite the fact that their sexual orientation bears no relationship to their ability to contribute to society.” “A number of states” have found that sexual orientation bears “no relationship whatsoever” to an individual’s ability to perform in society. |
| Williams Eskridge | <i>The Case for Same-Sex Marriage</i> | Free Press 1996 | 177 | “No impartial judge, no executive officer, no respected professional, no competent senator, no unbiased observer of any scruple is willing to say that sexual orientation bears any relation to lesbian and gay people's ability to participate in and contribute to society.” <i>Id.</i> at 177. |
| Jon-Peter Kelly | <i>Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution</i> | 7 CORNELL J.L. & PUB. POL'Y 203 (1997) | 233-239 | The author finds that the criterion regarding a group’s ability to contribute to society “barely necessitates discussion.” <i>Id.</i> at 235. “Even vociferous opponents of same-sex marriage seldom make the claim that homosexuals are unable to fully contribute to society as a result of their sexual orientation.” <i>Id.</i> at 235. |

| Author | Title | Citation / Year | Pages | Discussion |
|--|--|-----------------------------------|--------|---|
| Ann M. Reding | <i>Lofton v. Kearney: Equal Protection Mandates Equal Adoption Rights</i> | 36 U.C. DAVIS L. REV. 1285 (2003) | 1303 | “[T]he sexual orientation of individuals does not bear any relation to their ability to perform or contribute to society.” <i>Id.</i> at 1303. |
| Ronald J. Krotoszynski, Jr. & E. Gary Spitko | <i>Navigating Dangerous Constitutional Straits: A Prolegomenon of the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities</i> | 76 U. COLO. L. REV. 599 (2005) | 126 | “Sexual orientation classifications merit heightened equal protection scrutiny because gays and lesbians have suffered a long history of discrimination despite the fact that their sexual orientation bears no relationship to their ability to contribute to society.” <i>Id.</i> at 637 n126 and accompanying text (<i>quoting</i> E. Gary Spitko, <i>A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process</i> , 18 U. HAW. L. REV. 571, 598-620 (1996)). |
| L. Camille Hebert | <i>Sexual Orientation Discrimination as Violation of Equal Protection</i> | 2 EMPL. PRIVACY LAW § 9:5 | n30-31 | “It is indeed very difficult to understand how the gender of one's preferred sexual partner could have any bearing on the ability to perform the duties of a job, unless one takes into account that job performance is made more difficult because of the existence of discrimination and prejudice by coworkers and others. But surely the existence of workplace tension because of fellow employees' hatred of gay men and lesbians is no more relevant to determining their ability to contribute to society than is the existence of workplace tension caused by racial bias to the ability of racial minorities to so contribute. In addition, the very fact that employers argue that discrimination on the basis of sexual orientation is justified on this ground suggests that the discrimination aimed at gay men and lesbians is indeed the result of prejudice.” <i>Id.</i> at n31 and accompanying text. |



Chapter 5: The Legacy of Discriminatory State Laws, Policies, and Practices, 1945- Present

The explicitness and pervasiveness of the history of government discrimination against LGBT people has been well researched and documented in recent years.¹ It is a history of discrimination that is difficult to overstate. Understanding this history is important for three reasons. First, the breadth and explicitness of discrimination in public employment partially explains why employment discrimination against LGBT people is so widespread and persistent today in both the public and private sectors. Second, the history of discrimination based on state laws, policies, and practices explains not only why the patterns of discrimination in the public and private sectors are similar, but why discrimination in the public sector has, if anything, been more prevalent than in the private sector. Finally, it is a recent history with legacies that extend to the present day.

This chapter begins by providing a short summary of two intertwined parts of this history— explicit purges of homosexual employees by federal and state governments in the 1950s and 1960s and state sodomy laws that provided a justification for public and private employers to discriminate against LGBT employees. The chapter concludes by tracking two legacies of this history that connect the present with the past: 1) the use of state sodomy laws to

¹DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003* (2008); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* (University of Chicago Press 1998) (1983); KAREN L. GRAVES, *AND THEY WERE WONDERFUL TEACHERS: FLORIDA'S PURGES OF GAY AND LESBIAN TEACHERS* (2009); ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* (1990); RALPH S. BROWN JR., *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* (1958). FEDERAL GOVERNMENT (2004); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003* (2008); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* (University of Chicago Press 1998) (1983); KAREN L. GRAVES, *AND THEY WERE WONDERFUL TEACHERS: FLORIDA'S PURGES OF GAY AND LESBIAN TEACHERS* (2009); ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* (1990); RALPH S. BROWN JR., *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* (1958).

justify the exclusion of LGBT people from state and local law enforcement and 2) moral fitness test requirements for professional licenses that barred LGBT people from public and private employment, in particular in education.

I. Purges of LGBT Public Employees And Explicit Discriminatory Laws and Policies

Purges of LGBT public employees by federal, state, and local governments in the 1950s and 1960s and the criminalization of same-sex behavior are two separate but intertwined foundations of employment discrimination against LGBT people in the public and private sectors. While the purges of employees were, in part, motivated by political considerations and moral disapproval of homosexuality, criminal laws greatly facilitated that political agenda and the expression of those beliefs. Purges of government employees often involved coordinated efforts by law enforcement and civil administrators to expose “closeted homosexuals,” charge them with crimes based on private, consensual behavior, and expel them from employment. This governmental policy also served as a model for discrimination by private industry.

The federal government created and popularized justifications for excluding “homosexuals” from the workplace and then state, municipal and private employers followed suit.² Between 1946 and 1969, witch hunts for LGBT public employees by their employers meant they were fired *en masse*, not on an individual basis. While these purges saw thousands of employees fired, thousands more were investigated and harassed, and hundreds of thousands of employees were forced to swear that they were not homosexual, forcefully sending the message to all LGBT public and private employees to say in the closet.

A. Purge of Federal Employees

Purges of government employees began in the federal government, but were soon copied by state and then municipal employers. The implementation of required “loyalty oaths,” a

² See WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003 73-108 (2008).

vehicle that spread the impact of the purges to most of the public sector and much of the private sector, eventually impacted as much as 20 percent of the U.S. workforce.

From 1947 to 1961, more than 5,000 allegedly homosexual federal civil servants lost their jobs in the purges for no reason other than sexual orientation, and thousands of applicants were also rejected for federal employment for the same reason.³ During this period, more than 1,000 men and women were fired for suspected homosexuality from the State Department alone - a far greater number than were dismissed for their membership in the Communist party.⁴

The Cold War and anti-communist efforts provided the setting in which a sustained attack upon gay men and lesbians took place.⁵ The history of this “Lavender Scare” by the federal government has been extensively documented by historian David Johnson.⁶ Johnson has demonstrated that during this era government officials intentionally engaged in campaigns to associate homosexuality with Communism: “homosexual” and “pervert” became synonyms for “Communist” and “traitor.”⁷ LGBT people were treated as a national security threat, demanding the attention of Congress, the courts, statehouses, and the media.

In February of 1950, Deputy Undersecretary John Peurifoy testified before a subcommittee that 91 State Department employees dismissed for “moral turpitude” were homosexuals. After this hearing, Republicans made national security the centerpiece of their

³ JOHNSON, *supra* note 1, at 166-67.

⁴ Edward L. Tulin, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 TEX. L. REV. 1587, 1598, n. 64 (2006) (citing DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004))(noting that from the period 1947 to 1953, 402 of the 654 dismissals from the government on the grounds of disloyalty or security threats were tied to homosexuality—more than 60%).

⁵ D’EMILIO, *supra* note 1, at 40.

⁶ JOHNSON, *supra* note 1.

⁷ See JOHNSON, *supra* note 1, at 30-38. One senator said this: “You can’t hardly separate homosexuals from subversives. Mind you, I don’t say every homosexual is a subversive, and I can’t say every subversive is a homosexual. But a man of low morality is a menace to the government, whatever he is, and they are all tied up together.” *Id.* at 37-38 (quoting a senator leading the anti-homosexual witch-hunt).

strategy to discredit the Truman administration,⁸ accusing it of running a government filled with homosexuals. The Truman Administration responded by adopting a loyalty security program to weed out Communists and “homosexuals and other sex perverts.”⁹ It investigated 382 civil servants (most of whom resigned) in the first seven months of the program.

At the same time, the U.S. Senate created a subcommittee, chaired by North Carolina Senator Clyde Hoey, to evaluate the threat homosexuals presented to public civil service and national security.¹⁰ In December 1950, the Hoey Subcommittee issued its report, entitled *Employment of Homosexuals and Other Sex Perverts in Government*, unanimously concluding that “those who engage in acts of homosexuality and other perverted sex activities are unsuitable for employment in the Federal Government.” In the committee’s view, “homosexuals and other sex perverts” should be barred from civil service positions, those who were already employed should be fired, and the government should expend resources to aggressively ferret them out.¹¹

According to historical scholar Robert Dean” “The result was a Lavender Scare... linked to the anticommunist crusade ...complete with congressional investigations, inquisitorial panels,

⁸ D’EMILIO, *supra* note 1, at 41 (citing N.Y. TIMES, Mar. 1, 1950, at 1).

⁹ Legal scholar Edward Tulin describes the Republican Party strategy: Within a month after Peurifoy’s testimony, the Republican party organized a political strategy based on what the Republican National Chairman termed the “homosexual angle.” Tulin, *supra* note 4, at 1601 n. 84 (citing *Perverts Called Government Peril*, NY Times, Apr. 19, 1950, at 25)). In a newsletter sent to 7,000 Republican party volunteers, Chairman Gabrielson identified “sexual perverts” as a serious danger to the country, and further implied that because the national media would be unable to give a full, uncensored view of the danger, this responsibility would fall to the Republican faithful. Tulin, *supra* note 4, at 1602 n. 85 (citing D’EMILIO, *supra* note 1, at 41-42). As the midterm congressional elections approached, “[t]he primary issue [became] the [Republican] charge that the foreign policy of the U.S., even before World War II, was dominated by an all powerful, super-secret inner circle of highly educated, socially highly placed sexual misfits in the State Department, all easy to blackmail. While animus against homosexuals was certainly not confined exclusively to the Republican party, capitalizing on public concern about the Communist-homosexual threat was a central tenet of the party’s national political strategy. Tulin, *supra* note 4, at 1602 n. 86 (citing NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 258, 259 (1995).

¹⁰ See generally JOHNSON, *supra* note 1, at 101-18 (providing a thorough account of the subcommittee’s investigation, the “evidence” it ignored, and its report).

¹¹ S. COMM. ON EXPENDITURES IN THE EXEC. DEP’T, SUBCOMM. ON INVESTIGATIONS, 81ST CONG. 2ND SESS., *EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT* 4527-4528 (Cong. Rec. Vol. 96 1950). The report stated “It is the opinion of this subcommittee that those who engage in acts of homosexuality and other perverted sex activities are unsuitable for employment in the Federal Government. This conclusion is based upon the fact that persons who indulge in such degraded activity are committing not only illegal and immoral acts, but they also constitute security risks in positions of public trust.”

executive branch ‘security’ doctrine, guilt by association, threat of punitive exposure, ritual confession, the naming of names, and blacklisting.”¹² Max Lerner, in a New York Post column entitled “Panic on the Potomac,” also compared the effort to Cold War “witch hunts.” He wrote, “The Senators call it the ‘purge of the perverts.’”¹³

The immediate impact of the purge on the careers of civilian government workers was dramatic. Under Truman’s loyalty-security program the number of homosexuals dismissed by the government each month went from an average of five to more than sixty per month.¹⁴ Between 1947 and 1952, the State Department dismissed homosexuals for “security reasons” at about twice the rate of any other security or loyalty risks, including communists.¹⁵ In 1951, the State Department fired 119 employees for homosexuality, and only 35 as other security risks (Communists); the figures were 134 and 70, respectively, in 1952.¹⁶ By 1953, the Truman State Department claimed to have fired 425 employees for “allegations of homosexuality.”¹⁷

The Eisenhower Administration (1953-61) expanded Truman’s policies.¹⁸ In April 1953, President Eisenhower issued Executive Order 10,405, which officially added “sexual perversion” as a ground for investigation and dismissal under the federal loyalty-security program.¹⁹ Eisenhower’s executive order expanded the government’s anti-homosexual policies and

¹² ROBERT D. DEAN, *IMPERIAL BROTHERHOOD: GENDER AND THE MAKING OF COLD WAR FOREIGN POLICY* 63-96 (2001).

¹³ BERUBE, *supra* note 1, at 269, 269 n.25 (citing Max Lerner, *The Washington Sex Story: #1 – Panic on the Potomac*, NEW YORK POST, July 10, 1950, at 4).

¹⁴ BERUBE, *supra* note 1, at 268-69 n. 24 (citing D’EMILIO, *supra* note 1, at 44).

¹⁵ BROWN, *supra* note 1, at 56.

¹⁶ See D’EMILIO, *supra* note 1, at 44.).

¹⁷ Brown, *supra* note 1, at 258 n. 4 (citing *Departments of State, Justice, and Commerce Appropriations for 1954: Hearing before the Subcomm. of the H. Comm. On Appropriations*, 83d Cong. 114 (1953) (testimony of John William Ford).

¹⁸ JOHNSON, *supra* note 1, at 119-46.

¹⁹ Exec. Order No. 10,450 § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1953).

procedures to include every agency and department of the federal government. _This affected the job security of more than six million government workers and armed forces personnel.²⁰

In the next two years, more than 800 federal employees resigned or were terminated because they had files indicating “sex perversion,” which typically meant charges—not convictions— of loitering, solicitation, or disorderly conduct.²¹ These figures understate the number of gay men and women who lost jobs, as they exclude employees who were given the option of resigning quietly and applicants for jobs in the civil service. As a result of Eisenhower’s Order 10,450, an FBI report or background check was compiled for each existing federal employee and every job applicant._Between 1947 and 1950, the FBI denied government employment to 1,700 applicants because they had “a record of homosexuality or other sex perversion.”²²

The methods used to carry out the investigations were sweeping in their scope and intrusiveness. One scholar describes some of the methods:

[T]he State Department accelerated and broadened its efforts to expose and fire homosexuals. “Skilled” investigators were charged with interrogating every potential male applicant to discover if they had any effeminate tendencies or mannerisms.²³ ...Polygraphs were widely employed when an applicant or employee was accused of homosexual behavior and denied it.²⁴ ...The program

²⁰ BERUBE, *supra* note 1, at 270.

²¹ Under Executive Order 10,450, the Civil Service Commission records for the period from May 1953 to June 1955 list 837 cases relating to “sex perversions”, including 147 in the State Department.. See BROWN, *supra* note 1, at 258 n. 4 (citing *Departments of State, Justice, and Commerce Appropriations for 1954: Hearing before the Subcomm. of the H. Comm. On Appropriations*, 83d Cong. 114 (1953) (testimony of John William Ford)).

²² D’EMILIO, *supra* note 1, at 44.

²³ Tulin, *supra* note 4, at 1602 n.87 (citing JOHNSON, *supra* note 1, at 73).

²⁴ *Id.* at n. 88. (citing JOHNSON, *supra* note 1, at 73)(noting that in addition, two staff members were exclusively assigned the task of investigating suspected homosexuals. They would comb financial and penal records and order

was intended to leave no stone unturned, whether on American soil or abroad. Inspectors sent to every embassy, consulate, and mission were given special training sessions on “methods used in uncovering homosexuals,” instructed to be “continually on the alert” to discover homosexuals, and asked to brief others on the topic during their tours of inspection. A truly radical change had come over American government, sweeping through not only the State Department, but throughout all the agencies of the federal government.²⁵

To identify homosexuals in public employment, the FBI sought out state and local police officers to supply arrest records on morals charges, regardless of whether there were convictions; data on gay bars; lists of other places frequented by homosexuals; and press articles on the largely subterranean gay world. Even friendship with a “known homosexual” subjected individuals to investigation. The U.S. Post Office established a watch on the recipients of physique magazines, subscribed to pen pal clubs, and initiated correspondence with men whom they believed might be homosexual. If their suspicions were confirmed, they then placed tracers on victims’ mail in order to locate other homosexuals.²⁶

The reach of federal government discrimination was extended by the routine requirement that all private companies contracting with the federal government have similar policies and

surveillance, following the extensive protocols laid out in a nine-page section in the State Department procedural manual).

²⁵ *Id.* at n. 89 (citing JOHNSON, *supra* note 1, at 75).

²⁶ D’EMILIO, *supra* note 1, at 47 (citing J. Edgar Hoover, *Role of the FBI in the Federal Employee Security Program*, 49 NORTHWESTERN UNIV. L. REV. 333-47 (1954) and information from documents obtained from the FBI under the Freedom of Information Act, File Classification nos. 94-843, 94-1001, 94-283, 100-37394, and 100-45888 and General Correspondence, vol. 1, 1965, ACLU papers).

procedures to discover and fire homosexual employees.²⁷ For example, during this period the number of direct federal employees of the Atomic Energy Commission (“AEC”) was approximately 7500. At the same time, employees of Atomic Energy contractors numbered between 75,000 and 150,000.²⁸ In the five year period ending December 31, 1952, 400,000 investigations were made by the AEC.²⁹ In 1955, the General Counsel of the Department of Defense estimated that the number of private employees of Defense Department contractors investigated under the program was between two and three million.³⁰

Policies based on the government models were adopted independently by private companies and private organizations such as the American Red Cross, which “summarily dismissed” employees involved in homosexual conduct.³¹ This period also saw the growth of a vast system of tests and standards to determine the suitability of employees. During the 1950s, more than twelve million workers, or slightly more than 20 percent of the labor force, faced loyalty-security investigations.³² Within only a few years, anti-homosexual policies had spread from the federal government to nearly all levels of employment in the United States.

At the same time, the Department of Defense and Civil Service Commission also established procedures to prevent the re-employment of “sexual perverts” in any government job. If homosexual employees refused to resign, they would be charged, investigated, and fired, with

²⁷ BROWN, *supra* note 1, at 61. *Loyalty and Security*, 61, *See, e.g., AN ACT FOR THE DEVELOPMENT AND CONTROL OF THE ATOMIC ENERGY*, 60 Stat. 755, 42 USC 1801, Aug. 1, 1946, requiring “no contract shall be made .. unless ... the contractor or prospective contractor agrees in writing not to permit any individual to have access to restrictive data until the FBI shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual.”

²⁸ BROWN, *supra* note 1, at 61.

²⁹ BROWN, *supra* note 1, at 63 (citing ATOMIC ENERGY COMMISSION, FOURTEENTH SEMIANNUAL REPORT 70-71 (1953)).

³⁰ BROWN, *supra* note 1, at 70, 179, 179 n.16.

³¹ BERUBE, *supra* note 1, at 270, 270 n. 30 (citing *Are You Now Or Have You Ever Been a Homosexual?*, ONE Apr. 1953, at 5-13.) The Security Division of the American Red Cross described its antihomosexual policy before the Crittenden Board in 1957. RED CROSS POLICY, CRITTENDEN REPORT 54.

³² D’EMILIO, *supra* note 1, at 46 (citing Ralph S. Brown Jr., *Loyalty-Security Measures and Employment Opportunities*, BULLETIN OF THE ATOMIC SCIENTISTS, Apr. 1955, at 113-17 and BROWN, *supra* note 1); ELEANOR BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM (1953).

their names reported to several civilian and military offices.³³ In 1951 and 1952, national registration laws were introduced in Congress that would set up a federal pool of the names of everyone who had been identified by cities, states, and the armed services as “sexual psychopaths” under laws that mainly applied that term to homosexuals.³⁴ Another way federal anti-homosexual policy spilled over into the private sector was by sharing police and military records with private employers. For these reasons, a person discharged from a federal agency as a “sex pervert” often found himself blacklisted by private employers as well.³⁵ At the end of the period of federal purges the threat to the livelihoods of federal employees reached absurd lengths. For example, in 1969, the U.S. Court of Appeals for the Tenth Circuit upheld the firing of a janitor’s assistant who worked for the Post Office because he had been convicted of “engaging in a lewd act” with another man.³⁶

B. Denials of Federal Security Clearance

As described above, Executive Order 10450, issued by President Eisenhower in 1953, modified the federal loyalty program to include “sexual perversion” as a basis for denial or revocation of security clearances.³⁷ As a result, federal agencies used “sexual perversion” as a basis for denying security clearances to LGBT people.³⁸ From the 1950s to the present, the eligibility of LGBT people for clearance has depended on changing interpretations of “sexual perversion.”³⁹

In 1995, the United States General Accounting Office issued a report entitled “Security

³³ BERUBE, *supra* note 1, at 269, n.26 (citing REPORT OF HOMOSEXUAL CASES – CIVILIAN EMPLOYEES, JUNE 14 TO DECEMBER 4, 1950, Folder: “230.741 (1948-1949-1950),” Box 3593, Classified Decimal File 1948-50, RG 407.)

³⁴ BERUBE, *supra* note 1, at 269, n.27 (citing *Are You Now Or Have You Ever Been a Homosexual?*, *supra* note 31.)

³⁵ ESKRIDGE, *supra* note 1, at 103.

³⁶ *Vigil v. Post Office Dept. of U.S.*, 406 F.2d 921 (10th Cir. 1969).

³⁷ 18 FR 2489 (Apr. 27, 1953).

³⁸ UNITED STATES GENERAL ACCOUNTING OFFICE, GAO REPORT: SECURITY CLEARANCES: CONSIDERATION OF SEXUAL ORIENTATION IN THE CLEARANCE PROCESS, at 2 (Mar. 1995)(hereinafter “GAO report”).

³⁹ Although Executive Order 10450 has been amended several times, sexual perversion continues to be a criterion for security clearances. GAO report at 2.

Clearances: Consideration of Sexual Orientation in the Clearance Process” (“GAO report”) pursuant to a congressional request to review “how sexual orientation is treated in the security clearance process for federal civilian and contractor employees, focusing on: (1) whether clearances are currently being denied or revoked based on individuals' sexual orientation; (2) whether sexual orientation is being used as a criterion in granting or revoking security clearances; and (3) how concealment of sexual orientation affects the granting or revoking of security clearances.”⁴⁰

The GAO report provides a review of the history of the use of sexual orientation in the security clearance process and then focuses on the then current security clearance practices of eight federal agencies.⁴¹ The report summarizes the history as follows:

Federal agencies used the sexual perversion criteria in the early 1950s to categorize homosexuals as security risks and separate them from government service. Agencies could deny homosexual men and women employment because of their sexual orientation until 1975, when the Civil Service Commission [now the Office of Personnel Management] issued guidelines prohibiting the government from denying employment on the basis of sexual orientation.⁴² The guidelines, which further define the provisions of Executive Order 10450, resulted from court decisions requiring

⁴⁰ GAO report at 1.

⁴¹ The eight agencies were the Department of Defense (DOD), the Departments of Energy and State, OPM, the U.S. Information Agency (USIA), the Federal Bureau of Investigation (FBI), the U.S. Secret Service, and the U.S. Customs Service.

⁴² (footnote in original text) The Civil Service Commission is now the Office of Personnel Management (OPM). As a result of legal actions, the Commission initially issued suitability guidelines for federal government employment in Federal Personnel Manual letter 731-3 (July 3, 1975). In May 1980, OPM issued a memorandum to heads of departments and independent establishments clarifying that personnel actions based on non-job-related conduct such as sexual orientation may be considered prohibited personnel practices under 5 U.S.C. § 2302(b). The policy was reaffirmed in February 1994.

that persons not be disqualified from federal employment solely on the basis of homosexual conduct. Although the public policy change resulted in the restrictions against employment of homosexuals being lifted, the guidance for granting security clearances to homosexuals remained generally vague or restrictive until the early 1990s.⁴³

According to the GAO report, in 1991 “agencies began to change their security policies and practices regarding sexual orientation,”⁴⁴ leading to a reduction in reported denials or revocations of security clearances on the basis of sexual orientation.

The GAO investigation then focused on the period from 1991 through 1994 after the agencies reportedly began to change their policies.⁴⁵ Thus, the GAO did not appear to attempt to identify all known or discoverable cases prior to 1991 in which sexual orientation impacted the security clearance process. However, the GAO reported that eight of the sixteen cases it identified prior to 1991 where sexual orientation impacted the security clearance process resulted in revocation of the clearances. The GAO did not identify any cases after 1991 in which a security clearance had been denied or revoked on the basis of sexual orientation, although there were nine reported instances where “employees believed their sexual orientation had an impact on their security clearance investigations,” in that the investigations took longer than necessary or inappropriate questions were asked during the clearance process.⁴⁶

At the time of the 1995 GAO report, three agencies, the Department of Defense, the Secret Service, and the FBI, maintained policies or procedures that required investigation into

⁴³GAO report at 2.

⁴⁴GAO report at 2.

⁴⁵GAO report at 4 (soliciting input from individuals who believe federal agencies denied or revoked their security clearances based on their sexual orientation between 1991 and 1994).

⁴⁶GAO report at 5.

allegations of homosexuality or whether homosexual applicants for security clearances concealed their sexual orientation.⁴⁷ These policies were rationalized as addressing vulnerability to blackmail or coercion. However, the GAO report pointed out that these concerns were not substantiated by evidentiary research, and the GAO recommended that these agencies eliminate these policies.⁴⁸ The Department of Defense and Secret Service stated that they intended to follow the GAO's recommendation, but the FBI, represented by the Justice Department, indicated that the agency would continue to allow consideration and investigation of sexual orientation in "circumstances in which sexual orientation could reasonably be thought to raise an issue of susceptibility to coercion."⁴⁹

In addition to the GAO report, the following court cases brought by plaintiffs challenging denial or revocation of federal security clearances on the basis of sexual orientation also trace the history of these discriminatory policies from the late 1960s until the mid 1990s.

- ***Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).** A former budget analyst at NASA was fired on grounds of "immorality" after it was alleged that he engaged in homosexual conduct. The court ruled that alleged or proven immoral conduct is not grounds for separation from public employment unless it can be shown that such behavior has demonstrable effects on job performance. The court found that the notion that the federal government could enforce the majority's conventional codes of conduct in the private lives of its employees was inconsistent with the elementary concepts of liberty, privacy, and diversity.
- ***Adams v. Laird*, 420 F.2d 230 (D.C. Cir. 1969).** An employee for a private company that contracted with the Department of Defense was denied security clearance by the DOD

⁴⁷GAO report at 3-4, 8, 13-14.

⁴⁸GAO report at 15-16.

⁴⁹GAO report at 16.

necessary for his job because he had previously engaged in private, consensual homosexual acts. Both the district court and the Court of Appeals for the District of Columbia upheld the denial of security clearance, with the Court of Appeals finding that “DOD 5220.6 sets forth many ‘Criteria,’ which include ample indications that a practicing homosexual may pose serious problems for the Defense Department in making the requisite finding for security clearance. They refer expressly to the factors of emotional instability and possible subjection to sinister pressures and influences which have traditionally been the lot of homosexuals living in what is, for better or worse, a society still strongly oriented towards heterosexuality.”

- ***Finley v. Hampton*, 473 F.2d 180 (D.C. Cir. 1972).** An employee of the Federal Housing Administration was denied security clearance on the basis that he had two friends who were described as having “homosexual mannerisms.” There were no specific allegations evident from the record in the case that the plaintiff himself was accused of being homosexual. His job was subsequently reclassified as not requiring a security clearance. Consequently, his suit was dismissed for failure to state a claim because he had retained his job and failed to demonstrate any harm caused by the investigation into his personal life.
- ***Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973).** The Department of Defense denied security clearance to an “admitted active homosexual.” The Court reversed the revocation of clearance based on the narrow facts of the case, concluding that in this instance the DOD's questioning intruded too far. However, the Court also noted the Board is entitled to ask questions about “the kind of deviant sexual life the applicant lives” and that homosexual conduct “violates the criminal laws of the State in which

appellee resides and that of every other state except Illinois.” It further opined “[t]hat some human infirmities are beyond the control of the applicant may be unfortunate, but it does not undermine the power of the Executive to hire only those whose employment will ‘best promote the efficiency’ of the public service.”

- ***McKeand v. Laird*, 490 F.2d 1262 (9th Cir. 1973).** An electronics engineer employed by a government contractor was denied a job-necessary security clearance by the Department of Defense on the basis of his homosexuality *per se*. The Ninth Circuit upheld the DOD’s decision, holding that the agency showed an adequate “rational nexus” in concluding that this specific plaintiff’s fear of disclosure made him “a target for coercion or pressure which may be likely to cause action contrary to the national interest.” Thus, the Court did not reach the question of whether homosexuality *per se* could constitute a rational basis for denial of a security clearance.
- ***Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973).** An organization of homosexual individuals and a discharged Civil Service Commission employee brought action to challenge the Commission’s policy of excluding individuals who have engaged in homosexual conduct from government employment. The court found that the Commission could discharge a person for immoral behavior only if the behavior impaired the efficiency of the service, and that the Commission had not met this standard. The court ordered reinstatement of the employee.
- ***Marks v. Schlesinger*, 384 F. Supp. 1373 (C.D. Cal. 1974).** An employee of a government contractor challenged the withdrawal of his security clearance based on his refusal to answer questions about homosexual conduct, including questions asking him to describe specific sexual acts, how many times they had occurred, and in what locations.

The court upheld withdrawal of the security clearance, finding that, although the government may not “conduct a fishing expedition into an applicant's sex life, be it homosexual or heterosexual,” “it was repeatedly explained to the employee that additional information was needed to ascertain whether he was engaging or had engaged in criminal conduct; whether he was subject to coercion and influence; whether he had engaged in acts that might indicate poor judgment and instability such as to suggest that he might disclose classified information, and thus whether it was consistent with the national interest to grant or continue his security clearance.”

- ***Webster v. Doe*, 486 U.S. 592 (1988), on remand, *Doe v. Webster*, 769 F. Supp. 1 (D.D.C. 1991), *aff'd in part, rev'd in part, Doe v. Gates*, 981 F.2d 1316 (U.S. App. D.C. 1993), *cert. denied, Doe v. Woolsey*, 510 U.S. 928 (1993).** An employee of the CIA from 1973 through 1982 was fired for homosexuality *per se* after admitting that he was homosexual. The District of Columbia Court of Appeals ultimately upheld his dismissal, reasoning that the CIA did not have a “blanket” policy against homosexuals, and that it had made an individualized determination that the plaintiff’s homosexuality could be harmful to the agency because “[t]he record establishes that the CIA had a legitimate concern about Doe's trustworthiness, in light of the fact that he hid information about his involvement in homosexual activity despite suspecting or knowing that the Agency considered such involvement to be a matter of security significance.”
- ***Dubbs v. Cent. Intelligence Agency*, 769 F. Supp. 1113 (N.D. Cal. 1990).** An employee at a private non-profit research institute was denied a job-necessary security clearance by the CIA because of her status as an openly homosexual woman. The court denied the CIA’s motion to dismiss her equal protection claim, holding that there was a triable issue

as to whether the CIA had a blanket policy against granting homosexuals security clearance, and if so, whether the policy was rational.

- ***High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).** Plaintiffs brought a class action on behalf of all adult individuals engaging in private, consensual homosexual activity who had either applied for security clearances or who held such clearances at the time of the action. The Ninth Circuit held that the Department of Defense's proffered explanation that homosexuals were more susceptible to targeting by hostile intelligence agencies was adequate to establish a rational basis for the DOD's anti-homosexual policies.
- ***Buttino v. FBI*, 1992 WL 12013803 (N.D. Cal. 1992) (unpublished).** The plaintiff was employed as a special agent with the Federal Bureau of Investigation (FBI). In August 1988, the FBI received an undated, handwritten letter stating that the plaintiff engaged in homosexual activity. The FBI then initiated an administrative inquiry regarding the plaintiff that resulted in the FBI's revoking the plaintiff's security clearance. The plaintiff brought action against the FBI and its director alleging deprivation of constitutional rights, and the court granted class certification "for all past and present employees and all applicants of the FBI, who are gay, or who engage in homosexual conduct with consenting adults in private." In 1994, under the terms of a settlement agreement, the FBI established guidelines for conducting background investigations, employment determinations, and security clearance adjudications intended to prevent discrimination based on sexual orientation.

On August 2, 1995, President Clinton signed Executive Order 12968,⁵⁰ which stated that the United States Government does not discriminate on the basis of sexual orientation in granting

⁵⁰60 FR 40245 (August 2, 1995).

access to classified information and barring the federal government from denying security clearances simply on the basis of sexual orientation.⁵¹ In accordance with Executive Order 12968, on March 24, 1997, President Clinton approved the uniform *Adjudicative Guidelines and the Temporary Eligibility Standards and Investigative Standards*. Guideline D of the *Adjudicative Guidelines* stated that “[s]exual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance.”⁵²

However, under the Bush Administration new questions emerged about the relationship between sexual orientation and security clearances. For example, in 2001 new guidelines proposed for the clearance process required that applicants be asked about “illegal” sexual acts. This proposal was prior to the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), and consensual homosexual sex was still outlawed in over a dozen states.⁵³ Then in 2005, the Bush administration promulgated the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, which re-wrote the language in Guideline D and replaced it with: “No adverse inference concerning the standards in the Guideline may be raised solely on the basis of the sexual orientation of the individual.”⁵⁴ The new language that removed the clear prohibition on using sexual orientation as a basis for denying security clearance and added the “solely on the basis” language raised concerns that the Guidelines weakened protections for LGBT people applying for or holding security clearances.⁵⁵ The current language in the

⁵¹This order specifically accommodated the FBI's policy regarding sexual orientation described above, however. *Id.* at Sec. 6.2(4)(b).

⁵²U.S. Dep't of State, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (Mar. 24, 1997), available at <http://www.fas.org/sgp/spb/class.htm> (last visited Oct. 1, 2009). In addition, on May 28, 1998, President Clinton issued Executive Order 13087, prohibiting discrimination based upon sexual orientation within Executive Branch civilian employment, although this order does not apply to the “excepted services,” which include many agencies that require security clearances such as the National Security Agency and the FBI.

⁵³ See <http://www.glapn.org/sodomylaws/usa/usnews31.htm>.

⁵⁴U.S. Dep't of State, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (Dec. 29, 2005) available at <http://www.state.gov/m/ds/clearances/60321.htm#d> (last visited Oct. 1, 2009).

⁵⁵See, e.g., Katherine Shrader, *New Security Clearance Rules Affect Gays*, THE WASHINGTON POST, Mar. 17, 2006,

Guidelines is the 2005 language.⁵⁶

In sum, the current policy regarding consideration of sexual orientation in the security clearance process appears to encompass a broad prohibition on federal employment discrimination on the basis of sexual orientation, and, per federal regulations, proscribes denial of security clearances “solely” on the basis of sexual orientation. The impact of the language changed by the Bush administration remains unclear, although there have been no reported cases in recent years of security clearance denials or revocations solely on the basis of sexual orientation.

C. State and Local Purges

By the mid-1950s, loyalty and security oaths similar to those at the federal level had been put into effect by many state and local governments, extending the prohibitions on employment of homosexuals to state and local workers, employees of state-funded schools and colleges, and private individuals in professions requiring state licenses.⁵⁷ In addition, state and local governments conducted similar purges of LGBT employees.⁵⁸ This section describes eight of these purges that have been recently documented by scholars and journalists.

1. California

In the early 1950s, the State of California enacted laws making homosexuals criminals and then used their criminal records to deny them employment, particularly in public education

available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/16/AR2006031601787.html>.

⁵⁶ However, on June 17, 2009, President Obama issued a memorandum on “Federal Benefits and Non-Discrimination” to the Office of Personnel Management instructing OPM to issue guidance within 90 days to all executive departments and agencies “regarding compliance with, and implementation of, the civil service laws, rules, and regulations, including 5 U.S.C. 2302(b)(10), which make it unlawful to discriminate against Federal employees or applicants for Federal employment on the basis of factors not related to job performance.”

Memorandum for the Heads of Executive Departments and Agencies (June 17, 2009), *available at* http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/ (last visited Oct. 1, 2009).

⁵⁷ BROWN, *supra* note 1, at 103.

⁵⁸ ESKRIDGE, *supra* note 1, at 102.

and in professions requiring a state-issued license. As a result, scholars estimate that hundreds of educators in California lost their jobs.

The use of the criminal law to purge LGBT teachers from public education began in California in 1949 when California Governor Warren met with “[m]ore than 70 of the State’s foremost enforcement officers and medical authorities” at a “sex crimes conference” that passed resolutions supporting the fingerprinting of all persons convicted of sex offenses, fingerprinting of all persons applying for teaching credentials, and increasing the maximum penalty for sodomy to 20 years.⁵⁹ These resolutions became California law during 1951-1952, as summarized by Yale law professor William Eskridge:

Under California law, a person who engaged in “immoral conduct”⁶⁰ (including sodomy and oral copulation) could not be a public school teacher. To give this rule greater enforcement bite, the legislature in 1951 adopted [California Governor] Warren’s proposal to require law enforcement officers to notify the state and local education departments of the arrest of any public school teacher for a sex crime. The following year, the legislature directed the state board of education to deny or withdraw teaching certificates for any person convicted of sodomy, oral copulation, lewd vagrancy, or various crimes against children. School districts were prohibited from employing anyone guilty of those offenses.

⁵⁹ *Death Penalty Urged for Child Molesters*, LA TIMES, Dec. 7, 1949, at 1.

⁶⁰ ESKRIDGE, *supra* note 1, at 103. Exclusions for engaging in “immoral conduct” are found in California Education Code §§ 13202, 13209 (certificates for state teachers), 24306(a) (state college employees) (West 1960); California Government Code § 19572(l) (civil service workers) (West 1964)The Warren-era amendments are 1951 California Statutes chap. 872 (June 4, 1951) (arrest notification); 1952 California Statutes, Extraordinary Session chap. 23 (April 17, 1952). ESKRIDGE, *supra* note 1, at 436 n.75.

Hundreds of gay men resigned or were fired after minor scrapes with law enforcement.⁶¹

Karen Harbeck describes further how local officials, police and school boards used these state laws to purge those suspected of being LGBT from teaching positions -- even if they were never convicted of a crime:

Local police officials, particularly in the communities of Long Beach and Los Angeles, actively used two pieces of state legislation aimed at ferreting out immoral educators. Enacted after World War II, California Penal Code, Section 291, required a sheriff or chief of police to notify the state licensing board and the local superintendent of schools immediately upon the arrest of a teacher for certain enumerated criminal behaviors relating to sex and morality, even if the arrest later proved to be erroneous or unsubstantiated. Immediate job suspension, and often job termination followed. The strong constitutional protections pertaining to criminal matters applied in the arrest but not to the school employment controversy. Thus, while the criminal case against the school employee might be dropped due to lack of evidence, an illegal arrest, or a not guilty finding, all the information could be used in the job termination hearing. With this highly incriminating evidence, the usual outcome was job termination or employee resignation.

In a collateral move, in 1954 the California Legislature passed California Education Code, Section 12756, that permitted the immediate suspension of teaching credentials if an educator was convicted of any one of several statutes pertaining to sex and morality.

This presumption of unfitness to teach streamlined the administrative process in the

⁶¹ ESKRIDGE, *supra* note 1, at 103.

educational setting by automatically providing the grounds for teacher dismissal. Even in cases where the teacher was found not guilty, school boards used the arrest as grounds for dismissal on the presumption of unfitness to teach.⁶²

In 1953, the California legislature considered two additional antigay measures which indicate the extensive legal regime that was being created to hobble the ability of LGBT people to earn a living. First, the legislature passed a law that prohibited anyone civilly committed as a “sexual psychopath” from receiving state unemployment insurance.⁶³ It also considered, but rejected, a law that would have suspended the driver’s licenses of “sexual deviants.”⁶⁴

2. Florida

In his book *Dishonorable Passions*⁶⁵ William Eskridge summarizes an even more extensive purge of public employees in Florida in 1957, carried out by the Johns Committee, an investigative committee of the Florida legislature led by state senator Charley Johns:

In 1957, Hillsborough County (Tampa) commenced an investigation of homosexuality in public schools. After staking out lesbian bars, pressuring informants to identify suspected homosexuals, and conducting a trip to Anna Maria Island to spy on lesbian activities, the sheriff by the

⁶² KAREN M. HARBECK, *GAY AND LESBIAN EDUCATORS: PERSONAL FREEDOMS, PUBLIC CONSTRAINTS* 188-189 (1997).

⁶³ CAL. UNEMP. INS. CODE § 1805 (1953).

⁶⁴ Assemb. B. 3049, 1953 Leg., Reg. Sess. (Ca. 1953). In 1953, ONE Magazine, the first publication in the United States to discuss LGBT legal issues, provided a contemporaneous account of how California state law supported a purge of LGBT people in public employment: “The purge fever against homosexuals, and against those who might have personal or social associations with homosexuals, spread from the State Department to every department of Government. At this point, even the lowly mail carrier is required on oath to be anti-homosexual. In 1951, the State of California hastened to slap a [sex criminal] registration law on its books which was tighter than its model... the earlier designed Los Angeles Municipal Registration Law. In 1951 and 1952, National Registration bills were introduced into Congressional hoppers which were to include not only those persons previously registered in cities and states, but also those names heretofore lying unexposed in Armed Services Files, and those names suspected but officially documented by chaplains and personnel officers of the Armed Services. In 1952, the State of California required by law that teachers declare themselves anti-homosexual and allowed municipalities, such as Los Angeles, the mechanics whereby anonymous information could be passed against individuals in the employ of the Board of Education. *Are You Now*, ONE MAGAZINE, Apr., 1953, at 8.

⁶⁵ ESKRIDGE, *supra* note 1, at 103.

end of the year had discovered almost sixty admitted or confirmed homosexual teachers, most of whom resigned their posts.

Inspired by this and other local investigations, the Johns Committee engaged in a six-year campaign to remove homosexuals from state schools (1958-1964). The campaign identified suspected homosexuals who were high school teachers, college students and university professors. Most of the suspected homosexuals resigned or were dismissed. The committee also pressured the state board of education to revoke teachers' certificates, which the legislature seconded with a 1959 statute authorizing certificate revocation for "moral misconduct" and a 1961 statute setting forth expedited procedures for revocation. Near the end of its tenure, the Johns Committee announced that the board had revoked seventy-one teachers' certificates (with sixty-three more cases pending); fourteen professors had been removed from the state universities (nineteen pending); and thirty-seven federal employees had lost their jobs, while fourteen state employees faced removal in pending cases.⁶⁶

The Johns Committee also provided information to professional licensing boards about the individuals investigated for homosexuality, causing doctors, lawyers and others to lose their

⁶⁶ *Id.* (citing 1959 Fla. Laws 59-404 (new revocation standard); 1961 Fla. Laws 61-396 (new expedited procedure) FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE, HOMOSEXUALITY AND CITIZENSHIP, 10 (Deposition of [Deponent Blacked Out]), FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE, February 6, 1959, in Johns Papers, Box 7; REPORT OF THE FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE TO THE 1959 SESSION OF THE LEGISLATURE (April 13, 1959), in Johns Papers, Box 1, Folder 21; FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE, STAFF MEMORANDA, July-September 1964, in Johns Papers, Box 1, Folder 6 (final documentation of the Johns Committee-backed removals)); ESKRIDGE, *supra* note 1, at 436 n.76 citing Johns Papers: Papers of the Florida Legislative Investigation Committee (the "Johns Committee" after its Chair, Senator Charley Johns), Florida State Archives, Tallahassee, Florida, Record Group 000940, Series 1486.)

licenses.⁶⁷ Scholar Karen Graves recently published an extensive history of the Johns Committee documenting its impact on LGBT public employees in Florida.⁶⁸

3. Iowa

In 1955, the Iowa Legislature followed 25 other states and passed a sexual psychopath law, allowing for “the confinement of persons who are dangerous criminal sexual psychopaths.”⁶⁹ Specifically, anyone charged with a public offense (but not necessarily convicted) and found to have propensities to commit sex offenses could be labeled a sexual psychopath and detained indefinitely in a state mental hospital.⁷⁰ In practice, the states that enforced these laws made no distinction between consensual and nonconsensual offenses and gay men were frequently committed under such laws for offenses including consensual sex in the privacy of their homes or even for merely possessing erotic photographs.⁷¹

The Iowa sexual psychopath law was passed after the deaths of two children, although none of the men eventually arrested were ever charged with, or even thought to be connected with, the murders. Following the second murder in Sioux City, Iowa, the public and newspapers urged the state to use the law as the basis of a roundup of homosexuals. The state quickly responded by setting up a special ward for sexual psychopaths at a state hospital.⁷² Iowa Governor Leo Hoegh, described the target of the roundup as “the guy ... who is now roaming the street but never committed a crime.”⁷³

⁶⁷ *Id.* at 104.

⁶⁸ GRAVES, *supra* note 1.

⁶⁹ NEIL MILLER, SEX-CRIME PANIC: A JOURNEY TO THE PARANOID HEART OF THE 1950S 76, 81 (2002) (citing IOWA CODE ANN. §255A.4 (Supp. 1958)).

⁷⁰ *Id.* at 76.

⁷¹ *Id.* at 82.

⁷² *Id.* at 84-88.

⁷³ *Id.* at 88.

Under this law, in 1955 and 1958, two purges in Sioux City, Iowa ruined the lives of 33 men suspected of being homosexual. Many of these men lost their jobs and professional licenses and were then incarcerated in the Iowa State Mental Hospital.

The Sioux City police began the roundup with sting operations at a local hotel that was known as a meeting place for gay men, and then pressured those arrested to name others. Two friends were arrested for merely sitting and having a drink at a bar with each other.⁷⁴ Questioned without lawyers, most of the men cooperated, naming other men and pleading guilty to conspiracy to commit a felony (sodomy), rather than face trial on a sodomy charge, which carried a maximum sentence of 10 years.⁷⁵ Instead of sending them to prison, the authorities had the men declared criminal sexual psychopaths under Iowa's new law and ordered them committed indefinitely to a state hospital.⁷⁶ Within two months, 20 gay men who were not suspected of having any connection to the two child murders that started the purge were committed.⁷⁷ In fact, when the citizens near the state hospital objected to having dangerous sex criminals housed near them, officials assured them that it was unlikely the hospital would house any "sex-murderer type of criminal" and "most of those committed would be homosexuals."⁷⁸

For individuals dependent on a professional license, the felony conviction was especially problematic. Five of the men sent to the state hospital were hairdressers.⁷⁹ By pleading guilty to a felony, they lost their professional licenses and could no longer work.⁸⁰ Neil Miller, the author of a book describing the Iowa purge, describes the effect on one of these men:

⁷⁴ *Id.* at 115.

⁷⁵ *Id.* at 115-121.

⁷⁶ *Id.* at 121-122.

⁷⁷ *Id.* at 122.

⁷⁸ *Id.* at 155.

⁷⁹ *Id.* at 127.

⁸⁰ *Id.* at 160.

For Harold McBride, perhaps more than any of the rest of the 20 men, incarceration was extremely difficult. He worried about [his wife] and the children. He had lost his license to cut hair, a consequence of pleading guilty to a felony. He watched despairingly as his wife was forced to sell his business, put their furniture in storage, and moved herself and the three children out of their...apartment to stay with his family.... And in his darkest moments he was convinced he would never get out of [the state hospital]. “My life was shattered,” Harold said 40 years later. “It was gone.”⁸¹ Three months after his release...Harold got his hairdressing license back. To do this, he had to appear before a judge.... Two women from [the area]...told the judge they would continue to be Harold’s clients. (This was required by law.) The judge asked Harold what he planned to do in the future. Harold said that he planned to leave the state. “That is probably in your best interest,” said the judge, and granted him his license.⁸²

In 1958, Sioux City experienced another roundup of thirteen gay men. This time the men were offered a deal to plead guilty to conspiracy to commit a felony and receive two years parole.⁸³ Four of the men were schoolteachers, two who taught in Sioux City schools.⁸⁴ For them, too, the conviction would have meant losing their teaching certificates. One teacher fought the charges, the first time that had been done in either of the Iowa purges, and eventually succeeded in having the charges dismissed. He wanted to keep his teaching certificate and an

⁸¹ *Id.* at 160, based on personal interview with “Harold McBride”.

⁸² *Id.* at 198-201.

⁸³ *Id.* at 215.

⁸⁴ *Id.* at 217.

honorable discharge from the Air National Guard, both of which would have been lost as a consequence of a felony sodomy conviction. After two mistrials, he was able to plead guilty to two misdemeanor counts. Despite this successful outcome, he “never taught in a public school again and was deprived of that great love of his life – teaching.”⁸⁵

4. Massachusetts

In the 1960s, the Massachusetts State Police used obscenity laws to target a group of professors at the University of Massachusetts, Smith College, and dozens of other private and public colleges and universities in a witch hunt that eventually stretched from Massachusetts to throughout New England, and then to New York and California.⁸⁶ Just two years later, the Supreme Court would rule that the material the men were charged with possessing was not obscene. But that ruling came too late to salvage their careers and reputations.⁸⁷

In September of 1960, Massachusetts State Police used a new state obscenity law to target a group of gay professors who had shared mildly erotic material at a small gathering at a private apartment.⁸⁸ The initial target, highly regarded Smith College professor Newton Arvin, had been identified by federal authorities through use of the mail, most likely from a mailing list seized from a magazine supply house.⁸⁹ Using the fact of “displaying the photographs at his apartment and swapping them with others” as evidence of “exhibition” and “circulation” of obscene materials, Arvin was charged with a felony and a misdemeanor charge of lewd vagrancy.⁹⁰ Police coerced Arvin into naming colleagues and seized and searched his personal journals to identify more names.⁹¹ They then searched the apartments of the other individuals, in

⁸⁵ *Id.* at 221–233.

⁸⁶ BARRY WERTH, *THE SCARLET PROFESSOR* 209 (2001).

⁸⁷ *Id.* at 288–289.

⁸⁸ *Id.* at 194.

⁸⁹ *Id.* at 195.

⁹⁰ *NY TIMES*, Sept. 8, 1960.

⁹¹ WERTH, *supra* note 65, at 196–197.

some cases without warrants, ultimately making the searches and the convictions based on evidence gained in them unconstitutional.⁹² From the beginning, the police knew the investigation had the potential to go beyond the Northeast and spread across the country.⁹³

The consequences for the jobs and careers of the men caught up in the investigation were devastating. Many feared their academic careers were over.⁹⁴ These fears were well-founded: “Within days, the University of Massachusetts would announce its plans to suspend immediately any staff member named in the investigation.” At Smith, instructors and professors were terminated immediately. Arvin, tenured and with 37 years on the faculty, was allowed to resign.⁹⁵ Soon, the entire Western Massachusetts gay community felt that they were experiencing a “McCarthy-like purge:”

“The fear spread concentrically, in waves. There were those at greatest risk, like [Smith professor Joel] Dorius, who had shown their pictures to Arvin and to whom he had shown his, and whom Arvin... had named. There were other homosexuals, at Smith and dozens of others schools...There were friends, and friends of friends, who feared that their past connections might implicate them. And there were those heterosexuals who had erotica of their own and whom [Massachusetts State Police Sergeant] Regan was determined to find and punish. Most of these people were veterans of the McCarthy era...who had seen their lives and communities ripped by this kind of thing before. They knew they would be pressed to name others to save themselves, and that everyone

⁹² *Id.* at 214.

⁹³ *Id.* at 206-209

⁹⁴ *Id.* at 215.

⁹⁵ *Id.* at 213.

around them would be, too.... Many people stopped using their phones, on the chance that they were tapped. Others abruptly left town, hoping the hysteria would end before the term began.... As the trial loomed...there were hushed, cryptic confessions and terrified talk of tapped phones, secret mail blocks, more police raids, more lives ruined⁹⁶.

Two years later, the Supreme Court would rule that the material the men were charged with possessing was not obscene, removing the last legal basis for their persecution and convictions, but not removing the devastating consequences on their academic positions and community reputations.⁹⁷

5. Texas

Predating the federal purges, in the 1940s at least ten members of the faculty of the University of Texas were investigated by the Board of Regents and then fired for being suspected of being homosexual. In 1944, the University of Texas Board of Regents fired University President Homer P. Rainey. Orville Bullington, one of the members of the Board of Regents, testifying before a Texas state senate committee, stated that one of the reasons Rainey was fired was that he had been slow to get rid of a “nest of homosexuals” on the University of Texas faculty. Bullington reported that since an investigation into the presence of homosexuals had been initiated, ten faculty members and fifteen students had been forced to leave the University.⁹⁸

6. Oklahoma

⁹⁶ *Id.* at 205- 220.

⁹⁷ *Id.* at 288-289.

⁹⁸ See, e.g., *Education: In the Lone Star State*, TIME MAGAZINE, Nov. 27, 1944; *University Row Laid Partly to Homosexuality*, LATIMES, Nov. 18, 1944, at 4.

According to an article in the *New York Times*, in 1966, Oklahoma City experienced a similar purge of gay men in public employment. On July 11, 1966, the attorney for Oklahoma County, Curtis Harris, announced that 26 teachers and administrators in the city's schools had resigned as the result of a six-month investigation of alleged homosexual activity. According to Harris, the purpose of the investigation lead by his office was to weed out sex deviates from public jobs but not prosecute them. The executive assistant to the school superintendent of Oklahoma City said the school board had not worked closely with the attorney's office but had conducted its own investigations after charges had been filed. Teachers and administrators were asked to resign if, according to the school board representative, "evidence substantiate[d] the charges."⁹⁹ Nothing in the *New York Times* article indicates any of the men were suspected of anything but private, consensual sex with other adults.

7. Idaho

In November 1955,¹⁰⁰ the arrest of three men on charges of sexual activity with teenagers "precipitated a massive witch hunt" in Boise, Idaho. An investigator who had worked for the State Department purging homosexuals from federal employment was called to Boise to "clean up the city."¹⁰¹ Over a 15-month period, some 1,472 men were brought in for questioning, over 3 percent of Boise's population of 40,000. Eventually sixteen men were arrested including a public school teacher. Under the headline "Crush the Monster," a November 3, 1955, *Idaho Daily Statesman* editorial called for "immediate and systematic cauterization" in the wake of the first arrests.¹⁰²

⁹⁹ 26 *Quit School Jobs in Drive on Oklahoma City Deviates*, N.Y. TIMES, July 12, 1966, at 36.

¹⁰⁰ MILLER, *supra* note 48, at 108-109.

¹⁰¹ *Id.*

¹⁰² *Id.*

In addition to those arrested, large numbers of gay men fled the Idaho capital. An anonymous source explained: “I know hundreds of Gay people left the city, schoolteachers, people in every walk of life – Gay people who had never gotten involved in anything, who were just afraid.”¹⁰³ Their fears were justified. Investigators publicly exposed and humiliated those suspected of being homosexual. Many of the men lost their jobs and families. Some entered the criminal justice system while others faced involuntary commitment to psychiatric treatment facilities. Several years later, one man who fled to California described the mood of Boise during that period:

Even before [the Vice-President of Idaho First National Bank] got arrested, friends of mine warned me that a witch hunt was going on. I didn't believe it. But when they went after [him], Christ, I saw the hand-writing on the wall. And that editorial, too! First they say, “Save the kids.” Then they say, “Crush the homosexuals.” Enemies of society – that's what we were called. I remember very well. So I asked myself, where will this stop? I've never had any kind of relations except with consenting adults. But is Boise going to be calm enough to draw the difference? Will they look for the difference? No, I knew they'd go after anybody who wears a ring on their pinky. I wasn't going to take the chance and get swallowed up in a blind, raging witch-hunt. I got the hell out.¹⁰⁴

¹⁰³ JACKIE M. BLOUNT, FIT TO TEACH, 95 (2005) (quoting *Witch-Hunt in Boise, Idaho; An Interview with a Victim, “They Lit a Match to a Bonfire,”* GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.; A DOCUMENTARY HISTORY, 109-119 (Jonathan Ned Katz ed. 1992), 109-119.

¹⁰⁴ *Id.* at 95 (quoting JOHN GERASSI, THE BOYS OF BOISE: FUROR, VICE, AND FOLLY IN AN AMERICAN CITY 15-17 (1966) 15-17).

8. North Carolina

Another purge of public employees occurred in Greensboro, North Carolina in 1956 and 1957. In 2006, journalist Lorraine Ahearn described what Greensboro residents referred to as “the purge” in an article for the *Greensboro News & Record* based on dozens of interviews with those who lived through it.¹⁰⁵ According to Ahearn “the purge was the largest attempted roundup of homosexuals in Greensboro history and marked one of the most intense gay scares of the 1950s.”¹⁰⁶ Thirty-two men were eventually caught up in the investigation including a judge, two lawyers, at least one teacher, and a policeman. All 32 were found guilty at trial with 24 of the convictions resulting in prison terms of five to 60 years. Some defendants were assigned to highway chain gangs.

Under Greensboro Police Chief Paul Calhoun, who took office in the summer of 1956, the juvenile and vice squads were assigned full time to morals investigations. The purpose, in the words of the police chief, was to “remove these individuals from society who would prey upon our youth,” and to protect the town from what a presiding judge called “a menace.” According to trial transcripts at the North Carolina Supreme Court, after police charged each suspect, they were questioned about a list of names detectives were developing. The investigation began “to skyrocket,” in the words of a former Greensboro sheriff.¹⁰⁷

On Feb. 4, 1957, the grand jury issued indictments against the 32 men accused of being homosexual. The men were tried for “crimes against nature,” almost exclusively for conduct with consenting adults in the privacy of their homes. Rather than try to argue against the fairness of the state's sodomy law - which at the time carried a maximum sentence of 60 years - they pled for mercy. A few defendants persuaded judges to set suspended sentences, on the condition that

¹⁰⁵ Lorraine Ahearn, *One officer called morals trials*, GREENSBORO NEWS & RECORD, Sept. 17, 2006.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

they remained under the care of psychiatrists. “It would be hard to imagine a blacker mark against a man,” recalled Percy Wall, a veteran trial lawyer, about the Greensboro purge. “You could be accused of murder and be acquitted and people would forget. But this was considered dirty, sinful.”¹⁰⁸ One of the legacies of these purges of the 1950 and 1960s, were more explicit policies by state and local governments prohibiting LGBT people from public employment. Although there is less information documenting the aggressive enforcement described above, the examples below document some of these policies:

1. **New York**

Until 1969, New York City had an explicit policy denying city employment to LGBT people. That year, the City’s Civil Service Commission officially changed its employment policy so that homosexuality was no longer “a bar to all employment under its jurisdiction.” The overtly discriminatory policy was changed as a result of a successful lawsuit by two individuals who had been refused employment as social workers because they were thought to be homosexual.¹⁰⁹ In *Brass v. Hoberman*, Plaintiff Brass was denied employment following a mandatory medical exam by a psychiatrist who found him unfit for the position “because of a history of homosexuality.” The City Personnel Director wrote to Brass, “[i]t is our policy to disqualify homosexuals for employment as Case Workers, Hospital Care Investigators, and Children's Counselors.” Plaintiff Teper had a similar experience. The City argued that the policy was not unconstitutional when restricted to a few selected positions because, based on recognized and accepted medical and psychiatric opinions, it had a reasonable basis in denying employment to homosexuals.¹¹⁰

¹⁰⁸ *Id.*

¹⁰⁹ See 2 *Denied City Jobs As Deviates Suing*, NEW YORK TIMES, Jul. 25, 1968, at 29; *City Lifts Job Curbs for Homosexuals*, NEW YORK TIMES, May 9, 1969, at 1.

¹¹⁰ *Brass v. Hoberman*, 295 F. Supp. 358 (S.D.N.Y. 1968).

Despite the change in policy, the City's Civil Service Commission indicated its intent to continue to consider homosexuality as a condition that could render an applicant unfit for the duties of certain positions. The Commission gave as an example "an admitted homosexual, when the acts are frequent and recent, would probably not be qualified for the position of Correctional Officer, whose duty it would be to guard prisoners in one of the city penitentiaries. Nor would such a person be probably qualified as a children's counselor or playground attendant."¹¹¹ In 1970 and 1971, the Gay Activists Alliance of New York ("GAA") presented a pair of reports to the New York City Commission on Human Rights describing public and private employment discrimination, including by public commissions, private employers, credit reporting agencies and employment agencies.¹¹² These reports indicate that the New York City ban, although purportedly repealed, was continuing to have an impact.

New York City was not the only municipality in New York to have such a policy. In 1971, in response to a survey, Erie County admitted to using morals convictions as a basis for disciplinary action and firing of homosexuals; the chairman of the Civil Service Commission of Nassau County reported that the department refused to hire an applicant for a lifeguard position because of the discovery of a "history of homosexuality" and Suffolk County used an employment questionnaire that expressly asked the applicant to indicate "Homosexual Tendencies: yes or no."¹¹³

¹¹¹ See 2 *Denied City Jobs As Deviates Swing*, NEW YORK TIMES, Jul. 25, 1968, at 29; *City Lifts Job Curbs for Homosexuals*, NEW YORK TIMES, May 9, 1969, at 23.

¹¹² *Employment Discrimination Against Homosexuals*, Presentation by the GAY ACTIVISTS ALLIANCE to the NEW YORK CITY COMMISSION ON HUMAN RIGHTS (Jul. 14, 1970); *Employment Discrimination Against Homosexuals Supplement #1*, Presentation by the GAY ACTIVISTS ALLIANCE to the NEW YORK CITY COMMISSION ON HUMAN RIGHTS (Feb. 3, 1971). The 1971 report describes personal histories of discrimination by the New York City Public Schools against two individuals. In both cases the individuals had passed all other screening procedures and in one case was already teaching when they were asked to sign a waiver releasing the information in their draft records, which in both cases indicated "homosexual tendencies". Both were sent to psychiatrists for evaluation and ultimately refused certification and / or discharged.

¹¹³ See *Employment Discrimination Against Homosexuals Supplement #1*, *supra* note 170.

2. South Carolina

In 1976, the Attorney General of South Carolina issued the following two sentence opinion confirming that homosexual could not be state employees, “Thank you for your letter of recent date asking whether an individual may be fired or refused employment on the grounds that he is a **homosexual**. In my opinion, a **homosexual** may validly be refused employment by the State and if he is employed, discovery of such a practice would be a valid basis for termination of his employment.”¹¹⁴

3. Ohio

In 1982, the Ohio Attorney General issued an opinion that an employee could be dismissed from the Department of Youth Services on the basis of sexual orientation, if it was shown that his or her sexual orientation impacted job performance. The opinion states that if a person’s homosexual orientation was known or could become known, it would be a reason to fire the employee, because a youth could have a “homosexual panic.” The opinion states: “In your request, you have advised that fifteen to twenty percent of youths served by the Department have the fear that they will be sexually molested, and that such fear may manifest itself in a ‘will kill if approached’ attitude toward homosexual persons. I must assume, for the purposes of this opinion, that the facts regarding ‘homosexual panic’...are correct”¹¹⁵

¹¹⁴ S.C. Op. Atty. Gen. 4345 (1976) (emphasis added).

¹¹⁵ Ohio Op. Atty. Gen. 2-213 (1982).

II. The Impact of State Sodomy Laws on Public and Private Employment

State criminal law provided the basis for the purges of state and local LGBT employees described above, and state and local law enforcement provided the investigative and implementation tools necessary to carry them out. This relationship between state criminal law and law enforcement did not end with the purges of the 1950s and 1960s. Until at least 2003, sodomy laws served as a central reason for LGBT people staying in the closet and artificially crippling their potential in the workplace.¹¹⁶ Despite the Supreme Court's ruling in *Lawrence v. Texas*¹¹⁷ that sodomy laws are unconstitutional, their impact on employment continues today.

At common law, "sodomy" denoted certain types of sexual conduct, whether engaged in by a man and woman or by two persons of the same sex.¹¹⁸ As gay people became more socially visible, the selective enforcement of sodomy laws, often achieved indirectly through employment discrimination, became one of the leading ways in which gay people were forced to lie about their identity and to take on secret lives.¹¹⁹ Beginning in the 1970s, several states decriminalized sodomy for male-female couples, but maintained the criminal prohibition for identical conduct if the parties were of the same sex.¹²⁰ Even though the majority of state laws remained neutral as to the sexual orientation of the parties, over time the term "sodomy" became synonymous with homosexual sexual conduct. This perception reached its zenith in *Bowers v. Hardwick*,¹²¹ where the Supreme Court conflated sodomy, homosexual sodomy and homosexuality.

¹¹⁶ See generally ESKRIDGE, *supra* note 1.

¹¹⁷ 539 U.S. 558 (2003).

¹¹⁸ Anne B. Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L. J. 1073, 1086-89 (1988).

¹¹⁹ Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV 813 (2001); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. REV. 103 (2003).

¹²⁰ Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. REV. 531 (1992).

¹²¹ 478 U.S. 186 (1986).

The nature of the link between sodomy laws and employment discrimination was succinctly stated by Professor Patricia Cain, who wrote that “[s]o long as gay men and lesbians were presumed to engage in acts of criminal sodomy, employers could argue that they should not be forced to hire criminals.”¹²² State governments used this argument to deny employment and licensing with particular frequency in the fields of education and law enforcement. The link between sodomy laws and job discrimination was so widespread and pervasive that it was relied on by the U.S. Supreme Court in *Lawrence* and by numerous state courts in making the decision to prohibit criminalization of private consensual sexual conduct between two adults of the same sex.

A. The U.S. Supreme Court

In *Lawrence v. Texas*, both the majority opinion and Justice O’Connor’s concurring opinion relied on the impact of sodomy statutes on employment as one reason that *Bowers* should be overturned:

- The majority noted that if an adult was convicted in Texas for private, consensual homosexual conduct, “the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.”¹²³
- Justice O’Connor’s concurrence also noted the impact on employment, with the restrictions that would keep a homosexual from joining a variety of professions.¹²⁴

¹²² Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1588 (1993).

¹²³ *Lawrence*, 539 U.S. at 576.

¹²⁴ *Id.* at 581 (O’Connor, J., concurring) (“It appears that petitioners’ convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, e.g., Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer).”).

- O'Connor also noted that “the law ‘legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.’”¹²⁵

It is not surprising that the Court picked up on the employment issue, as the *Lawrence* Petitioners’ brief and several amicus briefs filed before the Supreme Court detailed several specific instances of sodomy statutes impacting employment. These instances included (discussed in chronological order):

- In the 1920s, private institutions like Harvard University mounted secret but systematic efforts to root out gay people.¹²⁶
- A spot check of the records of the Civil Service Commission indicates that between January 1, 1947, and August 1, 1950, approximately 1,700 applicants for Federal positions were denied employment because they had a record of homosexuality or other sex perversion.¹²⁷
- In 1950, following Senator Joseph McCarthy’s denunciation of the employment of gay persons in the State Department, a Senate Committee recommended excluding gay men and lesbians from all government service because homosexual acts violated the law.”¹²⁸

The Committee also cited the general belief that “those who engage in overt acts of

¹²⁵ *Id.* at 582 (citing *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)).

¹²⁶ Petitioner’s Brief at 47 n.36, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Amit R. Paley, *The Secret Court of 1920*, HARV. CRIMSON, Nov. 21, 2002, available at <http://www.thecrimson.com/article.aspx?ref=255428> (accessed Jan. 14, 2003)).

¹²⁷ Amicus Brief of History Professors at 15-16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing S. Rep. No. 241 (1950) at 9); see also Amicus Brief of LGBT Associations at 17-18, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *Developments in the Law-Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1556 (1989)).

¹²⁸ S. Rep. No. 241 (1950) at 3.

perversion lack the emotional stability of normal persons,”¹²⁹ and that homosexuals “constitute security risks”.¹³⁰ It also portrayed homosexuals as predators: “[T]he presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. . . . One homosexual can pollute a Government office.”¹³¹

- In 1953, President Eisenhower issued an executive order requiring the discharge of homosexual employees from federal employment, civilian or military. Thousands of men and women were discharged or forced to resign from civilian and military positions because they were suspected of being gay or lesbian.¹³² In addition, President Eisenhower’s executive order required defense contractors and other private corporations with federal contracts to ferret out and discharge their homosexual employees.¹³³
- Furthermore, to enforce Eisenhower’s executive order, the FBI initiated a widespread system of surveillance to enforce the executive order. As one historian has noted, “Regional FBI officers gathered data on gay bars, compiled lists of other places frequented by homosexuals, and clipped press articles that provided information about

¹²⁹ *Id.* at 4.

¹³⁰ *Id.* at 5.

¹³¹ *Id.* at 4; *see also* Amicus Brief of History Professors at 15-16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). *See also* Petitioner’s Brief at 46-47, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“Beginning in the 1950s, McCarthy-era and later witch hunts led to the firing from federal and federal-contractor employment of thousands of persons suspected of being homosexuals”) (citing JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 91-109 (1976)); *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969); *see also* Amicus Brief of LGBT Associations at 17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“In 1950, a Senate Investigations Subcommittee concluded that homosexuals were unfit for federal employment because they ‘lack the emotional stability of normal persons’ and recommended that all homosexuals be dismissed from government employment”).

¹³² Amicus Brief of History Professors at 15-16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102)(citing D’EMILIO, *supra* note 1, at 44; DEAN, *supra* note 12).

¹³³ *Id.* at 17 (citing David Johnson, *Homosexual Citizens: Washington’s Gay Community Confronts the Civil Service*, WASH. HISTORY, Fall/Winter 1994-95, at 45, 53).

the gay world. Federal investigators engaged in more than fact-finding; they also exhibited considerable zeal in using information they collected.”¹³⁴

- Beginning in 1958, the Florida Legislative Investigation Committee turned its attention to homosexuals working in the State’s universities and public schools. Its initial investigation of the University of Florida resulted in the dismissal of fourteen faculty and staff members, and in the next five years it interrogated some 320 suspected gay men and lesbians. It pressured countless others into relinquishing their teaching positions, and had many students quietly removed from state universities.¹³⁵ Countless state employees, teachers, hospital workers, and others lost their jobs as a result of official policy.¹³⁶
- In 1973, when an open homosexual applied for admission to the New York Bar, a New York appellate court noted: “Accordingly, so long as this statute is in effect (Penal Law §130.38), homosexuality, which, in its fulfillment, usually entails commission of such a statutorily prescribed act, is a factor which could militate against the eligibility of an applicant for admission to the Bar who proposes to pursue this way of life in disregard of the statute.”¹³⁷
- A review of twenty surveys conducted across America between 1980 and 1991 showed that between 16 and 44 percent of gay men and lesbians had experienced discrimination in employment. As one example, Cheryl Summerville’s separation notice from Cracker

¹³⁴ *Id.* at 17 (citing D’EMILIO, *supra* note 1, at 46-47).

¹³⁵ *Id.* at 19 (citing Stacy Braukman, “*Nothing Else Matters But Sex*”: Cold War Narratives of Deviance and the Search for Lesbian Teachers in Florida, 1959-1963, 27 FEMINIST STUDIES 553, 555 (2001); *see also id.* at 553-557, 573 & n.3).

¹³⁶ *Id.* (citing Braukman, at 561).

¹³⁷ Amicus Brief of the American Bar Association at n.7, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102)(citing *Matter of Kimball*, 40 NY A.D. 2d 252, 257 (2d Dept. 1973)).

Barrel read: “This employee is being terminated due to violation of company policy. This employee is gay.”¹³⁸

- In the 1990s, the Dallas Police Department had a policy of denying jobs to applicants who had engaged in violations of § 21.06, without regard to whether they had ever been charged with, or convicted of, any crime. By contrast, the department did not disqualify from consideration heterosexual applicants who engaged in oral or anal sex.¹³⁹
- In 1990, the Texas Attorney General issued an opinion that conviction of “homosexual conduct,” a class C misdemeanor, was an acceptable basis to automatically bar an applicant or dismiss an employee from working for the Texas State Department of Health. The Attorney General maintained this position even though the penal code explicitly stated that conviction of a Class C misdemeanor “does not impose any legal disability or disadvantage.”¹⁴⁰
- Also in the 1990s, the state attorney general of Georgia was able to rescind a job offer to an attorney who had received excellent evaluations as a summer intern because she participated in a religious marriage ceremony with another woman.¹⁴¹
- In 1999, one law firm in Virginia explained that it does “not employ and would not knowingly employ a homosexual attorney” because sodomy “is a crime in Virginia” and

¹³⁸ Amicus Brief of History Professors at 28, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 2d Sess. 70 (1994) (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy); *see also id.* at 6.

¹³⁹ Amicus Brief of Constitutional Law Professors at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *City of Dallas v. England*, 846 S.W.2d 957, 958 (Tex. Ct. App. 1993)).

¹⁴⁰ Tex. Op. Atty. Gen. JM-1237 (1990).

¹⁴¹ *Id.* at 16, citing *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (finding rescission of job offer justified because of the mere *existence* of a sodomy law, when she could be *presumed* to be violating the state law against homosexual sodomy).

“[i]t therefore would be wrong ... for a law firm to employ homosexuals or condone homosexual conduct.”¹⁴²

- In 2002, the New York state legislature found that anti-gay prejudice “has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering.”¹⁴³
- In 2002, the Texas Homosexual Conduct Law was used to justify opposition to the candidacy of an openly gay justice of the peace. As one member of the candidate’s own party argued, “whether you like it or not, there is a state law that prohibits sodomy in the state of Texas, and having a judge who professes to have a lifestyle that violates state law ... is wrong.”¹⁴⁴
- In the pre-*Lawrence* landscape, “individuals *convicted* of violating consensual sodomy statutes can find their ability to pursue their careers sharply curtailed by state licensing laws that deny individuals with criminal convictions, even convictions for misdemeanors like § 21.06, the right to practice certain professions. In Texas, for example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d).”¹⁴⁵

¹⁴² Amicus Brief of the American Bar Association at 12-13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing REPORT OF THE DISTRICT OF COLUMBIA BAR TASK FORCE ON SEXUAL ORIENTATION AND THE LEGAL WORKPLACE App. C, at 39 cmt. 166 (Mar. 1999)).

¹⁴³ Petitioner’s Brief at 47, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing N.Y. Sexual Orientation Non-Discrimination Act, 2002 N.Y. Laws ch. 2).

¹⁴⁴ Amicus Brief of the American Bar Association at 13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Penny Weaver, *Pro-Gay Danburg Ousted by Wong*, HOUSTON VOICE, Nov. 8, 2002, at 1).

¹⁴⁵ Amicus Brief of Constitutional Law Professors at 16-17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

- In January 2003, just as briefs were being filed in the *Lawrence* case, a Virginia legislator suggested that a gay person’s violations of a sodomy law could disqualify her from being a state judge.¹⁴⁶

B. State Courts

In half a dozen states, spread geographically across the nation, state court judges who struck down sodomy laws as unconstitutional under state constitutions have considered evidence concerning the relationship between those laws and employment – and specifically how state government officials had exploited that linkage to discriminate against gay citizens.

1. Arkansas¹⁴⁷

The Supreme Court of Arkansas struck down that state’s sodomy law in 2002.¹⁴⁸ Employment discrimination was presented, and considered, in this case: the opinion itself discusses the fact that the plaintiffs “fear prosecution for violations of the statute and claim that such prosecution could result in their loss of jobs, professional licenses, housing, and child custody.”¹⁴⁹ Three of the plaintiff/appellees brought up employment discrimination as they set forth the harms they had suffered because of the law.¹⁵⁰ One plaintiff/appellee had been hired as a school counselor, but when school administrators learned he was gay, they refused to honor his contract;¹⁵¹ another had to conceal her relationship because her lover was afraid she would be

¹⁴⁶ Amicus Brief of LGBT Associations at 13, n.35, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Scanlon & Halladay, *Sex Life May Be Used Against Judges*, DAILY PRESS, Jan. 15, 2003).

¹⁴⁷ Brief of National Conference for Community Justice et al. as Amici Curiae in Support of Appellee, *Jegley v. Picado*, 349 Ark. 600, 608 (Supreme Court of Arkansas, 2002) (No. 01-815); Brief of the American Psychological Association et al. as Amici Curiae in Support of Appellees and the Ruling of the Court Below, *Jegley*, 394 Ark. 600 (2002) (No. 01-815); Appellant’s Reply Brief, *Jegley*, 394 Ark. 600 (2002) (No. 01-815); Appellant’s Supplemental Brief and Addendum, *Jegley*, 394 Ark. 600 (2002) (No. 01-815).

¹⁴⁸ *Jegley v. Picado*, 349 Ark. 600, 608 (Supreme Court of Arkansas, 2002).

¹⁴⁹ *Id.* at 609.

¹⁵⁰ Appellee’s Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815).

¹⁵¹ Aff. of Brian Manire, *Jegley*, 349 Ark. 600 (No. 01-815).

fired from her teaching job if her sexual orientation became known;¹⁵² and a third feared that if his sexual orientation became known, he would be reported to the State Board of Nursing and lose his nursing license.¹⁵³

2. Maryland¹⁵⁴

The Maryland sodomy law was overturned in *Williams v. Glendening*, in which four of the plaintiffs were members of the Maryland bar.¹⁵⁵ For those plaintiffs, loss of state licensure was a real concern.¹⁵⁶ The court noted this effect of the law, and relied on the legitimacy of these fears as the basis for the plaintiffs' standing: "Since many of the plaintiffs are lawyers, they express anxiety that a conviction might jeopardize their licenses to practice law and thereby their means of earning a livelihood. . . . This court cannot say that the concerns of these plaintiffs are not real."¹⁵⁷

On the basis of these fears, the court held that "the Plaintiffs' concerns are real and that a justiciable issue, ripe for resolution, is presented."¹⁵⁸ The ACLU attorney who brought the Maryland case cited the sodomy law's effect of denying jobs to gays and lesbians as central to defining the injustice alleged in the case.¹⁵⁹ In the press, the issue of job discrimination was

¹⁵² Aff. of Charlotte Downey, *Jegley*, 349 Ark. 600 (No. 01-815).

¹⁵³ Aff. of George Townsend, *Jegley*, 349 Ark. 600 (No. 01-815).

¹⁵⁴ Resources consulted include those noted as well as those listed *supra* note 7, and Dwight H. Sullivan, Michael Adams & Martin H. Schreiber, II, *The Legalization of Same-Gender Sexual Intimacy in Maryland*, 29 U. BALT. L. F. 15 (1999)

¹⁵⁵ No. 9803 6031, 1998 WL 965992, at *1 (Md. Cir. Ct.).

¹⁵⁶ *Id.* at *1 ("Since all are members of the Maryland Bar, they contend that a conviction would affect their ability to continue to practice law.").

¹⁵⁷ *Id.* at *5.

¹⁵⁸ *Id.*

¹⁵⁹ Press Release, American Civil Liberties Union, Maryland's Criminal Ban on 'Unnatural Sex' Targeted by ACLU Class-Action Suit (Feb. 5, 1998) available at <http://www.glapn.org/sodomylaws/usa/maryland/mdnews01.htm>.

mentioned repeatedly.¹⁶⁰ One of the plaintiffs aspired to be a judge, and feared having to admit to having broken the law if the opportunity one day arose.¹⁶¹

3. Massachusetts¹⁶²

Although the legal action taken in Massachusetts did not result in judicial invalidation of the statute, it did result in a stipulation by the state Attorney General not to “prosecute anyone under the challenged laws absent probable cause to believe that the prohibited conduct occurred either in public or without consent.”¹⁶³ The opinion mentions that the plaintiffs “fear arrest and prosecution, and the attendant consequences for their careers and personal lives.”¹⁶⁴ The briefs filed in the case discussed employment discrimination more extensively.¹⁶⁵ The plaintiff’s briefs state that they believed that they would lose their jobs and not get the professional licenses as a result of the sodomy law;¹⁶⁶ the ACLU’s *amicus* brief noted that the plaintiffs feared losing job prospects if they had a criminal record;¹⁶⁷ the history of sodomy laws and discriminatory denial of employment and security clearances for government work was presented in the *amicus* brief by the Massachusetts Psychological Association and others as justifying the fears of the

¹⁶⁰ Caitlin Franke, *Homosexuals Win Challenge to State Sex Practices Law*, THE BALTIMORE SUN, Oct. 17, 1998; Caitlin Franke, *Gay, Lesbian Activists Target Maryland Law Southeast County Briefs*, THE BALTIMORE SUN, Aug. 26, 1998.

¹⁶¹ Franke, *Gay, Lesbian*, *supra* note 32.

¹⁶² Resources consulted include those noted as well as those listed *supra* note 7, as well as Pls.’ Reply Br., *Gay & Lesbian Advocates & Defenders (GLAD) v. Attorney General*, 436 Mass. 132, 133 (Mass. 2002).

¹⁶³ *Gay & Lesbian Advocates & Defenders (GLAD) v. Attorney General*, 436 Mass. 132, 133 (Mass. 2002).

¹⁶⁴ *Id.* at 134.

¹⁶⁵ Br. of Am. Civ. Lib. Un. of Mass. as Amicus Curiae in Supp. of Appellant’s Br. at 29, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Br. for Defs.-Appellees at 5, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Br. of Mass. Lesbian and Gay Bar Assoc. et al. as Amici Curiae at 37, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Br. of Mass. Psych. Assoc. et al. as Amici Curiae at 19-23, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Br. of Pls.-Appellants at 6, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Reply Br. of Pls.-Appellants at 17, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

¹⁶⁶ Br. of Pls.-Appellants at 6, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

¹⁶⁷ Br. of Am. Civ. Lib. Un. of Mass. as Amicus Curiae in Supp. of Appellant’s Br. at 29, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539); Mass. Lesbian and Gay Bar Assoc. et al. as Amici Curiae at 37, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

plaintiffs;¹⁶⁸ and the plaintiffs argued that the potential for loss of licensure, teaching jobs, and Bar membership gave them standing to bring suit.¹⁶⁹

4. Minnesota¹⁷⁰

The Minnesota state sodomy law was invalidated in 2001 by a statewide class action suit.¹⁷¹ Like in Maryland, the Minnesota court used the possibility of adverse effects on the plaintiffs' employment to give them standing. The plaintiffs here represented a wide variety of professions—teachers and doctors joined lawyers in fighting the state sodomy law. The court noted that the “state-mandated application for a medical license requires applicants to swear under oath that they have ‘not engaged in any of the acts prohibited by the statutes of Minnesota’” and that the lawyers must adhere to their rules of professional conduct, which dictates that all attorneys will “follow the requirements of the law.”¹⁷² The court then detailed these “collateral injur[ies]”: “Dr. Krebs, who is now in her residency, faces the prospect of having to state under oath, as part of her application later this year for a physician license from the Minnesota Board of Medical Practice, that she has ‘not engaged in any of the acts prohibited by the statutes of Minnesota.’ Similarly...Mr. Roe,¹⁷³ a licensed elementary school teacher, and Mr. Duran and Ms. Doe, licensed Minnesota lawyers, fear adverse licensure consequences from any disclosure, voluntary or otherwise, of their past and future violations” of the state sodomy statute.¹⁷⁴

¹⁶⁸ Br. of Mass. Psych. Assoc. et al. as Amici Curiae at 19-23, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

¹⁶⁹ Reply Br. of Pls.-Appellants at 17, *GLAD*, 436 Mass. 132 (2002) (No. SJC-08539).

¹⁷⁰ Resources consulted include those noted as well as those listed *supra* note 7.

¹⁷¹ *Doe v. Ventura*, 2001 WL 543734 (D. Minn. May 15, 2001).

¹⁷² *Id.* at *1.

¹⁷³ It should be noted that in the case of Mr. Roe, the adverse effect on employment could not be linked to his sexual orientation—he is a heterosexual, married man, and therefore outside the class of plaintiffs who make up the focus of this memorandum.

¹⁷⁴ *Id.* at *4.

5. Montana¹⁷⁵

Montana's same-sex sodomy statute was invalidated in 1997.¹⁷⁶ Again, the issue of employment discrimination came in the arguments for standing: “[Respondents] contend that the damage to their self-esteem and dignity and the fear that they will be prosecuted or will lose their livelihood or custody of their children create an emotional injury that gives them standing to challenge the statute. For example, two Respondents are employed or are seeking employment in positions requiring state licenses. Because they engage in conduct classified as a felony, they fear they could lose their professional licenses.”¹⁷⁷ The specifics of the respondents’ fears were laid out with greater detail in the filings in the case. The two respondents who needed to be licensed by the state were a high school history teacher with more than 25 years experience, and a midwife seeking certification. Neither of these respondents could attain licensure if they were convicted of a felony (which sodomy was under then-existing Montana law).¹⁷⁸ Not only would they have been unable to attain licensure were they prosecuted and convicted under the statute, but they could have had their licensure revoked at any time, even without prosecution: “[C]ertification in both professions requires that the individual be ‘of good moral and professional character’.”¹⁷⁹ “Even if they are never prosecuted, the statute could be used to support a finding that they are engaged in immoral conduct.”¹⁸⁰

6. Tennessee¹⁸¹

¹⁷⁵ Resources consulted include those noted as well as those listed *supra* note 7.

¹⁷⁶ *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

¹⁷⁷ *Id.* at 441.

¹⁷⁸ Br. of Resp’t at 7, *Gryczan v. State*, 283 Mont. 433, No. 96-202 (1997).

¹⁷⁹ *Id.* at 8.

¹⁸⁰ *Id.*

¹⁸¹ Resources consulted include those noted as well as those listed *supra* note 7. Filings beyond the APA brief (cited below) were not available.

Employment issues arose several times in the case that invalidated the Tennessee sodomy law. In the opinion itself, the court noted that the identity of one of the plaintiffs (John Doe) had been sealed “due to concern that he would be fired from his job if his violation of the [Homosexual Practices Act] became known to his employer.”¹⁸² The court also noted that the plaintiffs “believe they are threatened with prosecution for violations of the statute, which could result in plaintiffs losing their jobs, professional licenses, and/or housing should they be convicted.”¹⁸³

Lawrence v. Texas and these state court cases document how state criminal law and law enforcement was used to limit LGBT people’s ability to work in the public and private sector, starting with the purges in the 1950s and 1960s and continuing until this decade. Thirteen states still had sodomy laws on their books in 2003 when the Supreme Court declared them unconstitutional. Of those thirteen states, only the legislature of one state, Missouri, has repealed its sodomy law statute. Efforts to repeal sodomy laws in the other states, both before and after *Lawrence*, have failed:

- In 2004, SB 560 was introduced in the North Carolina¹⁸⁴ state senate to amend the state sodomy law in order to comply with *Lawrence* but the effort failed.
- In 2007, a similar attempt to amend Utah’s sodomy law¹⁸⁵ to comply with *Lawrence* also failed.¹⁸⁶ The 2007 amendment was sponsored by Utah Senator Scott McCoy, who said it was ““bad form when we have unconstitutional laws on

¹⁸² *Campbell v. Sundquist*, 926 S.W.2d 250, 253 n.1 (Tenn. Ct. App. 1996).

¹⁸³ *Id.* at 253.

¹⁸⁴ NC GEN. STAT. ANN. § 14-177 (2004).

¹⁸⁵ *Id.* at § 76-5-403.

¹⁸⁶ Text of the proposed bill, S.B. 169, 2007 General Session, available at <http://le.utah.gov/~2007/bills/sbillint/sb0169.pdf>.

the books,” which may be misused by prosecutors and judges.¹⁸⁷ However, according to Senate Majority Leader Curt Bramble, ““The Senate caucus unanimously decided that sodomy should not be legal in the state of Utah.””¹⁸⁸

- Seven attempts to repeal Texas’s sodomy law¹⁸⁹ prior to the *Lawrence* decision failed and the law still remains on the books
- In Virginia, attempts to decriminalize consensual sodomy in 1997 and to reduce penalties in 2000 both failed, and its sodomy law¹⁹⁰ remains on the book today.
- Idaho’s sodomy laws was taken off the books in 1971 but then reinstated in 1972, where it remains today.¹⁹¹
- An effort to repeal Louisiana’s sodomy law¹⁹² in 2001 failed in the state house and senate.

None of the thirteen states that had sodomy laws when *Lawrence* was decided had anti-discrimination statutes prohibiting discrimination in employment on the basis of sexual orientation or gender identity. In fact, state sodomy laws have been used as a basis to argue against passing such protections. For example, when Rhode Island enacted its anti-discrimination law in 1995,¹⁹³ at least one state senator argued that its sodomy law, which remained on the books until 1998, prevented the state from enacting an anti-discrimination

¹⁸⁷ Arthur S. Leonard, LESBIAN & GAY L. NOTES (Mar. 2007).

¹⁸⁸ *Id.*

¹⁸⁹ TEX. CODE ANN. § 21.06.

¹⁹⁰ VA. CODE ANN. § 18.2-361 (2009).

¹⁹¹ IDAHO CODE ANN. §§ 18-6605, 18-6606 (2008).

¹⁹² LA. REV. STAT. ANN. § 14:89 (2008).

¹⁹³ R.I. GEN. LAWS § 28-5.1-5.2 (1949).

statute. Senator Lawrence noted that if Rhode Island “has a right to criminalize sodomy, it should not be required to adopt legislation protecting homosexuals from discrimination.”¹⁹⁴

The following sections trace two legacies of the purges of LGBT people from public employment and the criminalization of same-sex behavior: the use of state sodomy laws to deny LGBT people employment in law enforcement, and state occupational licensing requirements that impaired the ability of LGBT people to work in the public and private sectors, in particular in the field of education.

III. Sodomy Laws and Discrimination in Law Enforcement

One of the areas of public employment where the legacy of purges and the criminalization of same-sex sexual behavior have had the most impact is in law enforcement. Federal, state and local law enforcement agencies adopted policies that no LGBT people could serve in law enforcement because they were potential felons under state sodomy laws, and these decisions were upheld by courts. Explicit policies ranged from those in Dallas, Texas challenged in the 1980s¹⁹⁵ and 90s,¹⁹⁶ to a policy in Puerto Rico¹⁹⁷ that was in place until 2001. The legacy of this history is clearly demonstrated in Chapter 12 of this report, which provides almost 400 specific examples of discrimination against LGBT public employees. Over 40 percent of these examples deal with law enforcement -- 144 involve discrimination against public safety officers and 30 deal with corrections officers.

The following court cases illustrate how sodomy laws were the basis for discrimination against LGBT employees in law enforcement:

¹⁹⁴ See Senator Lawrence, Floor Statement, Rhode Island Senate, June 28, 1995.

¹⁹⁵ *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981).

¹⁹⁶ *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993).

¹⁹⁷ *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001).

- ***Childers v. Dallas Police Dep’t*, 513 F. Supp. 134 (N.D. Tex. 1981).** In *Childers*, the plaintiff was not hired for a position with the Dallas Police Department following his disclosure during his interview that he was gay.¹⁹⁸ Among the reasons stated for the Department’s refusal to hire Childers was that he was a “habitual lawbreaker” because “his sexual practices violated state law.”¹⁹⁹ The interviewer also considered that he would be a security risk “because of the kind of contraband that the property room controls [which included sexual paraphernalia] and because Childers might warn other homosexuals of impending police raids.”²⁰⁰ In upholding the Department’s refusal to hire Childers against Childers’ due process challenge, the court noted that he had admitted conduct that violated the Police Department Code of Conduct in a number of ways, including by violating Texas’s sodomy laws and “cohabit[ing] with a sex pervert of the same sex.”²⁰¹ It also held that “tolerance of homosexual conduct might be construed as tacit approval, rendering the police department subject to approbation and causing interference with the effective performance of its function.”²⁰²

• ***Termination Of An Assistant United States Attorney On Grounds Related To His Acknowledged Homosexuality*, 7 U.S. Op. Off. Legal Counsel 46, 1983 WL 187355 (O.L.C.).** In a 1983 opinion, the Office of Legal Counsel of the Department of Justice responded to a request for advice on the legal implications of failing to retain an Assistant U.S. Attorney who is “an acknowledged homosexual.”²⁰³ The only reason for the proposed termination was the particular Assistant United States Attorney’s (AUSA)

¹⁹⁸ *Childers*, 513 F. Supp. at 137-38.

¹⁹⁹ *Id.* at 138.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 144.

²⁰² *Id.* at 147.

²⁰³ *Termination Of An Assistant United States Attorney On Grounds Related To His Acknowledged Homosexuality*, 7 U.S. Op. Off. Legal Counsel at 46.

“homosexual conduct.” The opinion assumes that any letter of termination “would note that homosexual acts are a crime under law of the state in which the AUSA is stationed, and that the Department believes that any such violations of local criminal law reflect adversely on the AUSA’s fitness to represent the government as a prosecutor.”²⁰⁴ The opinion further notes that “it would be permissible for the department to refuse to retain an AUSA upon a determination that his homosexual conduct would, because it violates state criminal law, adversely affect his performance by calling into question his and, therefore, the Department’s, commitment to upholding the law.”²⁰⁵ In discussing the requirement established by the courts of a nexus between the conduct and the job performance, it further states that “the most effective way to prove adverse effect on job performance would be to prove that the special nature of a prosecutor’s job -- his public representation of the entire department, his duty to uphold the law, and the potential for accusations of hypocrisy for hiring a lawbreaker to enforce the law -- requires that there be no taint of criminality.”²⁰⁶ The opinion then acknowledges that on the particular facts of the case—the AUSA in question had an excellent record, and the laws of the state in which he was stationed only enforced the criminal sodomy law against private conduct—the arguments would not likely prevail without stronger evidence of a nexus between any state law violations and adverse effects on job performance.²⁰⁷

- ***Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).** Appellant Margaret Padula applied for a job as a special agent with the FBI, and ranked well among all applicants based on her interview and a written examination. After a background check revealed, and a

²⁰⁴ *Id.* at 47.

²⁰⁵ *Id.* at 46.

²⁰⁶ *Id.* at 51-52.

²⁰⁷ *Id.* at 46, 55-56.

follow-up interview confirmed, that she was a lesbian, however, she was not hired for the position. Padula alleged that she was not hired based solely on the fact that she was a lesbian, and argued that this decision denied her equal protection of the law under the Fourteenth Amendment. Padula requested that the court treat homosexuality as a suspect or quasi-suspect classification for purposes of its analysis. The court rejected Padula's claim that discrimination against gays and lesbians merited any kind of heightened standard of review, especially following the U.S. Supreme Court's decision in *Bowers v. Hardwick*, noting that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that the state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."²⁰⁸ In subjecting the FBI's hiring practices to rational basis review, the court also invoked the criminality associated with homosexuality as a justification for employment discrimination: "To have agents who engage in conduct criminalized in roughly one-half of the states would undermine the law enforcement credibility of the Bureau. Perhaps more important, FBI agents perform counterintelligence duties that involve highly classified matters relating to national security. It is not irrational for the Bureau to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality

²⁰⁸ *Padula*, 822 F.2d at 103.

exposes many homosexuals, even ‘open’ homosexuals, to the risk of possible blackmail to protect their partners, if not themselves.”²⁰⁹

- ***Todd v. Navarro*, 698 F. Supp. 871 (S.D. Fla. 1988).** The Plaintiff was a deputy sheriff who asserted that she was discharged from the sheriff’s office solely because she was a lesbian. In denying any claim to heightened scrutiny, the court cited approvingly the D.C. Circuit’s discussion in *Padula v. Webster* of the “anomal[y]” of providing strict scrutiny for purposes of equal protection analysis when the conduct that defines the class may be constitutionally criminalized concluding that “[i]n the context of both military and law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end.”²¹⁰ In applying rational basis review, the court summarily denied the Plaintiff’s claim.²¹¹
- ***Dawson v. State Law Enforcement Div.*, 1992 WL 208967 (D.S.C. Apr 6, 1992).** The Plaintiff worked with the State Law Enforcement Department (SLED) for sixteen years, but was asked for his resignation following allegations that he had been involved in sexual activity with a co-worker’s husband. Dawson denied any homosexual activity, but claimed that to the extent the denial was based on homosexual conduct, he had been the victim of an equal protection violation because “SLED continues to employ an officer who was charged with a criminal violation involving off-duty gambling; an employee who is the mother of a child born out of wedlock; and employees who committed adultery while employees of SLED.”²¹² Accordingly, he argued that he should not have been terminated on the basis that he was suspected of violating state sodomy laws when

²⁰⁹ *Id.* at 104.

²¹⁰ *Todd v. Navarro*, 698 F. Supp. 871, 874-5 (S.D.Fla. 1988).

²¹¹ *Id.* at 875.

²¹² *Dawson*, 1992 WL 208967, at *6.

other employees were also engaged in criminal activity but were not terminated for violating other state laws (gambling, adultery, and fornication). The court, however, dismissed the argument and upheld his dismissal because “homosexual conduct is not a fundamental right and because Dawson is not a member of a suspect class.”²¹³

- ***City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993).** The Dallas Police Department denied the plaintiff employment because she stated truthfully that she was a lesbian, which meant that she was, in the eyes of the Department, in presumptive violation of departmental policy and the Texas sodomy statute.²¹⁴ The trial court ruled that the state sodomy statute, and the Department’s anti-gay hiring policy that derived from it were unconstitutional, and the Texas court of appeals affirmed.
- ***Woodward v. Gallagher*, No. S9-5776 (Orange Co., Fla. Cir. Ct., filed June 9, 1992) (discussed in 21 Fordham Urb. L.J. 997, 1035 (1994)).** In Florida, the Orange County Sheriff fired a deputy, despite his concededly “exemplary” record, when it was discovered that he was gay. The sheriff’s office cited the existence of sodomy laws as a justification for the dismissal, noting that Florida prohibits oral or anal sex, and that deputies might have to work with agencies in other states that also have such laws. The court rejected these arguments and found that the anti-gay discrimination violated the state constitutional right to privacy.
- ***Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).** Shahar’s offer to work at the Attorney General’s office in Georgia was rescinded after she made comments to her

²¹³ *Id.* at *7.

²¹⁴ *City of Dallas v. England*, 846 S.W.2d at 958.

coworkers about her upcoming wedding to her same-sex partner.²¹⁵ The Attorney General's office revoked the offer because employing Shahar "would create the appearance of conflicting interpretations of Georgia law and affect public credibility about the Department's interpretations [and] . . . interfere with the Department's ability to enforce Georgia's sodomy law."²¹⁶ In an *en banc* decision, the Eleventh Circuit accepted the Attorney General's arguments and held that the discrimination against Shahar was justified based in large part on the existence of sodomy laws in Georgia. For example, in rejecting Shahar's attempted analogy between her case and *Loving v. Virginia* as "not helpful," the court noted "concerns about public perceptions about whether a Staff Attorney in the Attorney General's office is engaged in an ongoing violation of criminal laws against homosexual sodomy--which laws the Supreme Court has said are valid."²¹⁷ In addition, in referring to the U.S. Supreme Court's 1986 decision in *Bowers v. Hardwick* (in which the Georgia Attorney General was the defendant), the court noted that hiring Shahar would not only have raised issues of perception but also of morale, given that the lawyers in the department had worked hard to ensure that sodomy could still be constitutionally criminalized.²¹⁸

- ***Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001).** Until 2001, a Puerto Rico Police Department had a policy of prohibiting employment of an officer who

²¹⁵ *Shahar*, 114 F.3d at 1100.

²¹⁶ *Id.* at 1101.

²¹⁷ *Id.* at 1105 n.17.

²¹⁸ *See id.* at 1108 (noting that the Department had recently won "a recent battle about homosexual sodomy--highly visible litigation in which its lawyers worked to uphold the lawful prohibition of homosexual sodomy. This history makes it particularly reasonable for the Attorney General to worry about the internal consequences for his professional staff (for example, loss of morale, loss of cohesiveness and so forth) of allowing a lawyer, who openly--for instance, on her employment application and in statements to coworkers--represents herself to be 'married' to a person of the same sex, to become part of his staff").

even associated with homosexuals. In *Gay Officers Action League v. Puerto Rico*,²¹⁹ the First Circuit upheld the District Court decision to declare the policy unconstitutional. The First Circuit noted in its decision that the policy had a chilling effect on First Amendment rights even if, as the Commonwealth claimed, it was an unenforced policy. The court cast doubt on the Commonwealth's assertion that the policy was a dead letter, observing that the case history revealed a bitter fight on part of the Commonwealth to maintain the policy, including an offer to rewrite the regulation to prohibit association with "persons of dubious reputation."²²⁰

V. State Occupational Licensing Requirements and Discrimination in Education

The legacy of the purges of LGBT public employees and the criminalization of same-sex behavior also continues to the present in the form of morality requirements for state issued occupational licenses. Under these requirements, LGBT people across the country have been considered immoral and denied professional licenses or have had them revoked. While this form of employment discrimination against LGBT people by state governments has impacted thousands of public and private employees, it has had a disproportionate impact on public employees who are much more likely to be in professions that require occupational licenses.

One of the areas where this discrimination in licensing has been the most prevalent is in education. The legacy of this history of discrimination in public education is clearly demonstrated in the chapter of this report providing almost 400 specific examples of discrimination against LGBT public employees, over 27 percent deal with public employees in education- 7 percent employed by college and universities and 20 percent employed by elementary, middle, and high schools.

²¹⁹ 247 F.3d 288 (1st Cir. 2001).

²²⁰ *Id.* at 292.

Over 40 percent of public employees in the United States are in professions that require professional licenses issued by state governments, and many of these licenses have moral fitness requirements. In 2003, the Council of State Governments estimated that in the United States, more than 800 occupations were licensed in at least one state. Altogether more than 1,100 occupations are either licensed, certified or registered by state governments.²²¹ According to a recent analysis of data collected in a 2006 Gallup Poll, over 29 percent of the workforce in the United States is required to hold an occupational license from a government agency.²²² Government workers are more likely to need a license than workers in the private sector: 41 percent of government workers were in jobs that required an occupational license in 2006, compared with 25 percent of workers in the private sector.²²³

A large number of these licenses have moral fitness tests that were used to exclude LGBT people. These tests ranged from exclusions based on “gross immorality,” “immoral conduct” and acts or crimes involving “moral turpitude” to more general bans on “unprofessional conduct.” For example, in the 1950s and 1960s in California, as in virtually all the other states, “gross immorality” was a statutory basis for professional disciplinary action against doctors, dentists, pharmacists, embalmers, and guardians.²²⁴ In addition, conviction of a “crime involving moral turpitude” precluded people from dozens of more occupations and was also a common basis for revoking a professional license in most states.²²⁵ In 1969, the California Supreme Court

²²¹ Council of Licensure, Enforcement, and Regulation (CLEAR) (2004), <http://www.clearhq.org>.

²²² Morris M. Kliener and Alan B. Krueger, Institute for the Study of Labor, *The Prevalence and Effects of Occupational Licensing*, Discussion Paper No. 3765, Aug. 2008, at 2. Prior studies suggest that over 20 percent of the U.S. workforce works in occupations licensed by state governments. *Id.* at 3.

²²³ *Id.* at 12 panel C.

²²⁴ Cal. Business and Professions Code §§ 2361(d) (doctors), 1680(8) (dentists), 3105 (optometrists), 4350.5 (pharmacists), 7698 (funeral directors and embalmers) (West 1954); Cal. Probate Code § 1580(4) (guardians) (West 1954).

²²⁵ E.g., Cal. Business and Professional Code §§ 1000-10(b) (chiropractors), 1679 (dentists), 2383 (doctors), 2685(d) (physical therapists), 3105 (optometrists), 4214 (pharmacists), 6775 (engineers) (West 1954).

summarized the state's rules in *Morrison v. State Board of Education*,²²⁶ where a gay schoolteacher was unconstitutionally discharged because of his sexual orientation:

Along with public school teachers, all state college employees (Ed. Code, § 24306, subd. (a)), all state civil service workers (Gov. Code, § 19572, subd. (1)), and all barbers (Bus. & Prof. Code, § 6582) can be disciplined for “immoral conduct.” The prohibition against “acts involving moral turpitude” applies to attorneys (Bus. & Prof. Code, § 6106) and to technicians, bioanalysts and trainees employed in clinical laboratories (Bus. & Prof. Code, § 1320), as well as to teachers. The ban on “unprofessional conduct” is particularly common, covering not only teachers, but also dentists (Bus. & Prof. Code, § 1670), physicians (Bus. & Prof. Code, § 2361), vocational nurses (Bus. & Prof. Code, § 2878, subd. (a)), optometrists (Bus. & Prof. Code, § 3090), pharmacists (Bus. & Prof. Code, § 4350), psychiatric technicians (Bus. & Prof. Code, § 4521, subd. (a)), employment agency officials (Bus. & Prof. Code, § 9993), state college employees (Ed. Code, § 24306, subd. (b)), certified shorthand reporters (Bus. & Prof. Code, § 8025), and funeral directors and embalmers (Bus. & Prof. Code, § 7707)

“Gross immorality” constitutes ground for disciplinary measures against doctors (Bus. & Prof. Code, § 2361, subd. (d)), dentists (Bus. & Prof. Code, § 1680, subd. (8)), optometrists (Bus. & Prof. Code, § 3105), pharmacists (Bus. & Prof. Code, § 4350.5, subd. (a)), funeral directors and embalmers (Bus. & Prof. Code, § 7698) and guardians (Prob. Code, § 1580, subd. (4)) [T]he most common basis for revocation of licenses and certificates is conviction of a crime involving moral turpitude. Among those covered by such a provision are trainers of guide dogs for the blind (Bus. & Prof. Code, § 7211.9, subd. (d)), chiropractors (Bus. & Prof. Code, § 1000-1010), laboratory technicians and bioanalysts (Bus. & Prof. Code § 1320, subd. (k)), dentists (Bus. & Prof. Code, § 1679), doctors (Bus. & Prof. Code, § 2361, subd. (e)), physical therapists (Bus. & Prof. Code, § 2660, subd. (d)), registered nurses (Bus. & Prof. Code, § 2761, subd. (f)), vocational nurses (Bus. & Prof. Code, § 2878, subd. (f)), psychologists (Bus. & Prof. Code, § 2960, subd. (a)), optometrists (Bus. & Prof. Code § 3094), pharmacists (Bus. & Prof. Code, § 4354), psychiatric technicians (Bus. & Prof. Code, § 4521, subd. (f)), veterinarians (Bus. & Prof. Code, § 4882, subd. (b)), attorneys (Bus. & Prof. Code, § 6101), barbers (Bus. & Prof. Code, § 6576), engineers (Bus. & Prof. Code, § 6775, subd. (a)), collection agency officials (Bus. & Prof. Code, § 6930), private detectives (Bus. & Prof. Code, § 7551, subd. (d)), shorthand reporters (Bus. & Prof. Code, § 8025, subd. (a)), geologists (Bus. & Prof. Code, § 7860, subd. (a)), social workers (Bus. Prof. Code, § 9028, subd. (a)), and employment agency officials (Bus. & Prof. Code, § 9993, subd. (e)).

²²⁶ 1 Cal. 3d 214, 227-29 & n.21 (1969).

These requirements remain common for occupational licenses today. For example, in Utah, the Division of Occupational and Professional Licensing (the “Division”) administers and enforces all of the states licensing laws.²²⁷ Currently, the Division issues licenses in approximately 60 categories of licensure, with most categories including several individual license classifications.²²⁸ The Division may refuse to issue, renew, revoke, suspend, restrict, or place on probation a license of any licensee if “the applicant or licensee has engaged in unprofessional conduct.”²²⁹ The definition of “unprofessional conduct” includes “probation[s] with respect to a crime of moral turpitude.”²³⁰ Moreover, most of the occupations and professions that must be licensed under Title 58 also contain language requiring that the applicant must “be of good moral character.”

²²⁷ UTAH CODE ANN. § 58-1-103 (2008) (“Occupations and Professions.”.) The Division is assisted by approximately 60 professional boards and commissions that advise the Division by recommending, assisting and supporting the Division in taking appropriate action in licensure and investigative matters. General Information About the Utah Division of Occupational and Professional Licensing, <http://www.dopl.utah.gov/info.html> (last visited Sept. 3, 2009).

²²⁸ The Division issues licenses for the following occupations and professions promulgated by the appropriate acts under Title 58: Architects Licensing Act; Podiatric Physician Licensing Act; Funeral Services Licensing Act; Barber, Cosmetologist/Barber, Esthetician, Electrologist, and Nail Technician Licensing Act; Health Care Providers Immunity from Liability Act; Health Facility Administrator Act; Utah Optometry Practice Act; Pharmacy Practice Act; Environmental Health Scientist Act; Professional Engineers and Professional Land Surveyors Licensing Act; Physical Therapist Practice Act; Certified Public Accountant Licensing Act; Veterinary Practice Act; Nurse Practice Act; Nurse Licensure Compact; Advanced Practice Registered Nurse Compact; Utah Controlled Substances Act; Utah Drug Paraphernalia Act; Imitation Controlled Substances Act; Utah Controlled Substance Precursor Act; Clandestine Drug Lab Act; Drug Dealer’s Liability Act; Alternative Dispute Resolution Providers Certification Act; Recreational Therapy Practice Act; Athletic Trainer Licensing Act; Speech-language Pathology and Audiology Licensing Act; Occupational Therapy Practice Act; Nurse Midwife Practice Act; Hearing Instrument Specialist Licensing Act; Massage Therapy Practice Act; Dietitian Certification Act; Private Probation Provider Licensing Act; Landscape Architects Licensing Act; Radiology Technologist and Radiology Practical Technician Licensing Act; Utah Construction Trades Licensing Act; Utah Uniform Building Standards Act; Respiratory Care Practices Act; Mental Health Professional Practice Act; Psychologist Licensing Act; Security Personnel Licensing Act; Deception Detection Examiners Licensing Act; Utah Medical Practice Act; Physicians Education Fund; Utah Osteopathic Medical Practice Act; Dentist and Dental Hygienist Practice Act; Physician Assistant Act; Naturopathic Physician Practice Act; Acupuncture Licensing Act; Chiropractic Physician Practice Act; Certified Court Reporters Licensing Act; Genetic Counselors Licensing Act; Professional Geologist Licensing Act; Direct-entry Midwife Act.

²²⁹ UTAH CODE ANN. § 58-1-401(2)(a)(2008).

²³⁰ *Id.* at § 58-1-501(2)(c).

Ample documentation supports that these moral fitness tests were used to deny LGBT people licenses and limit their employment opportunities.²³¹ Moreover, the documented cases likely under represent the actual impact on LGBT employees since “it is most likely that homosexual individuals in licensed professions keep a low profile for fear of potential dismissal or discipline.”²³² For example, when Governor Mario Cuomo issued New York’s executive order forbidding employment discrimination the basis of sexual orientation in 1983, he stated: “As Secretary of State, I was required to issue special regulations to prohibit discrimination against individuals seeking licenses for certain occupations or corporate privileges. Up to that time such licenses were denied on the basis of sexual orientation or even presumed sexual orientation. There is no reason to believe that the discrimination apparent in that part of government was confined there.”²³³

As explained above, the fact that applicants and licensees could even potentially violate state sodomy laws also resulted in the denial and revocation of occupational licenses issued by state governments. In her concurrence in *Lawrence* striking down all remaining sodomy laws in the United States, Justice O’Connor’s noted that “[i]t appears that petitioners’ convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design.”²³⁴ State courts also recognized the direct link between sodomy laws and LGBT people’s eligibility for occupational licenses when

²³¹ Rivera, *supra* note 230, at 1078. (“From those cases which have been published, however, it is evident that the homosexuality of a prospective licensee is often a dispositive factor”).

²³² *Id.*

²³³ Mario M. Cuomo, Nov. 18, 1983, Executive Order 28: Establishing a Task Force on Sexual Orientation Discrimination, N.Y. COMP. CODE R. & REGS. tit. 9, § 4.28 (1983).

²³⁴ *Lawrence*, 539 U.S. at 581 (O’Connor, J., concurring) *See, e.g.*, Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer.)” See also, Amicus Brief of Constitutional Law Professors at 16-17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). (“In Texas, for example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d).”)

striking down their sodomy laws. Plaintiffs from numerous professional disciplines requiring state licensure initiated a number of challenges to sodomy laws in state courts. In each of these cases, the plaintiffs were granted standing because they feared losing their licenses and the sodomy laws were declared unconstitutional.²³⁵ In *Jegley v. Picado*,²³⁶ a nurse joined two educational professionals to challenge Arkansas's sodomy law. In *Doe v. Ventura*,²³⁷ two licensed Minnesota lawyers and a doctor joined a teacher to challenge the state's sodomy law. Both *Gryczan v. State*²³⁸ and *Campbell v. Sundquist*²³⁹ were brought by plaintiffs employed in or seeking employment in positions requiring state licenses. The *Campbell* plaintiff requested that his identity be sealed "due to the concern that he would be fired from his job if his violation of the [Homosexual Practices Act] became known to his employer." The Maryland case which overturned the state's sodomy law, *Williams v. Glendening*,²⁴⁰ was brought by four licensed lawyers who legitimately "express[ed] anxiety that a conviction might jeopardize their licenses to practice law and thereby their means of earning a livelihood."²⁴¹ The court went on to admit that it "cannot say that the concerns of [the] plaintiffs are not real."²⁴²

Court cases and historians also document a number of specific cases of people who lost their licenses because they were, or were even suspected of being, LGBT, including lawyers,²⁴³

²³⁵ *Jegley*, 349 Ark. at 621-622; *Doe*, 2001 WL 543734 at *9; *Gryczan*, 283 Mont. At 446; *Campbell*, 926 S.W.2d at 266; *Williams v. Glendening*, No. 9803 6031, 1998 WL 965992, at *1 (Md. Cir. Ct.).

²³⁶ 349 Ark. at 608.

²³⁷ 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001).

²³⁸ 283 Mont. 433 (Mont. 1997).

²³⁹ 926 S.W.2d 250, 253 n.1 (Tenn. Ct. App. 1996).

²⁴⁰ *Williams*, 1998 WL 965992 at *1.

²⁴¹ *Id.* at *5.

²⁴² *Id.*

²⁴³ See, e.g., *In re Boyd*, 307 P.2d 625 (Cal. 1957) Marcus, *Making History*, 149-151; *In Application of Kimball*, 301 N.E.2d 436 (N.Y. 1973). (Plaintiff, a lawyer who had previously been licensed in Florida and then had his license revoked based on his sodomy conviction under the Florida sodomy law, brought suit against the New York State Bar for denying his bar application on the basis that his homosexuality per se made him unfit. The court held that a bar applicant may not be rejected as "unfit" or "lacking in character" because of homosexuality per se, and ordered the State Bar to reconsider the application.) *Fla. Bd. of Bar Exam'rs v. Eimers*, 358 So. 2d 7 (Fla. 1978). (The Florida State Bar sought guidance from Florida Supreme Court as to whether applicant should be denied admission for lack

doctors,²⁴⁴ pilots,²⁴⁵ hairdressers,²⁴⁶ and realtors.²⁴⁷ For these plaintiffs, and other LGBT public employees, the ramifications of having a license denied or revoked extended beyond the immediate loss of a job. The loss of an occupational license means it is illegal to get *any* job in the state in that occupation.²⁴⁸ As legal scholar Rhonda Rivera explains further: “The denial of entrance into a profession toward which time and money have been invested or the revocation of

of “good moral character” because of his admitted orientation as homosexual per se. The court held that a “rational connection” to fitness was required to deny bar admission, and held: “[w]hile Respondent’s act definitely affronts public conventions...there is no showing in the record of a substantial nexus between his antisocial act, or its notoriety, or place of commission, and a manifest permanent inability on Respondent’s part to live up to the professional responsibility and conduct required of an attorney.”) *Florida Bd. of Bar Examiners Re N.R.S.*, 403 So.2d 1315 (Fla. 1981). (A lawyer applying to the Florida Bar admitted a preference for men but refused to answer questions about his sexual practice. He petitioned the Court to order the Board to certify him for admission to practice. The Florida Supreme Court held that “[p]rivate noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law. This might not be true of commercial or nonconsensual sex or sex involving minors....In the instant case the board may ask the petitioner to respond to further questioning if, in good faith, it finds a need to assure itself that the petitioner’s sexual conduct is other than noncommercial, private, and between consenting adults. Otherwise, the board shall certify his admission.”)

²⁴⁴See, e.g., *McLaughlin v. Bd. of Med. Exam’rs*, 35 Cal. App. 3d 1010 (Cal. Ct. App. 1973). (Plaintiff, a medical doctor, had his medical license revoked for “moral turpitude” after he was charged with the solicitation of a homosexual act from another adult (an out-of-uniform police officer) in a public restroom. The court upheld the revocation, reasoning that Plaintiff’s homosexual proclivities could cause him to be a danger to his patients if he was unable to control his sexual urges; Frank Wood Jr., *The Homosexual and the Police*, ONE, INC., May 1963, at 21-22..

²⁴⁵Rivera, *supra* note 230, at 1078 (internal citations omitted) (“In *Doe v. Department of Transportation*, [412 F.2d 674 (8th Cir. 1969)], the court upheld the finding of the National Transportation Safety Board that the applicant had a “character or behavior disorder severe enough to have repeatedly manifested itself by overt acts.” Such a disorder constituted statutory grounds for denial of the medical certificate necessary for a pilot’s license. In reaching its decision, the court considered the testimony of an Air Force psychiatrist that the applicant was a “constitutional psychopathic personality,” as well as the applicant’s conviction of sodomy and several traffic violations. The court justified the severity of the penalty as a necessary incident to its main concern, the safety of the airways.”)

²⁴⁶Marcus, *Making History*, 57; NEIL MILLER, *SEX-CRIME PANIC: A JOURNEY TO THE PARANOID HEART OF THE 1950s* 127 (2002).

²⁴⁷*Harden v. Zinnemann*, 2003 WL 21802250 (Cal. App. Aug. 6, 2003). (The California Court of Appeal, 3rd District, upheld a decision by the state’s Department of Real Estate to deny a realtor’s license to Fred Harden, who had been ordered to register as a sex offender after two convictions for “lewd conduct in a public place” based on his soliciting sex from male undercover police officers in public restrooms. Although the administrative judge who first reviewed Harden’s application issued a decision finding that the department failed to show that Harden’s convictions were substantially related to the qualifications, functions, and duties of a real estate salesperson, and recommended that he be issued the license, the commissioner denied the license, focusing on a real estate salesperson’s access to house keys, and potential access to “unsupervised children.” The Superior Court held that although there was no dispute that Harden’s offenses involve moral turpitude as that concept is defined in California, no substantial relationship had been shown between the offenses and the job of a real estate salesperson. The Court of Appeal reversed, finding, “the court order that he register as a sex offender conclusively establishes he committed the second offense ‘as a result of sexual compulsion or for purposes of sexual gratification.’...Based on his former conduct, it cannot be said Harden will not use this opportunity, under the right circumstances, to engage in lewd conduct.”)

²⁴⁸The Prevalence and Effects of Occupational Licensing, Moris M. Kliener and Alan B Krueger, Discussion Paper No. 3765, Institute for the Study of Labor (August 2008) at page 1.

a license to practice is a severe penalty, especially when the denial or revocation is based upon an administrative determination, which is predictably arbitrary and arguably irrelevant to the individual's ability to practice his or her profession.”²⁴⁹

One of the employment sectors that discrimination in state licensing has had the biggest impact on LGBT public employees is education. In all 50 states, a teaching certificate, granted by the state, must be obtained in order to teach in a public school system at the elementary or secondary level.²⁵⁰ Explains Rivera:

The homosexuality of an individual teacher may be raised on application for the teaching certificate or on application for a particular teaching position. It can also become an issue as a cause for dismissal from a particular job and, more severely, as a cause for the revocation of the license to teach. The main legal issues confronting the homosexual teacher are dismissal from a current position and revocation of his or her teaching certificate. While dismissal from a current position is certainly injurious to the teacher, revocation of his or her teaching certificate is a personal catastrophe. Without proper credentials a teacher cannot be hired anywhere in that state and is thus essentially banned from his or her profession. All states have statutes that permit the revocation of teaching certificates (or credentials) for immorality, moral turpitude, or unprofessionalism. Homosexuality is considered to fall within all three categories. Dismissals of homosexual teachers, as differentiated from loss of credentials, have also usually been based on charges of —immorality.²⁵¹

In some states, the state legislature or state officials created explicit policies of prohibiting LGBT people from teaching. For example, in 1983, the West Virginia Attorney General issued an opinion that homosexual teachers in the state would be considered “immoral” under West Virginia law and therefore could be dismissed. The opinion stated: “From the information given us, it appears clear that homosexual and lesbian behavior, even if legal, is

²⁴⁹ Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015, 1074 (1999).

²⁵⁰ *Id.* at 1079.

²⁵¹ *Id.* at 1079.

strongly contrary to the moral code of the Hampshire County community. It similarly appears to violate community standards of acceptable sexual behavior. Thus, by the definition adopted by our Court, it is immoral in the first instance.”²⁵²

Until 1990, Oklahoma had a law explicitly barring LGBT people from teaching.²⁵³ The law provided that “a teacher, student teacher or teacher’s aide may be refused employment or reemployment, dismissed, or suspended after a finding that the teacher or teacher’s aide has: (i) engaged in public homosexual conduct or activity; and (2) has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teacher’s aide.”²⁵⁴ The statute defined “homosexual conduct” broadly to include “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.”²⁵⁵ Thus, in effect, the statute barred openly gay teachers from employment in the Oklahoma public school system. In 1982, the U.S. District Court for the Western District of Oklahoma upheld the statute’s constitutionality.²⁵⁶ On appeal, the Tenth Circuit Court of Appeals upheld the statute with respect to the ban on public homosexual activity, but struck the

²⁵² 60 W. Va. Op. Atty. Gen. 46 (1983).

²⁵³ See, *Nat’l Gay Task Force v. Bd. of Educ. of the City of Okla. City, State of Okla.*, 729 F.2d 1270 (10th Cir. 1984). The law provided for public school teachers to be fired or suspended for “public homosexual activity,” defined as specific acts committed with a person of the same sex that is “indiscreet and not practiced in private,” or for homosexual “conduct,” defined as “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employers.” In a constitutional challenge to the law, the 10th Circuit found “no constitutional problem in the statute’s permitting a teacher to be fired for engaging in ‘public homosexual activity,’” but struck down the “conduct” clause as overbroad and violative of the First Amendment because it included terms such as “encouraging” and “promoting” that “do not necessarily imply incitement to imminent action.”

²⁵⁴ OKLA. STAT 70, § 6-103.5 (repealed in 1989) (statutory text available in *Nat’l Gay Task Force v. Bd. of Ed. of the City of Okla. City*, 729 F. 2d 1270 (10th Cir. 1984)).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 1272.

statute with respect to the ban on public homosexual conduct as unconstitutionally vague.²⁵⁷ In 1989, the statute was repealed.

The following cases exemplify the discrimination against LGBT teachers over the last 50 years to obtain and retain state-issued credentials:

- ***Sarac v. State Bd. Of Educ.*, 249 Cal. App. 2d 58 (1957).** In *Sarac*, the California Court of Appeal affirmed the revocation of Sarac’s teaching credential because he was charged with “lewd or dissolute conduct” under the California Penal Code, and subsequently convicted, for soliciting sex from a male undercover police officer.²⁵⁸ The trial court upheld the education board’s determination that Sarac’s homosexual conduct made him unfit to teach, and the Court of Appeal affirmed. It noted that “[h]omosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples. It is clearly, therefore, immoral conduct within the meaning of Education Code, section 13202. It may also constitute unprofessional conduct within the meaning of that same statute as such conduct is not limited to classroom misconduct or misconduct with children. It certainly constitutes evident unfitness for service in the public school system within the meaning of that statute.”²⁵⁹ Accordingly, there was an “obvious rational connection between [Sarac’s] homosexual conduct on the beach and the consequent action of respondent in revoking his secondary teaching credential on the statutory

²⁵⁷ *Id.* at 1270.

²⁵⁷ *Id.* at 1272.

²⁵⁸ *Sarac v. State Bd. Of Educ.*, 249 Cal. App. 2d at 60-61 (citing Cal. Penal Code § 647(a)).

²⁵⁹ *Id.* at 62.

grounds of immoral and unprofessional conduct and evident unfitness for service in the public school system of this state.”²⁶⁰

Even after the California Supreme Court’s decision two years later in *Morrison*,²⁶¹ which required a nexus between the alleged immoral conduct and the teacher’s fitness to teach, several California cases continued to revoke teaching credentials based on arrests or convictions of gay teachers for sex offenses with other adults.²⁶² Following these cases, the California Supreme Court in *Board of Education v. Jack M.* clarified that even those convicted of a criminal sex offense were entitled to a fitness hearing and that “proof of the commission of a criminal act does not alone demonstrate the unfitness of a teacher, but is simply one of the factors to be considered.”²⁶³

- ***McConnell v. Anderson*, 316 F. Supp. 809 (D. Minn. 1970), rev’d 451 F.2d 193 (8th Cir. 1971).** In April 1970, James McConnell was offered a post as a librarian at the University of Minnesota, which he accepted. In May 1970, he moved to Minnesota, and there, he sought a marriage license with his partner, Jack Baker, a move that drew substantial publicity.²⁶⁴ Following these events, McConnell’s job offer was withdrawn upon a determination by the Board of Regents that McConnell’s “personal conduct, as

²⁶⁰ *Id.*

²⁶¹ *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214 (1969).

²⁶² See e.g. *Moser v. State Board of Education*, 22 Cal. App. 3d 988 (1972) (revocation of teaching credentials upheld where the appellant’s homosexual conduct was considered violative of California Penal Code sections, and distinguishing *Morrison* on the basis that the conduct alleged there was non-criminal); *Purifoy v. State Board of Educ.*, 30 Cal. App. 3d 187 (1973) (upholding revocation of teaching credentials where teacher was convicted under California Penal Code § 647 and distinguishing between criminal sexual misconduct and “noncriminal sexual misconduct or other sexual misconduct,” with only the latter requiring a separate showing of unfitness); *Board of Education v. Calderon*, 35 Cal. App. 3d 490 (1973) (upholding revocation of teaching credentials where teacher was acquitted of “oral copulation” charge because the legislature intended “to permit school boards to shield children of tender years from the possible detrimental influence of teachers who commit [sex offenses] even if they are not found guilty beyond a reasonable doubt).

²⁶³ 19 Cal. 3d 691 (1977).

²⁶⁴ *McConnell v. Anderson*, 316 F. Supp. at 810. Baker and McConnell took their marriage case to the U.S. Supreme Court, resulting in the Court’s denial of their cert. petition for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972).

represented in the public and University news media, is not consistent with the best interest of the University.”²⁶⁵ The Regents’ position was that “even though plaintiff may be a very capable librarian, his professed homosexuality connotes to the public generally that he practices acts of sodomy, a crime under Minnesota law; that the Regents have a right to presume that by his applying for a license to marry another man plaintiff intended, were the license to be granted, to engage in such sodomous criminal activities; that the Regents cannot condone the commission of criminal acts by its employees and thus plaintiff has rendered himself unfit to be employed.”²⁶⁶ McConnell appealed the withdrawal of the offer, and the lower court found that McConnell’s constitutional rights had been violated, because the University had established no nexus between his sexual orientation and his likely job performance, and issued an injunction.²⁶⁷ The Eighth Circuit reversed, noting that this was not case in which an applicant was excluded from employment because of a desire clandestinely to pursue homosexual conduct, but rather one in which the appellant sought to “pursue an activist role in implementing his unconventional ideas” and thus the court concluded that the Board of Regents’ action was not arbitrary or capricious.²⁶⁸

- ***Acanfora v. Bd. of Educ. of Montgomery County*, 491 F. 2d 498 (1974).** Acanfora faced discrimination first while still a student at Pennsylvania State University, then while seeking licensure in Pennsylvania, and again after he was employed as a teacher by Montgomery County. While a student teaching at Penn State University, Acanfora was suspended for "public acknowledgement of homosexuality." Though a state court

²⁶⁵ *McConnell*, 316 F. Supp. at 811.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 814-15.

²⁶⁸ *McConnell v. Anderson*, 451 F.2d 193, 194-96 (8th Cir. 1971).

ordered reinstatement, the discrimination did not stop. When Acanfora applied for teacher certification, Penn State officials differed as to his qualifications and forwarded his application to the Pennsylvania Secretary of Education without recommendation. While awaiting a decision on his application by the Pennsylvania Secretary of Education, Acanfora was hired to teach junior high school in Montgomery County. Montgomery County learned that Acanfora was gay when the Pennsylvania Secretary of Education held a widely publicized press conference to announce favorable action on his certification application. At that point, the county demoted Acanfora to a non-teaching position.

When analyzing Acanfora's speech in this case, the district court pointed out that it was necessary to realize the degree to which homosexuality was *sui generis* in American culture-- that it is "peculiarly sensitive" and of special concern to the family-- distinguishing it from the race relations, armbands, and long hair that were subjects of First Amendment precedent in the schoolhouse setting. The court decided that the correct standard for unprotected speech in the schoolhouse was that "speech which is likely to incite or produce imminent effects deleterious to the educational process." Applying this special standard, the court found Acanfora's "repeated, unnecessary appearances on local and especially national news media" unprotected speech that rendered Defendants' choice to not reinstate Acanfora or renew his contract neither arbitrary nor capricious.

On appeal, the Fourth Circuit found that Acanfora's public discussion was protected by the First Amendment, but affirmed the lower court decision on other grounds. The Court found the decision not to reinstate acceptable because Acanfora failed to disclose on his teaching application his affiliation with Homophiles, a Penn State

student organization—an affiliation which, had it been disclosed on his application, would have kept the Board, by its own admission, from hiring him in the first place.²⁶⁹

- ***Gaylord v. Tacoma School Dist. No. 10*, 559 P.2d 1340 (Wash. 1977).** Gaylord was a teacher who was dismissed based on a Tacoma School Board policy that allowed removal for “immorality.” The lower court noted, in upholding the dismissal, that Gaylord’s admission that he was a homosexual “connote[d] illegal as well as immoral acts, because sexual gratification with a member of one’s own sex is implicit in the term ‘homosexual’ These acts were proscribed by RCW 9.79.120 (lewdness) and RCW 9.79.100 (sodomy).”²⁷⁰ While the case was pending, however, the Washington sodomy statute was repealed. The Supreme Court of Washington nonetheless held that “the fact that sodomy is not a crime no more relieves the conduct of its immoral status than would consent to the crime of incest.”²⁷¹ Accordingly, it affirmed the lower court’s decision, finding that Gaylord’s “immorality” impaired his fitness as a teacher.

Examples of discrimination in the credentialing of teachers extends into the 1990s and the present decade. For example, in 1992, a committee on teacher credentials recommended to the California Teacher Credentialing Commission that two San Francisco high school science teachers have their teaching credentials revoked as a result of a single incident in 1992 when a classroom speaker from Community United Against Violence, a gay anti-violence group, made sexually explicit comments to a class of eleventh graders. According to news reports, the teachers had combined their classes to hear the speakers, who engaged in discussion with the

²⁶⁹ *Acanfora v. Bd. of Educ. of Montgomery County*, 491 F. 2d 498 (1974).

²⁷⁰ *Gaylord*, 559 P.2d at 1342.

²⁷¹ *Id.* at 1346.

students that led to some sexual comments by one of the speakers.²⁷² In 1998, a sting operation in Fresno, California led to the arrests of five schoolteachers and a high school football coach. Police were required by state law to notify their supervisors of that arrest, which could have meant the end of their careers.²⁷³

As noted above, during the past decade courts in several states have granted standing to LGBT teachers to challenge their state's sodomy law because they anticipated state revocation or denial of credentials. For example, in *Jegley v. Picado*,²⁷⁴ among the plaintiffs who challenged Arkansas's state sodomy law in 2002 were a school counselor and a public school teacher who "fear[ed] prosecution for violations of the statute and...that such prosecution could result in their loss of jobs, professional licenses, housing, and child custody."²⁷⁵ Also, in *Doe v. Ventura*,²⁷⁶ one of the plaintiffs challenging Minnesota's sodomy law in 2001 was a licensed elementary school teacher who "fear[ed] adverse licensure consequences from any disclosure, voluntary or otherwise, of their past and future violations of [the state's sodomy law]."²⁷⁷ And, in *Gryczan v. State*,²⁷⁸ a teacher who had been licensed in the state for 25 years "contend[ed] that the damage to [his/her] self-esteem and dignity and the fear that [he/she] will be prosecuted or will lose their livelihood...create[d] an emotional injury that g[ave him/her] standing to challenge the statute."

²⁷² Art Leonard, LESBIAN & GAY L. NOTES (Oct. 1995), available at <http://www.qrd.org/qrd/www/legal/lgl/10.2005.pdf>.

²⁷³ See Charles McCarthy, *Arrests Help Cut Sex Acts At Park*, FRESNO BEE, June 14, 1998, at B1. Today, California has a requirement in its Penal Code that if a public school employee is arrested for certain sex offenses, that arrest must be reported to the employer by police; this provision appears to capture arrests for public consensual same-sex sex. See Cal. Penal Code § 290.

²⁷⁴ 349 Ark. 600, 609 (Ark. 2002).

²⁷⁵ Appellee's Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815); Appellee's Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815).

²⁷⁶ No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001).

²⁷⁷ *Id.* at *5.

²⁷⁸ 283 Mont. 433 (Mont. 1997).

In each of these cases, the teachers were granted standing and the sodomy laws were declared unconstitutional.²⁷⁹

VI. Conclusion

This chapter summarizes the very explicit and pervasive history of discrimination against LGBT people in public employment throughout the 1950s and 1960s and extending into the present. This history provides the context for the documentation of current discrimination against LGBT people in public employment presented in chapters 6 through 14. Why does this more recent documentation show such a high level of discrimination against LGBT people in public employment? In part, because the individual cases of LGBT public employees and the personal experiences they report in surveys are not the result of random bad actors, but are the legacy of an era when discrimination in state employment was by policy and pervasive. Why do some of the surveys and the wage gap analysis show more discrimination in the public sector than the private sector? In part, because discrimination against LGBT people began in the purges, prosecutions, and policies of federal and state governments and were then copied by private employers. Why does the pattern of discrimination by state governments look so similar to the pattern of discrimination by local governments, in particular the widespread patterns of discrimination in law enforcement and education? In part, because the same discriminatory policies of state governments, including sodomy laws and occupational licensing requirements, formed the legal foundation for discrimination in all employment sectors. Put differently, this chapter illustrates state laws, policies and practices that either required, or resulted in, discrimination against LGBT employees who not only worked for the state, but for federal, local, and private employers as well.

²⁷⁹ *Jegley*, 349 Ark. at 621-622; *Doe*, 2001 WL 543734 at *9; *Gryczan*, 283 Mont. At 446.



Chapter 6: State Courts, Federal Courts, and Legal Scholars Have Determined That LGBT People Have Experienced a Long History of Discrimination

Equal protection analysis, as articulated by the United States Supreme Court¹ and followed by most states in interpreting state constitutions, requires that a suspect class must historically have been subjected to discrimination. Every state and federal court that has substantively considered whether sexual orientation is a suspect class has held that LGBT people have faced a long history of discrimination. In addition, dozens of legal scholars have also concluded that LGBT people have suffered the requisite history of discrimination to qualify sexual orientation to be a suspect class. In making these determinations, many of these courts and scholars have explicitly considered employment and other forms of discrimination by public employers, including state, local, and federal government employers. These findings, unanimously agreed upon by state and federal courts, provide substantive evidence that LGBT people have experienced a widespread practice of unconstitutional discrimination by state governments. In at least one case, the court indicated that even the government party to the litigation did not dispute that this requirement is met. And in another, the court cited characterizations of LGBT people in the brief filed by the government as indicia of the history of discrimination suffered by LGBT people. This section describes the case law and scholarly literature that address the history of discrimination requirement of suspect class determination.

¹ See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (listing history of discrimination as one of the requirements for suspect class determination under equal protection analysis).

A. State Courts' Determinations of a History of Discrimination Against LGBT

People

Judicial opinions from appellate courts in seven states - California,² Connecticut,³ Iowa,⁴ Maryland,⁵ Montana,⁶ Oregon,⁷ and Washington,⁸ including six of those states' highest courts - have all agreed that LGBT people have faced a long history of discrimination, no matter how the court ultimately ruled on whether sexual orientation is a suspect classification. In doing so, some have specifically discussed employment discrimination against LGBT people by state, local, and federal government employers. For example, in 2008, Maryland's highest court found that "[h]omosexual 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"⁹ and that "homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society."¹⁰ In 2009, the Iowa Supreme Court reviewed the long history of discrimination against LGBT people, including that "public employees identified as gay or lesbian have been thought to pose security risks due to a perceived risk of extortion resulting from a threat of public exposure."¹¹ In addition, a concurring opinion filed by a justice of the Supreme Court of Montana in 2004 describes how LGBT people have been marginalized by their "government and institutions" in Montana, including citing a number of cases documenting discrimination by state and local governments to show that "gays and lesbians

² *Strauss v. Horton*, 46 Cal. 4th 364, 411-12 (2009); *In re Marriage Cases*, 43 Cal. 4th 757 (2008). See also *In Re Marriage Cases*, 49 Cal. Rptr. 3d 675 (2006).

³ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

⁴ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

⁵ *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

⁶ *Snetsinger v. Montana University System*, 104 P.3d 445 (Mont. 2004).

⁷ *Shineovich and Kemp v. Shineovich*, 229 Or. App. 670 (2009); *Tanner v. Oregon Health Sciences University*, 971 P.2d 435 (Or. App. 1998).

⁸ *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) ("There is no dispute that gay and lesbian persons have been discriminated against in the past." - and indicating that even the government party to the lawsuit did not dispute that contention).

⁹ *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007) (Maryland S. Ct. 2008).

¹⁰ *Id.* at 610.

¹¹ *Varnum v. Brien*, 763 N.W.2d at 889.

historically have been the focus of discriminatory treatment in the workplace.”¹² These cases and opinions from state appellate courts are summarized in Table 7-A.

¹² *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 455 (Mont.2004) (Nelson, J., specially concurring).

Table 7-A. State Appellate Courts Determinations of a History of Discrimination Against LGBT People

| State | Court | Year | Citation | History of Discrimination Analysis |
|------------|----------------------------|------|--|---|
| California | California Court of Appeal | 2006 | <u>In re Marriage Cases</u> , 49 Cal. Rptr. 3d 675 (Cal. App. 2006), <i>review granted and superseded</i> , 149 P.3d 737 (Cal. 2006), <i>rev'd</i> , 43 Cal. 4th 757 (2008). | As many courts do, the majority took as true that there has been a history of discrimination against homosexuals. 49 Cal. Rptr. 3d at 713 (stating that requirement of history of discrimination “would seem to be readily satisfied”). In his concurring opinion, Justice Parrilli underscored the point by stating that “[t]he struggles gay men and lesbians have faced to become who they <i>are</i> individually is not to be understated.” 49 Cal. Rptr. 3d at 730 (Parrilli, J., concurring (emphasis in original)). Justice Kline’s concurring and dissenting opinion acknowledges that the record of discrimination against lesbians and gay men is long and well known. In it, he explains that in Western culture since “the time of Christ” the prevailing attitude towards LGBT people has “been one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment. . . . Courts have recognized that ‘[t]he aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.’” 49 Cal. Rptr. 3d at 756 (Kline, J., concurring and dissenting). He notes that the California Legislature officially acknowledged this history in its findings regarding the California Domestic Partner Rights and Responsibilities Act of 2003. 49 Cal. Rptr. 3d at 756 (citing Cal. Fam. Code §§ 297 <i>et seq.</i>). He further relates how, because of their sexual orientation, lesbians and gay men have been denied the custody of their children, denied employment opportunities, subjected to harassment and violence, and have been treated as “deviants, in need of treatment.” 49 Cal. Rptr. 3d at 756-57. |
| California | California Supreme Court | 2008 | <u>In re Marriage Cases</u> , 43 Cal. 4th 757 (2008). | The court cites <u>People v. Garcia</u> , 77 Cal. App. 4th 1269 (2000), which found that lesbians and gay men share a history of persecution comparable to that of Blacks and women and that “outside of racial and religious minorities, no group has suffered such ‘pernicious and sustained hostility’ and such immediate and severe opprobrium as homosexuals.” 43 Cal. 4 th at 840. |
| California | California Supreme Court | 2009 | <u>Strauss v. Horton</u> , 46 Cal. 4th 364 (2009). | The California Supreme Court reaffirmed its finding in <u>In re Marriage Cases</u> above that gay men and lesbians have suffered a long history of discrimination. 46 Cal. 4 th at 411-12. In his dissent, Justice Moreno quoted the Iowa Supreme Court in <u>Varnum v. Brien</u> , 763 N.W.2d 862 |

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| | | | | (Iowa 2009), for its finding that “[g]ay and lesbian people as a group have long been the victim of purposeful and invidious discrimination because of their sexual orientation. The long and painful history of discrimination against gays and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of the country until very recently. Additionally, only a few years ago persons identified as homosexual were dismissed from military service regardless of past dedication and demonstrated valor. Public employees identified as gay or lesbian have been thought to pose security risks due to a perceived risk of extortion resulting from a threat of public exposure. School-yard bullies have psychologically ground children with apparently gay or lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice. At the same time, lesbian and gay people continue to be frequent victims of hate crimes.” 46 Cal. 4 th at 498-99 (citations omitted; quoting <u>Varnum</u> , 763 N.W.2d at 889). |
| Connecticut | Connecticut Supreme Court | 2008 | <u>Kerrigan v. Comm’r of Pub. Health</u> , 957 A.2d 407 (Conn. 2008). | “Of course, gay persons have been subjected to such severe and sustained discrimination because of our culture’s long-standing intolerance of intimate homosexual conduct.” 957 A.2d at 433. “Fifty years ago, no openly gay people worked for the federal government. In fact, shortly after ... Dwight Eisenhower [became the president in 1953, he] issued an executive order that banned homosexuals from government employment, civilian as well as military, and required companies with government contracts to ferret out and fire their gay employees. At the height of the McCarthy witch-hunt, the [Department of State] fired more homosexuals than communists. In the 1950s and 1960s literally thousands of men and women were discharged or forced to resign from civilian positions in the federal government because they were suspected of being gay or lesbian.” 957 A.2d at 433 n.25. Furthermore, the court notes that until <i>Lawrence</i> , sodomy was criminalized in many states. 957 A.2d at 433. Homosexuals were considered “deviants,” many states even forcing them by statute to undergo psychological evaluations. 957 A.2d at 434 nn.27. |
| Iowa | Iowa Supreme Court | 2009 | <u>Varnum v. Brien</u> , 763 N.W.2d 862 (Iowa 2009). | “The long and painful history of discrimination against gay and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of this country until very recently.... [o]nly a few years ago persons identified as homosexual were dismissed from military service regardless of past dedication and demonstrated valor. Public employees identified as gay or lesbian have been thought to pose security risks due to a perceived risk of extortion resulting from a threat of public exposure. School-yard bullies have psychologically ground children with apparently gay or lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice.” 763 N.W.2d at 889 (citations omitted). “[T]his |

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|-----------------|---------------------------|------|--|---|
| | | | | history of discrimination suggests any legislative burdens placed on lesbian and gay people as a class 'are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.'" 763 N.W.2d at 889. |
| Maryland | Maryland Court of Appeals | 2007 | <u>Conaway v. Deane</u> , 932 A.2d 571 (Md. 2007). | "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." 932 A.2d at 609. "It is clear that homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society." 932 A.2d at 610. The court traces the history of discrimination against LGBT people in the United States from the turn of the twentieth century through the "Red Scare" of the late 1910s to early 1920s, to the 1950s when a U.S. Senate investigations subcommittee found that "homosexuals and other sex perverts" were unsuitable for employment by the federal government. The court noted that laws before 1900 criminalized "gender inversion," which included, but was not limited to, "cross-dressing, prostitution," and other indecencies. 932 A.2d at 609. Many LGBT people were viewed as "heretics, degenerates, or psychopaths." 932 A.2d at 609. Even in the 20 th century, the medical profession "accepted the degeneracy theory of homosexuality." 932 A.2d at 609. Homosexuals were also considered "security risks because of their susceptibility to blackmail" and barred from public employment. 932 A.2d at 609. The <i>Conaway</i> Court also discusses the "Kulturkampf," a period spanning from 1946 to 1961, in which it is believed that as many as a million gay and lesbian persons were prosecuted criminally under state statutes aimed at prohibiting consensual same-sex adult intercourse (both public and private), kissing, holding hands, or other forms of "public lewdness." 932 A.2d at 610. Further, the court recognized that until the Supreme Court's decision in <i>Lawrence v. Texas</i> , 539 U.S. 558 (2003), it was not unconstitutional under the Fourteenth Amendment for a state to enact legislation making it a crime for two consenting adults of the same sex to engage in sexual conduct in the privacy of their home. 932 A.2d at 610. |
| Montana | Montana Supreme Court | 2004 | <u>Snetsinger v. Mont. Univ. Sys.</u> , 104 P.3d 445 (Mont. 2004). | "It is overwhelmingly clear that gays and lesbians have been historically subject to unequal treatment and invidious discrimination." 104 P.3d at 455 (Nelson, J., specially concurring). "Gays and lesbians share a history of persecution comparable to that of blacks and women." 104 P.3d at 456 (Nelson, J., specially concurring) (citation omitted). The concurrence further describes how LGBT people have been marginalized by their government in Montana. It cites a string of cases from several different states to show that "gays and lesbians historically have been the focus of discriminatory treatment in the workplace," including cases documenting |

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|-------------------|--------------------------|------|---|--|
| | | | | discrimination by state and local governments. 104 P.3d at 455 (Nelson, J., specially concurring) (citations omitted). The concurrence describes how LGBT people have been accused of being pedophiles and child molesters and stereotyped as Communists and security risks. 104 P.3d at 455 ((Nelson, J., specially concurring). Other examples of discrimination discussed include: in 1953, President Eisenhower issued Executive Order 10,450, “requiring the dismissal of all homosexual government employees;” until 1965, homosexual aliens could not be admitted to the United States “because they were classified as sexual deviants under 8 U.S.C. § 1182(a)(4); and gay and lesbian parents are frequently denied custody of their children because of their sexual orientation and irrespective of their parenting ability. 104 P.3d at 455 (Nelson, J., specially concurring). |
| Oregon | Oregon Court of Appeals | 1998 | <u>Tanner v. Oregon Health Sci. Univ.</u> , 971 P.2d 435 (Or. App. 1998). | “[I]t is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.” 971 P.2d at 447. |
| Oregon | Oregon Court of Appeals | 2009 | <u>Shineovich v. Shineovich</u> , 229 Or. App. 760 (2009). | “[I]t is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.” 229 Or. App. at 681 (quoting <u>Tanner v. OHSU</u> , 971 P.2d 435, 447 (Or. App. 1998). |
| Washington | Washington Supreme Court | 2006 | <u>Andersen v. King County</u> , 138 P.3d 963 (Wash. 2006). | <p>“[T]here is no dispute that gay and lesbian persons have been discriminated against in the past.” 138 P.3d at 974 (indicating that even the parties did not dispute this point).</p> <p>In an opinion in which he concurred in Judge Fairhurst's dissent, Justice Bridge provides a detailed history of sexual orientation discrimination, from prohibition, to 1930s Hollywood, to the McCarthy era, to the late 1990s, “when gays and lesbians could be barred from federal employment solely on the basis of their sexual orientation.” 138 P.3d at 1030 (Bridge, J., concurring in Judge Fairhurst's dissent). Justice Bridge also states that, “[w]hen reviewing laws that discriminate against gays and lesbians, there is no justification for courts to ignore the ‘pernicious and sustained hostility’ gays and lesbians suffered through the decades and continue to face.” 138 P.3d at 1030 (Bridge, J., concurring in Judge Fairhurst's dissent).</p> |

B. Federal Court Determinations That LGBT People Have Suffered a Long History of Discrimination

Similarly, all fifteen federal judicial opinions that have substantively addressed sexual orientation as a suspect classification have agreed that LGBT people have suffered a long history of discrimination. These opinions have focused not only on discrimination by private actors but also on discrimination by state, local, and federal governments. For example, in 1989, the Ninth Circuit observed that "[d]iscrimination against homosexuals has been pervasive in both the public and private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools... ." ¹³ In 1995, the Sixth Circuit concluded "Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation." ¹⁴ Also in 1995, a District of Columbia Court of Appeals justice cited examples of such discrimination in a dissent, including that: "[b]eing identified with homosexuality has been the basis of refusals to hire, the ruin of careers, undesirable military discharges, denials of occupational licenses... ." ¹⁵ These cases and opinions are summarized in Table 7-B.

¹³ *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

¹⁴ *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261, 264 n.1 (6th Cir. 1995) (quoting trial court findings), *rev'd and vacated by* 54 F.3d 261 (6th Cir. 1995), *cert. granted, judgment vacated*, 518 U.S. 1001 (1996).

¹⁵ *Dean v. D.C.*, 653 A.2d 307, 334 (D.C. 1995) (quoting Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 Women's Rts. L. Rep. 143, 157 (1988)).

Table 7-B. Federal Court Determinations That LGBT People Have Suffered a Long

History of Discrimination

| Court | Year | Citation | History of Discrimination Analysis |
|-------------------------------|-------------|---|--|
| U.S. Supreme Court | 1985 | <u>Rowland v. Mad River Local Sch. Dist.</u> , 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of <i>cert.</i>). | In explaining his dissent from a denial of <i>cert.</i> , Justice Brennan, joined by Justice Marshall, concluded, “Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely ... to reflect deep-seated prejudice rather than ... rationality.'” 470 U.S. At 1014 (Brennan, J., dissenting from denial of <i>cert.</i> (quoting <u>Plyler v. Doe</u> , 457 U.S. 202, 216 (1982))). |
| 6th Circuit | 1995 | <u>Equal. Found. of Greater Cincinnati v. City of Cincinnati</u> , 54 F.3d 261 (6th Cir. 1995), <i>cert. granted</i> , <i>vacated</i> , 518 U.S. 1001 (1996). | "Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation." 54 F.3d at 264 n.1. |
| 7th Circuit | 1989 | <u>Ben-Shalom v. Marsh</u> , 881 F.2d 454 (7th Cir. 1989). | “Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree.” 881 F.2d at 465. |
| 9th Circuit | 1988 | <u>Watkins v. U.S. Army</u> , 847 F.2d 1329 (9th Cir. 1988), <i>rehearing en banc granted</i> , 847 F.2d 1362 (1988), <i>opinion withdrawn on rehearing</i> , 875 F.2d 699 (1989), <i>cert. denied</i> , 498 U.S. 957 (1990). | The court noted that the Army conceded that “it is indisputable that 'homosexuals have historically been the object of pernicious and sustained hostility'. More recently, Judge Henderson echoed the same harsh truth: 'Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society.’” 847 F.2d at 1345 (quoting <u>High Tech Gays v. Defense Industrial Security Clearance Office</u> , 668 F. Supp. 1361 (N.D. Cal.1987), which was later reversed in part and vacated in part). The <u>Watkins</u> court further explained that homosexuals have been the frequent victims of violence and have been excluded from jobs, schools, housing, churches, and even families. 847 F.2d at 1345, citing a 1984 law review note. The court concluded that “the discrimination faced by homosexuals in our society is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.” 847 F.2d at 1345. |
| 9th Circuit | 1989 | <u>Watkins v. U.S. Army</u> , 875 F.2d 699 (1989), <i>cert. denied</i> , 498 U.S. 957 (1990). | "Discrimination against homosexuals has been pervasive in both the public and private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools, and have prevented homosexuals marriage. In the private sphere, homosexuals continue to face discrimination in jobs, housing and churches. . . . Moreover, reports of violence against homosexuals have become commonplace in our society. In sum, the discrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.” 875 F.2d at 724 (Norris, J., concurring) (citations omitted). |
| 9th Circuit | 1990 | <u>High Tech Gays v. Def. Indus. Sec. Clearance</u> | "we do agree that homosexuals have suffered a history of discrimination.”895 F.2d at 573. |

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| | | <u>Office</u> , 895 F.2d 563 (9th Cir. 1990), <i>rehearing and rehearing en banc denied</i> , 909 F.2d 375 (9th Cir. 1990). | |
| 9th Circuit | 1990 | <u>High Tech Gays v. Def. Indus. Sec. Clearance Office</u> , 909 F.2d 375 (9th Cir. 1990). | "The panel agrees that the first criterion is met; homosexuals have suffered a history of discrimination." 909 F.2d at 376 (Canby, J., dissenting from denial of rehearing <i>en banc</i> and citing majority opinion, 895 F.2d at 573). |
| 9th Circuit | 2008 | <u>Witt v. Dep't of Air Force</u> , 527 F.3d 806 (9th Cir. 2008). | In his partial concurrence partial dissent, Judge Canby explained that "My reasons for concluding that such classifications are suspect are fully set out in my dissent from denial of en banc review in <i>High Tech Gays</i> , and I will not belabor the matter here. Suffice it to say that homosexuals have 'experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.'" 527 F.3d at 824-25 (citations omitted) (Canby, J., concurring in part and dissenting in part). |
| District of Columbia Court of Appeals | 1995 | <u>Dean v. District of Columbia</u> , 653 A.2d 307 (D.C. App. 1995) | In considering whether homosexuals had been subjected to a history of purposeful discrimination, Judge Ferren quoted Justice Brennan's often-quoted conclusion in <i>Rowland</i> "that 'homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely ... to reflect deep-seated prejudice rather than ... rationality.'"" 653 A.2d at 344 (Ferren, J., concurring in part and dissenting in part and quoting <u>Rowland v. Mad River Local School Dist.</u> , 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of <i>cert.</i>)). Judge Ferren listed examples from scholarly literature and other courts of the history of pervasive discrimination, including: "[b]eing identified with homosexuality has been the basis of refusals to hire, the ruin of careers, undesirable military discharges, denials of occupational licenses, denials of the right to adopt, to the custody of children and visitation rights, denials of national security clearances and denials of the right to enter the country... . Discrimination against homosexuals has been pervasive in both the public and the private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools, and have prevented homosexuals marriage. In the private sphere, homosexuals continue to face discrimination in jobs, housing and churches." 653 A.2d at 344-45 (Ferren, J., concurring in part and dissenting in part) (citations omitted). |

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| Northern District of California | 1987 | <u>High Tech Gays v. Def. Indus. Sec. Clearance Office</u> , 668 F. Supp. 1361 (N.D. Cal. 1987), <i>rev'd in part, vacated in part</i> , 895 F.2d 563 (9th Cir. 1990), <i>rehearing and rehearing en banc denied</i> , 909 F.2d 375 (9th Cir. 1990). | The court acknowledged that “[l]esbians and gay men have been the object of some of the deepest prejudice and hatred in American society. Some people's hatred for gay people is so deep that many gay people face the threat of physical violence on American streets today.” 668 F. Supp. at 1369. In cataloguing this “pervasive discrimination,” 668 F. Supp. At 1369 & 1370, the court further quoted Justice Brennan’s dissent from denial of <i>cert.</i> in <i>Rowland v. Mad River Local School District</i> , 470 U.S. 1009, 1014 (1985) (Brenna, J., dissenting from denial of <i>cert.</i>)(“homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is ‘likely ... to reflect deep-seated prejudice rather than ... rationality.’”). The <u>High Tech Gays</u> court also stated that “[f]or years, many people have branded gay people as abominations to nature and considered lesbians and gay men mentally ill and psychologically unstable.” 668 F. Supp. at 1369. |
| Eastern District of Wisconsin | 1989 | <u>Ben-Shalom v. Marsh</u> , 703 F. Supp. 1372 (E.D. Wis. 1989), <i>rev'd</i> , 881 F.2d 454 (7th Cir. 1989), <i>cert. denied</i> , 494 U.S. 1004 (1990). | The court recognized that “[h]omosexuals have suffered a history of purposeful discrimination.” 703 F. Supp. At 1379. It quoted Justice Brennan's statement that “homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is ‘likely ... to reflect deep-seated prejudice rather than ... rationality.’” 703 F. Supp. at 1379 (quoting <u>Rowland v. Mad River Local School District</u> , 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of <i>cert.</i>)). The <u>Ben-Shalom</u> court further elaborated that “Such hostility is evident in the very pleadings in this case wherein homosexuals are analogized to kleptomaniacs and arsonists.” 703 F. Supp. at 1379. |
| District of Columbia | 1991 | <u>Steffan v. Cheney</u> , 780 F. Supp. 1 (D.D.C. 1991), <i>rev'd</i> , <u>Steffan v. Aspin</u> , 8 F.3d 57 (D.C. Cir. 1993), <i>rehearing en banc, judgment vacated, on rehearing en banc</i> , <u>Steffan v. Perry</u> , 41 F.3d 677 (D.C. Cir. 1994). | “Homosexuals have suffered a history of discrimination and still do, though possibly now to a less degree.” 780 F. Supp. at 5 (quoting <u>Ben-Shalom v. Marsh</u> , 881 F.2d 454, 465-66 (7th Cir. 1989)). |
| Eastern District of California | 1993 | <u>Dahl v. Secretary of U.S. Navy</u> , 830 F. Supp. 1319 (E.D. Cal. 1993). | The court accepted as “undisputed that homosexuals have historically been discriminated against.” 830 F. Supp. at 1324 n.7(citations omitted). |
| Southern District of Ohio | 1994 | <u>Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati</u> , 860 F. Supp. 417 (S.D. Ohio 1994), <i>rev'd and vacated</i> , 54 F.3d 261 (6th Cir. 1995), <i>cert.</i> | The court found as one of its findings of fact: “13. Homosexuals have suffered a history of pervasive, irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.” 860 F. Supp. at 426. The court concluded that “gays, lesbians and |

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| | | <i>granted, judgment vacated</i> , 518 U.S. 1001 (1996). | bisexuals have been stigmatized throughout history based on erroneous stereotypes and mischaracterizations regarding their sexual orientation. Gays, for example, have been characterized as effeminate mental defects with a proclivity towards pedophilia, and a host of other deviant sexual practices. Gays have been subjected to pervasive private discrimination as well as public discrimination on the local, state and federal levels." 860 F. Supp. At 436 (footnote and citations omitted). The court noted that the campaign literature under consideration in the case "accused homosexuals of habitually engaging in a wide range of activities, some of which allegedly involve the use of rodents, fists, and other objects." 860 F. Supp. at 436 n.16. |
| Eastern District of New York | 1997 | <u>Able v. U.S.</u> , 968 F. Supp. 850 (E.D.N.Y. 1997), <i>rev'd</i> , 155 F.3d 628 (2d Cir. 1998). | Court discusses the "bleak" history of discrimination of homosexuals over the centuries, which suggest that "laws imposing disabilities on gay men and lesbians are based on prejudice." 968 F. Supp. at 854-56, 862, 862-63. |

C. Legal Scholars Determinations That LGBT People Have Suffered a Long History of Discrimination

In addition to state and federal courts, a number of legal scholars have also concluded that LGBT people have been subjected to a long history of discrimination when considering whether sexual orientation is a suspect classification. Table 7-C provides a summary of the law review articles with the most substantive discussions about LGBT people having suffered such a history of discrimination. These scholars incorporate into their discussions cases from the two prior tables, as well as other examples of unconstitutional state, local, federal and private employment discrimination against LGBT people.

Harris Miller's *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*,¹⁶ is a foundational article cited frequently in other articles and case law documenting the history of discrimination against LGBT people. In it, Miller lays out the history of discrimination based on sexual orientation evident in various forms of official discrimination, including sodomy statutes, government employment decisions, and immigration policies.¹⁷ Miller's article also cites useful outside sources, statistics, and accounts of discrimination.¹⁸ Other frequently cited articles include: Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. Tex. L. Rev. 205, 243-44 (1993); Stephen Zamansky, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. Rev. 221, 244-49 (1993); and Kenji Yoshino, *Suspect Symbols: The Literary*

¹⁶ Harris M. Miller, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984).

¹⁷ See *id.* At 799-807, 821-25.

¹⁸ See *id.*

Argument for Heightened Scrutiny for Gays, 96 Colum. L. Rev. 1753, 1772-93 (1996).¹⁹ One author even poses the question whether judges themselves may be perpetuating stereotypes and anti-gay bias, as evidenced by the perfunctory manner in which they often perform the equal protection analysis.²⁰ In addition, articles written during and after the AIDS epidemic describe the increased stigmatization of and violence against gay men that occurred during the last three decades.²¹ At least one scholar specifically recounts the particularly difficult history of transgender people.²²

Many of these scholars detail unconstitutional employment discrimination by federal, state, and local governments and place it in the context of a larger system of government discrimination.²³ In a 2008 law review article, one scholar summarizes: “Lesbians, gay men, bisexuals, and transgendered people were the objects of specific criminal laws against cross-dressing and homosexual solicitation, as well as generic sodomy laws; saw books, movies, radio programs, and even art depicting their point of view censored or denigrated by the state; were excluded from service in the United States armed forces; *were barred from federal or state government employment*; ... could not adopt children or even retain custody of their own biological children; [and] were excluded from entering the United States or even becoming

¹⁹ Although not included on Exhibit C (because they do not specifically discuss the constitutional suspect class analysis), three additional resources provide invaluable background information and analysis of the history of discrimination against LGBT people: Jonathan Katz’s *Gay American History* (Penguin Group 1976); John D’Emilio’s *Sexual Politics, Sexual Communities* (University of Chicago Press 1983); and Posner, *supra* note 2.

²⁰ Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1772-93 (1996).

²¹ Kurt D. Hermansen, *Analyzing the Military’s Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151, 175-76 (1992); Murphy, *infra* note 23, at 351.

²² Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 903-04 (2007).

²³ See, e.g., Marie Elena Peluso, *Tempering Title VII’s Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1554 (1993) (“This discrimination exists not only in the public and private employment context but is pervasive throughout every aspect of society”); Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 351 (1995) (“Gay men and lesbians are also discriminated against in employment, in both the public and the private sectors.”).

American citizens.”²⁴ Yale Law Professor William Eskridge summarizes the history of discrimination as follows: “[Y]ou could not have a job in the federal or most state civil services, have a national security clearance, serve in the armed forces, immigrate to the United States or ...become a U.S. citizen, use the U.S. mails for your informational magazines, *obtain some professional and business licenses*, dance with someone of the same sex in a public accommodation, loiter in a public place, hold hands with someone of the same sex anywhere, or ...actually have intercourse with someone of the same sex.” (emphasis added)²⁵ Another legal scholar writing in 2000 concludes: “*Being identified with homosexuality has been the basis of the ruin of careers, undesirable military discharges, denials of occupational licenses, denials of the right to adopt, denials of national security clearances and denials of the right to enter the country.* It is clear that homosexuals have endured a pattern of purposeful discrimination throughout history that has intruded on every aspect of their public and private lives.”²⁶ Finally, an American Law Reports annotation summarizing cases where LGBT employees have brought constitutional claims against government employers concludes: “Employment discrimination against gay, lesbian, and bisexual persons has a long history of acceptance... .Contemporary courts have been more willing than their predecessors to scrutinize such employment discrimination under a variety of constitutional theories.”²⁷

²⁴ Alison Lorenzo, *Constitutional Law—Equal Rights Amendment, Equal Protections, and Due Process—The Right of Same-Sex Marriage is Not Fundamental, Prohibiting Same-Sex Marriage Does Not Constitute Gender-Based Discrimination, and Restrictions on the Right of Marriage are Rationally Related to the State’s Interest in Regulation of Marriage. Conaway v. Deane*, 932 A.2D 571 (MD. 2007), 39 RUTGERS L.J. 1003 nn. 122-124 (2008) (emphasis added).

²⁵ Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL’Y 203, 233-39 & accompanying notes (1997) (discussion re: “the suspect class argument”).

²⁶ Pamela M. Jablow, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1128 (2000) (emphasis added).

²⁷ Robin Cheryl Miller, *Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Orientation or Conduct*, 96 A.L.R.5th 391 (2002 & supps.).

Table 7-C. Legal Scholars Determinations That LGBT People Have Suffered a Long History of Discrimination

| Author | Title | Citation / Year | Relevant Discussion | Notes & Highlights from Article |
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| Harris M. Miller II | AN ARGUMENT FOR THE APPLICATION OF EQUAL PROTECTION HEIGHTENED SCRUTINY TO CLASSIFICATIONS BASED ON HOMOSEXUALITY | 57 S. Cal. L. Rev. 797 (1984) | See pp. 799-807; 821-25. | This is a foundational article regarding LGBT suspect classification and is cited in many later articles and cases. Part I of this article surveys the forms of official discrimination against gays, including sodomy statutes, ineligibility for government employment, such as the military or elementary schools, immigration policies prohibiting the entry of gays, segregation of gays in prison, lack of legislative protection against discrimination, and discrimination in the area of family law. “Gays in America have historically faced pervasive discrimination. This discrimination appears as both “homophobia” and the acceptance and perpetuation of incorrect stereotypes. At times this discrimination has reached hysterical proportions.” |
| Harvard Law Review Association | THE CONSTITUTIONAL STATUS OF SEXUAL ORIENTATION: HOMOSEXUALITY AS A SUSPECT CLASSIFICATION | 98 Harv. L. Rev. 1285 (1985) | See footnotes 1-9, 88-90 and accompanying text. | The article describes how in 1985: <ul style="list-style-type: none"> • Twenty-three states and the District of Columbia still had in force criminal statutes proscribing private, consensual sodomy. • Only the state of Wisconsin and approximately 30 cities proscribed discrimination on the basis of sexual preference. • Only California's ‘public accommodations’ statute had been interpreted to protect gays. |
| Adrienne K. Wilson | SAME-SEX MARRIAGE: A REVIEW | 17 Wm. Mitchell L. Rev. 539 (1991) | See discussion and accompanying footnotes, p. 555. | “More recently, discrimination has appeared in the form of homophobia. Discrimination has at times even reached ‘hysterical proportions.’ “Although not as harsh, contemporary society continues to maintain a hostile attitude toward homosexuality. Continued discrimination and prejudice suffered by homosexuals provides support for the use of suspect classification for homosexuals.” |
| Kendall Thomas | BEYOND THE PRIVACY PRINCIPLE | 92 Colum. L. Rev. 1431 (1992) | See discussion and accompanying footnotes, pp. 1462-70. | “Over the course of American history, gay men and lesbian women have been discursively marked as ‘faggots’ (after the pieces of kindling used to burn their bodies), ‘monsters,’ ‘fairies,’ ‘bull dykes,’ ‘perverts,’ ‘freaks,’ and ‘queers.’ Their intimate associations have been denominated ‘abominations,’ ‘crimes against nature,’ and ‘sins not fit to be named among Christians.’ This symbolic violence has produced and been produced by congeries of physical violence.” “Gay men and lesbians in America have been ‘condemned to death by choking, burning and drowning; ... executed, [castrated], jailed, pilloried, fined, court-martialed, prostituted, fired, framed, blackmailed, disinherited, [lobotomized, shock-treated, psychoanalyzed and] declared insane, driven to insanity, to suicide, murder, and self-hate, witch-hunted, entrapped, stereotyped, mocked, insulted, isolated ... castigated ... |

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| | | | | <p>despised [and degraded].”</p> <p>“The continuity between the seventeenth-century experience and homophobic violence in our own time is startling. Violence against gay men and lesbians-on the streets, in the workplace, at home-is a structural feature of life in American society. A study commissioned by the National Institute of Justice (the research arm of the U.S. Department of Justice) concluded that gay men and women “are probably the most frequent victims [of hate violence today].”</p> |
| Kurt D. Hermansen | ANALYZING THE MILITARY’S JUSTIFICATIONS FOR ITS EXCLUSIONARY POLICY: FIFTY YEARS WITHOUT A RATIONAL BASIS | 26 Loy. L.A. L. Rev. 151 (1992) | See discussion and accompanying footnotes, pp. 175-76. | <p>“Lesbians and gay men remain the subject of significant and virulent stereotyping in modern society. Gay men are believed by many to be effeminate and lesbians to be masculine. Many assert that lesbians and gay men proselytize children to homosexuality and molest children. Further, lesbians and gays are considered by large numbers of individuals to be mentally ill.”</p> <p>“The Supreme Court has focused on the historical background of the discrimination in deciding whether to apply strict scrutiny. Historically, American society has discriminated intensely against lesbians and gays. In finding jobs, securing housing- indeed, in nearly every aspect of social existence-sexual orientation-based discrimination has been a persistent facet of life in the United States.”</p> <p>“The deeply ingrained societal prejudice against lesbians and gays also manifests itself in widespread violence against this group. Research indicates that lesbians and gays are physically abused and assaulted because of their sexual orientation. Law enforcement officials report that violence against lesbians and gays is both significant and, perhaps in part due to the AIDS epidemic, increasing.”</p> |
| Renee Culverhouse & Christine Lewis | HOMOSEXUALITY AS A SUSPECT CLASS | 34 S. Tex. L. Rev. 205 (1993) | See discussion and accompanying footnotes, pp. 243-44. | <p>This article addresses false stereotypes of homosexuals as preying on young children, engaging in improper conduct, and being mentally ill.</p> <p>“To date, only two states (Wisconsin and Massachusetts) have civil rights statutes that protect homosexuals. Legislation in three other states (California, New York, and Michigan) provides some protection for homosexual groups by prohibiting discrimination based on sexual orientation in such areas as the use of health facilities and access to state employment. Recently, several large cities have enacted anti-discrimination regulations aimed at protecting homosexuals. However, for practical purposes, no state protection is available to homosexuals against discrimination by the private sector, and there are no federal statutes barring such discrimination.”</p> |

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| Stephen Zamansky | COLORADO'S AMENDMENT 2 AND HOMOSEXUALS' RIGHT TO EQUAL PROTECTION OF THE LAW | 35 B.C. L. Rev. 221 (1993) | See discussion and accompanying footnotes, pp. 244-49. | “Homosexuals are saddled with unique disabilities because of both prejudice and inaccurate stereotypes. They have been subjected to a long history of public and private denigration, condemnation, violence and discrimination. Such discrimination is widespread throughout society. As Judge Norris of the United States Court of Appeals for the Ninth Circuit said, ‘the discrimination faced by homosexuals is no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens and people of a particular national origin.’” |
| Marie Elena Peluso | TEMPERING TITLE VII'S STRAIGHT ARROW APPROACH: RECOGNIZING AND PROTECTING GAY VICTIMS OF EMPLOYMENT DISCRIMINATION | 46 Vand. L. Rev. 1533 (1993) | See discussion and accompanying footnotes, beginning p. 1554. | <p>“The <i>Jantz</i> court pointed out that homosexuals have experienced continuous and extremely intense discrimination. Even courts that have declined to extend suspect status to homosexuals agree that gays and lesbians historically have been subjected to purposeful discrimination. In fact, one court noted, ‘Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society.’”</p> <p>“This discrimination exists not only in the public and private employment context but is pervasive throughout every aspect of society.”</p> <p>“Judges Canby and Norris of the Ninth Circuit Court of Appeals, insightfully pointed out that this history of intense and pervasive discrimination makes it probable that any different treatment is simply a product of past prejudice, rather than a legitimate classification necessary to achieve a pressing government goal. The judiciary should not endorse the discrimination by refusing to subject classifications based on sexual orientation to strict or heightened scrutiny.”</p> |
| Eric A. Roberts | HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE: A REMEDY TO DISCRIMINATION BASED ON SEXUAL ORIENTATION | 42 Drake L. Rev. 485 (1993) | See discussion and accompanying footnotes, pp. 497-501. | <p>“In light of the extensive history of discrimination against homosexuals, this element of the Bowen test is clearly satisfied.”</p> <p>“Today, discrimination against gays and lesbians continues to flourish. The public, the judiciary, and the armed forces acknowledge and promote, in one form or another, invidious discrimination against homosexuals. This discrimination appears in two forms: hostile attitudes expressed by heterosexuals towards homosexuals, and the existence and perpetuation of false stereotypes regarding homosexuals.”</p> <p>“Discriminatory treatment has also appeared in the courts. In November 1989, a Texas district court judge was publicly censured for remarks he made following the sentencing of the murderer of two homosexuals.”</p> |
| Spiro P. Fotopoulos | THE BEGINNING OF THE END FOR THE MILITARY'S TRADITIONAL POLICY ON HOMOSEXUALS: STEFFAN | 29 Wake Forest L. Rev. 611 (1994) | See discussion and accompanying footnotes, beginning p. 618. See also | “The origin of our society's bias against homosexuals goes back over two hundred years to colonial America. In the early 1700's, strict laws against homosexuality existed; these lasted until after the American Revolution. In many colonies, homosexuality was punishable by death.” |

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| | V. ASPIN | | discussion beginning p. 642. | The author notes that at the time the article was published almost one half of the states still criminalize the act of sodomy . |
| Fernando J. Gutierrez, Ed.D., J.D. | GAY AND LESBIAN: AN ETHNIC IDENTITY DESERVING EQUAL PROTECTION | 4 Law & Sexuality 195 (1994) | See discussion and accompanying footnotes, beginning p. 217. | This article looks at the similarities in discrimination against homosexuals and African Americans. |

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| Nancy E. Murphy | QUEER JUSTICE: EQUAL PROTECTION FOR VICTIMS OF SAME-SEX DOMESTIC VIOLENCE | 30 Val. U. L. Rev. 335 (1995) | See discussion and accompanying footnotes, beginning p. 351. | <p>“The gay and lesbian communities have been consciously, consistently, and vigorously discriminated against in America since colonial times. The AIDS crisis has resulted in an increased stigmatization of homosexuals.”</p> <p>“Gay men and lesbians are also discriminated against in employment, in both the public and the private sectors.”</p> <p>“Gay men and lesbians are often discriminated against in housing in the form of zoning ordinances which exclude gay men and lesbians through the use of narrow definitions for the purpose of zoning single-family residential areas.”</p> <p>“Gay men and lesbians face discrimination in the receipt of economic benefits and government services.”</p> <p>“Perhaps the most egregious form of discrimination is the denial of gays and lesbians of custody or visitation with their children.”</p> |
| Kenji Yoshino | SUSPECT SYMBOLS: THE LITERARY ARGUMENT FOR HEIGHTENED SCRUTINY FOR GAYS | 96 Colum. L. Rev. 1753 (1996) | See discussion pp. 1772-93. | <p>This article contains a detailed discussion of the perfunctory manner in which courts perform the Equal Protection Clause test.</p> <p>“While every court to engage in the inquiry has concluded that gays have suffered a history of discrimination, many have not reached the inquiry because they consider it</p> |

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| | | | | pre-empted by <i>Bowers v. Hardwick</i> . Given that this unwillingness to entertain a gay Equal Protection claim may stem in part from anti-gay bias, these courts are perhaps the ones most in need of this analysis.” |
| E. Gary Spitko | A BIOLOGIC ARGUMENT FOR GAY ESSENTIALISM- DETERMINISM: IMPLICATIONS FOR EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS | 18 U. Haw. L. Rev. 571 (1996) | See p. 607. | This article notes that every federal court that has considered the issue has concluded that gay people have suffered a history of discrimination on account of their classification as gay people. |
| Andrea M. Kimball | ROMER V. EVANS AND COLORADO'S AMENDMENT 2: THE GAY MOVEMENT'S SYMBOLIC VICTORY IN THE BATTLE FOR CIVIL RIGHTS | 28 U. Tol. L. Rev. 219 (1996) | See discussion and accompanying footnotes, p. 241. | <p>“Gays face numerous forms of discrimination, both state-sponsored and in the private sector. Gays are forbidden from marrying, adopting children, and even gay forms of 'lovemaking' are illegal in most states.”</p> <p>“In the private sector, no federal law, and only a few state laws prohibit an employer from terminating an employee based solely on sexual orientation. For gays in the military, discrimination is institutionalized.”</p> <p>“Most would agree that gays suffer from a societal stigma that regards homosexuals as 'child molesters,' 'AIDS carriers,' and 'perverts.' Since gays have suffered from such bias and prejudice, the traditional discrimination requirement for suspect class status for homosexuals is easily satisfied.”</p> |
| Jon-Peter Kelly | ACT OF INFIDELITY: WHY THE DEFENSE OF MARRIAGE ACT IS UNFAITHFUL TO THE CONSTITUTION | 7 Cornell J.L. & Pub. Pol'y 203 (1997) | See discussion and accompanying footnotes, pp. 233-39. | <p>“Documented incidents of historical discrimination are legion--easily satisfying the 'history of discrimination' criterion.”</p> <p>“William Eskridge lists several legal discriminations suffered by homosexuals in this century alone: '[Y]ou could not have a job in the federal or most state civil services, have a national security clearance, serve in the armed forces, immigrate to the United States or (if you slipped in by mistake) become a U.S. citizen, use the U.S. mails for your informational magazines, obtain some professional and business licenses, dance with someone of the same sex in a public accommodation, loiter in a public place, hold hands with someone of the same sex anywhere, or (heaven forbid) actually have intercourse with someone of the same sex.’”</p> |
| Celena R. Mayo | THE ROAD NOT TAKEN: ABLE V. UNITED STATES, | 16 N.Y.L. Sch. J. Hum. Rts. | See footnotes 209-213 and accompanying text. | The Eastern District of New York in <i>Able</i> noted that homosexuals have a “bleak history” of discrimination, both “in this country and elsewhere.” “Because of the immediate and |

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| | EQUAL PROTECTION, DUE DEFERENCE, AND RATIONAL BASIS REVIEW | 407 (1999) | | severe opprobrium often manifested against homosexuals or one so identified publicly, members of this group are particularly powerless to pursue their rights openly in the public arena.” |
| Evan Gerstmann | THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION | The University of Chicago Press (1999) | See Chapter 4, “Class Based-Analysis and the Courts,” pp. 62-66. | This book provides a brief analysis of the history of discrimination against LGBT people. |
| Pamela M. Jablow | VICTIMS OF ABUSE AND DISCRIMINATION: PROTECTING BATTERED HOMOSEXUALS UNDER DOMESTIC VIOLENCE LEGISLATION | 28 Hofstra L. Rev. 1095 (2000) | See discussion beginning p. 1128. | <p>“A historical review of the treatment of gays and lesbians demonstrates the purposeful discrimination to which they have been subjected. Courts that have addressed this issue have conceded that homosexuals have endured a history of hostility and discrimination.”</p> <p>“Since colonial times, gay and lesbian communities in America have been consistently, deliberately, and vigorously discriminated against.”</p> <p>“During the 1950s, homosexuality became embroiled in Senator Joseph McCarthy's attack on government agencies. McCarthy's persecution had enduring effects in the following decade. Homosexuality became the justification for doctors and lawyers to lose their licenses and also was a permissible foundation for divorce and loss of child custody.”“</p> <p>“Being identified with homosexuality has been the basis of the ruin of careers, undesirable military discharges, denials of occupational licenses, denials of the right to adopt, denials of national security clearances and denials of the right to enter the country. It is clear that homosexuals have endured a pattern of purposeful discrimination throughout history that has intruded on every aspect of their public and private lives.”</p> |
| Alvin C. Lin | SEXUAL ORIENTATION ANTIDISCRIMINATION LAWS AND THE RELIGIOUS LIBERTY PROTECTION ACT: THE PITFALLS OF THE COMPELLING STATE INTEREST INQUIRY | 89 Geo. L.J. 719 (2001) | See discussion beginning p. 741. | “In his vigorous dissent from the denial of certiorari in <i>Rowland v. Mad River Local School District</i> , Justice Brennan asserted that 'homosexuals constitute a significant and insular minority of this country's population'” subject to 'pernicious and sustained hostility' and 'deep-seated prejudice' He noted that 'discrimination based on sexual preference has been found by various courts to infringe upon fundamental constitutional rights.’” |
| Ann M. Reding | LOFTON V. KEARNEY: EQUAL PROTECTION MANDATES EQUAL | 36 U.C. Davis L. Rev. 1285 (2003) | See footnotes 129-137 and accompanying text. | “Courts have recognized the long history of discrimination against homosexuals. Justice Brennan specifically stated that 'homosexuals have historically been the object of pernicious and sustained hostility.' In addition, homosexuals are often the victims of hate |

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| | ADOPTION RIGHTS | | | crimes and violence, and employers frequently exclude homosexuals from job opportunities based on their sexual orientation.” |
| Lindsay Gayle Stevenson | MILITARY DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION: "DON'T ASK, DON'T TELL" AND THE SOLOMON AMENDMENT | 37 Loy. L.A. L. Rev. 1331 (2004) | See footnote 63. | The footnote cites Samuel A. Marcossou, <i>Constructive Immutability</i> , 3 U. Pa. J. Const. L. 646, 648-49 (2000), for the proposition that “the wide consensus of scholars that sexual orientation... should be a suspect classification subject to the most exacting judicial scrutiny”. The footnotes in this article also cite a number of sources for the proposition that the private and public sectors have discriminated against homosexuals because of their status—there have been numerous reports of violence related to homosexuals, of schools and employers refusing to accept homosexual candidates for jobs, and of same-sex partners being prevented from marrying. |
| Ryan E. Mensing | A NEW YORK STATE OF MIND: RECONCILING LEGISLATIVE INCREMENTALISM WITH SEXUAL ORIENTATION JURISPRUDENCE | 69 Brook. L. Rev. 1159 (2004) | See footnote 36 and accompanying text regarding a New York State Legislative statement acknowledging a history of discrimination against LGBT persons. | “Many residents of New York have encountered prejudice on account of their sexual orientation, and this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.” |
| Ronald J. Krotoszynski, Jr. & E. Gary Spitko | NAVIGATING DANGEROUS CONSTITUTIONAL STRAITS: A PROLEGOMENON ON THE FEDERAL MARRIAGE AMENDMENT AND THE DISENFRANCHISEMENT OF SEXUAL MINORITIES | 76 U. Colo. L. Rev. 599 (2005) | See footnote 126. | The authors, citing state cases which apply strict scrutiny, argue that sexual orientation classifications merit heightened equal protection scrutiny because gays and lesbians have suffered a long history of discrimination despite the fact that their sexual orientation bears no relationship to their ability to contribute to society. |
| Cassie Coleman | LOVE OR CONFUSION? COMMON LAW MARRIAGE, HOMOSEXUALITY AND THE MONTANA SUPREME COURT IN SNETSINGER V. MONTANA UNIVERSITY SYSTEM | 66 Mont. L. Rev. 445 (2005) | See pp. 457-60. | “Like other classes of people who have obtained suspect class status such as women and racial minorities, homosexuals have historically been subjected to such a degree of unequal treatment so as to warrant classification as a suspect class. For example, the United States denied admission to homosexual aliens until 1965 based on their status as 'psychopaths.' Homosexuals have repeatedly been discriminated against in employment and continue to be discriminated against by the U.S. Department of Defense.” |

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| Jeffrey A. Williams | RE-ORIENTING THE SEX DISCRIMINATION ARGUMENT FOR GAY RIGHTS AFTER LAWRENCE V. TEXAS | 14 Colum. J. Gender & L. 131 (2005) | See text accompanying footnotes 60-66. | “Moreover, the vast weight of authority seems to recognize that a history of purposeful unequal treatment clearly <i>does</i> exist.... . Even earlier, a leading authority noted, 'after all, what more palpable discrimination could there be than to criminalize the conduct that defines the class.' This sentiment is pervasive.” |
| Diana Elkind | THE CONSTITUTIONAL IMPLICATIONS OF BATHROOM ACCESS BASED ON GENDER IDENTITY: AN EXAMINATION OF RECENT DEVELOPMENTS PAVING THE WAY FOR THE NEXT FRONTIER OF EQUAL PROTECTION | 9 U. Pa. J. Const. L. 895 (2007) | See pp. 903-904. | <p>“The transgender community is also a demonstrable suspect class because of the history of disparate treatment the group has suffered. As Dylan Vade points out, '[t]ransgender people are discriminated against in many areas of life, from employment and housing, to health care and custody rights.’”</p> <p>“Transgender people are disproportionately affected by poverty and frequently rely upon public assistance programs such as welfare, Medicaid, and foster care. Additionally, the combination of poverty and employment discrimination leads to a disproportionate number of transgender people participating in criminalized economies; therefore, gender nonconforming people are also disproportionately represented in the criminal justice system, court-mandated treatment programs, and prisons.”</p> |
| Evangelos Kostoulas | ASK, TELL, AND BE MERRY: THE CONSTITUTIONALITY OF "DON'T ASK, DON'T TELL" FOLLOWING LAWRENCE V. TEXAS AND UNITED STATES V. MARCUM | 9 U. Pa. J. Const. L. 565 (2007) | See discussion and accompanying footnotes, pp. 585-87. | “The Court has alluded to several justifications for the application of strict scrutiny, which include a long history of past discrimination Homosexuals have been subjected to a range of discriminatory acts in the distant and recent past, including being categorized as mentally ill, incarcerated for not remaining celibate, and excluded from hate crime legislation despite being targets of such crimes.” |
| Alison Lorenzo | CONSTITUTIONAL LAW-- EQUAL RIGHTS AMENDMENT, EQUAL PROTECTION, AND DUE PROCESS--THE RIGHT OF SAME-SEX MARRIAGE IS NOT FUNDAMENTAL, PROHIBITING SAME-SEX MARRIAGE DOES NOT CONSTITUTE GENDER-BASED DISCRIMINATION, AND RESTRICTIONS ON THE RIGHT OF MARRIAGE ARE RATIONALLY RELATED TO THE STATE'S | 39 Rutgers L.J. 1003 (2008) | See footnotes 122-124. | <p>The lengthy footnotes in this article discuss the history of violence against homosexuals from the beginning of the twentieth century to the present.</p> <p>“Lesbians, gay men, bisexuals, and transgendered people were the objects of specific criminal laws against cross-dressing and homosexual solicitation, as well as generic sodomy laws; saw books, movies, radio programs, and even art depicting their point of view censored or denigrated by the state; were excluded from service in the United States armed forces; were barred from federal or state government employment; suffered under the stigma of laws or policies barring schools from depicting sexual or gender minorities positively or requiring them to denigrate such minorities; could not obtain state recognition of their intimate relationships[,] and could not adopt children or even retain custody of their own biological children; [and] were excluded from entering the United States or even becoming American citizens.”</p> |

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| | INTEREST IN REGULATION OF MARRIAGE. CONAWAY V. DEANE, 932 A.2D 571 (MD. 2007). | | | |
| Robin Cheryl Miller | FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AS PROHIBITING DISCRIMINATION IN EMPLOYMENT ON BASIS OF GAY, LESBIAN, OR BIXSEXUAL ORIENTATION OR CONDUCT | 96 A.L.R.5th 391 (2002 & supps.) | Provides a broad summary of relevant case law and various fact patterns. | This annotation collects and analyzes state and federal cases discussing whether employment discrimination on the basis of sexual orientation violates a federal or state constitutional provision. “Employment discrimination against gay, lesbian, and bisexual persons has a long history of acceptance. In particular, many agencies of the Federal Government have, at least in the past, expressly precluded the employment of homosexuals, and the military continues to do so. Contemporary courts have been more willing than their predecessors to scrutinize such employment discrimination under a variety of constitutional theories.” |
| L. Camille Hebert | SEXUAL ORIENTATION DISCRIMINATION AS VIOLATION OF EQUAL PROTECTION | 2 Empl. Privacy Law § 9:5 | See text accompanying footnotes 24-27. | “Even courts that have refused to grant suspect class status to gay men and lesbians generally have recognized that they have in fact suffered a history of discrimination, including the Supreme Court.” |



Chapter 7: Findings of Widespread Discrimination Against LGBT People by State and Local Legislative Bodies, Commissions, and Elected Officials

A number of state and local elected officials, legislative bodies, and special commissions have issued findings of widespread discrimination against LGBT people in their jurisdictions, including discrimination in public employment. For example, in May 2007 when the governor of Ohio issued an executive order prohibiting discrimination in state employment based on sexual orientation and/or gender identity,¹ the order included the finding that the “[i]nformation compiled by the Ohio Civil Rights Commission documents ongoing and past discrimination on the basis of sexual orientation and/or gender identity in employment-related decisions by personnel at Ohio agencies, boards and commissions.”² Similarly, when the governor of Alaska issued an administrative order in 2002 prohibiting sexual orientation discrimination in state employment,³ the order stated that it was “in recognition of the findings concerning perceived institutional intolerance in state agencies set out in the final report of the Governor’s Commission on Tolerance.”⁴ And when the governor of Oregon issued an executive order in 1998 prohibiting sexual orientation discrimination it was accompanied by a “Questions and Answers” sheet that stated, “Although existing law may require equality in state employment or services, some homosexual employees or applicants for state services are

¹ Exec. Order No. 2007-10S (2007), *available at* <http://www.wright.edu/admin/affirm/ExecutiveOrder2007-10S.html> (last visited Feb. 1, 2009).

² The referenced information compiled by the Ohio Civil Rights Commission could not be found publicly.

³ Admin. Order No. 195, dated March 5, 2002, a copy of which may be found at <http://gov.state.ak.us/admin-orders/195.html>.

⁴ Admin. Order No. 195, dated March 5, 2002 *available at* <http://gov.state.ak.us/admin-orders/195.html>.

afraid to assert their rights because they fear discrimination if they make their sexual orientation public. This order is intended to reduce that fear by making it clear that the Governor expects state officials and agencies not to discriminate.”⁵ Table 8-A summarizes twenty-nine examples of such findings from seventeen different states: Alaska, California, Colorado, Hawai’i, Iowa, Idaho, Kansas, Kentucky, Maine, Maryland, Michigan, New Jersey, New York, Ohio, Oregon, Utah, and Virginia.

⁵ *Id.*

Table 8-A: Findings of Widespread Discrimination Against LGBT People by State and Local Legislative Bodies, Commissions, and Officials

| State | Government Body, Elected Official, or Commission | Year | Finding |
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| Alaska | Administrative Order ⁶ by Governor | 2002 | By an administrative order dated March 5, 2002, Governor Tony Knowles declared that “it was the continued goal of the executive branch to . . . prohibit and prevent discriminatory behavior in the state workplace based on race, sex, color, religion, physical or mental disability, sexual orientation, or economic status.” ⁷ In the administrative order, the Governor stated that the order was “in recognition of the findings concerning <i>perceived institutional intolerance in state agencies</i> set out in the final report of the Governor’s Commission on Tolerance.” (emphasis added) ⁸ |

⁶ Based on a search of references to administrative orders in Alaska case law, it seems that an administrative order may not be a source for a cause of action. Administrative orders are issued under the authority of law (and not under the force of law). Examples of administrative orders include “an order issued under AS 26.20.040 to declare a state of emergency or to exercise powers necessary for the protection of the population in time of attack; to dispose of the property of a dissolved city under AS 29.10.546; to assign functions in the executive branch under AS 44.17.060; to create interim advisory boards under AS 44.19.060; etc.” Alaska Admin. Order No. 1, dated January 23, 1964, a copy of which may be found at <http://www.gov.state.ak.us/admin-orders/001.html>. If the statute from which the governor derives authority is found to be unconstitutional, then the administrative order is void. *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1144 (AK. 1987). By contrast, an executive order has the force of law and is subject to “disapproval” by the legislature. Alaska Admin. Order No. 1, dated January 23, 1964. That is, an executive order can change existing law because it is “issued under the authority of Article III, Sec. 23, Constitution of the State of Alaska” and reviewed by the legislature. *Id.* See also 1979 Alas. AG LEXIS 403 (Alas. AG 1979). The “legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove [the] executive [order]. Unless disapproved by resolution concurred in by a majority of the members in joint session, [the order becomes] effective at a date thereafter to be designated by the governor.” AK. CONST. Article III §23.

⁷ Ak. Admin. Order No. 195, dated March 5, 2002, a copy of which may be found at <http://gov.state.ak.us/admin-orders/195.html>.

⁸ Ak. Admin. Order No. 195, dated March 5, 2002 available at <http://gov.state.ak.us/admin-orders/195.html>.

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| Alaska | Governor's Commission on Tolerance Final Report | 2001 | One of the findings laid out in the Commission on Tolerance's final report was that "Alaska's statutes fail to protect individuals on the basis of economic status or sexual orientation. The Commission heard testimony from people who have been discriminated against in the workplace based on their sexual orientation...yet have no recourse because our laws do not specifically protect them." ⁹ |
| California | Statement by Speaker of the State Assembly | 1992 | In September 1992, Governor Wilson signed a bill that added sexual orientation to the Labor Code and protecting gay individuals against job discrimination. ¹⁰ The next day he vetoed the Civil Rights Restoration Act of 1992. ¹¹ The vetoed bill would have given a state agency jurisdiction to impose criminal penalties for violations, whereas the bill he signed permitted only civil enforcement of discriminatory complaints. Assembly Speaker Willie Brown said the veto "shows a callous disregard for the basic rights of many Californians who have felt the sting and humiliation of discrimination." ¹² |
| California | Legislative Findings in State Statute | 2003 | The California Legislature, in passing a domestic partnership statute in 2003, recognized the "longstanding social and economic discrimination, many lesbian, gay, and bisexual" people in the California have faced. ¹³ |
| Colorado | Report by State Assembly | 1992 | Amendment 2 would have rendered unconstitutional municipal ordinances prohibiting sexual orientation discrimination already adopted in Aspen, Boulder and Denver, but was ultimately overturned by the United States Supreme Court. ¹⁴ In conjunction with Amendment 2, the state General Assembly prepared a report called "The Report on Ballot Proposals of the Legislative Council of Colorado General Assembly, An Analysis of 1992 Ballot Proposals" ¹⁵ , to provide a survey of the law on sexual orientation discrimination and policies existing as of 1992. According to the Report: "Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in |

⁹ GOVERNOR'S COMMISSION ON TOLERANCE FINAL REPORT, December 6, 2001 at 28-29. The Commission also made findings of discrimination and harassment based on sexual orientation in Alaska's public schools. *Id.*

¹⁰ *California Gay Rights Timeline*, available at: <http://www.pinknews.co.uk/aroundtheworld/tag/vetoes/>

¹¹ New York Times, *California Governor Vetoes Civil Rights Bill*, September 28, 1992, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE3DF1E3BF93BA1575AC0A964958260&n=Top/Reference/Times%20Topics/People/W/Wilson,%20Pete>.

¹² *Id.*

¹³ AB 205 as chaptered January 23, 2003.

http://www.assembly.ca.gov/LGBT_Caucus/laws/2003/ab0205/fulltextchapteredbill.htm, last visited on September 3, 2009.

¹⁴ In *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁵ (Research Publ. No. 369, p. 9-12, 1992).

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| | | | 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the “No Protected Status” complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation. The Report went on to note that local ordinances in Aspen, Boulder and Denver protected “individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation.” The Report concluded that none of these ordinances afforded affirmative action or minority status, but rather that “these cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations.” |
| Hawaii | House Judiciary Committee Findings | 1991 | When the Hawaii House Judiciary Committee recommended that the proposed inclusion of “sexual orientation” to the Fair Employment Practices Act, it found “that the AIDS epidemic has compounded discriminatory treatment of gays and lesbians. To treat someone differently simply on the basis of what the person is and not in relation to the person’s behavior is unfair.” ¹⁶ |
| Iowa | Civil Rights Commission Report | 2007 | The Iowa Civil Rights Commission, in its statement of 2007 priorities, supported the proposed amendment [to add sexual orientation and gender identity to anti-discrimination statute] and stated: “We no longer wish to see our children, neighbors, co-workers, nieces, nephews, parishioners, or classmates leave Iowa so they can work, prosper, live or go out to eat. Our friends who are gay or lesbian know the fear and pain of hurtful remarks, harassment, attacks, and loss of jobs or housing simply because of their sexual orientation or gender identity.” ¹⁷ |
| Idaho | Statement of Purpose in Bill Introduced in State Senate | 2008 | “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”. ¹⁸ |

¹⁶ STATE OF HAWAII, JOURNAL OF THE HOUSE OF REPRESENTATIVES, H. 16-907, Reg. Sess., at 1163 (1991).

¹⁷ Iowa Civil Rights Commission, Policy Statements, available at: <http://www.iowa.gov/government/crc/publications/index.html>.

¹⁸ S.B. 1323 (Id. 2008).

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| Kansas | Findings in Bill to add “sexual orientation“ to state anti-discrimination law | 2005 | During the 2005 Kansas Legislative Session, Senate Bill 285 (“SB 285”) was introduced in the Committee on Federal and State Affairs to amend the Kansas Act Against Discrimination to include “sexual orientation.” ¹⁹ The bill stated: “The practice or policy of discrimination against individuals in employment relations...by reason of...sexual orientation... 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, ... It is also declared to be the policy of this state to assure equal opportunities and encouragement to every citizen regardless ...sexual orientation, in securing and holding, without discrimination, employment in any field of work or labor for which a person is properly qualified.” ²⁰ |
| Kansas | Legislative Testimony on Anti-Discrimination Bill | 2009 | At the February 12, 2009 hearing on SB 169, Maggie Childs, Chair, Kansas Equality Coalition, presented a policy brief, entitled “The Extent of Sexual Orientation Discrimination in Topeka, KS,” ²¹ to the Senate Federal and State Affairs Committee. ²² The brief reported the results of a survey conducted from October 2003 through January 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: 16% of respondents reporting that they were denied employment; 11% reporting that they were denied a promotion; 18% reporting that they were overlooked for additional responsibilities at work; 15% reporting that they were fired; and 35% reporting that they had received harassing letters, e-mails, or faxes at work all based on the respondent’s sexual orientation or gender identity. ²³ Furthermore, 47% of respondents reported that 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. |

¹⁹ Telephone Interview of Kim Horp, Reference Librarian, State Library of Kan. (Jan. 23, 2009) (hereinafter “Telephone Interview”).

²⁰ Kan. S.B. 285 (Kan. 2005).

²¹ *The Extent of Sexual Orientation Discrimination in Topeka, KS*, Roddrick Colvin, National Gay and Lesbian Task Force Policy Institute.

²² Minutes of the Kansas Senate Federal and State Affairs Committee, February 12, 2009.

²³ *The Extent of Sexual Orientation Discrimination in Topeka, KS*, Roddrick Colvin, National Gay and Lesbian Task Force Policy Institute, at 2.

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| Kentucky | Statement of City Alderman | 1999 | One of the Louisville Aldermen to vote in favor of the Louisville civil rights ordinance to prohibit employment discrimination on the basis of sexual orientation and gender identity, Steve Magre, had previously voted against the proposal in three earlier versions. He reportedly changed his mind after hearing “personal testimonials . . . about employment discrimination faced by Louisvillians.” ²⁴ |
| Maine | Finding in City Ordinance | 1999 | The Falmouth town council found that “The population of the Town of Falmouth is diverse and includes people of every sexual orientation (they are our family members, neighbors, friends, employees, taxpayers, landlords and tenants, lenders and borrowers), some of whom are at risk of being discriminated against in employment opportunities, housing, access to public accommodations, education, and the extension of financial credit. Many individuals are reluctant to report acts of harassment or violence because of their sexual orientation because of a lack of legal protection against discrimination in employment, housing, access to public accommodations, education, and the extension of financial credit. Therefore, to protect the public health, safety, and welfare, it is declared to be the policy of this town to prevent discriminatory practices that infringe on the basic human right to a life with dignity, so that corrective measures may, where possible, be promptly recommended and implemented, and to prevent discrimination in employment, housing, access to public accommodations, education, or the extension of credit on account of sexual orientation” ²⁵ |
| Maine | Finding in City Ordinance | 1998 | The City of Portland found that “The population of the City Portland is diverse and includes people of every sexual orientation, some of whom are at risk of being discriminated against in employment opportunities, housing, access to public accommodations and in the extension of financial credit.” ²⁶ |
| Maine | Finding in City Ordinance | 2000 | The Portland City Council found that “(a) The population of the city consists of people of every sexual orientation, some of whom are discriminated against in employment opportunities, housing, access to public accommodations and in the extension of financial credit; ... (c) There has been a disturbing increase in the number of violent incidents within the city in which individuals have been attacked because of their sexual orientation; and (d) The lack of legal protection for individuals discourages them from publicizing acts of discrimination out of fear of reprisal.” ²⁷ |

²⁴ GenderNews, *Louisville, KY Gets Fairness Law with Some TG Protection*, January 26, 1999, available at <http://www.ifge.org/news/1999/feb/nws99feb25.htm#story2>.

²⁵ See <http://www.municode.com/resources/gateway.asp?pid=12125&sid=19> (visited July 29, 2009).

²⁶ See City of South Portland Ord. 97/98 (2008-2009), available at <http://www.memun.org/SchoolsProject/Resources/Ordinance/SexOrientationSP.htm>.

²⁷ See City of Portland, Code of Ordinances, Ch. 13.5, Art. II, § 13.5-21, available at: http://www.ci.portland.me.us/Chapter013_5.pdf

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| Maryland | Special Commission Created by the Governor | 2000 | In October 2000, Governor Glendening created a Special Commission to Study Sexual Orientation Discrimination in Maryland, motivated by the death of his brother, who served for many years in the armed forces and had lived “in the closet.” ²⁸ The Special Commission held hearings regarding sexual orientation discrimination. 60% of people in Maryland favored a ban on discrimination against gay men and lesbians. ²⁹ Of the 113 oral testimonies at the hearings 87 were in favor of passage and 26 were opposed. The testimony of proponents of the bills tended to focus on personal stories of discrimination as well as a desire to simply work on “a level playing field,” opponents’ testimony was largely based on the belief that homosexuality is immoral and invoked their religious beliefs to support this position. ³⁰ Maryland passed a non-discrimination bill the next year. |
| Maryland | Memorandum by County Attorneys passing gender identity discrimination ordinance | 2007 | Two staff attorneys working for Montgomery County presented a detailed memorandum to the County Council regarding Montgomery County Bill 23-07. ³¹ The County Memorandum included testimony from the Montgomery County Chapter of the American Civil Liberties Union in favor of the measure, which recounted the story of a woman who was offered a job with the Library of Congress Congressional Research Service only to have it withdrawn when she revealed that she would undergo gender reassignment surgery. ³² Similarly, a letter from Equality Maryland cited a survey indicating that 42 percent of transgender individuals are unemployed, 31 percent have annual incomes below \$10,000, and 19 percent do not have their own living space in the Washington, D.C. region. ³³ Finally, the Council Memorandum contained a letter from a resident detailing the professional challenges she faced after coming out as transgendered. ³⁴ This proposal was enacted in 2007 by a unanimous vote of the County Council. |
| Michigan | Statement of Purpose in Governor’s Executive Directive | 2007 | <u>Executive Directive 2007-24</u> : Issued November 21, 2007, ED 2007-24 protects employees in the State’s executive branch from discrimination and harassment based on “gender identity or expression.” The directive states, “[t]o build a more inclusive Michigan our state government must be a model of tolerance, accessibility, equal opportunity -- reaching out to people, knocking down barriers, and |

²⁸ Geoffrey Greif & Daphne McClellan, *Being Heard on Sexual Orientation: An Analysis of Testimonies at Public Hearings on an Anti-Discrimination Bill*, 8 J. HUMAN BEH. IN SOC. ENVIRON. 2,3 (2003).

²⁹ T.W. Waldron, *Answers Put State Among Progressives*, BALT. SUN, Jan. 10, 2001, at A1, A14.

³⁰ *Id.*

³¹ Memorandum from Amanda Mihill & Michael Faden to [the Montgomery] County Council (Nov. 13, 2007) (“Council Memorandum”), available at http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2007/071113/20071113_11.pdf.

³² *Id.* at 24.

³³ *Id.* at 26.

³⁴ *Id.* at 28.

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| | | | dispelling prejudices which hold Michigan back;...when the State of Michigan acts inclusively, the state benefits from the contribution and full participation of all Michigianians;... the employment practices of the State of Michigan should promote public confidence in the fairness and integrity of government, and should reflect a firm commitment to strengthening and developing equal employment opportunities;... state employment policies and procedures that encourage non-discriminatory and equal employment practices provide desirable models for the private sector and local governments and build upon successful policies and procedures of private and public sector employers." The directive adds "gender identity or expression" to a list of other prohibited forms of discrimination and harassment, including religion, race, color, national origin, age, sex, sexual orientation, height, weight, marital status, partisan considerations, disability and genetic information. |
| New Jersey | Finding in State Statute | 1991 and 2006 | In support of the LAD, the New Jersey Legislature found as follows: "The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of ... gender identity or expression, [or] affectional or sexual orientation, ... are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State.... The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the ... gender identity or expression, [or] affectional or sexual orientation ... in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured. The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act." ³⁵ |
| New York | Executive Order by Governor | 1983 | When issuing the first executive order to forbid employment discrimination on the basis of sexual orientation in New York in 1983, Governor of New York Mario M. Cuomo stated: "As Secretary of State, I was required to issue special regulations to prohibit discrimination against individuals seeking licenses for certain occupations or corporate privileges. Up to that time such licenses were denied on the basis of sexual orientation |

³⁵ N.J. STAT. ANN. § 10:5-3.

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| | | | or even presumed sexual orientation. There is no reason to believe that the discrimination apparent in that part of government was confined there. No one argued then against my change in the State's regulations. No one was heard to say that government had no place in fighting unfair discrimination. In fact, in recognition of this, a personnel directive against discrimination in hiring was issued during the prior administration." (emphasis added) ³⁶ In the Executive Order, Cuomo established the Office Employee Relations and vested it with the authority to "promulgate clear and consistent guidelines prohibiting discrimination based on sexual orientation to maintain an environment where only job-related criteria are used to assess employees of the State." ³⁷ |
| New York | Sponsorship Memo from New York Assembly Member for Anti-Discrimination Statute | 2001 | "Discrimination based on sexual orientation is widespread and commonplace throughout the State of New York despite our best efforts to eliminate it. These efforts are hampered substantially because the State's laws do not prohibit discrimination based on sexual orientation. It exists -- both directly and indirectly -- in employment, in housing, in public accommodations and services. It affects people of all ages, races, genders, religions and sexual orientations. It hinders the economic development of the entire State." ³⁸ |
| New York | Legislative Findings in Anti-Discrimination Statute | 2002 | "The legislature further finds that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual." ³⁹ |
| New York | Letter from the Mayor Of New York City to the Governor of New York | 2001 | "The need for such legal safeguards against sexual orientation discrimination is well established. In 1986, in response to a growing number of documented incidents of discrimination on the basis of real or perceived sexual orientation, the City enacted into local law protection against discrimination on the basis of sexual orientation. Since its enactment, the number of sexual orientation discrimination claims filed in the City have dramatically increased. In FY92, 13 such claims were filed; in FY93, 45 filed; FY94, 62 filed; FY95, 57 filed; FY96, 95 filed; and FY97, 101 filed." ⁴⁰ |

³⁶ Mario M. Cuomo, Nov. 18, 1983, Executive Order 28: Establishing a Task Force on Sexual Orientation Discrimination, N.Y. COMP. CODE R. & REGS. tit. 9, § 4.28 (1983).

³⁷ *Id.*

³⁸ N.Y. Assembly Mem. in Support, Bill Jacket, 2002 A.B. 1071, Ch. 2 (Jan. 17, 2001)

³⁹ 2002 N.Y. Laws ch. 2, § 1.

⁴⁰ Dec. 17, 2002 letter from the Office of the Mayor, The City of New York to Governor George H. Pataki recommending approval of SONDA.

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| New York | Legislative Findings in Anti-Discrimination Bill | 2009 | In connection with New York A.5710/S.2406 (2009), legislation that would in relevant part, prohibit discrimination based on gender identity or expression in employment, the legislature makes the following statement regarding legislative intent in §1 of the bill. “The legislature further finds that many residents of this state have encountered prejudice on account of their gender identity or expression, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to live in a gender identity or expression which is different from that traditionally associated with the sex assigned to that person at birth.” ⁴¹ |
| New York | Sponsorship Memo from New York Assembly Member for Anti-Discrimination Statute | 2009 | The bill’s sponsor memo for A.5710 states as the justification for the legislation that: “The transgender community is still not protected from discrimination under the law. Transgender people whose gender identity, appearance, behavior, or expression differs from their genetic sex at birth face discrimination in housing, employment, public accommodations and many other areas of life, and they are particularly vulnerable to hate crimes.” ⁴² |
| Ohio | Executive Order by Governor | 2007 | In May 2007, Ohio Governor Strickland issued executive order 2007-10S prohibiting discrimination in public employment based on sexual orientation and/or gender identity. ⁴³ The Executive Order states that, “[i]nformation compiled by the Ohio Civil Rights Commission documents ongoing and past discrimination on the basis of sexual orientation and/or gender identity in employment-related decisions by personnel at Ohio agencies, boards and commissions.” ⁴⁴ |
| Oregon | Executive Order by Governor | 1988 | The Executive Order prohibiting discrimination in public employment on the basis of sexual orientation includes the following: “Oregon was settled by those who cherished fairness and the opportunity to use their skills and talents as they saw fit. Oregon law embodies this belief in its use of objective standards for the provision of services, and in its declaration that personnel decisions be made ‘without regard to non-job related factors.’ (ORS 240.306(1)).” ⁴⁵ From the Executive Order Questions and Answers issued with the Executive Order: “Although existing law may require equality in state employment or services, some |

⁴¹ 2009 N.Y. A.B. 5710; and see 2009 N.Y. S.B. 2406.

⁴² 2009 Legis. Bill Hist. N.Y. A.B. 5710, <http://assembly.state.ny.us/leg/?bn=A05710>.

⁴³ Exec. Order No. 2007-10S (2007), available at <http://www.wright.edu/admin/affirm/ExecutiveOrder2007-10S.html> (last visited Feb. 1, 2009).

⁴⁴ The referenced information compiled by the Ohio Civil Rights Commission could not be found publicly.

⁴⁵ Or. Exec. Order No. EO-87-20 (1988).

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| | | | homosexual employees or applicants for state services are afraid to assert their rights because they fear discrimination if they make their sexual orientation public. This order is intended to reduce that fear by making it clear that the Governor expects state officials and agencies not to discriminate,”(emphasis added) ⁴⁶ and “...[this Executive Order] says that lifestyle is irrelevant to a person’s ability to do a good job, or to their need for state services.” ⁴⁷ |
| Oregon | Special Task Force of the Governor | 2006 | The Oregon Equality Act is a result of the Governor’s Task Force on Equality in Oregon, which was established in February 2006 by Executive Order No. 06-03. The Governor charged the Task Force with studying whether changes to Oregon law were necessary to guarantee that Oregonians are protected from discrimination in employment, housing, public accommodations and other opportunities, regardless of sexual orientation or gender identity. The Task Force held public meetings throughout Oregon and issued a report on December 15, 2006. The report notes, among other things that: (1) courts have determined that homosexuals are a “suspect class” under the Oregon Constitution; (2) discrimination based on sexual orientation exists in Oregon; and (3) laws and ordinances that prohibit discrimination based on sexual orientation have not had a negative impact on businesses. The Oregon law prohibiting discrimination on the basis of sexual orientation and gender identity was passed in 2007. ⁴⁸ |
| Utah | Report by Utah Anti-Discrimination and Labor Division, Salt Lake City Human Rights Commission | 2009 | According to the 2009 Discrimination Report issued by this Salt Lake City Human Rights Commission, Utah Antidiscrimination and Labor Division (“UALD”) no longer keeps data on sexual orientation and gender identity discrimination complaints. ⁴⁹ When statistics were kept, between June 2007 and September 2008, the data suggested an average of three sexual orientation and gender identity employment discrimination complaints per month. ⁵⁰ The Report also found that the forms of discrimination currently experienced by Salt Lake City’s residents includes heterosexism. ⁵¹ Individuals present at the focus groups conducted by the Commission reported facing |

⁴⁶ *Id.*

⁴⁷ Or. Exec. Order No. EO-87-20 (1988), *Questions and Answers*.

⁴⁸ Or. S.B. 2 (2007) (legislative history).

⁴⁹ 2009 DISCRIMINATION REPORT, Salt Lake City Human Rights Commission (2009), at p.1.

⁵⁰ *Id.*

⁵¹ *Id.*

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| | | | discrimination in both housing and employment, including eight people who believed they were terminated from their jobs when their sexual orientation was discovered. ⁵² |
| Virginia | Report of Virginia Department of Health and Virginia HIV Community Planning Committee | 2007 | In January 2007 the Virginia Department of Health, in conjunction with the Virginia HIV Community Planning Committee, published a report on the life experiences of transgender Virginians. ⁵³ The study, consisting of a final analysis sample of 350 respondents, ⁵⁴ found that 20% of transgender Virginians had been denied a job and 13% had been fired due to their transgender status or gender expression. ⁵⁵ Of the respondents, 9% were unemployed at the time of the survey and 39% reported incomes at or below the poverty level (\$17,000/year). ⁵⁶ |

⁵² *Id.* at p. 32.

⁵³ *The Health, Health-related Needs, and Lifecourse Experiences of Transgender Virginians*, Richmond: Division of Disease Prevention through the Centers for Disease Control and Prevention, Virginia Department of Health, Xavier, J.M, Hannold, J.A., Bradford, J., Simmons R., January, 2007.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.* at 21.

⁵⁶ *Id.* at 14.



Chapter 8: Congressional Record of Employment Discrimination Against LGBT Public Employees. 1994-2007.

In considering versions of ENDA from 1994 to 2007, Congress has specifically considered unconstitutional discrimination by state, local, and federal employers against LGBT people. Direct victims of such discrimination have testified at Congressional hearings; legal scholars have presented specific cases as well as scholarship on the history and continuing legacy of such discrimination; social scientists have presented survey data and other studies documenting such discrimination; LGBT rights organizations have submitted reports and expert testimony documenting such discrimination; and members of Congress have shared specific examples and spoken more generally about such discrimination. In total, over 67 specific examples of employment discrimination against LGBT people by public employers have been presented to Congress in prior years, including discrimination involving 13 state employees, 14 teachers, 12 public safety officers, 2 other local employees, and 26 federal employees. Table 4-A briefly summarizes some of the testimony and other references to such discrimination that Congress has considered over the past fifteen years.

Table 4-A. Documentation of Employment Discrimination Against LGBT People by State, Local, and Federal Employers Presented to Congress When Considering ENDA, 1994-2008

| Year | Type | Citation | Public Employment Discrimination Against LGBT People Considered |
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| 1994 | Statement by Senator Ted Kennedy | 140 Cong. Rec. S. 7581, S. 7581, Senator Ted Kennedy to the Committee on Labor and Human Resources re: S. 2238 <i>Congressional Record, Senate – Statements on Introduced Bills and Joint Resolutions</i> , Thurs., June 23, 1994(Legislative day of Tues., June 7, 1994) 103rd Congress, 2nd Session | “This bill is for the postal worker in Michigan who was verbally harassed and then beaten unconscious by his coworkers for being gay. He reported continued harassment to his superiors-but they did nothing. In a subsequent law suit, the court rejected his claim because discrimination based on sexual orientation is not covered under Federal law.” (describing the story of Ernest Dillon, a postal employee in Detroit, Michigan, who was harassed and assaulted at work and eventually forced to resign.) |

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| <p>1994</p> | <p>Prepared Testimony by Legal Scholar on Reported Cases of Discrimination by Public Employers Before Senate Committee on Labor and Human Resources</p> | <p>S. Hrg. 103-703, pp. 94-105 Prepared Testimony of Chai R. Feldblum, Appendix I <i>Hearing before the Senate Committee on Labor and Human Resources re: S. 2238: Employment Non-Discrimination Act of 1994</i> July 29, 1994 103rd Congress, 2nd Session</p> | <p><i>Aumiller</i>. State university refused to re-hire a faculty member due to his involvement in a series of articles about gay life. <i>Aumiller v. Univ. of Delaware</i>, 434 F. Supp. 1273 (D. Del. 1977).</p> <p><i>Bush</i>. A gay inmate was fired from his job in the state prison kitchen. <i>Bush v. Potter</i>, 875 F.2d 862 (6th Cir. 1989).</p> <p><i>Kelley</i>. A gay inmate in state prison was removed from his job in the prison bakery. <i>Kelley v. Vaughn</i>, 760 F. Supp. 161 (W.D. Mo. 1991).</p> <p><i>Johnson</i>. A gay inmate in state prison was denied a prison job. <i>Johnson v. Knable</i>, No. 90-7388, 1991 U.S. App. LEXIS 12125 (4th Cir. May 28, 1991).</p> <p><i>Dawson</i>. State law enforcement division forced an employee to resign due to homosexual conduct. <i>Dawson v. State Law Enforcement Div.</i>, No. 3:91-1403-17, 1992 U.S. Dist. LEXIS 8862 (D.S.C. April 3, 1992).</p> <p><i>Wolotsky</i>. Male social worker (at a non-profit under contract with state) terminated without warning when male patient alleged they had sex. No "state action" found. <i>Wolotsky v. Huhn</i>, 960 F.2d 1331 (6th Cir. 1992).</p> <p><i>Shahar</i>. State attorney general withdrew job offer to a law school graduate after learning of her same-sex wedding. <i>Shahar v. Bowers</i>, 836 F. Supp. 859 (N.D. Ga. 1993).</p> <p><i>Burton</i>. A teacher who was discovered to be a "practicing lesbian" was fired pursuant to Oregon statute permitting dismissal for "immorality." <i>Burton v. Cascade Sch. Dist. Union High Sch. No. 5</i>, 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975).</p> <p><i>Brass</i>. Pursuant to department policy, New York City Department of Social Services refused to hire two gay male applicants for caseworker positions. <i>Brass v. Hoberman</i>, 295 F. Supp. 358 (S.D. N.Y. 1968).</p> <p><i>Jantz</i>. Heterosexual part-time teacher not hired for the available full-time position because principal believed he was gay. <i>Jantz v. Muci</i>, 759 F. Supp. 1543 (D. Kan. 1991).</p> <p><i>Rowland</i>. Bisexual high school guidance counselor suspended and school district refused to</p> |
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| | | <p>renew her contract. <i>Rowland v. Mad River Local Sch. Dist.</i>, 730 F. 2d 444 (6th Cir. 1984), <i>cert. denied</i>, 470 U.S. 1009 (1985).</p> <p><i>Childers</i>. Police department refused to hire gay applicant. <i>Childers v. Dallas Police Dept.</i>, 513 F. Supp. 134 (N.D. Tex. 1981), <i>aff'd</i>, 669 F.2d 732 (5th Cir. 1982).</p> <p><i>Walls</i>. City fired an employee who refused to answer security check questions regarding her sexuality. <i>Walls v. City of Petersburg</i>, 895 F.2d 188 (4th Cir. 1990).</p> <p><i>Endsley</i>. Woman working as an unpaid deputy sheriff was forced to resign due to rumors that she was a lesbian. <i>Endsley v. Naes</i>, 673 F. Supp. 1032 (D. Kan. 1987).</p> <p><i>Gish</i>. School board ordered teacher involved in gay activist associations to undergo a psychiatric examination. <i>Gish v. Bd. of Educ. of Paramus</i>, 366 A.2d 1337 (N.J. Super. Ct. App. Div. 1976), <i>cert. denied</i>, 377 A.2d 658 (N.J.). <i>cert. denied</i>, 434 U.S. 879 (1987).</p> <p><i>Acanfora</i>. A school principal transferred a teacher from his post to a non-teaching position when the principal discovered the teacher was gay. <i>Acanfora v. Bd. of Educ.</i>, 491 F.2d 498 (4th Cir.), <i>cert. denied</i>, 419 U.S. 836 (1974).</p> <p><i>City of Dallas</i>. Police department refused to hire a woman who disclosed, in response to interview questions, that she was a lesbian. <i>City of Dallas v. England</i>, 846 S.W.2d 957 (Tex. App. 1993).</p> <p><i>Merrick</i>. School board regulations permitted discrimination on the basis of sexual orientation (declaratory action sought by lesbian employee). <i>Merrick v. Bd. of Higher Educ.</i>, 841 P.2d 646 (Or. App. 1992).</p> <p><i>Gaylord</i>. Teacher fired shortly after answering a school official's questions regarding his sexual orientation. <i>Gaylord v. Tacoma Sch. Dist. No. 10.</i>, 559 P.2d 1340 (Wash.), <i>cert. denied</i>, 434 U.S. 879 (1977).</p> <p><i>Delahoussaye</i>. City refused to re-employ laid off police officer discovered engaged in homosexual conduct. <i>Delahoussaye v. City of New Iberia</i>, 937 F.2d 144 (5th Cir. 1991).</p> |
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| | | <p><i>Ashton</i>. FBI forced gay clerical employee to resign. <i>Ashton v. Civiletti</i>, 613 F.2d 923 (D.C. Cir. 1979).</p> <p><i>Dillon</i>. Postal worker forced to quit due to ongoing harassment. <i>Dillon v. Frank</i>, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).</p> <p><i>Singer</i>. EEOC employee dismissed due to his sexual orientation and involvement in gay community activities. <i>Singer v. United States Civ. Serv. Comm'n</i>, 530 F.2d 247 (9th Cir. 1976), <i>vacated</i>, 429 U.S. 1034 (1977).</p> <p><i>Society for Individual Rights</i>. Department of Agriculture discharged gay clerical employee (who had been previously discharged from the Army for being gay). <i>Society for Individual Rights, Inc. v. Hampton</i>, 528 F.2d 905 (9th Cir. 1975).</p> <p><i>Baker</i>. National Bureau of Standards dismissed a clerical employee for refusing to answer questions regarding his sexual orientation. <i>Baker v. Hampton</i>, 6 Empl. Prac. Dec. P9043 (D.D.C. 1973).</p> <p><i>Dew</i>. Civil Aeronautics Authority dismissed an air traffic controller when it learned that he had been dismissed from a previous job due to homosexual conduct. <i>Dew v. Halaby</i>, 317 F.2d 582 (D.C. Cir. 1962), <i>cert. dismissed</i>, 379 U.S. 951 (1964).</p> <p><i>Buttino</i>. FBI dismissed an agent who disclosed during a security investigation that he was gay. <i>Buttino v. FBI</i>, 801 F. Supp. 298 (N.D. Cal. 1992).</p> <p><i>Doe v. Gates</i>. CIA agent dismissed because he was gay and thus a “security risk”. <i>Doe v. Gates</i>, 981 F.2d 1316 (D.C. Cir. 1992), <i>cert. denied</i>, 114 S. Ct. 337 (1993).</p> <p><i>United States Information Agency</i>. Foreign service employee dismissed for homosexual conduct overseas. <i>United States Info. Agency v. Krc</i>. 989 F.2d 1211 (DC. Cir 1993).</p> <p><i>High Tech Gays</i>. Three men who worked for defense contractors were denied security clearances because of their sexual orientation. <i>High Tech Gays v. Defense Indus. Sec. Clearance Office</i>, 895 F. 2d 563 (9th Cir. 1990).</p> |
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| | | | <p><i>Dubbs.</i> Defense contractor’s CIA security clearance upgrade was denied on the grounds that her previous failure to disclose her sexual orientation demonstrated that she was prone to deception. <i>Dubbs v. CIA</i>, 769 F. Supp. 1113 (N.D. Cal. 1990).</p> <p><i>Doe v. Cheney.</i> NSA agent’s security clearance was revoked after he disclosed during a security interview that he had had gay relationships with foreign nationals. <i>Doe v. Clienex</i>, 885 F.2d 898 (D.C. Cir. 1989).</p> <p><i>Gayer.</i> Security clearances for three defense contractors were revoked when they admitted during questioning that they were gay. In one case, the revocation was based on the assertion that the gay employee would be susceptible to blackmail and coercion. In the other two cases, the revocation was based on the employees’ “failure to cooperate” in a security investigation because they failed to answer detailed questions about their sexuality. <i>Gaver v. Schlesinger</i>, 490 F.2d 740 (D.C. Cir. 1973).</p> <p><i>Adams.</i> Defense contractor employee’s Top Secret security clearance was denied and his current Secret security clearance was suspended when the security investigation revealed that he was gay. <i>Adams v. Laird</i>, 420 F.2d 230 (D.C. Cir. 1969), <i>cert. denied</i>, 397 U.S. 1039 (1970).</p> <p><i>Anonymous.</i> U.S. Post Office employee fired for engaging in “homosexual acts” with no indication the acts were public or non-consensual, or that Plaintiff ever faced criminal charges for the acts. <i>Anonymous v. Macy</i>, 398 F.2d 317 (5th Cir. 1968).</p> <p><i>Calderon.</i> Public school teacher discharged for immoral conduct after he was arrested on a college campus for the crime of engaging in oral copulation, despite the fact that he was acquitted from the criminal charges. <i>Bd. of Educ. v. Calderon</i>, 35 Cal. App. 3d 490 (Cal. App. 1973).</p> <p><i>Marks.</i> Plaintiffs brought class action on behalf of all gay individuals who had applied for security clearances or who held such clearances, alleging Equal Protection and other civil rights violations. Plaintiffs limited claim to adults engaging in private, consensual homosexual activity. The district court entered a favorable ruling; the Ninth Circuit reversed, holding that the explanation that homosexuals were more susceptible to blackmail was adequate. <i>Marks v. Schlesinger</i>, 384 F. Supp. 1373 (C.D. Cal. 1974).</p> |
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| | | | <p><i>McConnell.</i> University librarian applied for and was offered employment at the St. Paul University library; the offer of employment was subsequently withdrawn after his attempt to marry another man was reported by news agencies. The Eighth Circuit upheld the university's refusal to employ Plaintiff, stating that his "activist" role was adequate to show the university's actions were not arbitrary or capricious. <i>McConnell v. Anderson</i>, 316 F. Supp. 809 (D. Minn. 1970), <i>rev'd</i>, 451 F.2d 193 (8th Cir. 1971).</p> <p><i>McKeand.</i> Electronics engineer employed by a government contractor was denied a job-necessary security clearance by the Department of Defense on the basis of his homosexuality <i>per se</i>. Both the district court and the Ninth Circuit upheld the DOD's decision, holding that homosexuality was linked to character deficits that could compromise security. <i>McKeand v. Laird</i>, 490 F.2d 1262 (9th Cir. 1973).</p> <p><i>Morrison.</i> Secondary school teacher had diplomas revoked by California Board of Education because he was gay, constituting "immoral and unprofessional conduct and acts involving moral turpitude." As a result, he was unable to teach at any public school in the state. The California Court of Appeal affirmed the trial court's determination of immoral and unprofessional conduct despite the trial court's finding of no direct evidence that the acts complained of or Morrison's sexual orientation in any manner affected his ability and willingness to perform as a teacher. The Supreme Court of California disagreed with the Court of Appeal, stating that the extramarital sexual relationship against a background of years of satisfactory teaching would not justify revocation of the diploma without any showing of an adverse effect on fitness to teach. <i>Morrison v. State Bd. of Educ.</i>, 461 P.2d 375 (Cal. 1969).</p> <p><i>Moser.</i> Teacher had his teaching credentials rescinded after being caught engaging in homosexual activities in a public restroom. The conduct was determined to be an act of moral turpitude, immoral and unprofessional under the Education Code. The court did question whether the conduct demonstrated an unfitness to teach. <i>Moser v. State Bd. of Educ.</i>, 22 Cal. App. 3d 988 (1972).</p> <p><i>National Gay Task Force.</i> Task Force sought a declaration that an Oklahoma law was unconstitutional that permitted public school teachers to be fired for public homosexual "activity," defined as specific acts committed with a person of the same sex that is "indiscreet and not practiced in private," or for homosexual "conduct," defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that</p> |
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| | | | <p>creates a substantial risk that such conduct will come to the attention of school children or school employers.” The court struck down the “conduct” clause as overbroad and violative of the First Amendment but upheld the “activity” clause with minimal analysis. <i>National Gay Task Force v. Bd. of Educ.</i>, 729 F.2d 1270 (10th Cir. 1984), <i>aff’d</i>, 470 U.S. 904 (1984) (per curiam).</p> <p><i>Newman</i>. Police officer initiated an action against the police department and the police chief for discrimination based on sexual orientation. The trial court dismissed the police officer's complaint, and he sought review. The appellate court held that the trial court erred in dismissing the common law claims. <i>Newman v. District of Columbia</i>, 518 A.2d 698 (D.C. 1986).</p> <p><i>Norton</i>. Budget analyst for NASA was fired after he was arrested for a “traffic violation” by the “Morals Squad” division of the police department in which he was accused of making a homosexual advance to another man. Plaintiff denied the allegations. The District of Columbia Court of Appeals held that government agencies were required to demonstrate a “rational basis” for discharge, and that homosexuality <i>per se</i> was not a rational basis; the agency must demonstrate that the individual’s homosexuality could rationally affect the efficiency of the agency operations. <i>Norton v. Macy</i>, 417 F.2d 1161 (D.C. Cir. 1969).</p> <p><i>Padula</i>. Highly qualified female candidate was denied a position with the FBI on the basis of her admitted homosexuality. Despite the fact that the FBI had not itself proffered a rational nexus for its decision, the Court of Appeals held that a rational nexus existed because “[t]he FBI . . . is a national law enforcement agency whose agents must be able to work in all the states in the nation. To have agents who engage in conduct criminalized in roughly one-half of the states would undermine the law enforcement credibility of the Bureau.” <i>Padula v. Webster</i>, 822 F.2d 97 (D.C. Cir. 1987).</p> <p><i>Richards</i>. A career employee with the United States Information Agency resigned under the duress of false charges of same-sex sexual activity. During the month prior to the termination, Richards’s supervisor ordered that he undergo an investigation. Richards and his co-workers, who provided favorable reviews of Richards, cooperated fully. When the investigation revealed no information not already contained in Richards’s record, the investigators concocted a declaration alleging that Richards had engaged in same-sex sexual activities. Thereafter, the investigators confronted Richards with the declaration and submitted him to a five hour</p> |
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| | | <p>interrogation which resulted in a report falsely stating that Richards had admitted misconduct. Immediately before Richards was terminated, he was told that if he fought the charges of engaging in same-sex sexual activity, his pregnant wife and the rest of his family would suffer considerably. Richards then resigned. <i>Richards v. Mileski</i>, 662 F.2d 65 (D.C. Cir. 1981).</p> <p><i>Richardson</i>. Clerk for the U.S. Post Office was fired after he refused to answer questions regarding his sexual orientation. Co-workers had made allegations that he had expressed his preference for men, had complained of harassment from his colleagues based on his sexual orientation, and had broken down in tears at work related to this harassment. Plaintiff was further subsequently denied employment with the civil service commission, also on the basis of his refusal to answer questions about his sexual orientation. The court dismissed Plaintiff's claim against the civil service commission on the grounds that the commission was entitled to make a "reasonable inquiry" into Plaintiff's sexual orientation, because homosexuality could affect his job performance. <i>Richardson v. Hampton</i>, 345 F. Supp. 600 (D.D.C. 1972).</p> <p><i>Safransk</i>. The Wisconsin Supreme Court allowed the administrators of a state-run home for mentally retarded boys to fire a gay man who had served as houseparent, on the ground that he failed to project "the orthodoxy of male heterosexuality." <i>Safransk v. Personnel Bd.</i>, 215 N.W.2d 379 (Wis. 1974).</p> <p><i>Sarac</i>. The California State Board of Education revoked the teaching license of Plaintiff, a public school teacher, after he was criminally charged for engaging in public homosexual acts at a public beach, for the reason that such conduct was "immoral" and "unprofessional" pursuant to the applicable regulation. Plaintiff was alleged to have "rubbed, touched and fondled the private sexual parts" of another man. Both the lower court and the appellate court upheld the license revocation. Rather than focusing on the public nature of the act, the appellate court reasoned that homosexual behavior "has long been contrary and abhorrent to the social mores and moral standards" of California and is "clearly, therefore, immoral conduct" under the regulation. <i>Sarac v. State Bd. of Educ.</i>, 249 Cal. App. 2d 58 (Cal. App. 1967).</p> <p><i>Schlegel</i>. Military veteran and civilian employee of the Department of the Army was fired after an investigation established that he was a practicing homosexual. The court upheld Plaintiff's discharge, and nominally followed the <i>Norton</i> "rational basis" test, citing testimony from three of Plaintiff's superiors that "the morale and efficiency of the office would have been affected by Plaintiff's continued presence," and further concluding that "Any schoolboy knows that a</p> |
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| | | | <p>homosexual act is immoral, indecent, lewd, and obscene. . . . If activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected.” <i>Schlegel v. United States</i>, 416 F.2d 1372 (Ct. Cl. 1969), <i>cert. denied</i>, 397 U.S. 1039 (1970).</p> <p><i>Scott</i>. Plaintiff applied for civil service employment and performed well on the requisite exams; however, the Civil Service Commission refused to hire Plaintiff on the basis of allegations that Plaintiff had previously engaged in homosexual conduct (Plaintiff refused to comment as to his sexual orientation on the basis that it was irrelevant), stating that Plaintiff’s conduct was “immoral.” The lower court upheld the Commission’s actions, but the District of Columbia Court of Appeals reversed, holding that the Commission’s decision was “arbitrary” because it failed to specify the conduct it found “immoral” and state why that conduct related to occupational competence or fitness; the court thus remanded the case to the district court for judgment to be entered in favor of Plaintiff. However, Plaintiff was forced to renew his suit after the Commission again refused to hire him, ostensibly because Plaintiff refused to answer questions regarding his sexuality. The District of Columbia Court of Appeals again held in favor of Plaintiff, finding that the Commission’s rationale for refusing to hire Plaintiff was pretext. <i>Scott v. Macy</i>, 349 F.2d 182 (D.C. Cir. 1965) (“<i>Scott I</i>”), <i>appeal after remand</i>, 402 F.2d 644 (D.C. Cir. 1968) (“<i>Scott II</i>”).</p> <p><i>Swift</i>. Swift brought suit against the United States after he was denied access to the White House to perform his duties as a stenographer. Swift alleged that the White House violated his rights to privacy, association, due process, and equal protection. The court denied the White House’s motions to dismiss Swift’s privacy and equal protection claims. “Government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all.” Swift recorded and transcribed the President’s public speeches and press conferences at the White House for nearly two years. Shortly before Swift was terminated, a White House agent approached his supervisor and asked if, to her knowledge, Swift was gay. The supervisor confirmed that he was. Immediately thereafter, the White House notified Swift’s employer that he was determined to be a security risk and would no longer be permitted to access the complex. Swift was then terminated by the private company under contract with the White House. <i>Swift v. United States</i>, 649 F. Supp. 596 (D.D.C. 1986).</p> <p><i>Todd</i>. Deputy for the sheriff’s department was fired after the sheriff’s department discovered she was a lesbian due to two of her former lovers (also employees of the sheriff’s department)</p> |
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| | | | <p>telling the sheriff's department about Plaintiff's sexual orientation. The court granted the sheriff's department's motion for summary judgment, assuming for its analysis that Plaintiff was terminated based on her sexual orientation, and holding with minimal analysis that "[i]n the context of both military and law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end." <i>Todd v. Navarro</i>, 698 F. Supp. 871 (S.D. Fla. 1988).</p> <p><i>Williams</i>. Housekeeping aide at a veterans' hospital was interviewed by an investigator of the Civil Service Commission approximately one year after he began his employment. The investigator asked Williams several questions about his sexual orientation, which Williams refused to answer. Williams was terminated by the Regional Director three weeks after the interview on grounds of "immoral" conduct. The Board of Appeals and Review of the Commission upheld the decision because Williams had previously admitted that he was gay and his sexual orientation ". . . would adversely reflect against the Federal government, and that the adverse reflection would, in turn, harm the efficiency of the Federal service." The court affirmed, stating, "It cannot be gainsaid that 'homosexuality' as 'measured by common understanding and practices' is considered to be 'immoral.'" <i>Williams v. Hampton</i>, 7 Empl. Prac Dec. P9226 (N.D. Ill. 1974).</p> |
| 1994 | <p>Data on Administrative Complaints against State Government Employer in Prepared Testimony of Legal Scholar Before the Senate</p> | <p>S. Hrg. 103-703, pp. 106-111 Prepared Testimony of Chai R. Feldblum, Appendix II <i>Hearing before the Senate Committee on Labor and Human Resources</i> <i>re: S. 2238: Employment</i></p> | <p>Complaints filed in six out of eight of the states with sexual orientation anti-discrimination laws as of 1994. Under Vermont anti-discrimination statute, 7 state employment discrimination complaints filed in 1993-1994.</p> |

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| | Committee on Labor and Human Resources | <i>Non-Discrimination Act of 1994</i> July 29, 1994 103rd Congress, 2nd Session | |
| 1994 | Cases Presented in Monograph, "Documented Cases of Job Discrimination Based on Sexual Orientation," by Human Rights Campaign in Prepared Testimony by Legal Scholar Before Senate Committee on Labor and Human Resources | S. Hrg. 103-703, pp. 112-115 Prepared Testimony of Chai R. Feldblum, Appendix III <i>Hearing before the Senate Committee on Labor and Human Resources re: S. 2238: Employment Non-Discrimination Act of 1994</i> July 29, 1994 103rd Congress, 2nd Session | <i>Jantz.</i> Heterosexual part-time teacher not hired for the available full-time position because principal believed he was gay. <i>Harbeck.</i> State university assistant professor was promised a promotion, but instead was removed from her post when a student began threatening her life and threatening to kill all homosexuals. <i>Shaw.</i> Social worker at a state-funded center for children was fired for bringing pictures of her same-sex partner to work. <i>Corliss.</i> Librarian at state prison was harassed at work due to her sexual orientation and fired soon after she was hired. |
| 1996 | Statement by Senator Ted Kennedy | 142 Cong. Rec. S 9986 Senator Ted Kennedy <i>Congressional Record, Senate – Employment Nondiscrimination Act of 1996</i> Fri., Sept. 6, 1996 104th Congress, 2nd Session | "In the 1950s, the Senate investigated government employees' sexuality and President Eisenhower recommended dismissal of all homosexuals." |

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| <p>1996</p> | <p>Testimony on History of Public Employment Discrimination Against LGBT People by Legal Scholar Before House Committee on Small Business, Subcommittee on Government Programs</p> | <p>H.R. Hrg. 104-87, pp. 128–153 Prepared Testimony of Chai R. Feldblum, Associate Prof. of Law, Georgetown U. Law Center <i>Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act</i> Wed., July 17, 1996 104th Congress, 2nd Session</p> | <p>“Discrimination against gay men and lesbians by the government intensified in the 1950s, setting a norm for private actors. In 1950, the Senate directed a Senate Investigation Subcommittee ‘to make an investigation into the employment by the government of homosexuals and other sex perverts.’ The subcommittee concluded that homosexuals were unfit for employment because they ‘lack the emotional stability of normal persons’ and recommended that all homosexuals be dismissed from government employment. In 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all government employees who were “sex perverts”.From 1947 through mid-1950, <i>1,700 individuals</i> were denied employment by the federal government because of their alleged homosexuality.” (Emphasis added; footnotes and citations omitted).</p> |
| <p>1996</p> | <p>Testimony Before House Committee on Small Business: Subcommittee on Government Programs</p> | <p>H.R. Hrg. 104-87, pp. 79–82 Prepared Testimony of Ernest Dillon <i>Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act</i> Wed., July 17, 1996 104th Congress, 2nd Session <i>Referenced at 142 Cong. Rec. D 755, D 760</i> <i>Reprinted in Federal News</i></p> | <p>Ernest Dillon, a postal employee in Detroit, Michigan, was harassed and assaulted at work and eventually forced to resign.</p> |

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| 1996 | Testimony Before House Committee on Small Business: Subcommittee on Government Programs | H.R. Hrg. 104-87, pp. 163–165 Prepared Testimony of Michael Proto <i>Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act</i> Wed., July 17, 1996 104th Congress, 2nd Session <i>Referenced at 142 Cong. Rec. D 755, D 760</i> <i>Reprinted in Federal News Service, In the News, Wed., July 17, 1996</i> | Michael Proto, Aspiring Police Officer, North Haven, CT. Applicant to police department was denied employment, despite his exceptional test results. His background investigation was said to reveal issues regarding his “integrity” because the applicant was gay. |
| 1996 | Testimony Before House Committee on Small Business: Subcommittee on Government Programs | H.R. Hrg. 104-87, pp. 157–160 Prepared Testimony of Nan Miguel <i>Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-</i> | Nan Miguel, Radiologist, Pullman, WA. Nan Miguel was hired as the manager of the radiology department at a hospital in Pullman, WA, where he single-handedly executed many of the department’s responsibilities. He hired an additional technologist against the wishes of his medical director, who suspected she was a lesbian. Mr. Miguel did his best to support the technologist, but after increasingly confrontational behavior from their co-workers, both were fired from their positions. |

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| | | <p><i>Discrimination Act</i> Wed., July 17, 1996 104th Congress, 2nd Session</p> <p><i>Referenced at 142 Cong. Rec. D 755, D 760</i> <i>Reprinted in Federal News Service, In the News, Wed., July 17, 1996</i></p> | |
| 1996 | Prepared Testimony by Legal Scholar on Reported Cases of Discrimination by Public Employers Before House Committee on Small Business, Subcommittee on Government Programs | <p>H.R. Hrg. 104-87, pp. 181-228 Prepared Testimony of Chai R. Feldblum, Appendix I <i>Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act</i> Wed., Jul. 17, 1996 104th Congress, 2nd Session</p> | <p><i>Aumiller</i>. State University refused to re-hire a faculty member due to his involvement in a series of articles about gay life. <i>Aumiller v. Univ. of Delaware</i>, 434 F. Supp. 1273 (D. Del. 1977).</p> <p><i>Givens</i>. State prisoner alleged discrimination by the warden based on sexual orientation with respect to job assignments. <i>Givens v. Shuler</i>, No. 87-2856, 1987 U.S. Dist. LEXIS J4935 (E.D. Pa. June 8, 1987).</p> <p><i>Bush</i>. A gay inmate was fired from his job in the state prison kitchen. <i>Bush v. Potter</i>, 875 F.2d 862 (6th Cir. 1989).</p> <p><i>Kelley</i>. A gay inmate in state prison was removed from his job in the prison bakery. <i>Kelley v. Vaughn</i>, 760 F. Supp. 161 (W.D. Mo. 1991).</p> <p><i>Johnson</i>. A gay inmate in state prison was denied a prison job. <i>Johnson v. Knable</i>, No. 90-7388, 1991 U.S. App. LEXIS 12125 (4th Cir. May 28, 1991).</p> <p><i>Dawson</i>. State law enforcement division forced an employee to resign due to homosexual conduct. <i>Dawson v. State Law Enforcement Div.</i>, No. 3:91-1403-17, 1992 U.S. Dist. LEXIS 8862 (D.S.C. April 3, 1992).</p> <p><i>Wolotsky</i>. Male social worker (at a non-profit under contract with state) terminated without warning when male patient alleged they had sex. No "state action" found. <i>Wolotsky v. Huhn</i>,</p> |

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| | | <p>960 F.2d 1331 (6th Cir. 1992).</p> <p><i>Shahar</i>. State attorney general withdrew job offer to a law school graduate after learning of her same-sex wedding. <i>Shahar v. Bowers</i>, 836 F. Supp. 859 (N.D. Ga. 1993).</p> <p><i>Burton</i>. A teacher who was discovered to be a “practicing lesbian” was fired pursuant to Oregon statute permitting dismissal for “immorality.” <i>Burton v. Cascade Sch. Dist. Union High Sch. No. 5</i>, 512 F.2d 850 (9th Cir.), <i>cert. denied</i>, 423 U.S. 839 (1975).</p> <p><i>Brass</i>. Pursuant to department policy, New York City Department of Social Services refused to hire two gay male applicants for caseworker positions. <i>Brass v. Hoberman</i>, 295 F. Supp. 358 (S.D. N.Y. 1968).</p> <p><i>Jantz</i>. Heterosexual part-time teacher not hired for the available full-time position because principal believed he was gay. <i>Jantz v. Muci</i>, 759 F. Supp. 1543 (D. Kan. 1991).</p> <p><i>Rowland</i>. Bisexual high school guidance counselor suspended and school district refused to renew her contract. <i>Rowland v. Mad River Local Sch. Dist.</i>, 730 F.2d 444 (6th Cir. 1984), <i>cert. denied</i>, 470 U.S. 1009 (1985).</p> <p><i>Childers</i>. Police department refused to hire gay applicant. <i>Childers v. Dallas Police Dept.</i>, 513 F. Supp. 134 (N.D. Tex. 1981), <i>aff’d</i>, 669 F.2d 732 (5th Cir. 1982).</p> <p><i>Walls</i>. City fired an employee who refused to answer security check questions regarding her sexuality. <i>Walls v. City of Petersburg</i>, 895 F.2d 188 (4th Cir. 1990).</p> <p><i>Endsley</i>. Woman working as an unpaid deputy sheriff was forced to resign due to rumors that she was a lesbian. <i>Endsley v. Naes</i>, 673 F. Supp. 1032 (D. Kan. 1987).</p> <p><i>Gish</i>. School board ordered teacher involved in gay activist associations to undergo a psychiatric examination. <i>Gish v. Bd. of Educ. of Paramus</i>, 366 A.2d 1337 (N.J. Super. Ct. App. Div. 1976), <i>cert. denied</i>, 377 A.2d 658 (N.J.), <i>cert. denied</i>, 434 U.S. 879 (1987).</p> <p><i>Acanfora</i>. A school principal transferred a teacher from his post to a non-teaching position when the principal discovered the teacher was gay. <i>Acanfora v. Bd. of Educ.</i>, 491 F.2d 498 (4th</p> |
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| | | <p>Cir.), <i>cert. denied</i>, 419 U.S. 836 (1974).</p> <p><i>City of Dallas</i>. Police department refused to hire a woman who disclosed, in response to interview questions, that she was a lesbian. <i>City of Dallas v. England</i>, 846 S.W.2d 957 (Tex. App. 1993).</p> <p><i>Merrick</i>. School board regulations permitted discrimination on the basis of sexual orientation (declaratory action sought by lesbian employee). <i>Merrick v. Bd. of Higher Educ.</i>, 841 P.2d 646 (Or. App. 1992).</p> <p><i>Gaylord</i>. Teacher fired shortly after answering a school official's questions regarding his sexual orientation. <i>Gaylord v. Tacoma Sch. Dist. No. 10.</i>, 559 P.2d 1340 (Wash.), <i>cert. denied</i>, 434 U.S. 879 (1977).</p> <p><i>Delahoussaye</i>. City refused to re-employ laid off police officer discovered engaged in homosexual conduct. <i>Delahoussaye v. City of New Iberia</i>, 937 F.2d 144 (5th Cir. 1991).</p> <p><i>Ashton</i>. FBI forced gay clerical employee to resign. <i>Ashton v. Civiletti</i>, 613 F.2d 923 (D.C. Cir. 1979).</p> <p><i>Dillon</i>. Postal worker forced to quit due to ongoing harassment. <i>Dillon v. Frank</i>, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).</p> <p><i>Singer</i>. EEOC employee dismissed due to his sexual orientation and involvement in gay community activities. <i>Singer v. United States Civ. Serv. Comm'n</i>, 530 F.2d 247 (9th Cir. 1976), <i>vacated</i>, 429 U.S. 1034 (1977).</p> <p><i>Society for Individual Rights</i>. Department of Agriculture discharged gay clerical employee (who had been previously discharged from the Army for being gay). <i>Society for Individual Rights, Inc. v. Hampton</i>, 528 F.2d 905 (9th Cir. 1975).</p> <p><i>Baker</i>. National Bureau of Standards dismissed a clerical employee for refusing to answer questions regarding his sexual orientation. <i>Baker v. Hampton</i>, 6 Empl. Prac. Dec. P9043 (D.D.C. 1973).</p> |
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| | | | <p><i>Dew.</i> Civil Aeronautics Authority dismissed an air traffic controller when it learned that he had been dismissed from a previous job due to homosexual conduct. <i>Dew v. Halaby</i>, 317 F.2d 582 (D.C. Cir. 1962), <i>cert. dismissed</i>, 379 U.S. 951 (1964).</p> <p><i>Buttino.</i> FBI dismissed an agent who disclosed during a security investigation that he was gay. <i>Buttino v. FBI</i>, 801 F. Supp. 298 (N.D. Cal. 1992).</p> <p><i>Doe v. Gates.</i> CIA agent dismissed because he was gay and thus a “security risk”. <i>Doe v. Gates</i>, 981 F.2d 1316 (D.C. Cir. 1992), <i>cert. denied</i>, 114 S. Ct. 337 (1993).</p> <p><i>United States Information Agency.</i> Foreign service employee dismissed for homosexual conduct overseas. <i>United States Info. Agency v. Krc</i>, 989 F.2d 1211 (D.C. Cir 1993).</p> <p><i>High Tech Gays.</i> Three men who worked for defense contractors were denied security clearances because of their sexual orientation. <i>High Tech Gays v. Defense Indus. Sec. Clearance Office</i>, 895 F. 2d 563 (9th Cir. 1990).</p> <p><i>Dubbs.</i> Defense contractor’s CIA security clearance upgrade was denied on the grounds that her previous failure to disclose her sexual orientation demonstrated that she was prone to deception. <i>Dubbs v. CIA</i>, 769 F. Supp. 1113 (N.D. Cal. 1990).</p> <p><i>Doe v. Cheney.</i> NSA agent’s security clearance was revoked after he disclosed during a security interview that he had had gay relationships with foreign nationals. <i>Doe v. Clielex</i>, 885 F.2d 898 (D.C. Cir. 1989).</p> <p><i>Gayer.</i> Security clearances for three defense contractors were revoked when they admitted during questioning that they were gay. In one case, the revocation was based on the assertion that the gay employee would be susceptible to blackmail and coercion. In the other two cases, the revocation was based on the employees’ “failure to cooperate” in a security investigation because they failed to answer detailed questions about their sexuality. <i>Gayer v. Schlesinger</i>, 490 F.2d 740 (D.C. Cir. 1973).</p> <p><i>Adams.</i> Defense contractor employee’s Top Secret security clearance was denied and his current Secret security clearance was suspended when the security investigation revealed that he</p> |
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| | | <p>was gay. <i>Adams v. Laird</i>, 420 F.2d 230 (D.C. Cir. 1969), <i>cert. denied</i>, 397 U.S. 1039 (1970).</p> <p><i>McDonnell</i>. HUD employees alleged abusive investigation based on anonymous tip regarding job-related sexual misconduct. <i>McDonnell v. Cisneros</i>, 84 F.3d 256 (7th Cir. 1996).</p> <p><i>Anonymous</i>. U.S. Post Office employee fired for engaging in “homosexual acts” with no indication the acts were public or non-consensual, or that Plaintiff ever faced criminal charges for the acts. <i>Anonymous v. Macy</i>, 398 F.2d 317 (5th Cir. 1968).</p> <p><i>Calderon</i>. Public school teacher discharged for immoral conduct after he was arrested on a college campus for the crime of engaging in oral copulation, despite the fact that he was acquitted from the criminal charges. <i>Bd. of Educ. v. Calderon</i>, 35 Cal. App. 3d 490 (Cal. App. 1973).</p> <p><i>Marks</i>. Plaintiffs brought class action on behalf of all gay individuals who had applied for security clearances or who held such clearances, alleging Equal Protection and other civil rights violations. Plaintiffs limited claim to adults engaging in private, consensual homosexual activity. The district court entered a favorable ruling; the Ninth Circuit reversed, holding that the explanation that homosexuals were more susceptible to blackmail was adequate. <i>Marks v. Schlesinger</i>, 384 F. Supp. 1373 (C.D. Cal. 1974).</p> <p><i>McConnell</i>. University librarian applied for and was offered employment at the St. Paul University library; the offer of employment was subsequently withdrawn after his attempt to marry another man was reported by news agencies. The Eighth Circuit upheld the university’s refusal to employ Plaintiff, stating that his “activist” role was adequate to show the university’s actions were not arbitrary or capricious. <i>McConnell v. Anderson</i>, 316 F. Supp. 809 (D. Minn. 1970), <i>rev’d</i>, 451 F.2d 193 (8th Cir. 1971).</p> <p><i>McKeand</i>. Electronics engineer employed by a government contractor was denied a job-necessary security clearance by the Department of Defense on the basis of his homosexuality <i>per se</i>. Both the district court and the Ninth Circuit upheld the DOD’s decision, holding that homosexuality was linked to character deficits that could compromise security. <i>McKeand v. Laird</i>, 490 F.2d 1262 (9th Cir. 1973).</p> <p><i>Morrison</i>. Secondary school teacher had diplomas revoked by California Board of Education</p> |
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| | | | <p>because he was gay, constituting "immoral and unprofessional conduct and acts involving moral turpitude." As a result, he was unable to teach at any public school in the state. The California Court of Appeal affirmed the trial court's determination of immoral and unprofessional conduct despite the trial court's finding of no direct evidence that the acts complained of or Morrison's sexual orientation in any manner affected his ability and willingness to perform as a teacher. The Supreme Court of California disagreed with the Court of Appeal, stating that the extramarital sexual relationship against a background of years of satisfactory teaching would not justify revocation of the diploma without any showing of an adverse effect on fitness to teach. <i>Morrison v. State Bd. of Educ.</i>, 461 P.2d 375 (Cal. 1969).</p> <p><i>Moser.</i> Teacher had his teaching credentials rescinded after being caught engaging in homosexual activities in a public restroom. The conduct was determined to be an act of moral turpitude, immoral and unprofessional under the Education Code. The court did question whether the conduct demonstrated an unfitness to teach. <i>Moser v. State Bd. of Educ.</i>, 22 Cal. App. 3d 988 (1972).</p> <p><i>National Gay Task Force.</i> Task Force sought a declaration that an Oklahoma law was unconstitutional that permitted public school teachers to be fired for public homosexual "activity," defined as specific acts committed with a person of the same sex that is "indiscreet and not practiced in private," or for homosexual "conduct," defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employers." The court struck down the "conduct" clause as overbroad and violative of the First Amendment but upheld the "activity" clause with minimal analysis. <i>National Gay Task Force v. Bd. of Educ.</i>, 729 F.2d 1270 (10th Cir. 1984), <i>aff'd</i>, 470 U.S. 904 (1984) (per curiam).</p> <p><i>Newman.</i> Police officer initiated an action against the police department and the police chief for discrimination based on sexual orientation. The trial court dismissed the police officer's complaint, and he sought review. The appellate court held that the trial court erred in dismissing the common law claims. <i>Newman v. District of Columbia</i>, 518 A.2d 698 (D.C. 1986).</p> <p><i>Norton.</i> Budget analyst for NASA was fired after he was arrested for a "traffic violation" by the "Morals Squad" division of the police department in which he was accused of making a</p> |
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| | | | <p>homosexual advance to another man. Plaintiff denied the allegations. The District of Columbia Court of Appeals held that government agencies were required to demonstrate a “rational basis” for discharge, and that homosexuality <i>per se</i> was not a rational basis; the agency must demonstrate that the individual’s homosexuality could rationally effect the efficiency of the agency operations. <i>Norton v. Macy</i>, 417 F.2d 1161 (D.C. Cir. 1969).</p> <p><i>Padula</i>. Highly qualified female candidate was denied a position with the FBI on the basis of her admitted homosexuality. Despite the fact that the FBI had not itself proffered a rational nexus for its decision, the Court of Appeals held that a rational nexus existed because “[t]he FBI . . . is a national law enforcement agency whose agents must be able to work in all the states in the nation. To have agents who engage in conduct criminalized in roughly one-half of the states would undermine the law enforcement credibility of the Bureau.” <i>Padula v. Webster</i>, 822 F.2d 97 (D.C. Cir. 1987).</p> <p><i>Richards</i>. A career employee with the United States Information Agency resigned under the duress of false charges of same-sex sexual activity. During the month prior to the termination, Richards’s supervisor ordered that he undergo an investigation. Richards and his co-workers, who provided favorable reviews of Richards, cooperated fully. When the investigation revealed no information not already contained in Richards’s record, the investigators concocted a declaration alleging that Richards had engaged in same-sex sexual activities. Thereafter, the investigators confronted Richards with the declaration and submitted him to a five hour interrogation which resulted in a report falsely stating that Richards had admitted misconduct. Immediately before Richards was terminated, he was told that if he fought the charges of engaging in same-sex sexual activity, his pregnant wife and the rest of his family would suffer considerably. Richards then resigned. <i>Richards v. Mileski</i>, 662 F.2d 65 (D.C. Cir. 1981).</p> <p><i>Richardson</i>. Clerk for the U.S. Post Office was fired after he refused to answer questions regarding his sexual orientation. Co-workers had made allegations that he had expressed his preference for men, had complained of harassment from his colleagues based on his sexual orientation, and had broken down in tears at work related to this harassment. Plaintiff was further subsequently denied employment with the civil service commission, also on the basis of his refusal to answer questions about his sexual orientation. The court dismissed Plaintiff’s claim against the civil service commission on the grounds that the commission was entitled to make a “reasonable inquiry” into Plaintiff’s sexual orientation, because homosexuality could affect his job performance. <i>Richardson v. Hampton</i>, 345 F. Supp. 600 (D.C. Cir. 1972).</p> |
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| | | | <p><i>Safransk.</i> The Wisconsin Supreme Court allowed the administrators of a state-run home for mentally retarded boys to fire a gay man who had served as houseparent, on the ground that he failed to project ‘the orthodoxy of male heterosexuality.’” <i>Safransk v. Personnel Bd.</i>, 215 N.W.2d 379 (Wis. 1974).</p> <p><i>Sarac.</i> The California State Board of Education revoked the teaching license of Plaintiff, a public school teacher, after he was criminally charged for engaging in public homosexual acts at a public beach, for the reason that such conduct was “immoral” and “unprofessional” pursuant to the applicable regulation. Plaintiff was alleged to have “rubbed, touched and fondled the private sexual parts” of another man. Both the lower court and the appellate court upheld the license revocation. Rather than focusing on the public nature of the act, the appellate court reasoned that homosexual behavior “has long been contrary and abhorrent to the social mores and moral standards” of California and is “clearly, therefore, immoral conduct” under the regulation. <i>Sarac v. State Bd. of Educ.</i>, 249 Cal. App. 2d 58 (Cal. App. 1967).</p> <p><i>Schlegel.</i> Military veteran and civilian employee of the Department of the Army was fired after an investigation established that he was a practicing homosexual. The court upheld Plaintiff’s discharge, and nominally followed the <i>Norton</i> “rational basis” test, citing testimony from three of Plaintiff’s superiors that “the morale and efficiency of the office would have been affected by Plaintiff’s continued presence,” and further concluding that “Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. . . . If activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected. <i>Schlegel v. United States</i>, 416 F.2d 1372 (Ct. Cl. 1969), <i>cert. denied</i>, 397 U.S. 1039 (1970).</p> <p><i>Scott.</i> Plaintiff applied for civil service employment and performed well on the requisite exams; however, the Civil Service Commission refused to hire Plaintiff on the basis of allegations that Plaintiff had previously engaged in homosexual conduct (Plaintiff refused to comment as to his sexual orientation on the basis that it was irrelevant), stating that Plaintiff’s conduct was “immoral.” The lower court upheld the Commission’s actions, but the District of Columbia Court of Appeals reversed, holding that the Commission’s decision was “arbitrary” because it failed to specify the conduct it found “immoral” and state why that conduct related to occupational competence or fitness; the court thus remanded the case to the district court for judgment to be entered in favor of Plaintiff. However, Plaintiff was forced to renew his suit</p> |
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| | | | <p>after the Commission again refused to hire him, ostensibly because Plaintiff refused to answer questions regarding his sexuality. The District of Columbia Court of Appeals again held in favor of Plaintiff, finding that the Commission’s rationale for refusing to hire Plaintiff was pretext. <i>Scott v. Macy</i>, 349 F.2d 182 (D.C. Cir. 1965) (“<i>Scott I</i>”), <i>appeal after remand</i>, 402 F.2d 644 (D.C. Cir. 1968) (“<i>Scott II</i>”).</p> <p><i>Swift</i>. Swift brought suit against the United States after he was denied access to the White House to perform his duties as a stenographer. Swift alleged that the White House violated his rights to privacy, association, due process, and equal protection. The court denied the White House’s motions to dismiss Swift’s privacy claim and the equal protection claim. “Government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all.” Swift recorded and transcribed the President’s public speeches and press conferences at the White House for nearly two years. Shortly before Swift was terminated, a White House agent approached his supervisor and asked if, to her knowledge, Swift was gay. The supervisor confirmed that he was. Immediately thereafter, the White House notified Swift’s employer that he was determined to be a security risk and would no longer be permitted to access the complex. Swift was then terminated by the private company under contract with the White House. <i>Swift v. United States</i>, 649 F. Supp. 596 (D.D.C. 1986).</p> <p><i>Todd</i>. Deputy for the sheriff’s department was fired after the sheriff’s department discovered she was a lesbian due to two of her former lovers (also employees of the sheriff’s department) telling the sheriff’s department about Plaintiff’s sexual orientation. The court granted the sheriff’s department’s motion for summary judgment, assuming for its analysis that Plaintiff was terminated based on her sexual orientation, and holding with minimal analysis that “[i]n the context of both military and law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end.” <i>Todd v. Navarro</i>, 698 F. Supp. 871 (S.D. Fla. 1988).</p> <p><i>Williams</i>. Housekeeping aide at a veterans’ hospital was interviewed by an investigator of the Civil Service Commission approximately one year after he began his employment. The investigator asked Williams several questions about his sexual orientation, which Williams refused to answer. Williams was terminated by the Regional Director three weeks after the interview on grounds of “immoral” conduct. The Board of Appeals and Review of the Commission upheld the decision because Williams had previously admitted that he was gay and his sexual orientation “. . . would adversely reflect against the Federal government, and that the</p> |
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| | | | adverse reflection would, in turn, harm the efficiency of the Federal service.” The court affirmed, stating, “It cannot be gainsaid that ‘homosexuality’ as ‘measured by common understanding and practices’ is considered to be ‘immoral.’” <i>Williams v. Hampton</i> , 7 Empl. Prac Dec. P9226 (N.D. Ill. 1974). |
| 1996 | Cases Presented in Monograph, “Documented Cases of Job Discrimination Based on Sexual Orientation,” by Human Rights Campaign in Prepared Testimony by Legal Scholar Before House Committee on Small Business, Subcommittee on Government | H.R. Hrg. 104-87, pp. 246-274 Prepared Testimony of Chai R. Feldblum, Appendix III <i>Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act</i> Wed., July 17, 1996 104th Congress, 2nd Session | <i>Jantz.</i> Heterosexual part-time teacher not hired for the available full-time position because principal believed he was gay. <i>Harbeck.</i> State university assistant professor was promised a promotion, but instead was removed from her post when a student began threatening her life and threatening to kill all homosexuals. <i>Shaw.</i> Social worker at a state-funded center for children was fired for bringing pictures of her same-sex partner to work. <i>Corliss.</i> Librarian at state prison was harassed at work due to her sexual orientation and fired soon after she was hired. <i>Romero.</i> Police department employee removed from her post as a school public safety instructor to patrol duty because she was a lesbian. <i>Dillon.</i> Gay post office employee subjected to harassment from his co-workers based on his sexual orientation. |

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| 1996 | Statement by Senator Ted Kennedy | 142 Cong. Rec. S 10712, S 10712 Senator Byron Dorgan <i>Congressional Record, Senate – Employment Non-Discrimination Act</i> Tues., Sept. 17, 1996 104th Congress 2nd Session | Discussing the story of Ernest Dillon, a postal employee in Detroit, Michigan, who was harassed and assaulted at work and eventually forced to resign. |
| 1997 | Testimony on History of Public Employment Discrimination Against LGBT People by Legal Scholar Before House Committee on Small Business, Subcommittee on Government Programs | S. Hrg. 105-279, pp. 7-9 Statement of David N. Horowitz, Esq. <i>Hearing before the Senate Committee on Labor and Human Resources re: S.869: The Employment Non-Discrimination Act of 1997</i> Thurs., Oct. 23, 1997 105th Congress, 1st Session <i>Reprinted in Federal News Service, In the News, Thurs., Oct. 23, 1997</i> | David Horowitz, Attorney, Mesa, AZ, “David Horowitz encountered this bigotry when he applied to be an Assistant City Attorney in Mesa, Arizona. He had graduated near the top of his law school class at the University of Arizona. While employed by a private law firm, he applied for a position with the City Attorney. He was not offered a position, but he was told he was the second choice. Six months later, he was called and interviewed for another job opening. The City Attorney asked David for references and told him that, ‘I only ask for references when I’m ready to make someone an offer.’ In the interview, David told the City Attorney that he was openly gay, and the tone of the interview suddenly changed. David was told that his sexual orientation posed a problem, and three weeks later he received a rejection letter.” |

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| 1997 | Statement of Senator Paul Wellstone | <p>S. Hrg. 105-279, p. 17 Senator Paul Wellstone <i>Hearing before the Senate Committee on Labor and Human Resources re: S.869: The Employment Non-Discrimination Act of 1997</i> Thurs., Oct. 23, 1997 105th Congress, 1st Session</p> <p><i>Reprinted in Federal News Service, In the News, Thurs., Oct. 23, 1997</i></p> | <p>Gwendolyn Gunther, Police Officer, Minneapolis, MN. “Gwendolyn Gunther (sp) is a police officer with the Minneapolis Police Department. Quote: ‘I seem to represent everything that the old boys hate in this department -- female, black and gay. The thing that makes it worst of all is I’m a good cop. When I first came to this shift, my sergeant was like, ‘When I saw your name on my list, I tried everything I could to get you the hell out of my precinct. I didn’t want you here. I’ve heard all those bad things about you. You were a trouble maker and you brought the morale down. I’m glad I got you because there’s not one person on this shift that won’t work with you.’”</p> |
| 1997 | Prepared Testimony by Legal Scholar on Reported Cases of Discrimination by Public Employers Before Senate Committee on Labor and Human Resources | <p>S. Hrg. 105-271, pp. 55-77 Prepared Testimony of Chai R. Feldblum, Appendix I <i>Hearing before the Senate Committee on Labor and Human Resources re: S. 869: Employment Non-Discrimination Act of 1997</i> Oct. 23, 1997 105th Congress, 1st Session</p> | <p><i>Aumiller</i>. State University refused to re-hire a faculty member due to his involvement in a series of articles about gay life. <i>Aumiller v. Univ. of Delaware</i>, 434 F. Supp. 1273 (D. Del. 1977).</p> <p><i>Wolotsky</i>. Male social worker (at a non-profit under contract with state) terminated without warning when male patient alleged they had sex. No “state action” found. <i>Wolotsky v. Huhn</i>, 960 F.2d 1331 (6th Cir. 1992).</p> <p><i>Shahar</i>. State attorney general withdrew job offer to a law school graduate after learning of her same-sex wedding. <i>Shahar v. Bowers</i>, 836 F. Supp. 859 (N.D. Ga. 1993).</p> <p><i>Burton</i>. A teacher who was discovered to be a “practicing lesbian” was fired pursuant to Oregon statute permitting dismissal for “immorality.” <i>Burton v. Cascade Sch. Dist. Union High Sch. No. 5</i>, 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975).</p> <p><i>Brass</i>. Pursuant to department policy, New York City Department of Social Services refused to hire two gay male applicants for caseworker positions. <i>Brass v. Hoberman</i>, 295 F. Supp. 358</p> |

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| | | <p>(S.D. N.Y. 1968).</p> <p><i>Jantz.</i> Heterosexual part-time teacher not hired for the available full-time position because principal believed he was gay. <i>Jantz v. Muci</i>, 759 F. Supp. 1543 (D. Kan. 1991).</p> <p><i>Rowland.</i> Bisexual high school guidance counselor suspended and school district refused to renew her contract. <i>Rowland v. Mad River Local Sch. Dist.</i>, 730 F.2d 444 (6th Cir. 1984), <i>cert. denied</i>, 470 U.S. 1009 (1985).</p> <p><i>Childers.</i> Police department refused to hire gay applicant. <i>Childers v. Dallas Police Dept.</i>, 513 F. Supp. 134 (N.D. Tex. 1981), <i>aff'd</i>, 669 F.2d 732 (5th Cir. 1982).</p> <p><i>Walls.</i> City fired an employee who refused to answer security check questions regarding her sexuality. <i>Walls v. City of Petersburg</i>, 895 F.2d 188 (4th Cir. 1990).</p> <p><i>Endsley.</i> Woman working as an unpaid deputy sheriff was forced to resign due to rumors that she was a lesbian. <i>Endsley v. Naes</i>, 673 F. Supp. 1032 (D. Kan. 1987).</p> <p><i>Gish.</i> School board ordered teacher involved in gay activist associations to undergo a psychiatric examination. <i>Gish v. Bd. of Educ. of Paramus</i>, 366 A.2d 1337 (N.J. Super. Ct. App. Div. 1976), <i>cert. denied</i>, 377 A.2d 658 (N.J.), <i>cert. denied</i>, 434 U.S. 879 (1987).</p> <p><i>Acanfora.</i> A school principal transferred a teacher from his post to a non-teaching position when the principal discovered the teacher was gay. <i>Acanfora v. Bd. of Educ.</i>, 491 F.2d 498 (4th Cir.), <i>cert. denied</i>, 419 U.S. 836 (1974).</p> <p><i>City of Dallas.</i> Police department refused to hire a woman who disclosed, in response to interview questions, that she was a lesbian. <i>City of Dallas v. England</i>, 846 S.W.2d 957 (Tex. App. 1993).</p> <p><i>Merrick.</i> School board regulations permitted discrimination on the basis of sexual orientation (declaratory action sought by lesbian employee). <i>Merrick v. Bd. of Higher Educ.</i>, 841 P.2d 646 (Or. App. 1992).</p> <p><i>Gaylord.</i> Teacher fired shortly after answering a school official's questions regarding his</p> |
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| | | <p>sexual orientation. <i>Gaylord v. Tacoma Sch. Dist. No. 10.</i>, 559 P.2d 1340 (Wash.), <i>cert. denied</i>, 434 U.S. 879 (1977).</p> <p><i>Tester.</i> City police officer was subjected to harassment, his property was vandalized by his co-workers and he was eventually forced to resign. <i>Tester v. City of New York</i>, No. 95 Civ. 7972, 1997 U.S. Dist. LEXIS 1937 (S.D.N.Y. Feb. 25, 1997).</p> <p><i>Ashton.</i> FBI forced gay clerical employee to resign. <i>Ashton v. Civiletti</i>, 613 F.2d 923 (D.C. Cir. 1979).</p> <p><i>Dillon.</i> Postal worker forced to quit due to ongoing harassment. <i>Dillon v. Frank</i>, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).</p> <p><i>Singer.</i> EEOC employee dismissed due to his sexual orientation and involvement in gay community activities. <i>Singer v. United States Civ. Serv. Comm'n</i>, 530 F.2d 247 (9th Cir. 1976). <i>vacated</i>, 429 U.S. 1034 (1977).</p> <p><i>Society for Individual Rights.</i> Department of Agriculture discharged gay clerical employee (who had been previously discharged from the Army for being gay). <i>Society for Individual Rights, Inc. v. Hampton</i>, 528 F.2d 905 (9th Cir. 1975).</p> <p><i>Baker.</i> National Bureau of Standards dismissed a clerical employee for refusing to answer questions regarding his sexual orientation. <i>Baker v. Hampton</i>, 6 Empl. Prac. Dec. P9043 (D.D.C. 1973).</p> <p><i>Dew.</i> Civil Aeronautics Authority dismissed an air traffic controller when it learned that he had been dismissed from a previous job due to homosexual conduct. <i>Dew v. Halabv</i>, 317 F.2d 582 (D.C. Cir. 1962), <i>cert. dismissed</i>, 379 U.S. 951 (1964).</p> <p><i>Buttino.</i> FBI dismissed an agent who disclosed during a security investigation that he was gay. <i>Buttino v. FBI</i>, 801 F. Supp. 298 (N.D. Cal. 1992).</p> <p><i>Doe v. Gates.</i> CIA agent dismissed because he was gay and thus a “security risk”. <i>Doe v.</i></p> |
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| | | | <p><i>Gates</i>, 981 F.2d 1316 (D.C. Cir. 1992), <i>cert. denied</i>, 114 S. Ct. 337 (1993).</p> <p><i>United States Information Agency</i>. Foreign service employee dismissed for homosexual conduct overseas. <i>United States Info. Agency v. Krc</i>, 989 F.2d 1211 (D.C. Cir 1993).</p> <p><i>High Tech Gays</i>. Three men who worked for defense contractors were denied security clearances because of their sexual orientation. <i>High Tech Gays v. Defense Indus. Sec. Clearance Office</i>, 895 F.2d 563 (9th Cir. 1990).</p> <p><i>Dubbs</i>. Defense contractor's CIA security clearance upgrade was denied on the grounds that her previous failure to disclose her sexual orientation demonstrated that she was prone to deception. <i>Dubbs v. CIA</i>, 769 F. Supp. 1113 (N.D. Cal. 1990).</p> <p><i>Doe v. Cheney</i>. NSA agent's security clearance was revoked after he disclosed during a security interview that he had had gay relationships with foreign nationals. <i>Doe v. Clivenex</i>, 885 F.2d 898 (D.C. Cir. 1989).</p> <p><i>Gayer</i>. Security clearances for three defense contractors were revoked when they admitted during questioning that they were gay. In one case, the revocation was based on the assertion that the gay employee would be susceptible to blackmail and coercion. In the other two cases, the revocation was based on the employees' "failure to cooperate" in a security investigation because they failed to answer detailed questions about their sexuality. <i>Gayer v. Schlesinger</i>, 490 F.2d 740 (D.C. Cir. 1973).</p> <p><i>Adams</i>. Defense contractor employee's Top Secret security clearance was denied and his current Secret security clearance was suspended when the security investigation revealed that he was gay. <i>Adams v. Laird</i>, 420 F.2d 230 (D.C. Cir. 1969), <i>cert. denied</i>, 397 U.S. 1039 (1970).</p> |
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| <p>1997</p> | <p>Testimony on History of Public Employment Discrimination Against LGBT People by Legal Scholar Before House Committee on Small Business, Subcommittee on Government Programs</p> | <p>S. Hrg. 105-271, pp. 24-54 Prepared Testimony of Chai R. Feldblum, Associate Prof. of Law, Georgetown U. Law Center <i>Hearing before the Senate Committee on Labor and Human Resources re: S. 869: Employment Non-Discrimination Act of 1997</i> Oct. 23, 1997 105th Congress, 1st Session</p> | <p>“Discrimination against gay men and lesbians by the government intensified in the 1950s, setting a norm for private actors. In 1950, the Senate directed a Senate Investigation Subcommittee ‘to make an investigation into the employment by the government of homosexuals and other sex perverts.’ The subcommittee concluded that homosexuals were unfit for employment because they ‘lack the emotional stability of normal persons’ and recommended that all homosexuals be dismissed from government employment. In 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all government employees who were ‘sex perverts’. From 1947 through mid-1950, 1,700 individuals were denied employment by the federal government because of their alleged homosexuality.” (Emphasis added; footnotes and citations omitted).</p> |
| <p>1997</p> | <p>Cases Presented in Monograph, “Documented Cases of Job Discrimination Based on Sexual Orientation,” by Human Rights Campaign in Prepared Testimony by Legal Scholar Before Senate Committee on Labor and Human Resources</p> | <p>S. Hrg. 105-271, pp. 82-90 Prepared Testimony of Chai R. Feldblum, Appendix III <i>Hearing before the Senate Committee on Labor and Human Resources re: S. 869: Employment Non-Discrimination Act of 1997</i> Oct. 23, 1997 105th Congress, 1st Session</p> | <p><i>Jantz.</i> Heterosexual part-time teacher not hired for the available full-time position because principal believed he was gay.</p> <p><i>Harbeck.</i> State university assistant professor was promised a promotion, but instead was removed from her post when a student began threatening her life and threatening to kill all homosexuals.</p> <p><i>Shaw.</i> Social worker at a state-funded center for children was fired for bringing pictures of her same-sex partner to work.</p> <p><i>Corliss.</i> Librarian at state prison was harassed at work due to her sexual orientation and fired soon after she was hired.</p> <p><i>Romero.</i> Police department employee removed from her post as a school public safety instructor to patrol duty because she was a lesbian.</p> <p><i>Dillon.</i> Gay post office employee subjected to harassment from his co-workers based on his</p> |

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| | | | <p>sexual orientation.</p> <p><i>Proto.</i> Applicant to police department passed over for employment despite his exceptional test scores, after his sexual orientation was disclosed during a polygraph test.</p> |
| 1998 | Statement of Representative Jackson-Lee | <p>144 Cong. Rec. H 7255, H 7259</p> <p>Representative Jackson-Lee</p> <p><i>Congressional Record, House – Departments of Commerce, Justice, and State, and Judiciary, and Related Agencies Appropriations Act, 1999</i></p> <p>Wed., Aug. 5, 1998</p> <p>105th Congress, 2nd Session</p> <p>* This statement was made in support of President Clinton’s Executive Order 13087, not ENDA</p> | <p>“In my own home State of Texas, two former employees of the Texas governor's office filed a lawsuit in Austin alleging that their former supervisor used hostile language to describe victims assistance language and attitudes towards gays and lesbians by the division's executive director. This type of discrimination should shock all of us, but unfortunately, gays and lesbians are still openly discriminated against in our society.”</p> |
| 1999 | Statement of Senator Ted Kennedy | <p>145 Cong. Rec. S 7591, S7599</p> <p>Senator Ted Kennedy</p> <p><i>Congressional Record,</i></p> | <p>David Horowitz, Attorney, Mesa, AZ, “David Horowitz encountered this bigotry when he applied to be an Assistant City Attorney in Mesa, Arizona. He had graduated near the top of his law school class at the University of Arizona. While employed by a private law firm, he applied for a position with the City Attorney. He was not offered a position, but he was told he</p> |

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| | | <p><i>Senate – Statements on Introduced Bills and Joint Resolutions</i> Thurs., June 24, 1999 106th Congress, 1st Session</p> | <p>was the second choice. Six months later, he was called and interviewed for another job opening. The City Attorney asked David for references and told him that, ‘I only ask for references when I’m ready to make someone an offer.’ In the interview, David told the City Attorney that he was openly gay, and the tone of the interview suddenly changed. David was told that his sexual orientation posed a problem, and three weeks later he received a rejection letter.”</p> |
| 2002 | <p>Testimony of Legal Expert Before Senate Health, Education, Labor and Pensions Committee</p> | <p>Testimony of Matt Coles, ACLU Senate Health, Education, Labor and Pensions Committee <i>Hearing on the Employment Nondiscrimination Act</i> Feb. 27, 2002 Reprinted in FDCH Political Transcripts</p> | <p>Matt Coles, Director of the ACLU’s Lesbian and Gay Rights and AIDS Projects, testified that the ACLU has handled a number of sexual orientation cases including those in the public and private sectors. For example, the ACLU handled a case on behalf of an inspirational teacher in Alabama who thought he had kept his family life completely private until the day that he lost his job.</p> |
| 2003 | <p>Statement of Senator Ted Kennedy</p> | <p>149 Cong. Rec. S 12377, S12382 Senator Ted Kennedy <i>Congressional Record, Senate – Statements on Introduced Bills and Joint Resolutions</i> Thurs., Oct. 2, 2003 108th Congress, 1st Session</p> | <p>Steve Morrison, Firefighter, Oregon, “Steve Morrison, a firefighter in Oregon. His co-workers saw him on the local news protesting an anti-gay initiative, and incorrectly assumed he was gay himself. He began to lose workplace responsibilities and was the victim of harassment, including hate mail. After a long administrative proceeding, the trumped-up charges were removed from his record, and he was transferred to another fire station.”</p> |

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| 2003 | Statement of Senator Joe Lieberman | 149 Cong. Rec. S 12377, S12383 Senator Joe Lieberman <i>Congressional Record, Senate – Statements on Introduced Bills and Joint Resolutions</i> Thurs., Oct. 2, 2003 108th Congress, 1st Session | A collection of one national survey and 20 city and State surveys, which included both public and private workers, found that as many as 44% of gay, lesbian and bisexual workers faced job discrimination in the workplace at some time in their careers. Other studies have reported even greater discrimination, as much as 68% of gay men and lesbians reporting employment discrimination. |
| 2007 | Testimony Before the House Education and Labor Subcommittee on Health, Employment, Labor, and Pensions | Statement of Michael Carney <i>Hearing before the House Education and Labor Committee, Subcommittee on Health, Employment, Labor, and Pensions re: H.R. 2015, The Employment Non-Discrimination Act of 2007</i> Sept. 5, 2007 110th Congress, 1st Session <i>Reprinted in Congressional Quarterly Transcriptions, Sept. 5, 2007</i> and Congressional Quarterly Testimony, Sept. 5, 2007 | Michael Carney, Police Officer, Springfield, MA. Mr. Carney testified that he realized soon after graduating the police academy that, because he was gay, his safety as a police officer and his future as a public servant were seriously jeopardized. He worried that if he were killed in the line of duty there would be no one to tell his partner what happened to him and his partner would learn about it on the news. Mr. Carney testified that he is a good cop, but he lost two-and-a-half years of employment fighting to get his job back because he is gay. Because Massachusetts has an antidiscrimination law that protects against sexual orientation discrimination he was eventually able to get his job back but if he lived in a state without such protections or if he were a federal employee living in Massachusetts, he would not have been able to get his job back. |
| 2007 | Statement of Representative | 153 Cong. Rec. E 2365, E 2365-66 | Rep. Sheila Jackson of Texas discussed some studies showing discrimination against both public and private LGBT employees, including a 2005 survey finding a quarter of LGB people |

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| | Sheila Jackson | Representative Sheila Jackson <i>Congressional Record, House – Providing for Consideration of H.R. 3685; Employment Non-Discrimination Act of 2007</i> Nov. 7, 2007 110th Congress, 1st Session | disagreed with the statement that most employers in their area would hire openly GLB people; a 2007 study found that 16% of GL people reported being fired or denied a job because of their sexual orientation; a recent study by the Journal of Applied Psychology found that 37% of GL workers across the US have faced discrimination based on sexual orientation, 10% indicated they had been physically harassed, 2% had been verbally harassed; and nearly 20% said they had resigned from a job or been fired because of discrimination based on sexual orientation. |
| 2007 | Statement of Representative George Miller | 153 Cong. Rec. H 13228. H 13228 Representative George Miller <i>Congressional Record, House – Employment Non-Discrimination Act of 2007</i> Nov. 7, 2007 110th Congress, 1st Session | Michael Carney, Police Officer, Springfield, MA. Mr. Carney testified that he realized soon after graduating the police academy that, because he was gay, his safety as a police officer and his future as a public servant were seriously jeopardized. He worried that if he were killed in the line of duty there would be no one to tell his partner what happened to him and his partner would learn about it on the news. Mr. Carney testified that he is a good cop, but he lost two-and-a-half years of employment fighting to get his job back because he is gay. Because Massachusetts has an antidiscrimination law that protects against sexual orientation discrimination he was eventually able to get his job back but if he lived in a state without such protections or if he were a federal employee living in Massachusetts, he would not have been able to get his job back. |



Chapter 9: Surveys of LGBT Public Employees and Their Co-Workers

In 2007, the Williams Institute published a study summarizing dozens of surveys about LGBT people's experiences of discrimination conducted from the mid-1980s to 2007.¹ This report did not distinguish between private and public employees. Among the report's key findings were:

- Since the mid-1990s, fifteen studies found that 15% to 43% of LGB respondents experienced discrimination in the workplace-- 8% to 17% were fired or denied employment, 10% to 28% were denied a promotion or given negative performance evaluations, 7% to 41% were verbally/physically abused or had their workplace vandalized, and 10% to 19% reported receiving unequal pay or benefits.
- When transgender individuals were surveyed separately, they reported similar or higher levels of employment discrimination. In six studies conducted between 1996 and 2006, 20% to 57% of transgender respondents reported having experienced employment discrimination at some point in their life. More specifically, 13% to 56% were fired, 13% to 47% were denied employment, 22% to 31% were harassed, and 19% were denied a promotion based on their gender identity.
- When surveyed, many heterosexual co-workers also report witnessing sexual orientation discrimination in the workplace. These studies revealed

¹ LEE BADGETT, DEBORAH HO, AND BRAD SEARS, THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007).

that 12% to 30% of respondents in certain occupations, such as the legal profession, have witnessed antigay discrimination in employment.

This section summarizes a large body of survey data, with samples drawn from across the nation and covering a range of occupational classifications, that provides compelling evidence that discrimination against LGBT state government employees, as well as other public sector workers, is serious, pervasive and continuing. The more than 80 surveys summarized in this section also indicate that there is no reason to believe that the level of employment discrimination based on sexual orientation and gender identity by state employers and local employers is any different than the level of discrimination by private employers.

This section is divided into six parts. The first five sections provide data from 1) general surveys of LGBT people that include public employees; 2) surveys of LGBT education professionals; 3) surveys of judges and lawyers; 4) surveys of public safety officers; and 5) surveys of heterosexual employees asking if they have witnessed sexual orientation and gender identity discrimination in the workplace. Despite the high levels of discrimination reported in these surveys, the final section summarizes research that indicates that employment discrimination against LGBT people is likely under-reported because many LGBT workers remain closeted in the workplace to avoid such discrimination, and many select into jobs and workplaces where they are less likely to encounter such discrimination.

Some of the main findings of this section include:

- One in five LGB state, local, and federal employees in the 2008 General Social Survey reported some type of employment discrimination.

- A 2009 survey of 646 transgender employees, 11% of whom were public sector employees, revealed that 70% had experienced workplace discrimination directly related to their gender identity.
- In the spring of 2009 a survey including 1,902 LGBT faculty and employees from state public colleges and universities from across the country found that almost one in five (19%) responded that during the past year they had “personally experienced exclusionary, intimidating, offensive,” “hostile,” and/or “harassing” behavior that had “interfered with their ability to work or learn on campus.” Over 70% of these respondents, representing 257 LGBT public employees at state institutions, said that this treatment was due to their “sexual identity.”
- In a 2008 survey of 514 high, middle, and elementary school teachers, over half felt unsafe at work because they were LGBT, 35% feared losing their job if “outed” to an administrator, and 27% had been harassed within the prior year.
- In the 2002-2003 study conducted by the American Bar Foundation, 37% of LGBT state and local public employees with law degrees reported being verbally harassed in the workplace and more than one in four experienced some other type of discrimination.
- In a 2009 survey of LGBT public safety officers published in *Police Quarterly*, 22% reported experiencing discrimination in promotions, 13% in hiring, and 2% reported being fired because of their sexual orientation or gender identity.

- A Kaiser Family Foundation survey found that 76% of heterosexuals thought LGBT people experienced discrimination “often” or sometimes” in applying or keeping jobs.
- A 2008 Out & Equal survey reported that 36% of lesbians and gay men were closeted at work.

A. General Surveys of LGBT Employees That Include State and Other Employees

1. 2008 General Social Survey– Sexual Orientation Module

In 2008, the highly respected General Social Survey (GSS) found that one in five LGB government employees reported employment discrimination, including being fired and workplace harassment.

The GSS is a bi-annual survey conducted by the National Opinion Research Center at the University of Chicago. The GSS is designed to provide information on the structure and development of American society. The GSS contains a standard ‘core’ of demographic and attitudinal questions, plus topics of special interest. In the 2008 GSS, the core included a sexual orientation identity question and a module of questions for those who indicated a gay, lesbian, or bisexual (GLB) sexual orientation or who reported having had same-sex sexual partners. Of the 2,023 respondents surveyed in the 2008 GSS, 85 individuals who either identified as GLB or reported having same-sex sexual partners completed this module. Of that group, 21 individuals said that they were “employed by the federal, state, or local, government.” Among the 21 government employees who identified as GLB or reported same-sex sexual partners, more than one in five reported some type of employment discrimination based on their sexual orientation

(or perceived sexual orientation) at some point in their career—17% reported being fired because of their sexual orientation, 13% reported being denied a promotion or receiving a negative job evaluation, and 20% reported being harassed verbally or in writing on the job because they are gay, lesbian or bisexual. Unfortunately, the GSS data does not allow us to determine if the discrimination occurred during their government employment or a prior job, although it is reasonable to assume that at least some of this discrimination did occur during government employment.²

2. 2005 National Lambda Legal and Deloitte Financial Advisory Services Survey

A national survey conducted by Lambda Legal and Deloitte Financial Advisory Services LLP in 2005, which included public sector employees, further revealed extensive employment discrimination against LGBT workers or those perceived to be LGBT. The study is larger than any other poll of LGBT people in the workplace that has been conducted in the preceding decade. The sample included 1,205 respondents, 5% of whom identified their occupation as “government services” described on the questionnaire as “government, military, police, fire, sanitation, etc.”³ The sample had 13 other options for employment category, several of which would have encompassed both public and private sector employees; examples include “education and library services” and “legal profession” which ranked second and third largest percentage-wise (15% and 12% of the sample, respectively). Respondents came from across the United States with 26% from the West (Alaska, California, Hawaii, Nevada, Oregon, and Washington), 24%

² Special analyses conducted by Gary J. Gates, PhD, Williams Institute, UCLA School of Law, using the 2008 General Social Survey.

³ LAMBDA LEGAL & DELOITTE FINANCIAL SERVICES LLP, 2005 WORKPLACE FAIRNESS SURVEY (Apr. 2006), *available at* <http://data.lambdalegal.org/pdf/641/pdf>.

from the Northeast (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont), 17% from the Midwest (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin) 9% from the South Central region (Arkansas, Iowa, Kansas, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas), 13% from the South (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee), 7% from the Mid-Atlantic region (Washington, D. C., Delaware, Maryland, Pennsylvania, Virginia, and West Virginia), and 5% from the Mountains (Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming).

Of all respondents, 39% reported experiencing some form of discrimination or harassment related to their sexual orientation in the workplace within the past five years, and 11% reported frequent workplace discrimination or harassment. Additionally, 19% of respondents had experienced barriers to promotion because of their sexual orientation.

3. 2009 Transgender Law Center Survey

A March, 2009 report released by the Transgender Law Center assessing the economic health of the transgender community in California revealed that the passage of a non-discrimination law has not ended gender identity discrimination.⁴ California has prohibited employment discrimination on the basis of gender identity by statute since 2004⁵, yet discrimination against transgender employees remains common. Of 646 transgender respondents to the survey, 70% had experienced workplace discrimination directly related to their gender identity. More than 11% of the respondents were public sector employees. An earlier study by the National Center for Lesbian Rights and the

⁴ TRANSGENDER LAW CENTER, STATE OF TRANSGENDER CALIFORNIA (Mar. 2009), *available at* <http://www.transgenderlawcenter.org/pdf/StateofTransCAFINAL.pdf>.

⁵ CAL. GOV. CODE §§ 12926(p), 12949.

Transgender Law Center had similar results, and featured an anecdote from a San Francisco area public school teacher who transitioned in the late 1990's. After transitioning, she was unable to secure a teaching position in any of several school districts to which she applied.⁶ She was subsequently turned down for a federal position immediately after disclosing of her transgender status—and after two days and multiple hours of screening.

4. 2002 It's Time Illinois Survey

A study of discrimination cases filed on the basis of gender identity produced by a non-profit organization - It's Time, Illinois - revealed that employment discrimination was the most common form levied against gender non-conforming people (36.67% of complaints filed). One of the examples included in the published report consisted of portions of a complaint filed by a state government employee.⁷ The employee, a pre-operative male to female transgender individual, was constantly harassed on the job because of her gender status. Her union steward refused to take up her grievance because the steward "didn't agree with it."⁸

5. 1984 Levine and Leonard Survey

Martin P. Levine and Robin Leonard published a study in 1984 focused specifically on the unique workplace discrimination experiences facing lesbian employees in public and private sectors. The study included a total of 203 women recruited through social networks, known lesbian social venues, and professional/political

⁶ SHANNON MINTER & CHRISTOPHER DALEY, NATIONAL CENTER FOR LESBIAN RIGHTS & TRANSGENDER LAW CENTER, TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES (2003), *available at* <http://www.transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf>.

⁷ BETH PLOTNER, MIRANDA STEVENS-MILLER, AND TINA WOOD-SIEVERS, IT'S TIME ILLINOIS..., 6TH REPORT ON DISCRIMINATION AND HATE CRIMES AGAINST GENDER VARIANT PEOPLE (2002), *available at* www.itstimeil.org.

⁸ *Id.* at 16.

organizations; the data are not separated by type of employer.⁹ Nearly 25% of the women surveyed reported actual instances of formal (institutionalized decisions and procedures taken by supervisors) and informal (harassment and other unofficial conduct taken by supervisors and coworkers) job discrimination. The most common experiences reported were having been fired, forced to resign, or not hired as a result of disclosing sexual orientation.

B. Education Professionals

1. 50+ Campus Climate Surveys of State Colleges and Universities

There are over fifty surveys of public colleges and universities from the mid 1980s to the present that attempt to measure the “campus climate” for LGBT faculty and students. Most of these specifically survey and report results for faculty, staff, and administrators, including questions about harassment and discrimination while working at universities and colleges. Since 2003, professor and researcher Susan R. Rankin of Pennsylvania State University has conducted a number of these campus climate assessments measuring the discrimination and hostility faced by campus community members in order to make strategic recommendations to schools for improving the environment for minority groups. Since the inception of Rankin’s campus climate surveys, a number of public colleges and universities have chosen to measure their individual climates based on Rankin’s model, often commissioning Rankin & Associates to conduct the surveys, for the same purpose.

⁹ Martin P. Levine & Robin Leonard, *Discrimination Against Lesbians in The Work Force*, 9 JOURNAL OF WOMEN AND CULTURE 700 (1984).

The overall conclusion is consistent: these studies, without a doubt the largest amount of survey data that exists of discrimination against LGBT state employees of any kind, show that public colleges and universities are often unwelcoming, hostile, and even dangerous environments for LGBT employees and students. These surveys document substantial problems at state colleges and universities in every area of the United States, as illustrated in the summaries that follow.

In the spring of 2009, a group of researchers led by Professor Rankin conducted a national survey to assess the state of higher education for LGBT students, faculty and staff. From February to June of 2009, 5,149 LGBT participants from across the country responded to their survey including 1,902 LGBT employees of public colleges and universities. Almost one in five of these LGBT employees of these state institutions (19%) responded that during the past year they had “personally experienced exclusionary, intimidating, offensive,” “hostile,” and/or “harassing” behavior that had “interfered with their ability to work or learn on campus.” Over 70% of these respondents, 257 LGBT employees at state institutions said that this treatment was due to their “sexual identity.”¹⁰

Also in 2009, Professor Rankin conducted a meta-analysis of campus climate studies she has conducted from 2006-2009. Her analysis included assessments conducted at 41 state colleges and universities from across the country. In these 41 assessments from state schools, 282 respondents identified as “lesbian, gay, bisexual, transgender or queer” (LGBTQ) faculty or employees. When asked if they had observed “unfair, unjust, or discriminatory practices” at their institutions, 29% of these state employees said they had observed such practices in terms of hiring; 16% in terms of “employment-related

¹⁰ Rankin, S., Frazer, S, Weber, G., Blumenfeld, W. (in process, 2009). *The State Of Higher Education for LGBT People*.

disciplinary actions ...up to and including firing;” and 29% had observed such practices related to “behavior, procedures, or employment practices related to promotion.”¹¹

In 2003, Rankin with the Policy Institute of the National Gay and Lesbian Task Force published a report assessing the “Campus Climate” for LGBT people in colleges and universities across the country that included data on employment discrimination.¹² The study profiled survey results from 14 schools, including 10 public colleges and universities. Of the 1,669 surveys completed, 85% were from respondents at state public schools. The state schools included three from the Southwest, one from the Midwest, three from the Mideast, two from the Northwest, and one from the Northeast.¹³

Results of the comprehensive study revealed pervasive employment discrimination against faculty, staff, and administrators. In the previous year, 27% of faculty, staff, and administrators had concealed their sexual orientation to avoid discrimination. In addition, nearly one-quarter of the employees -- 19% of staff and 27% of faculty-- had been harassed due to their sexual orientation or gender identity within the previous year.¹⁴ Two-thirds of these employees reported that this harassment occurred while they were working at their college or university job.¹⁵

When asked whether they had been “denied a university/college employment or promotion due to their sexual orientation or gender identity within the past year,” 20 respondents (2% of faculty, staff, administrators and 1% of students) responded that they had. These percentages are high considering the time period was confined to just the

¹¹ SUSAN R. RANKIN AND DANIEL MERSON, NATIONAL CAMPUS CLIMATE PROJECT (publication in process 2009).

¹² SUSAN R. RANKIN, THE POLICY INSTITUTE OF THE NATIONAL GAY AND LESBIAN TASK FORCE, CAMPUS CLIMATE FOR GAY, LESBIAN, BISEXUAL, AND TRANSGENDER PEOPLE: A NATIONAL PERSPECTIVE (2003), available at http://www.who.edu/cms/files/CampusClimate_23425.pdf.

¹³ *Id.* at 16.

¹⁴ *Id.* at 32.

¹⁵ *Id.*

prior year, so most individuals who had been terminated in the prior year probably would not have received the survey to begin with, and this particular question was the most unanswered question on the survey. Fifty percent of the faculty and staff respondents and 45% of the students failed to answer this question even though it was the fourth question on the survey instrument. In the words of one state employee surveyed, “We need to improve the professional climate so LGBT employees don’t feel threatened to lose their job because of their sexual orientation. Often times I keep my mouth shut or don’t rock the boat so that I don’t fear for my job.”¹⁶

The results of other campus climate surveys conducted at individual state colleges and universities further shed light on state-sponsored employment discrimination based on sexual orientation and/or gender identity:

- In 2007, the South Dakota School of Mines, a public college in Rapid City South Dakota, conducted a Campus Climate survey measuring the perception of diversity in the school among faculty and staff.^[1] Of the 183 employees who responded to the question, only one out of five agreed or strongly agreed that the campus was welcoming to LGBT employees – 16% disagreed or strongly disagreed that the school was welcoming to LGBT faculty and staff. Similarly, only 21% of faculty and staff agreed or strongly agreed that the school was “committed to enhancing the diversity of faculty and staff” in terms of sexual orientation. When asked whether the respondent “felt accepted by members of

¹⁶ Id. at 26.

^[1] SOUTH DAKOTA SCHOOL OF MINES, CAMPUS CLIMATE SURVEY, Appendix D: Campus Climate Survey for Faculty and Staff Results (2007), *available at* http://74.125.155.132/search?q=cache:64YC0YRecf8J:sdmines.sdsmt.edu/cgi-bin/global/a_bus_card.cgi%3FSiteID%3D420466+school+of+mines+campus+climate+survey&cd=1&hl=en&ct=clnk&gl=us.

the School of Mines community” who were of a different sexual orientation than the respondent, 7% of faculty and staff reported that they disagreed or strongly disagreed with the statement.

- The 2005 Oregon State University Campus Climate Assessment prepared by Rankin & Associates revealed that of all sexual orientation or gender identity harassment on campus, 42% of the incidents occurred while the victim was working at a university job.¹⁷
- A campus climate survey of the University of Illinois-Urbana-Champaign conducted by Rankin & Associates in 2006 found that 9% of the 1,230 employees, 2,538 students, and 159 “other” respondents had been victims of harassment due to sexual orientation and/or gender identity and one third had witnessed such harassment.¹⁸ Of the LGB respondents of color, 6% often feared for their personal safety because of their sexual orientation or gender identity and additional 4% concealed their sexual orientation or gender identity to avoid intimidation.
- A 2005 survey of faculty and staff attitudes toward gay colleagues and students produced by the President’s Commission on LGBT Issues at the University of Maryland contained several responses hostile to LGBT employees. One university employee wrote, “Safe? Yes, until you force your special brand of mental illness upon me! Comfortable? I hope you are uneasy knowing you are a distinct minority. Welcoming? Probably, to the well behaved” and “The LGBT

¹⁷ RANKIN & ASSOCIATES CONSULTING, OREGON STATE UNIVERSITY: CAMPUS CLIMATE PROJECT (Jan. 2005), *available at* http://oregonstate.edu/diversity/reports/OSU_Climate_Report.pdf.

¹⁸ RANKIN & ASSOCIATES CONSULTING, UNIVERSITY OF ILLINOIS AT URBANA-CAMPAIGN: CAMPUS CLIMATE PROJECT EXECUTIVE SUMMARY (May 2006), *available at* <http://www.odos.uiuc.edu/lgbt/downloads/lgbtcampusclimatefinalreport.pdf>.

community has forced the rest of the nation to acknowledge and submit to their deviant behaviors.”¹⁹

- The 2004 Rankin & Associates survey of the University of California-Riverside found that 19% of the LGBTQ respondents (82% students and 18% employees) feared for their safety on campus and 16% had experienced harassment due to sexual orientation and/or gender identity. Four percent of all respondents had experienced physical assault because of their sexual orientation and/or gender identity.²⁰
- Similarly, Rankin’s 2002 Campus Climate Assessment of the University of Missouri found that 21.9% of staff and 30% of faculty had experienced harassment on campus due to their sexual orientation or gender identity. Of all respondents to the Missouri survey, 84% were LGBT.²¹
- In 1998, Virginia Tech surveyed 2,648 salaried faculty members working at least half time and found that more than 50% of the gay, lesbian, and bisexual faculty members reported unfair treatment or harassment in the workplace.²²
- In a 1995 survey of 1,161 respondents at the University of Illinois-Chicago, 42% reported verbal harassment and 15% reported negative effects on job advancement due to their sexual orientation or gender identity. Four percent

¹⁹ LAURA NICHOLS & LAURA SCOTT, UNIVERSITY OF MARYLAND, CAMPUS CLIMATE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER (LGBT) FACULTY AND STAFF (Oct. 17, 2005), *available at* <http://www.president.umd.edu/PCLGBTI/aboutus/lgbt%20final%20report.pdf>.

²⁰ RANKIN & ASSOCIATES CONSULTING, LGBT CAMPUS CLIMATE ASSESSMENT: UC-RIVERSIDE (2004), *available at* <http://out.ucr.edu/pdf/Survey2004.pdf>.

²¹ SUSAN R. RANKIN, CAMPUS CLIMATE ASSESSMENT FOR LESBIAN, GAY, BISEXUAL, & TRANSGENDER PERSONS (May 2002) (on file with the Williams Institute).

²² OFFICE OF MULTICULTURAL AFFAIRS, VIRGINIA TECH, THE FACULTY ASSESSMENT OF CAMPUS CLIMATE (1998), *available at* <http://www.dsp.multicultural.vt.edu/climate/>.

- reported pressure to be silent about, or felt threatened with exposure of, their sexual orientation or gender identity²³
- In a 1994 survey of 366 respondents at the University of Wisconsin-Milwaukee, 67% reported verbal harassment and 8% reported negative effects on job advancement due to their sexual orientation or gender identity.²⁴
 - In a 1992 survey of 600 faculty and staff at the University of Arizona, 12% indicated they had experienced verbal harassment and 35% said they had experienced negative effects on their job advancement due to their sexual orientation or gender identity.²⁵
 - In two surveys at Pennsylvania State University conducted in 1994 and 1987 that included 1,078 faculty respondents, 72% reported verbal harassment.²⁶
 - In a 1993 survey of 682 respondents at California State University-Chico, 23% reported verbal harassment due to their sexual orientation or gender identity.²⁷
 - In a 1992 survey at Michigan State University that included 63 members of the faculty, 35% of the faculty members reported verbal harassment due to their sexual orientation or gender identity. In addition, 41% of the faculty members reported pressure to be silent about, or felt threatened with exposure of, their sexual orientation or gender identity²⁸²⁹

²³ *Id.* at 11.

²⁴ *Id.*

²⁵ *Id.* at 10 and n. 20.

²⁶ *Id.*

²⁷ *Id.* at 10.

²⁸ *Id.* at 11.

²⁹ *Id.*

- In a 1991 survey of 1,004 respondents at the University of Colorado-Boulder, 23% reported verbal harassment and 30% reported negative effects on job advancement due to their sexual orientation or gender identity.³⁰
- In a 1990 survey of 773 respondents at University of California-Santa Cruz, 2% reported verbal harassment and 3% reported pressure to be silent about, or felt threatened with exposure of, their sexual orientation or gender identity.³¹
- In a 1990 survey at the University of Oregon that included 514 faculty members, 57% of the faculty respondents reported pressure to be silent about, or felt threatened with exposure of, their sexual orientation or gender identity.³²
- In a 1987 survey of 51 respondents at the University of Illinois-Emory, 67% reported verbal harassment due to their sexual orientation or gender identity.³³
- In a 1987 survey of 92 respondents at the University of Illinois-Urbana, 58% reported verbal harassment and 88% reported negative effects on job advancement due to their sexual orientation or gender identity.³⁴ Ninety-one percent also reported pressure to be silent about, or felt threatened with exposure of, their sexual orientation or gender identity³⁵
- In a 1985 survey of 445 respondents at the University of Massachusetts Amherst, 45% reported verbal harassment due to their sexual orientation or gender identity

³⁰ *Id.* at 10.

³¹ *Id.* at 10.

³² *Id.*

³³ *Id.* at 10.

³⁴ *Id.*

³⁵ *Id.* at 11.

and 29% reported pressure to be silent about, or felt threatened with exposure of, their sexual orientation or gender identity.³⁶

2. Surveys of Specific Types of Academic Professionals

In addition to the campus climate surveys conducted at state institutions, another set of studies has documented discrimination among certain types of faculty and academic professionals, such as anthropologists, historians, and student affairs professionals. While these surveys cover faculty and administrators at public and private colleges and universities, many, if not most, of those surveyed are employees at state institutions. The surveys include:

- In 2002, the *Journal of Homosexuality* published a study of LGB education faculty and researchers from colleges and universities across the country.³⁷ Half of the 104 respondents were employed by public colleges and universities. Public college and university faculty reported their work environments to be more hostile than their private sector counterparts, with 30% of public institution faculty reporting an intolerant or hostile workplace, compared to less than 15% of such reports from private institution faculty members. Public institution faculty also reported hearing more homophobic remarks on campus than those employed by private schools.
- According to a 1999 survey, 26% of LGB anthropologists surveyed reported experiencing employment discrimination because of their sexual orientation; an

³⁶ *Id.*

³⁷ James T. Sears, *The Institutional Climate for Lesbian, Gay and Bisexual Education Faculty*, 43 JOURNAL OF HOMOSEXUALITY 11 (2002).

- additional similar percentage indicated that they were unsure whether adverse employment actions against them were a result of such discrimination.³⁸
- A 1995 survey of the members of the Sociologists' Lesbian and Gay Caucus yielded responses indicating high rates of discrimination against faculty sociologists based on sexual orientation in state colleges and universities. All faculty in the study self-identified as lesbian, gay, or bisexual and 84% had disclosed their sexual identity to their department chair.³⁹ Public sector employees, demarcated in the study as faculty members of state universities and state/community colleges, totaled 61% of the faculty respondents (55% and 6%, respectively). Of the total faculty pool, nearly 55% had experienced some form of employment discrimination because of their sexual orientation.
 - According to a 1995 survey, only 31% of Political Science department chairs thought their institutions would find it “acceptable” to identify as gay or lesbian in the classroom.⁴⁰
 - In a 1994 survey of 249 GLB student affairs professionals, 26% reported jobs discrimination. Of those who disclosed their sexual orientation during their job search, 42% reported discrimination.⁴¹
 - Results of a survey distributed to members of the American Anthropological Association registered for its annual meeting in 1994 revealed that employment

³⁸ COMMITTEE ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ISSUES IN ANTHROPOLOGY, AMERICAN ANTHROPOLOGICAL ASSOCIATION, FINAL REPORT 10 (1999).

³⁹ Verta Taylor & Nicole C. Raeburn, *Identity Politics as High-Risk Activism: Career Consequences for Lesbian, Gay, and Bisexual Sociologists*, 42 SOCIAL PROBLEMS 252 (May 1995).

⁴⁰ Committee on the Status of Lesbians and Gays in the Profession of the American Political Science Association, *Report on the Status of Lesbians and Gays in the Political Science Profession*, 18 POLITICAL SCIENCE AND POLITICS 561-72 (1995).

⁴¹ James M. Croteau & Mark von Denstion, *A National Survey of Job Search Experiences of Lesbian, Gay, and Bisexual Student Affairs Professionals*, 35 JOURNAL OF COLLEGE STUDENT DEVELOPMENT 440-45 (Jan. 1994).

discrimination based on sexual orientation or gender identity frequently occurs in state colleges and universities. Of the 4,000 AAA members who received the survey, 528 returned the questionnaire, almost all of whom were university faculty and graduate students.⁴² The respondent pool, as determined by self-identification, consisted of 373 heterosexuals, 52 lesbians, 33 gay men, 51 bisexuals, 2 transgender people, and 14 “others”. Results indicate that 30% of the lesbian respondents, 44% of the gay male respondents, and 4% of the bisexual respondents had personally experienced instances of discrimination in the workplace because of their sexual orientation, with sizeable percentages reporting that they were unsure whether they had experienced employment discrimination. Because few respondents were employed in the private sector, these survey results indicate a high prevalence of employment discrimination based on sexual orientation in state-run academic institutions.

- Similarly, a 1993 study conducted by the Committee on Women Historians found that employment discrimination against professional historians based on sexual orientation was a continuing problem, despite the adoption of an American Historians Association policy against discrimination based on sexual orientation.⁴³ Of the 130 historians in the survey pool, 39% were tenured professors. (The report does not specify the total number of professionals in public sector employment).⁴⁴ Of all respondents, 43% reported having

⁴² Commission on Lesbian and Gay Issues in Anthropology, *The Survey of AAA Membership Regarding Lesbian/Gay Issues in Anthropology: A Preliminary Report*, 18 SOLGAN 6 (1994).

⁴³ AMERICAN HISTORICAL ASSOCIATION, STATEMENT ON DISCRIMINATION AND HARASSMENT IN ACADEMIA (May 1991), available at <http://www.historians.org/governance/pd/DiscriminationAndHarassment.cfm>.

⁴⁴ Committee on Women’s Historians, American Historical Association, *Report on the Lesbian and Gay Historians Survey*, PERSPECTIVES, Apr. 1993, available at <http://www.historians.org/perspectives/issues/1993/9304/9304AHA2.cfm> (last modified Aug. 21, 2007).

experienced some form of discrimination in the workplace because of their sexual orientation. More specifically, 16.9% of the total reported discrimination in promotion and tenure and 20% in hiring. The authors concluded that discrimination occurred at “large, cosmopolitan research universities” as well as at other locations.⁴⁵

- In 1992, 43% percent of sociologists reported experiencing discrimination. Among those who both had disclosed their sexual orientation and were working to improve the situations of LGBT individuals, 71% reported some type of employment discrimination.⁴⁶

3. 2008 National Survey K-12 Teachers

At the 2008 Annual Conference of the American Educational Research Association, four academics presented their findings from what they identified as the first “major quantitative research study” of K-12educators.⁴⁷ An effort was made to reach LGBT educators by snowballing, email, letters, websites, attendance at conferences, and phone calls. The sample consisted of 514 teachers from all disciplines and instructional levels, counselors, and librarians from public, charter, private, parochial, and technical schools throughout all fifty states and Washington D.C. who filled out an online survey. Of the 242 participants who chose to self-identify their sexual orientation, 88 identified as lesbian, 81 identified as gay, and 28 identified as bisexual. Of the 272 participants who indicated a self-identified gender, 3 were transgender.

⁴⁵ *Id.*

⁴⁶ Taylor & Raeburn, *supra* note 39, at 252.

⁴⁷ NANCY J. SMITH, TIFFANY WRIGHT, COLE REILLY, & JENNIFER ESPOSITO, A NATIONAL STUDY OF LGBT EDUCATORS’ PERCEPTIONS OF THEIR WORKPLACE CLIMATE (2006), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/3d/9d/f7.pdf.

The LGBT professionals reported that they perceive their workplaces as troubling, unsafe, and unsupportive, describing the school climate as homophobic, racist, sexist, and transphobic. Thirty-five percent feared losing their job if outed to an administrator and 53% feared losing their job if outed to students. Almost half of respondents reported not being out to anyone at work or only to a few people at their school.

Of all respondents, 86% reported hearing homophobic comments in school; 58% had heard homophobic comments from other educational professionals and 20% have heard administrators make homophobic comments. Additionally, nearly half reported that they felt unsafe at work because of they identify as LGBT. Twenty-seven percent experienced harassment during the preceding year and 59% of those harassed did not report it. Thirty-five percent of respondents had property stolen or deliberately damaged. Many of the professionals reported working where there are no civil protections and few received benefits equal to those of their heterosexual colleagues.

C. Lawyers and Judges

1. 2002 - 2003 American Bar Foundation Study

The After the JD Study, conducted by the American Bar Foundation, surveyed nearly 4,500 lawyers recently admitted to the bar.⁴⁸ The first wave of the study was conducted in 2002 and 2003. Respondents were asked about their sexual orientation and gender identity, place of employment, and their experiences in the workplace, among other questions.

⁴⁸ NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION AND THE AMERICAN BAR FOUNDATION, *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* (2004), available at <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf>.

An analysis of the first wave of respondents shows that 4% of individuals working for state or local governments, including in the judiciary, identify as lesbian, gay, bisexual, or transgender.⁴⁹ When comparing incidents of discrimination among state and local government employees, 37% of LGBT employees reported that they had “experienced demeaning comments or other types of harassment” compared to 17% of non-LGBT employees.⁵⁰ One in five LGBT state and local employees with JDs reported that “a client request[ed] someone other than you to handle a matter.”⁵¹ Only 7% of non-LGBT state and local employees indicated that this had happened to them. More than one in four (26%) LGBT employees experienced some other form of discrimination (than a demeaning comment, being passed over for a desirable assignment, or having a client request another attorney) compared to one in ten of the non-GLBT employees.⁵²

2. 1998 California State Judiciary Survey

In 1998, the Sexual Orientation Fairness Subcommittee of the Judicial Council of the State of California surveyed 1,525 California state court employees.⁵³ Of all respondents, 64 self-identified as lesbian, gay, or bisexual. Of the LGB respondent pool, 20% reported employment discrimination based on sexual orientation while employed by the court. The report also explored beliefs regarding sexual orientation of all court employees surveyed. The authors found that 57.9% believed that it was better for gay, lesbian, and bisexual employees not to be open about their sexual orientation at work, 17.3% thought it was more difficult for an LGB person to secure a job than a

⁴⁹ E-mail from Richard Sander, UCLA School of Law, to Naomi G. Goldberg, the Williams Institute (Sept. 2, 2009 15:09:00 PST) (on file with the Williams Institute).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE, JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA, SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS (2001).

heterosexual person, 13.4% believed a gay or lesbian sexual orientation could be used to debase the credibility of an employee, and 9.8% believed that anti-gay prejudice is common at work.

3. 2001 New Jersey State Judiciary Survey

A report by the New Jersey Supreme Court, released in 2001, mirrors many of the findings from the California state court employee survey. Because nearly 70% of the respondents to the New Jersey survey were court employees, generalizations can be formed from the data about the New Jersey state judiciary as an employer. Of the 2,594 survey respondents in New Jersey, 7% self-identified as lesbian, gay, or bisexual.⁵⁴ Of the 7% who self-identified as gay, lesbian, or bisexual, 78% had heard a judge or supervisor make a derogatory joke/statement about homosexuals. Of all respondents, 30% reported hearing such comments in the workplace. Sixteen percent of gay and lesbian workers and 2% of all New Jersey court employees heard a co-worker, supervisor, or judge criticize an employee or applicant for openly expressing a gay or lesbian sexual orientation, and 21% of all gay and lesbian employees and 1% of all employees stated that someone in their office had been asked to conceal his or her sexual orientation.

4. 2006 Minnesota State Bar Association Survey

In 2006, the Minnesota State Bar Association published a Self-Audit for Gender and Minority Equity. Thirteen percent of the 880 respondents to the individual portion of the survey worked in the government or the courts and 6% of all respondents self-

⁵⁴ NEW JERSEY SUPREME COURT, FINAL REPORT OF THE TASK FORCE ON SEXUAL ORIENTATION ISSUES (Jan. 2, 2001).

identified as gay, lesbian, or bisexual.⁵⁵ Of the LGB respondents, 84% reported bias in legal workplaces as a major or moderate problem, and 21% reported that they had been denied employment, equal pay, benefits, promotion, or another employment-related opportunity within the past five years because of their sexual orientation. Two-thirds (67%) of heterosexual respondents and 71% of LGB respondents agreed that it would be more difficult for an applicant to be hired as an attorney if people thought he/she were LGB. Additionally, 4% of LGB respondents reported that they had been physically threatened by a co-worker or another employee within the last five years because of their sexual orientation, and 16% had been verbally harassed.

5. 1993 New York State Bar Association Survey

In 1993, a Subcommittee of the Association of the Bar of the City of New York conducted a survey in order to uncover rates of sexual orientation and gender identity discrimination in legal employment in New York. The survey was returned by 229 attorneys and legal workers, 97% of whom self-identified as LGB.⁵⁶ Eleven percent of all respondents worked in a government agency and an additional 2% were employed in a court system. Forty percent of all respondents reported awareness of discriminatory attitudes or treatment in the workplace, and 70% did not include any employment history or membership in LGBT organizations for fear that they might be discriminated against in the hiring process. Fifty-four percent believed that their sexual orientation affected their ability to succeed in the legal profession. One respondent said of court personnel,

⁵⁵ TASK FORCE ON DIVERSITY IN THE PROFESSION, MINNESOTA STATE BAR ASSOCIATION, 2005 SELF-AUDIT FOR GENDER AND MINORITY EQUITY: A RESEARCH STUDY OF MINNESOTA LAW FIRMS, NON-FIRM EMPLOYERS AND INDIVIDUAL LAWYERS (Sept. 2006), *available at* <http://www.ncbp.org/2009/Handouts-2-09/1B/2005%20Self-Audit%20for%20Gender%20and%20Minority%20Equity%20Report.pdf>.

⁵⁶ Committee on Lesbian and Gay Men in the Legal Profession, *Report on the Experience of Lesbians and Gay Men in the Legal Profession*, 48 REC. ASS'N B. CITY N.Y. 843 (1993).

“Court officers, at least in criminal court, are notoriously homophobic. I have overheard many offensive comments from both them and other court personnel. I have also seen homophobic cartoons posted behind courtrooms. Court officers and other court personnel also routinely discriminate against people with AIDS.”⁵⁷

D. Public Safety Officers: 2009 Police Quarterly Survey

In 2009, *Police Quarterly* published a report on employment discrimination against gay and lesbian police officers.⁵⁸ The survey respondent pool included 66 officers who attended the 11th Annual International Conference of Gay & Lesbian Criminal Justice Professionals. Attendees of the conference came from 16 states and represented 23 law enforcement agencies. The majority of officers in attendance considered themselves gay or lesbian; 84% reported being out to everyone in their lives, including co-workers and supervisors. Officers reported that they had experienced several adverse employment actions based on their sexual orientation including, but not limited to, discrimination in promotion (22%), evaluations (16%), discipline (13%), hiring (8%), and firing (2%). Significant percentages of officers also reported the existence of factors which contributed to a generally hostile environment such as frequent homophobic comments (67%) and social isolation (48%).

⁵⁷ *Id.* at 860.

⁵⁸ Roddrick Colvin, *Shared Perceptions Among Lesbian and Gay Police Officers: Barriers and Opportunities in the Law Enforcement Work Environment*, 12 POLICE QUARTERLY 86 (2009).

**E. Heterosexual Employees Perceptions of LGBT Employment
Discrimination**

Most of the above cited statistics focus on perception of discrimination by LGBT employees. In addition, a number of studies have found that heterosexual co-workers of LGBT employees recognize that discrimination is occurring on the basis of sexual orientation or gender identity in the workplace. For example, in the general public component of the Kaiser Family Foundation survey, 76% of all respondents reported that they thought LGBT people experienced discrimination “often” or “sometimes” in applying for or keeping a job.⁵⁹ In a parallel study to the 2003 Campus Climate report which included heterosexual respondents, discrimination or harassment was predicted to be very likely or likely against gay men by 60% of respondents, against lesbians by 54% of respondents, against bisexual people by 38% of respondents, and against transgender people by 71% of respondents.⁶⁰ Among heterosexual respondents to the Minnesota State Bar Association survey, 67% thought it would be harder to be hired if prospective employers thought the interviewee was LGBT. In the same group, 23% believed that LGBT attorneys were treated differently than heterosexual attorneys in the practice of law, while another 32% were not certain.⁶¹

**F. Indicators that Surveys Underreport The Level of Employment
Discrimination Against LGBT People**

⁵⁹ THE KAISER FAMILY FOUNDATION, INSIDE-OUTL A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC’S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION (Nov. 2001), *available at* <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13875>.

⁶⁰ Rankin, *supra* note 12.

⁶¹ 2005 SELF-AUDIT FOR GENDER AND MINORITY EQUITY: A RESEARCH STUDY OF MINNESOTA LAW FIRMS, NON-FIRM EMPLOYERS AND INDIVIDUAL LAWYERS, *supra* note 55.

Several researchers have reported statistics indicating that discrimination rates against LGBT employees are or could be higher than the data from self-reported surveys reflect. They have suggested that this discrepancy is the result of two factors:

- First, a significant percentage of responding employees conceal their sexual orientation at work, and
- Second, a phenomenon known as “job-tracking” channels LGBT employees into job categories with “accepting” environments where they are less likely to experience employment discrimination.

As to the first, employees who are “closeted,” or have chosen to conceal their sexual orientation or gender identity at work, tend to experience and report less employment discrimination based on sexual orientation and/or gender identity than openly LGBT employees. Closeting remains common. A 1984 article reported that 77% of lesbians surveyed were partially or totally closeted at work.⁶² Nearly a quarter of a century later, this figure had decreased, but still remains high. The 2008 Out & Equal survey reported that 36% of lesbians and gays were closeted at work. A 2001 Kaiser Family Foundation study found almost exactly the same result, reporting that 37% of LGB employees were not open about their sexual orientation to their bosses.⁶³ James Croteau attributed the fairly common choice among employees to remain closeted at work to fear or anticipation that the employee would experience discrimination if his or

⁶² Levine & Leonard, *supra* note 9.

⁶³ HARRIS INTERACTIVE, OUT & EQUAL WORKPLACE ADVOCATES, OUT & EQUAL WORKPLACE CULTURE REPORT: SURVEY OF WORKPLACE ATTITUDES 2002-2008 (2008), *available at* http://outandequal.org/documents/OE_workplace_culture_report.pdf; THE KAISER FAMILY FOUNDATION, INSIDE-OUTL A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC’S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION, *supra* at note 59.

her sexual orientation were known.⁶⁴ From his review of several studies designed to map sexual orientation discrimination in the workplace, Croteau concluded that respondents who were more open about their sexual identity at work in fact reported higher percentages of discrimination.

A study of gay, lesbian, and bisexual sociologists published by Verta Taylor and Nicole C. Raeburn in 1995 supports Croteau's conclusion. In their study, Taylor and Raeburn analyzed whether there was a disparity in workplace treatment between those LGB employees who were labeled "activists" (respondents who have engaged in various forms of political resistance on their campuses) and those labeled "non-activists" (those who may be out at work but do not have a history of political action).⁶⁵ The surveys showed that 71% of activists had experienced discrimination in the workplace because of their sexual orientation compared to 36% of non-activists. Taylor and Raeburn concluded that the strategies employed by the "activists" in an attempt to negotiate what it meant to be "a gay sociologist" made them easily recognizable targets of exclusionary practices and discrimination by the dominant group.

In addition to studies which have sought to link higher rates of discrimination against "out" and/or politically active employees, several studies have asked "closeted" LGB employees why they have chosen to conceal their sexual orientation in the workplace. Anecdotal reports and survey statistics in these studies indicate that LGB employees fear or anticipate that discrimination will occur if they disclose their sexual orientation to their co-workers or supervisors. Levine and Leonard found that more than

⁶⁴ James M. Croteau, *Research on the Work Experiences of Lesbian, Gay, and Bisexual People: An Integrative Review of Methodology and Findings*, 48 JOURNAL OF VOCATIONAL BEHAVIOR 195, 198 (2002).

⁶⁵ Taylor & Raeburn, *supra* note 39.

60% of lesbians surveyed in their 1984 study worried that they would face adverse employment actions if they did not remain closeted on the job.⁶⁶ Eleven years later, Croteau and Lark found that 44% of LGB college student-affairs professionals anticipated the same.⁶⁷

As recently as 2005, 70% of closeted LGB respondents to the Lambda Legal and Deloitte Financial Advisory survey revealed that they had chosen not to disclose their sexual orientation because they feared risk to employment security or hostility and harassment in the workplace.⁶⁸ Of LGBT attorney respondents to the Minnesota State Bar Association survey in 2005, 70% stated that they had hidden their sexual orientation at some point in the course of their professional careers due to concern that revealing such would lead to adverse employment consequences.⁶⁹ In the same survey, 71% of LGBT respondents and 67% of heterosexual respondents agreed that it would be harder to get hired as an attorney if a person was thought to be LGBT. One employee respondent to the 2003 Campus Climate Assessment stated that there was a “need to improve the professional climate so that LGBT employees don’t feel threatened to lose their job because of their sexual orientation. Often times I keep my mouth shut or don’t rock the boat so that I don’t fear for my job.”⁷⁰ The studies by Croteau and Taylor and Raeburn indicate that these employees’ fears are legitimate.

Several studies also allude to a phenomenon referred to as “job tracking” in which LGB job candidates avoid the prospect of employment discrimination by seeking out

⁶⁶ Levine & Leonard, *supra* note 9.

⁶⁷ James M. Croteau & Julianne S. Lark, *On Being Lesbian, Gay or Bisexual in Student Affairs: A National Survey of Experiences on the Job*, 32 NASPA JOURNAL 189 (1995).

⁶⁸ 2005 WORKPLACE FAIRNESS SURVEY, *supra* note 20.

⁶⁹ 2005 SELF-AUDIT FOR GENDER AND MINORITY EQUITY: A RESEARCH STUDY OF MINNESOTA LAW FIRMS, NON-FIRM EMPLOYERS AND INDIVIDUAL LAWYERS, *supra* note 16.

⁷⁰ Rankin, *supra* note 12.

positions only in fields or with employers that have a record of supporting diversity in sexual orientation or by self-employing. One woman interviewed in the Levine and Leonard study said of her employment situation, “It is very difficult to work where you cannot be yourself. Instead of accepting this compromise, I chose to adjust my career to my lifestyle. I now own two gay businesses.”⁷¹ The same study reported that other women sought employment in fields traditionally tolerant of sexual diversity, including the arts, beauty, fashion, or firms run by lesbians or gay men. The Lambda Legal and Deloitte Financial Advisory Services Study revealed a similar sentiment: 54% of LGBT employees stating that when deciding where to work, whether the employer promotes fairness and equality through its policies and practices was a “critical factor.” Of respondents not “out” at work, 62% reported working for employers that failed to promote workplace equality through policies and practices.⁷²

The absence of legal protection from discrimination powerfully reinforces closeting and job tracking. The result is that fewer employment opportunities are effectively available to LGBT workers than to their heterosexual counterparts simply because of their sexual orientation and/or gender identity.

Conclusion

Self-report survey data demonstrate serious, pervasive, and continuing discrimination against public sector LGBT employees. Data indicate that discrimination occurs across the spectrum of government employment—from nationally recognized universities to courthouses to law enforcement units. Hostility and discrimination facing public sector LGBT employees is not only visible to those who identify as or are

⁷¹ Levine & Leonard, *supra* note 9, at 707.

⁷² 2005 WORKPLACE FAIRNESS SURVEY, *supra* note 20.

perceived to be LGBT, but has also been recognized by their heterosexual co-workers. Surveys reveal that many LGBT employees remain closeted at work due to fear of discrimination or feel that they must take jobs in “accepting environments” in order to avoid discrimination, suggesting that the actual rate of employment discrimination is or could be higher than reported. These surveys also indicate that the level of discrimination on the basis of sexual orientation and gender identity by state and local employers is any different than that of private employers.



Chapter 10: Analysis of Wage Gap Between LGB Public Employees and Their Co-Workers

An additional way that economists and sociologists look for evidence of discrimination is to compare the earnings of people who have different personal characteristics, such as sexual orientation, but share other characteristics significant for employment (“productive characteristics”), such as education, years of experience, and industry. If, after controlling for all the factors that are reasonably expected to influence wages, a wage difference still exists, the most likely conclusion is that discrimination is the reason for the wage gap for the disadvantaged group.

More than a decade of research and twelve studies have examined earnings and sexual orientation in the United States. All twelve studies, using data from the National Health and Social Life Survey (“NHSLs”), the General Social Survey (“GSS”), the United States Census, and the National Health and Nutrition Examination Survey (“NHANES III”), show a significant pay gap for gay men when compared to heterosexual men who have the same productive characteristics. Depending on the study, gay and bisexual men earn 10 to 32 percent less than similarly qualified heterosexual men. Lesbians generally earn the same or more than heterosexual women, but lesbians earn less than either heterosexual or gay men.¹

Two recent studies have found similar wage gaps when looking at government employees. Together the studies find that gay men, lesbians, and bisexuals who are

¹ Badgett, M.V.L., Lau, H., Sears, B., and Ho, D. Bias in the Workplace: Consistent evidence of sexual orientation and gender identity discrimination. *The Williams Institute*, 2007.

government employees earn 8 to 29 percent less than their heterosexual counterparts. More specifically, one study finds that men in same-sex couples who are state employees earn 8 to 10 percent less than their married heterosexual male counterparts. These studies suggest that sexual orientation employment discrimination by state, local, and federal governments sector is no different than sexual orientation discrimination in the private sector.²

1. 2009 Lewis Study

In a forthcoming study,³ Gregory B. Lewis, Professor of Public Management and Policy at Georgia State University, used Census 2000 and 2001-2006 American Community Survey data to examine the wages of individuals with same-sex partners who work in government. The decennial Census and the annual American Community Survey do not include questions about sexual orientation. However, it is possible to identify individuals who indicate that they live with a same-sex “unmarried partner.” Individuals who work were asked if they were employed by “a private company, a nonprofit organization, or a local, state, or federal government” and to identify their occupation. Using these variables, it is possible to identify government employees who are part of a same-sex couple. Lewis estimates that more than 313,000 individuals in same-sex couples work for state and local governments. When just considering employees of state governments, Lewis finds that men with same-sex partners earn 8 to 10 percent less than comparable married men in state government -- even when controlling for differences in education, race, years of experience, and occupation.

² Unfortunately, none of these studies includes data about transgender employees.

³ Gregory B. Lewis, *Are Gay-Straight Pay Disparities Smaller in the Public Sector?*, Presented at the Midwest Political Science Association Meeting (April 4, 2009).

Previous studies have found that, in general, women with same-sex partners have higher wages than women with different-sex spouses.⁴ Lewis finds that there is no statistically significant difference in wages for women with same-sex partners and women with different-sex partners working in state government.

2. 2007 Carpenter and Klawitter Study

In a study published in 2007,⁵ Christopher Carpenter, Associate Professor of Economics and Public Policy at the University of California, Irvine, and Marieka Klawitter, Associate Professor of Public Affairs at the University of Washington, investigated the earnings of self-identified lesbian, gay, and bisexual men and women in government employment in California. For their study, they use data from the California Health Interview Survey (CHIS), which is the nation's largest state health survey. Respondents were asked their sexual orientation and if they were employed by a government entity. Data from the 2005 CHIS suggest that 105,000 government employees in California identify as gay, lesbian, or bisexual. Carpenter and Klawitter find that even when taking into account age, education, and race/ethnicity, lesbian, gay, and bisexual men and women in public employment earn 10 to 29 percent less than their heterosexual counterparts. Further, their findings suggest that living in an area with anti-discrimination policies that include sexual orientation positively affects the earnings of LGB government employees (Carpenter, C. and M.A. Klawitter).

⁴ Badgett, 1995; Badgett, 2001; Berg and Lien, 2002; Black, *et al.*, 2003; Blandford, 2003; Carpenter, 2005; Arabshehani, *et al.*, 2007.

⁵“Sexual orientation-based antidiscrimination ordinances and the earnings of sexual minority individuals: evidence from local initiatives in California.” In *Sexual Orientation Discrimination: An international perspective*, eds. eds. M.V.L. Badgett and J. Frank. (New York: Routledge, 2007).



Chapter 11: Administrative Complaints on the Basis of Sexual Orientation and Gender Identity

Employment discrimination complaints filed with state and local administrative agencies and non-governmental organizations (NGOs) also document a widespread and persistent pattern of sexual orientation and gender identity discrimination against LGBT state and local employees.

This chapter proceeds in five parts. The first part reviews academic scholarship analyzing the number and scope of administrative complaints that have been filed based on allegations of sexual orientation or gender identity discrimination. The second part presents original research by the Williams Institute conducted during 2008 and 2009 updating these studies. The Williams Institute study is based on administrative complaints filed by state and local employees alleging sexual orientation and gender identity discrimination from 18 states (Arizona, California, Connecticut, Florida, Georgia, Kentucky, Maine, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Pennsylvania, Vermont, Washington, and Wisconsin). The third part provides additional research by the Williams Institute, which compares sexual orientation, race, and sex discrimination administrative complaints, and finds that the filing rates are comparable when the underlying populations are taken into account. The fourth part discusses additional academic research that indicates that the number of administrative complaints is almost certainly lower than the rate of actual employment discrimination experienced by LGBT people. The final part presents additional new research by the Williams Institute conducted during 2009 reporting the nature and

number of complaints lodged with NGOs that provide legal representation to the LGBT community.

Key findings of this chapter include:

- A 1996 academic study gathered 809 sexual orientation discrimination complaints filed with state administrative agencies for 11 states, and 67 complaints filed with 22 local agencies. Although there are few data about the outcomes of these complaints, and many were still pending at the time of the study, more than 55 complaints filed were settled or received an administrative disposition favorable to the complainant. Though the focus of the research was to assess discrimination against state and local government employees, and many of the local laws only covered public employees, in some instances, it appears that the researchers were unable to obtain data from the agencies that separated out complaints filed by private sector employees.
- A 2002 United States Government Accountability Office (GAO) study reported 4,788 administrative complaints from 1993-2001 alleging sexual orientation discrimination from twelve states; however, the study did not distinguish complaints by public and private employees.
- A 2009 Williams Institute study found 460 complaints of sexual orientation and gender identity discrimination by state and local employees filed with state administrative agencies in thirteen states from 1999-2007. Although not every state provided a breakdown between state

and local employees, at least 265 of these complaints were filed by state employees.

- For four of the five states that provided information about the dispositions for the claims by state employees, the rates of settlement or findings of probable cause averaged 30%. For the fifth state, California , 61% of complainants (of those where a disposition was provided) sought an immediate right to sue letter, which often indicates that the complainant has already found an attorney to take his or her case.
- An additional 23 cities and counties (from eleven different states), which prohibit sexual orientation and gender identity discrimination for local government employees, provided data about 128 complaints. For those complaints where the agency had already reached a known disposition (117), 21% had reached a favorable disposition ranging from a finding of probable cause to settlements and recovery of damages after litigation. An additional 2% of claimants sought an immediate right to sue letter and/or withdrew the complaint to litigate in court.
- Two recent studies by the Williams Institute demonstrate that when adjusted for population, the rate of complaints filed with state administrative agencies alleging sexual orientation discrimination in employment is comparable to the rate of complaints filed on the basis of race or sex: 5 per 10,000 workers for both sex and sexual orientation discrimination complaints and 7 per 10,000 workers for race discrimination complaints.

- Scholarship shows that the number of administrative filings most likely significantly under-represents the frequency of employment discrimination experienced by LGBT state and local workers. First, research shows that many LGBT workers are unlikely to file such complaints because they fear retaliation and wish to avoid “outing” themselves further to their workplace and community. Further, a study of employment law attorneys found that many sexual orientation discrimination claims never result in an administrative filing because they are settled via letters and negotiation before a filing is necessary.
- In addition, several academic studies demonstrate that state and local administrative agencies often lack the resources, knowledge, enforcement mechanisms and willingness to accept sexual orientation discrimination complaints.
 - For example, of the 122 city and county agencies that responded to the 2009 Williams Institute study, two incorrectly referred such complainants to the United States Equal Employment Opportunity Commission even though no federal law prohibits sexual orientation discrimination, one incorrectly said the city did not prohibit such discrimination, one incorrectly said there was no administrative enforcement mechanism for such complaints, five said they did not have the resources to enforce such claims and referred callers to their state administrative agency, and three said they lacked the resources to provide data requested by the

Williams Institute. Perhaps indicative of their ability to respond to individual complaints, another 81 city and county agencies never responded to phone calls, e-mails, letters, and formal requests for information by the Williams Institute.

- Similarly, of the 21 states that prohibit sexual orientation or gender identity discrimination, administrative enforcement agencies in only 11 of these states were able to provide a breakdown of public versus private complaints and only six were able to provide redacted copies of such complaints, often indicating a lack of resources and staff (See Chapter 15 for a full discussion).
- Four legal organizations serving the LGBT community reported a total of 104 contacts from public sector employees seeking advice regarding an incident of sexual orientation or gender identity discrimination in the workplace, including: 48 calls to Gay & Lesbian Advocates and Defenders (GLAD) from 2000-2009, 11 calls to Lambda Legal from 2007-2008, 33 calls to the National Center for Lesbian Rights from 2001-2009, and 12 calls to the American Civil Liberties Union (ACLU) from 2007-2008.

A. Prior Scholarship Analyzing Complaints of Discrimination Filed by State and Local Government Employees

The first comprehensive study of discrimination against lesbian and gay public sector employees was published in 1996 by researchers Norma M. Riccucci and Charles W. Gossett.¹ As part of their research, Riccucci and Gossett contacted state and local

¹ Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, 26 AMERICAN REVIEW OF PUBLIC ADMINISTRATION 175 (1996).

agencies in charge of enforcing anti-discrimination statutes, ordinances, and executive orders in order to determine both the rate at which complaints were being filed by lesbian and gay government employees and the effectiveness of state and local enforcement mechanisms. Though the focus of the research was to assess discrimination against state and local government employees, and many of the local laws only covered public employees, in some instances, it appears that the researchers were unable to obtain data from the agencies that separated out complaints filed by private sector employees.

Tables 12-A & 12-B below reproduce their findings. Table 12-A shows the number of complaints filed in the seven states which then had statutory coverage and the two states with executive orders. Table 12-B shows the number of complaints identified by Riccucci and Gossett as having been filed with local agencies.

Both tables also contain information regarding the disposition of complaints. In the course of contacting the agencies, Riccucci and Gossett observed that in some states, the enforcement of statutes or executive orders was “questionable.”² Riccucci and Gossett reported that “officials from Minnesota and Washington seemed baffled when [Riccucci and Gossett] asked about the enforcement aspect of their state’s anti-discrimination measure.”³ Gossett and Riccucci concluded from these and other responses that “the responsible officials did not anticipate the possibility of actual complaints being filed under these protections[. A]t a minimum, the new policies did not result in the normal implementation steps we expect of a state bureaucracy.”⁴

² *Id.* at 182.

³ *Id.*

⁴ *Id.*

Table 12-A

**Administrative Complaints Filed on the Basis of Sexual Orientation at the State Level
Adapted from Riccucci and Gossett Study, 1996**

| | Period | Number | Disposition |
|--------------------------------|----------------------------|--------------------------------------|---|
| CA (statute) | 1993 | 159 ^a | 34 withdrawn or abandoned 23 dismissed, no jurisdiction 10 conciliated settlements ^b 19 ruled in favor of employer |
| CT (statute) | 1991 – 1993 | 43 ^a | N.A. ^c |
| HI (statute) | 1991 – 1993 | 18 | all cases pending |
| MN (statute) | 1993 – 1996 | N.A. ^c | enforcement in question ^d |
| NJ (statute) | 1992 – 1996 | 25 ^a | 3 successful conciliations 2 not concluded 9 no probable cause 3 withdrawn by complainant 1 administrative closure 6 complainant unavailable or uncooperative 1 sent to EEOC on other charges |
| OH (executive order) | 1988 – 1992 | 5 | 2 withdrawn by complainant 1 no probable cause 1 conciliated settlement ^b 1 administrative closure |
| PA (executive order) | 1988 – 1996 | 1 | N.A. ^c |
| VT (statute) | 1992 – 1996 | 0 | |
| WI (statute) | 1983 – 1991 1992 – 1993 | 426 ^a 132 ^a | N.A. ^c 18 no probable cause 23 conciliated settlements ^c 3 no jurisdiction 20 pending 10 withdrawn by complainant |
| Total | | 809 | |

^aIncludes public- and private-sector claims in employment and other arenas. Wisconsin includes teachers.

^bResults of conciliation unknown.

^cNot available or provided by state. Where applicable, FOIA request made.

^dNo state official able to answer questions regarding how measure is enforced.

Table 12-B

Administrative Complaints Filed on the Basis of Sexual Orientation by City and County Employees against Local Governments Adapted from Riccucci and Gossett Study, 1996*

| | Period | Number | Disposition |
|---------------------------------|---------------|---------------|--|
| Cook County, IL | 1993 – 1996 | 4 | 2 dismissed for lack of evidence 1 withdrawn by complainant 1 under investigation at time of request |
| Chicago, IL | 1990 – 1996 | 1 | 1 under investigation at time of request |
| Urbana, IL | 1988 – 1996 | 3 | 1 dismissed; lack of cooperation |
| Washington, DC | 1977 – 1996 | 1 | 1 probable cause found for employee |
| Harrisburg, PA | 1984 – 1996 | 2 | 2 withdrawn by complainant |
| Philadelphia, PA | 1993 – 1996 | 5 | Not available or not provided |
| Pittsburgh, PA | 1990 – 1996 | 1 | 1 withdrawn by complainant |
| Boston, MA | 1990 – 1996 | 6 | 1 withdrawn by complainant |
| Cambridge, MA | 1990 – 1996 | 1 | Not available or not provided |
| Albany, NY | 1992 – 1996 | 1 | 1 no probable cause |
| Minneapolis, MN | 1982 – 1993 | 2 | 2 no probable cause |
| Cincinnati, OH | 1991 – 1993 | 1 | 1 successful conciliation |
| King County, WA | 1991 – 1996 | 5 | 2 no probable cause 1 no jurisdiction 1 prefinding settlement 1 withdrawn with settlement |
| Seattle, WA | 1985 – 1996 | 12 | 10 closed lack of evidence 1 successful conciliation 1 currently under investigation |
| Phoenix, AZ | 1991 – 1996 | 5 | 1 successful conciliation 3 administrative closures |
| Berkeley, CA | 1978 – 1996 | 1 | 1 no probable cause |
| Cupertino, CA | 1975 – 1996 | 1 | 1 pending at time of request |
| Los Angeles, CA | 1988 – 1993 | 5 | Not available or not provided |
| Santa Barbara County, CA | 1992 – 1993 | 2 | 2 successful conciliations |
| Santa Cruz County, CA | 1993 – 1994 | 2 | 1 no probable cause 1 pending at time of request |
| Montgomery County, MO | 1987 – 1996 | 1 | 1 no probable cause |
| Arlington County, VA | 1992 – 1993 | 5 | 2 successful conciliation 3 no probable cause |
| Total | | 67 | |

* Data appears for only 22 cities and counties because the other 43 cities and countries that responded to the survey stated that they had received no complaints or grievances from city or county employees based on sexual orientation⁵

⁵ *Id.*

In 2002, sponsors of United States Senate Bill 1284 (the Employment Non-discrimination Act) asked GAO to collect data on employment discrimination complaints that had been filed on the basis of sexual orientation.⁶ At the time of the report, twelve states had enacted statutory protection for sexual orientation in employment. GAO collected data from each state agency responsible for handling the complaints. Though GAO did not separate complaints made by state employees from those made by private or other public sector employees, the figures show a general record of discrimination against LGBT employees spanning periods of up to 11 years. The data obtained appear in Table 12-C.

Table 12-C

Administrative Complaints Filed with State Enforcement Agencies for Employment Discrimination on the Basis of Sexual Orientation Adapted from General Accounting Office Sexual Orientation-Based Employment Discrimination Report, 2002

| | Period | Number^a |
|--------------|---------------|---------------------------|
| CA | 1993 – 2001 | 2042 |
| CT | 1993 – 2001 | 295 |
| HI | 1992 – 2001 | 98 |
| MA | 1990 – 2001 | 1420 ^b |
| MN | 1995 – 2001 | 206 |
| NV | 2000 – 2001 | 37 |
| NH | 1998 – 2001 | 26 |
| NJ | 1992 – 2001 | 233 |
| RI | 1996 – 2001 | 41 |
| VT | 1993 – 2001 | 39 ^c |
| WI | 1996 – 2001 | 351 |
| Total | | 4788 |

^a Generally, a complainant can allege other bases—sex, race, or religion, for example—in a complaint that also alleges employment discrimination on the basis of sexual orientation. In this table, a case is counted as a sexual orientation case whether or not other bases are also alleged in the same complaint.

^b Massachusetts provided data for all discrimination complaints filed and the number of sexual orientation complaints filed. The state does not keep separate records on the number of employment discrimination complaints, although the state told [GAO] that typically around 85 percent of all discrimination complaints are employment discrimination complaints.

^c The number listed for sexual orientation discrimination complaints include only those complaints where sexual orientation is listed as the only or the primary basis for complaint. The numbers do not include complaints where sexual orientation is listed as a secondary basis for complaint.

⁶ U.S. GEN. ACCOUNTING OFFICE, SEXUAL ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES’ EXPERIENCE WITH STATUTORY PROHIBITION, GAO-02-878R (July 9, 2002).

**B. Updated Research on Complaints of Discrimination Filed by State
and Local Government Employees by the Williams Institute**

Updating the Riccucci and Gossett data described above, in 2008-2009, the Williams Institute contacted state and local agencies responsible for enforcing an anti-discrimination statute or ordinance to gather more recent data on employment discrimination against LGBT employees in the public sector. The Williams Institute contacted the agencies responsible for enforcing anti-discrimination statutes in 20 of the 21 states which currently offer statutory protection for sexual orientation and/or gender identity. An exception was made for Delaware because its statutory protection had not gone into effect at the time the study was conducted. The Williams Institute also contacted approximately 203 city and county agencies in localities with anti-discrimination ordinances prohibiting sexual orientation and/or gender identity discrimination in employment. The inquiries were made over a period of approximately ten months, from September, 2008 through June, 2009.

Upon contact with state and local agencies by phone, the agency was asked for the number of employment discrimination complaints filed on the basis of sexual orientation and/or gender identity by state or local government employees for each year since protection went into effect or, alternatively, as far back as the agency had a record. If the agency provided the data, the agency was asked if it would release redacted copies of the actual complaints filed and/or a record of case dispositions. If the agency refused to provide the data, the reason for refusal was logged. If the agency did not follow through on a request that was made by phone or failed to return a voicemail message, approximately four follow up contacts were made, either via phone calls, e-mails, or

written inquiries. If the agency had not produced the data after these additional contacts, a formal public records request was sent to the agency. If the agency refused to provide data in response to the public records request, the reason for refusal was logged.

The results of the Williams Institute study are shown in the following tables. Because many agencies maintain records only for a fixed period of years, many of the statistics reported below do not include the complaints listed in the Riccucci and Gossett table above, though there is some overlap.

State agency responses appear in Tables 12-D –12-F, which show the number of employment discrimination complaints filed with state agencies on the basis of sexual orientation and/or gender identity against the state as employer and the dispositions of these cases, where available. Of the 20 states contacted, 11 provided responses. Responses and inaction of state agencies that refused to provide data appear in Table 12-G.

Four hundred and thirty complaints of sexual orientation and gender identity discrimination by state and local employees were filed with administrative agencies in these eleven states from 1999-2007 (Table 12-D). Although not every state provided a breakdown of state and local employees, at least 265 of these complaints were by state employees (Table 12-E).

Although only 5 of these states provided information about the disposition of these complaints for a limited number of years and for only some of the claims within those years (See Table 12-F), at least 10 of the complaints by state employees for sexual orientation and gender identity discrimination were either settled and/or received a favorable administrative disposition. Many complainants with strong claims would seek

an immediate right to sue letter from the administrative agency, and these are not included in this number. For example of the 42 state discrimination claims between 2005-2007 with dispositions submitted by that the California Department of Fair Employment and Housing, 61% of complainants requested an immediate right to sue letter. A request for an immediate right to sue letter often means that the complainant has an attorney willing to take his or her case. For the four other states that provided dispositions for the claims by state employees, New Mexico, New York, Oregon, and Washington, the rates of settlement or findings of probable cause ranged from 13% to 50%, with an average of 30% of the state claims where a disposition was provided .

Tables 12-H and 12-I show the number of employment discrimination complaints filed with city and county agencies on the basis of sexual orientation and/or gender identity against the city or county as employer and the dispositions of these cases, where available. Of the 203 local agencies contacted: 81 cities and counties never responded, 23 reported that they had received complaints on the basis of sexual orientation and/or gender identity from public sector employees, 13 declined to provide the number of complaints, and 86 reported that they had not received any complaints on the basis of sexual orientation and/or gender identity from public sector employees. Several large metropolitan agencies failed to respond, including those in New York City, San Francisco, and Chicago. Table 12-J details responses given by local agencies that responded but declined to provide the number of complaints.

The 23 cities and counties that had received complaints of sexual orientation and gender identity discrimination reported 128 complaints. For those complaints where the agency had already reached a known disposition (108), 25% had reached a favorable

disposition ranging from findings of probable cause by the administrative agency to settlements and the recovery of damages by the complainant after litigation. Another 2% sought an immediate right to sue letter or withdrew the complaint to litigate the claim in court.

Table 12-D

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

| | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | Total |
|--------------|----------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|------------|
| CA | + | 16 ^x | 22 ^x | 23 ^x | 27 ^x | 24 ^x | 22 ^x | 26 ^x | 23 ^x | 183 |
| IA | * | * | * | * | * | * | * | * | 3 | 3 |
| ME | * | * | * | * | * | * | 0 | 5 | 7 | 12 |
| MN | 4 | 5 | 2 | 4 | 8 | 3 | 4 | 0 | 2 | 32 |
| NV | 0 | 2 | 4 | 3 | 3 | 3 | 3 | 4 | 5 | 27 |
| NJ | 2 | 1 | 1 | 2 | 1 | 1 | 4 | 5 | 1 | 18 |
| NM | * | * | * | * | 4 | 7 | 8 | 8 | 4 | 31 |
| NY | * | * | * | * | 18 | 24 | 21 | 26 | 10 ^x | 99 |
| OR | * | * | * | * | * | * | * | * | 2 | 2 |
| RI | 0 | 1 | 0 | 0 | 0 | 0 | 2 | 2 | 0 | 5 |
| VT | + | + | + | 1 | 2 | 2 | 0 | 3 | 2 | 10 |
| WA | * | * | * | * | * | * | * | 3 | 4 | 7 |
| WI | + | + | + | 3 | 11 | 3 | 5 | 5 | 4 | 31 |
| Total | 6 | 25 | 29 | 36 | 74 | 67 | 69 | 87 | 67 | 460 |

* No statutory protection in the given year
 + Data not available
 x State complaints only

Table 12-E

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

| | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|----|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| | State Local | State Local | State Local | State Local | State Local | State Local | State Local | State Local | State Local |
| CA | + + | 16 + | 22 + | 23 + | 27 + | 24 + | 22 + | 26 + | 23 + |
| ME | * * | * * | * * | * * | * * | * * | 0 * | 2 3 | 2 5 |
| MN | 2 2 | 1 4 | 0 2 | 1 3 | 3 5 | 1 2 | 0 4 | 0 0 | 1 1 |
| NJ | 2 0 | 0 1 | 0 1 | 0 2 | 1 0 | 0 1 | 2 2 | 2 3 | 0 1 |
| NM | * * | * * | * * | * * | 1 3 | 3 4 | 4 4 | 5 3 | 1 3 |
| NY | * * | * * | * * | * * | 2 16 | 5 19 | 5 16 | 2 24 | 10 + |
| OR | * * | * * | * * | * * | * * | * * | * * | * * | 1 1 |
| VT | + + | + + | + + | 1 + | 2 + | 2 0 | 0 0 | 2 1 | 0 2 |
| WA | * * | * * | * * | * * | * * | * * | * * | 1 2 | 2 2 |

| | | | | | | | | | |
|-----------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| WI | + / + | + / + | + / + | 1 / 2 | 5 / 6 | 1 / 2 | 2 / 3 | 3 / 2 | 2 / 2 |
|-----------|-------|-------|-------|-------|-------|-------|-------|-------|-------|

* No statutory protection in the given year
+ Data not available

Table 12-F

Dispositions of Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by State Employees against State Governments

| | Period | Settlement | No Probable Cause or Other Dismissal | Probable Cause | Other Administrative* | Unavailable |
|-----------|---------------|-------------------|---|-----------------------|------------------------------|--------------------|
| CA | 2005 – 2007 | 0 | 14 | 0 | 28* | 29 |
| NM | 2003 – 2007 | 3 | 8 | 1 | 1 | 1 |
| NY | 2003 – 2007 | 2 | 12 | 0 | 1 | 9 |
| OR | 2007 | 1 | 0 | 0 | 1 | 0 |
| WI | 2002 – 2007 | 2 | 6 | 1 | 3 | 2 |

* Cases closed in absence of a merit decision, settlement, or other defined category
* Includes 26 requests for immediate Right-to-Sue

Table 12-G

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

| | State Employee Response |
|-----------|--|
| CO | At time of request, protection too recently enacted to have compiled and maintained data in a way that made release feasible |
| CT | Limited data provided. |
| HI | Refused to provide data because of confidentiality requirement in anti-discrimination law (Haw. Rev. Stat. § 368-4) |
| IL | Unable to provide because Commission does not create or maintain the information requested |
| IA | Information cannot be generated |
| MD | Legal Department would not provide the information because it would require them to look up every case. When caller asked if there was a formal request procedure, Legal Department told caller to write a letter to the Executive Director. Executive Director did not respond to the request |
| MA | No response |
| NV | Information not available |
| NH | No response |

Table 12-H

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

| | Period* | Number | Basis | Disposition |
|-------------------------|----------------|----------------|--|---|
| Tucson, AZ | 2004 – 2009 | 1 | 1 sexual orientation | 1 withdrawn by complainant |
| Berkeley, CA | 2004 – 2009 | 4 | 4 sexual orientation | 3 discrimination found 1 unsubstantiated |
| Los Angeles, CA | 1999 – 2009 | 9 ^x | 9 sexual orientation | Not available |
| San Jose, CA | 2006 – 2009 | 9 | 9 sexual orientation | 7 unsubstantiated 2 substantiated |
| Hartford, CT | 2002 – 2009 | 1 | 1 sexual orientation | 1 currently under review |
| Gainesville, FL | Not available | 1 | 1 sexual orientation | 1 pending |
| Tampa, FL | 1995 – 2009 | 1 | 1 sexual orientation | 1 no reasonable cause |
| Atlanta, GA | 2002 – 2009 | 12 | 12 sexual orientation | 12 no probable cause |
| Louisville, KY | Not available | 1 | 1 sexual orientation | 1 unsubstantiated |
| Cincinnati, OH | Not available | 3 | 3 sexual orientation | 1 sustained 1 not sustained ^o 1 offender disciplined and moved to resolve |
| Columbus, OH | Not available | 2 | 2 sexual orientation | 2 no probable cause |
| Portland, OR | 2000 – 2009 | 7 | 6 sexual orientation 1 gender identity | 3 unsubstantiated 3 substantiated 1 withdrawn |
| Providence, RI | 2005 – 2008 | 5 | 5 sexual orientation | 3 no probable cause 2 probable cause |
| Harrisburg, PA | Not available | 5 | 5 sexual orientation | 2 withdrawn 1 no probable cause 1 administrative closure 1 unknown closure |
| Philadelphia, PA | 1982 – 2009 | 40 | 35 sexual orientation 5 gender identity | 5 substantiated 1 settlement 13 unsubstantiated 3 withdrawn 2 right to sue 8 other administrative closure 1 unknown 7 open cases |
| Pittsburgh, PA | 1990 – 2009 | 6 | 6 sexual orientation | 2 withdrawal of complaint 2 withdrawal with benefits 2 no probable cause |
| Seattle, WA | 2000 – 2009 | 3 | 3 sexual orientation | 2 withdrawal without benefits 1 no cause |
| Spokane, WA | Not available | 2 | 1 sexual orientation | 1 no discrimination |
| Tacoma, WA | Not available | 1 | 1 sexual orientation | 1 no probable cause |
| Total | | 104 | | |

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

^x There may also have been complaints of gender identity discrimination filed, however these are coded as sex discrimination and the number cannot be ascertained from the record kept by City of Los Angeles

^o Though the complaints was not sustained in the city administrative process, the employee filed a complaint in court and prevailed

Table 12-I

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

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

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

Table 12-J

Responses Given by City & County Agencies that Refused to Provide Data

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

C. Comparisons of Per Capita Rates of Sexual Orientation, Race, and Sex, Discrimination State Administrative Complainants

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

In 2001, William B. Rubenstein conducted the third empirical assessment of employment discrimination complaints filed on the basis of sexual orientation.⁷ Unlike the prior two, however, Rubenstein's study included comparisons to the number of state agency complaints that alleged race and sex discrimination. To study relative rates, Rubenstein placed the actual number of filed sexual orientation complaints in the context of the total number of gay and lesbian people in the workforce. He then used the same procedure to obtain the prevalence of complaint filing by women and people of color on the bases of sex and race. Finally, he compared the population-adjusted complaint rate for gay and lesbian people with the population-adjusted complaint rates for women and people of color. He found that in six of ten surveyed states, the incidence of sexual orientation filings fell between the incidence of sex and race discrimination filings. In two other states, the prevalence of sexual orientation filings exceeded that of both race and sex and only in two states did sexual orientation filings fall below race and sex filings.

Rubenstein drew the following conclusions from his data:

⁷ William B. Rubenstein, *Do Gay Rights Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 65-68 (2001).

- When considered in the context of the number of gay people in the workforce, gay rights laws are used with greater frequency than the raw numbers imply; and,
- the utilization of gays rights laws, per gay worker, is roughly equivalent to, if not slightly higher than, the utilization of sex discrimination laws by female workers.

In 2008, the Williams Institute replicated Rubenstein's 2001 study and reached the same conclusions, although the number of states prohibiting sexual orientation discrimination had grown significantly.⁸ The Williams Institute gathered data on complaint filings on the basis of race, sex, and sexual orientation in 16 of 20 states that statutorily prohibited sexual orientation discrimination in employment as of November, 2008 and Washington D.C. Using the same methodology as Rubenstein in 2001, the Williams Institute then adjusted the complaint rate for the workforce population of each marginalized group, specifically people of color, women, and gay, lesbian, or bisexual people. When the Williams Institute compared the adjusted rates for the protected classes, it found the following:

- On the national level, of those states with available data, the adjusted rate for both sex and sexual orientation complaint filings is 5 per 10,000 workers; the adjusted rate for race complaint filings is higher at 7 per 10,000.
- The adjusted rate for sexual orientation discrimination is higher than the adjusted rate for sex discrimination in eight of the seventeen states⁹ surveyed.

⁸ Christopher Ramos, M.V. Lee Badgett, & Brad Sears, the Williams Institute, *Evidence of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity* (Nov. 2008), available at <http://www.law.ucla.edu/williamsinstitute/pdf/PACR.pdf>.

⁹ Includes Washington D.C.

- The adjusted rate for sexual orientation is higher than the adjusted rate for race discrimination in three of the seventeen states surveyed.

The Williams Institute study and the Rubenstein study demonstrate that sexual orientation laws are utilized at frequencies comparable to those protecting race and sex while also demonstrating that, because of the relatively small size of the national LGBT population, there is no threat of sexual orientation and gender identity protection engendering an overwhelming number of administrative and civil complaints.

D. Academic Research Indicates That The Extent of Discrimination Against LGBT Employees Greatly Exceeds the Number of Administrative Complaints Filed

It is well established in academic literature that the pervasiveness of employment discrimination based on sexual orientation and/or gender identity is understated by the number of administrative complaints. The scholarly publications that have addressed this issue specifically have identified a variety of factors, mostly related to the nature of the discrimination or to the capacity of often under-funded state or local agencies, which put the raw numbers in perspective.

In 2000, Roddrick A. Colvin published an analysis of state non-discrimination laws prohibiting sexual orientation and/or gender identity discrimination and identified reasons for the disparity between the number of complaints filed with administrative agencies and the pervasiveness of discrimination.¹⁰ Colvin found a smaller than expected number of claims had been filed on the basis of sexual orientation or gender identity discrimination, given the extent of discrimination reported in surveys. Colvin concluded that the discrepancy was due to design flaws in the laws which inhibited full implementation. Colvin found that state laws were lacking sufficient accountability measures, including active support from constituents and policy makers, explicit commissions or advisory boards to oversee implementation of the policy, and committed and skillful enforcement staff. The implementation barriers that arise from these deficiencies include the inability to make employees aware of their legal rights, poor enforcement mechanisms, and a fear of retaliation experienced by potential claimants.

¹⁰ Roddrick A. Colvin, *Improving State Policies Prohibiting Public Employment Discrimination Based on Sexual Orientation*, 20 REVIEW OF PUBLIC PERSONNEL ADMINISTRATION 5 (2000).

Factors very similar to those reported by Colvin were documented in academic literature describing the role of agencies enforcing state and local civil rights laws prior to enactment of the Civil Rights Act of 1964. Just prior to passage of the federal law, 25 states had enacted statutes prohibiting race discrimination in employment,¹¹ closely tracking in number the 21 states today with statutes prohibiting sexual orientation discrimination. Blumrosen found that the state agencies charged with the enforcement of these laws had restricted budgets and hesitant administrators.¹² Another scholar reported wide variations and significant deficiencies in the state laws of that period, although he concluded that the New York statute was sufficiently successful to serve as a model for the Congress to follow in 1964.¹³

The 2009 Williams Institute study further supports the findings of this research. Of the 36 city and county agencies that responded to the 2009 Williams Institute study, two incorrectly referred such complainants to the EEOC even though there is no federal law prohibiting sexual orientation discrimination, one incorrectly said the city did not prohibit such discrimination, one said there was no administrative enforcement mechanism for such complaints and callers had to file in court, five said they did not have the resources to enforce such claims and referred callers to their state administrative agency, and three said they lacked the resources to compile the requested data. Another 136 city and county agencies, two-thirds of those contacted, never responded in any manner to repeated phone calls, e-mails, letters, and formal requests for information by the Williams Institute.

¹¹ BNA Incorporated, *STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION* 1 (1964).

¹² Alfred W. Blumrosen, *BLACK EMPLOYMENT AND THE LAW* 14 (1971).

¹³ Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Laws*, 52 *IOWA L. REV.* 1043, 1073-78, 1083 (1967).

In 2002, Roddrick A. Colvin and Norma M. Riccucci published a study in which they assessed the effectiveness of non-discrimination policies that protect sexual orientation or gender identity by surveying employment attorneys who had personally handled such cases.¹⁴ The attorneys reported that in all situations but one, the claims were settled before going to court, and in most situations were settled via letters and negotiation. These findings demonstrate that one reason for the discrepancy between the incidence of discrimination and the number of complaints is that matters are often resolved before formal legal procedures become necessary.

Survey data corroborate the existence of under-reporting. The Minnesota State Bar Association Survey found that 67% of employees who had experienced employment discrimination or harassment based on their sexual orientation or gender identity did not report the incident.¹⁵ Among the reasons proffered for not reporting were that the employee feared retaliation and that the employee had hidden his or her sexual orientation from a supervisor and did not want to be forced “out” because he or she had been the victim of discrimination. Further, a Report of the NEA Task Force on Sexual Orientation found that “the very nature of the problem ensures that many cases of discrimination go unreported”—revealing that many education professionals do not report discrimination because they fear further adverse employment action if they do so or are reluctant to publicly “out” themselves.¹⁶ Transgender respondents to the Good

¹⁴ Roddrick A. Colvin & Norma M. Riccucci, *Employment Nondiscrimination Policies: Assessing Implementation and Measuring Effectiveness*, 25 INT’L. J. OF PUBLIC ADMIN. 95 (2002).

¹⁵ TASK FORCE ON DIVERSITY IN THE PROFESSION, MINNESOTA STATE BAR ASSOCIATION, 2005 SELF-AUDIT FOR GENDER AND MINORITY EQUITY: A RESEARCH STUDY OF MINNESOTA LAW FIRMS, NON-FIRM EMPLOYERS AND INDIVIDUAL LAWYERS (Sept. 2006), *available at* <http://www.ncbp.org/2009/Handouts-2-09/1B/2005%20Self-Audit%20for%20Gender%20and%20Minority%20Equity%20Report.pdf>.

¹⁶ NATIONAL EDUCATION ASSOCIATION, REPORT OF THE NEA TASK FORCE ON SEXUAL ORIENTATION (Feb. 8, 2009) *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/225-1.pdf (reprinted by GLSEN with permission from the NEA).

Jobs NOW! survey disclosed similar rates of non-reporting with only 12% of those discriminated against filing a complaint of any kind and only 3% having done so with an agency that had the authority to enforce non-discrimination law.¹⁷

E. Incidents Reported to NGO's Reinforce the Widespread and Continuing Nature of Discrimination Against LGBT Public Sector Employees

Because most states in the U.S. lack state-wide anti-discrimination protection and because many LGBT Americans are less reluctant to contact community organizations than government officials, the Williams Institute asked several NGO's operating in the LGBT community to furnish examples of incidents of discrimination recently reported to their "help lines" or through similar channels. The results obtained are not scientific studies, but the patterns demonstrated nonetheless provide compelling evidence that the discrimination faced by public sector LGBT employees continues today and exists throughout the nation.

The four organizations contacted by the Williams Institute reported a total of 104 contacts from public sector employees seeking advice regarding an incident of sexual orientation or gender identity discrimination in the workplace, including: 48 calls to Gay & Lesbian Advocates and Defenders (GLAD) from 2000-2009, 11 calls to Lambda Legal from 2007-2008, 33 calls to the National Center for Lesbian Rights from 2001-2009, and 12 calls to the American Civil Liberties Union (ACLU) from 2007-2008.

¹⁷ The San Francisco Bay Guardian & Transgender Law Center, *Good Jobs NOW! A Snapshot of the Economic Health of San Francisco's Transgender Communities* (2006), available at <http://www.transgenderlawcenter.org/pdf/Good%20Jobs%20NOW%20report.pdf>.

When contacting the organizations, several employees provided factual information about the discrimination and harassment they had experienced. The callers reported harsh, hostile, and unrelenting discrimination in their workplaces. A number of employees had developed anxiety and other stress-related medical conditions as a result of facing sexual orientation or gender identity discrimination at work. Several examples of the discrimination suffered by public sector employees follow.

- An employee of a Connecticut State maintenance department was repeatedly subjected to harassment from his co-workers because of his sexual orientation. On one occasion, his co-workers tied his hands and feet together and locked him in a workplace locker. At the time the call was made, he was attempting to have the incident handled internally.
- An employee of a Massachusetts trial court suddenly began to experience severe demotions and unfair treatment after her co-workers discovered that she had married her female partner. The court employee was demoted, suffered a pay cut, and had holiday pay wrongfully taken away from her. After she had been suspended for two weeks following a verifiable medical absence, her union steward told her that her supervisor was out to fire her.
- A fire department paramedic in Illinois reported a history of hostility at the fire station. One co-worker told him he “wished all fags would die of AIDS” and his fire chief advised him to “change the way [he] was” because “any other chief would find him unfit for duty,” suggesting that he was unqualified for the job because he was gay. The employee’s

bedding was removed from firehouse quarters and his car window was broken while it was parked in the fire station lot. Eventually, he began sleeping in the ambulance during his down time to avoid harassment from his chief and co-workers.

- An employee of the Georgia Division of Family and Children Services was forced to answer invasive personal questions during an institutional interview. The interview was the result of complaints by the employee's coworkers to her supervisor about working with her because she was a lesbian. During the four hour interview, supervisors asked her if she was a lesbian, with whom she lived, who looked after her children, and who her friends were. At the close of the interview, she was instructed not to tell anyone that the interview had occurred. She was suspended two weeks later for "alleged misconduct."
- An Arizona Department of Child Support Enforcement employee's work environment quickly turned hostile after she disclosed that she was a lesbian to co-workers. Several co-workers began to regularly refer to the employee as "faggot" and "dyke" and told her she smelled of "shit and piss." They circulated a rumor around the office that she had sexually transmitted diseases and was mentally ill. Eventually, the offending co-workers were transferred to a different department, but no disciplinary action was taken, and the harassment did not stop.

In 2001, the Human Rights Campaign published a report featuring personal stories of discrimination in workplaces across the county.¹⁸ The report contained 13 anecdotes from public sector employees. Among the examples were the following:

- A California Highway Patrol officer who suffered through five years of constant harassment from co-workers because he was gay.¹⁹ Anti-gay pornographic cartoons were taped to his mailbox. A ticket for “sex with dead animals” was left on his car windshield. He found urine on his clothes in his locker. When the harassment continued despite reprimands from supervisors, the officer decided that he had no choice but to resign.
- Another employee, a county corrections officer from New York, encountered daily harassment from his co-workers who called him offensive names and displayed graphic images portraying him as a pedophile and someone who practices bestiality.²⁰ The officer’s supervisors did not intervene, but rather watched and laughed while the harassment took place. Just before going on medical leave for post-traumatic stress disorder, he was attacked with a chair by a fellow corrections officer.
- A Nassau County police officer was subjected to a nine-year campaign of abuse after his sexual orientation was disclosed to fellow officers by an assistant district attorney who was arrested for public indecency.²¹ Other

¹⁸ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf>.

¹⁹ *Id.* at 40-41.

²⁰ *Id.* at 26.

²¹ *Id.* at 27.

officers hung pornographic pictures and doctored records around the station house, portraying the gay officer as a child molester. They hid his uniform, put rocks in his hubcaps, and once placed a nightstick—labeled as a sexual device—in his squad car. His complaints to supervisors were ignored. He was involuntarily transferred to a less desirable precinct. Even after the officer retired, the harassment did not stop and he was forced to relocate to upstate New York. In 1999, a New York District Court jury awarded the officer \$380,000 in a suit against the government entity for violation of his constitutional rights.

Conclusion

Published scholarship and recent research tracking the number of employment discrimination complaints filed on the basis of sexual orientation or gender identity with state and local enforcement agencies show a pattern of pervasive discrimination against LGBT employees in the public sector. Academics studying the filing rate of sexual orientation and gender identity employment discrimination complaints have concluded that the numbers do not represent the prevalence of discrimination for several reasons, including insufficient laws that lack effective implementation and accountability measures and the frequency of settlement before formal legal steps must be taken. Additionally, two studies reveal that when proper population controls are applied to the numbers, sexual orientation and gender identity employment discrimination complaints are filed more often than the raw numbers imply and, in fact, the filing rate is roughly equivalent to, and in some states higher than, that of sex discrimination complaints. Self-report survey data corroborates the existence of under-reporting. Finally, reports of

discrimination received by NGOs evidence discrimination against public sector employees; many of whom are employed by states and localities without prohibitions on discrimination and therefore are currently unable to file a formal complaint.



Chapter 12: Specific Examples of Employment Discrimination by State and Local Governments, 1980-Present

Based on the reports on employment law and discrimination related to sexual orientation and gender identity for each of the 50 states (See Appendices), this chapter compiles almost 400 specific examples of workplace discrimination against state and local employees, almost all occurring within the last 20 years, and none occurring prior to 1980. The state reports collected examples of discrimination from court opinions, administrative complaints, academic journals, books, newspapers, and publications by and complaints made to community-based organizations.

This record demonstrates that discrimination against LGBT state and local employees is widespread in terms of quantity, geography, and occupational category. The quantity compares favorably to that of past records of public employment discrimination supporting civil rights legislation. Geographically, the examples reach into every state except North Dakota, which has a smaller population. The LGBT employees discriminated against work for every branch of state government: legislatures, judiciaries, and the executive branch. The examples include public employees who help people find jobs, housing, and health care; teachers and professors; state troopers and prison guards; judges, bus drivers and tax collectors; and those who work for museums and for the DMV.

In many of these cases, courts have found violations of rights to equal protection, free expression, and privacy, as well as the impermissible use of sex stereotypes. There

are also cases where plaintiffs lose because judges rule that, in the absence a law like ENDA, state and federal law do not provide a remedy.

What is missing in all of these cases is *any rational reason* for the adverse employment action, whether or not the law provides a remedy. In none of these cases do employers assert that sexual orientation or gender identity impacts an employee's performance in the workplace. To the contrary, among the examples of public servants who have been discriminated against are a gay faculty member at Louisiana State University who had received a Distinguished Service Award; a transgender sheriff in Oregon who had received a commendation for delivering a baby on the side of a highway, and a lesbian social worker in Mississippi who was told she was one of the best employees at her center helping mentally disabled children.

The irrationality of the discrimination is also vividly indicated by the harassment that many of these workers have been subjected to. Here is a very limited sense of what these employees have been called in the workplace: an officer at a state correctional facility in New York, "pervert" and "homo"; a lab technician at a state hospital in Washington, a "dyke"; an employee of New Mexico's Juvenile Justice System, a "queer." There are a large number of examples where employees are called "fag" or "faggot."

What is also striking about these examples of workplace harassment is the degree to which the words are accompanied with physical violence. A gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her that said God wanted her to die.

When employees complain about this kind of harassment, they are often told that it is of their own making, and no action is taken.

These nearly 400 documented examples are not a complete record of discrimination against LGBT people by state and local governments, and should not be read as such. Based on our research, and on other scholarship, we have concluded that these examples represent just a fraction of the actual discrimination for at least seven reasons:

- We were unable to collect administrative complaints from the vast majority of state and local enforcement agencies. For example, of the twenty state enforcement agencies we contacted to collect administrative complaints of discrimination, only six made available redacted complaints for us to review. Of the 203 cities and counties we contacted, only two, Philadelphia and Providence, provided administrative complaints for us to review.
- Of those we did contact, many agencies lacked the resources, knowledge and willingness to consider sexual orientation and gender identity discrimination complaints. Of the 36 city and county agencies that responded to our requests, two incorrectly referred such complainants to the EEOC even though there is no federal law prohibiting sexual orientation discrimination, one incorrectly said their jurisdiction did not prohibit such discrimination, one said there was no administrative enforcement mechanism for such complaints and callers had to file in court, five said they did not have the resources to enforce such claims and referred callers to their state administrative agency, and three said they lacked the resources to compile the requested data. Another 136 city and county agencies,

two-thirds of those contacted, never responded in any manner to repeated phone calls, e-mails, letters, and formal requests for information by the Williams Institute. Our research findings on this point confirmed earlier studies.¹

- Scholarship² and surveys indicate that some courts may not be receptive to the claims of LGBT plaintiffs, dissuading them from filing complaints. Even in California and New Jersey, states at the forefront of anti-discrimination efforts, surveys of thousands of persons who used the judicial system found a widespread perception that the courtroom experience was not fair or unbiased toward lesbians and gay men.³ In 1998, the Sexual Orientation Fairness Subcommittee of the Judicial Council of the State of California surveyed 1,225 LGBT users of the California court system.⁴ Fifty percent of these court users believed that the courts were not providing “fair and unbiased treatment to lesbians or gay men.”⁵ A report by the New Jersey Supreme Court, released in 2001, replicates many of the findings from the California state court survey. Of the 2,594 court users surveyed in New Jersey, 7% self-identified as lesbian, gay, or bisexual.⁶ Over 60

¹ Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, 26 AMERICAN REVIEW OF PUBLIC ADMINISTRATION 182 (1996) (observing that in some states, the enforcement of statutes or executive orders was “questionable”); see also Roddrick A. Colvin, *Improving State Policies Prohibiting Public Employment Discrimination Based on Sexual Orientation*, 20 REVIEW OF PUBLIC PERSONNEL ADMINISTRATION 5 (2000) (finding state laws were lacking sufficient accountability measures, including active support from constituents and policy makers, explicit commissions or advisory boards to oversee implementation of the policy, and committed and skillful enforcement staff. The implementation barriers that arise from these deficiencies include the inability to make employees aware of their legal rights, poor enforcement mechanisms, and a fear of retaliation experienced by potential claimants.).

² See Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015

³ Sexual Orientation Fairness Subcommittee, Judicial Council of the State of California, *Sexual Orientation Fairness in the California Courts* (2001); New Jersey Supreme Court, *Final Report of the Task Force on Sexual Orientation Issues* (Jan. 2, 2001).

⁴ *Sexual Orientation Fairness in the California Courts*, *supra*, note 3.

⁵ *Id.* At 5.

⁶ *Final Report of the Task Force on Sexual Orientation Issues*, *supra*, note 3.

percent of LGB participants in the survey felt that sexual orientation bias impacted cases outcomes; 78 percent had heard a judge or supervisor make a derogatory joke or statement about homosexuals. Based on these findings, the New Jersey Task Force concluded, “[S]exual orientation bias, whether actual or perceived, has the capacity to ... affect case disposition ...[and] *dissuade individuals from using the court system.*”⁷

- Scholars have also indicated that that judges may be uncomfortable with writing opinions about LGBT people or issues.⁸ The mere failure to publish opinions can distort the development of the law. Howard Slavitt discusses the impact on legal precedent of the failure to publish certain cases by using as an example a case involving an LGBT state employee, in this case an inmate employed in the prison’s education department.⁹ The plaintiff won his employment discrimination claim on constitutional grounds, but the Fourth Circuit chose not to publish the opinion, greatly reducing its value as precedent to support future claims.
- A large proportion of claims are settled before any complaint is filed, and therefore no record of the case is established. In 2002, Roddrick A. Colvin and Norma M. Riccucci published a study in which they assessed the effectiveness of

⁷ *Id.* at 3.

⁸ See, for example, Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015, 1022 n.27 (1999), citing *In State v. Brown*, 39 Ohio St. 2d 112, 118, 313 N.E.2d 847, 851 (1974) (“Justice Stern noted in his dissent: ‘In fact, nowhere in the recorded decisions of the Ohio Supreme Court has any justice ever used the term ‘homosexual’ or ‘homosexuality’’His opinion indicates that Justice Stem did computerized research using LEXIS.”). See also *To Publish or Not to Publish - That Is The Question*, 2 Sex L. Rptr. 18 (1976); KENNETH DAVISON, RUTH BADER GINSBURG & HERMA HILL KAY, *SEX-BASED DISCRIMINATION* (West Pub. Co. 1974), discussing unreported lesbian mother cases and applying the California standards with respect to certification for non-publication to determine whether many of the child custody cases were properly denied publication.

⁹ Howard Slavitt, *Selling The Integrity of the System of Precedent: Selective Publication, Depublication and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 110 (1995).

non-discrimination policies that protect sexual orientation or gender identity by surveying employment attorneys who had personally handled such cases.¹⁰ The attorneys reported that in all situations but one, the claims were settled before going to court, and in most situations were settled via letters and negotiation.

- LGBT people may not pursue claims for fear of outing themselves further in the workplace and their communities.¹¹ For example, in a study published in 2009 by the Transgender Law Center, only 15 percent of those who reported that they had experienced some form of discrimination had filed a complaint. Of those who did not, 26 percent were afraid they would lose their job and 13 percent were afraid to come out in order to file a complaint.¹²
- Perhaps most importantly, at least one-third of LGBT employees continue to be closeted at work, meaning that they avoid discrimination by hiding who they are. The 2008 Out & Equal survey reported that 36 percent of lesbians and gays were closeted at work.¹³ A 2001 Kaiser Family Foundation study found almost exactly the same result, reporting that 37 percent of LGB employees were not open about

¹⁰ Roddrick A. Colvin & Norma M. Riccucci, *Employment Nondiscrimination Policies: Assessing Implementation and Measuring Effectiveness*, 25 INT'L. J. OF PUBLIC ADMIN. 95 (2002).

¹¹ See, for example, NATIONAL EDUCATION ASSOCIATION, *Report of the NEA Task Force on Sexual Orientation* 4 (Feb. 8, 2002), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/225-1.pdf (Reprinted by GLSEN with permission from the National Education Association); Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, 26 AM. REV. OF PUBLIC ADMIN. 185 (1996); TRANSGENDER LAW CENTER, *State of Transgender California* (March 2009), available at <http://www.transgenderlawcenter.org/pdf/StateofTransCAFINAL.pdf> (last accessed September 20, 2009); MINNESOTA STATE BAR ASSOCIATION TASK FORCE ON DIVERSITY IN THE PROFESSION, *2005 Self-Audit for Gender and Minority Equity: A Research Study of Minnesota Law Firms, Non-Firm Employers and Individual Lawyers*, (September 2006), available at <http://www2.mnbar.org/governance/assembly/Committees/GeneralPolicy/MSBA.Diversity.Report.Final.doc>.

¹² *State of Transgender California*, supra note 11.

¹³ HARRIS INTERACTIVE, OUT & EQUAL WORKPLACE ADVOCATES, *Out & Equal Workplace Culture Report: Survey of Workplace Attitudes 2002-2008* (2008), available at http://outandequal.org/documents/OE_workplace_culture_report.pdf

their sexual orientation to their bosses.¹⁴ Levine and Leonard found that more than 60 percent of lesbians surveyed in their 1984 study worried that they would face adverse employment actions if they did not remain closeted on the job.¹⁵ Eleven years later, Croteau and Lark found that 44 percent of LGB college student-affairs professionals anticipated the same.¹⁶ As recently as 2005, 70 percent of closeted LGB respondents to the Lambda Legal and Deloitte Financial Advisory survey revealed that they had chosen not to disclose their sexual orientation because they feared risk to employment security or hostility and harassment in the workplace.¹⁷ Of LGBT attorney respondents to the Minnesota State Bar Association survey in 2005, 70 percent stated that they had hidden their sexual orientation at some point in the course of their professional careers due to concern that revealing such would lead to adverse employment consequences.¹⁸ In the same survey, 71 percent of LGBT respondents and 67 percent of heterosexual respondents agreed that it would be harder to get hired as an attorney if a person was thought to be gay or transgender.

Drawn from the 50 state reports that form the basis of this chapter, the following illustrate specific examples of experiences that might deter LGBT litigants from pursuing employment discrimination complaints in court.

¹⁴THE KAISER FAMILY FOUNDATION, *Inside-OUT A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation* (Nov. 2001), available at <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13875>.

¹⁵ Martin P. Levine & Robin Leonard, *Discrimination Against Lesbians in The Work Force*, 9 JOURNAL OF WOMEN AND CULTURE 700 (1984).

¹⁶ James M. Croteau & Julianne S. Lark, *On Being Lesbian, Gay or Bisexual in Student Affairs: A National Survey of Experiences on the Job*, 32 NASPA JOURNAL 189 (1995).

¹⁷ LAMBDA LEGAL & DELOITTE FINANCIAL ADVISORY SERVICES LLP, *2005 Workplace Fairness Survey* (April 2006), available at <http://data.lambdalegal.org/pdf/641.pdf>.

¹⁸ *2005 Self-Audit for Gender and Minority Equity: A Research Study of Minnesota Law Firms, Non-Firm Employers and Individual Lawyers*, *supra* note 11.

- In March of 2002, in response to a newspaper article on the expansion of rights to gay couples in other states, George County Justice Court Judge Connie Glen Wilkerson wrote a letter to *The George County Times* stating in part: “[I]n my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.”¹⁹ The judge later repeated these views in a telephone interview stating, “[H]omosexuality is an ‘illness’ which merited treatment, rather than punishment.”²⁰ When the judge was sued for violation of the Code of Judicial Conduct, the Mississippi Supreme Court ruled that the judge had not violated any canon of judicial conduct,²¹ and that any LGBT party before the judge had adequate protection through the recusal process.²²
- In 1997, a complaint was filed against a Texas judge who dismissed a domestic violence case involving two lesbians, because in dismissing the case he said, “You all have these funny relationships – that’s fine – I have nothing to do with it, but don’t bring it in here for me to try to decide . . . I’m dismissing the case . . . It’s too much for me. Don’t bring it back – the next time you come back, I’ll put somebody in jail.”²³
- In 1994, the Dallas County Sheriff’s Department suspended a bailiff after he was heard making derogatory remarks about a lesbian rape victim. The bailiff joked

¹⁹*Mississippi Comm’n on Judicial Performance v. Wilkerson*, 876 So. 2D 1006, 1008 (2004).

²⁰*Id.*

²¹*Id.* at 1015.

²²*Id.* at 1016. The current Mississippi Code of Judicial Conduct, promulgated on April 4, 2002, Canon 3[5] states: “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.” *In re Miss. Code of Jud. Conduct*, NO. 89-R-99013-SCT, 2002 Miss. LEXIS 124, 22 (Miss. 2002).

²³ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 48-49 (1997 ed.).

to the rapist's attorney that 'if it was me [on the jury], I'd only give him 30 days for raping a lesbian.'" A review board suspended the bailiff for 10 working days and ordered him to undergo sensitivity training and apologize in writing to the woman."²⁴

- In 1992, a justice of the South Dakota Supreme Court wrote a concurring opinion in a case limiting visitation for a mother who was a lesbian.²⁵ In the opinion, he stated: "Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children. . . . There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan 'Egyptian Book of the Dead' bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement."

The nearly 400 examples that follow include examples of discrimination against local employees as well as state employees. The Supreme Court has recognized "that evidence of constitutional violations on the part of non-state governmental actors is relevant to the § 5 inquiry,"²⁶ including discrimination by federal²⁷ and local

²⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 70 (1994 ed.).

²⁵ *Chicoine v. Chicoine*, 479 N.W.2d 891 (1992).

²⁶ *Tennessee v. Lane*, 124 S.Ct. 1978, 1991 n.16 (2004).

²⁷ *Nevada Dep't of Human Resources v. Hibbs*, 123 S.Ct. 1972, 1980 (Rehnquist, C.J.) (relying on a study of federal employers to draw the conclusion that "where state law and policies were not facially discriminatory, they were applied in discriminatory ways."); *see also id.* at 1989 (Kennedy, J., dissenting) ("A history of discrimination on the part of the Federal government may, in some situations, support an inference of similar conduct by the States . . ."); *Tennessee v. Lane*, 124 S.Ct. 1978, 1991 n. 16

government²⁸ employers and the private sector.²⁹ As these examples make clear, as well as other evidence considered in this report, the patterns of discrimination by state employers and local employers are strikingly similar. The discrimination against those in educational institutions looks the same whether the employee is working for a state university or a high school; the discrimination against law enforcement personnel does not vary depending on whether the officer's badge is that of a state or a county.

The patterns of discrimination look so similar between state and local governments because they are not merely parallel, they are connected. Much of the discrimination by local employers is grounded in historical, as well as current, discriminatory state laws, policies and practices. For example, many of the local government examples deal with discrimination against teachers. Teachers in all states are licensed by the state governments, and most of the terminations described in the examples are based upon failing to comply with "moral fitness requirements" established

(2004) ("Moreover, what THE CHIEF JUSTICE calls an 'extensive legislative record documenting States' gender discrimination in employment leave policies" in *Nevada Dep't of Human Resources v. Hibbs*, in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States. Indeed, the evidence before the Congress that enacted the FMLA related primarily to the practices of private sector employers and the Federal Government")(citation omitted).

²⁸ See, e.g., *Tennessee v. Lane*, 124 S.Ct. at 1991 (2004) ("Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of *local* courthouses ... And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and *local* governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.")(emphasis added); see also *id.* At 1991 n. 16 ("[M]uch of the evidence in *South Carolina v. Katzenbach*, 383 U.S. 301, 312– 315, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), to which THE CHIEF JUSTICE favorably refers, *post*, at 2003, involved the conduct of county and city officials, rather than the States.").

²⁹ See, e.g., *Nevada Dept. of Human Resources v. Hibbs*, 123 S.Ct. at 1979 n. 3 and accompanying text ("While this and other material described leave policies in the private sector, a 50 state survey also before Congress demonstrated that "The proportion and construction of leave policies available to public sector employers differs little from those offered private sector employers."); see also *Tennessee v. Lane*, *supra* note 27; *Nevada Dept' of Human Resources v. Hibbs*, 123 S.Ct. At 1987 (Kennedy, J., dissenting)("Congress's consideration of evidence of discrimination by private entities may be relevant for Section 5 analysis were discrimination in private sector is 'parallel' to discrimination by state governments.")

by state licensing requirements.³⁰ As long as sodomy laws were on the books, even a potential violation of those state laws was sufficient to find that a teacher was “immoral.” This connection was sufficiently direct that a number of state supreme courts recognized it as the basis for standing in lawsuits brought by teachers and other licensed professionals, litigation that ultimately led to the courts declaring their state sodomy laws unconstitutional.³¹ Further, there is a history of state purges of LGBT public employees

³⁰ See, for example, Rivera, *supra* note 8, at 1079:

In all fifty states, a teaching certificate, granted by the state, must be obtained in order to teach in a public school system at the elementary or secondary level. The homosexuality of an individual teacher may be raised on application for the teaching certificate or on application for a particular teaching position. It can also become an issue as a cause for dismissal from a particular job and, more severely, as a cause for the revocation of the license to teach. The main legal issues confronting the homosexual teacher are dismissal from a current position and revocation of his or her teaching certificate. While dismissal from a current position is certainly injurious to the teacher, revocation of his or her teaching certificate is a personal catastrophe. Without proper credentials a teacher cannot be hired anywhere in that state and is thus essentially banned from his or her profession. All states have statutes that permit the revocation of teaching certificates (or credentials) for immorality, moral turpitude, or unprofessionalism. Homosexuality is considered to fall within all three categories. Dismissals of homosexual teachers, as differentiated from loss of credentials, have also usually been based on charges of “immorality.”

³¹ See, for example, *Jegley v. Picado*, 349 Ark. 600, 609 (Ark. 2002), in which plaintiffs “fear prosecution for violations of the statute and claim that such prosecution could result in their loss of jobs, professional licenses, housing, and child custody.” In the case, one plaintiff had been hired as a school counselor, but when school administrators learned he was gay they refused to honor his contract. Appellee’s Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815). Another had to conceal her relationship because her lover was afraid she would be fired from her teaching job if her sexual orientation became known. Appellee’s Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815). See also *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001) (“Similarly...Mr. Roe, a licensed elementary school teacher, and Mr. Duran and Ms. Doe, licensed Minnesota lawyers, fear adverse licensure consequences from any disclosure, voluntary or other convicted of a felony” (which sodomy was under then-existing Minnesota law)); *Gryczan v. State*, 283 Mont. 433 (Mont. 1997) (referencing a teacher who had been licensed in the state for 25 years (“[Respondents] contend that the damage to their self-esteem and dignity and the fear that they will be prosecuted or will lose their livelihood or custody of their children create an emotional injury that gives them standing to challenge the statute. For example, two Respondents are employed or are seeking employment in positions requiring state licenses. Because they engage in conduct classified as a felony, they fear they could lose their professional licenses.”); *Campbell v. Sundquist*, 926 S.W.2d 250, 253 n.1 (Tenn. Ct. App. 1996) (the court noted that the identity of one of the plaintiffs (John Doe) had been sealed “due to concern that he would be fired from his job if his violation of the [Homosexual Practices Act] became known to his employer.” The court also notes that the plaintiffs “believe they are threatened with prosecution for violations of the statute, which could result in plaintiffs losing their jobs, professional licenses, and/or housing should they be convicted.”)

that focused on state and local educational professionals,³² state laws that explicitly barred LGBT people from teaching,³³ laws requiring that homosexuality not be taught in a positive manner,³⁴ and pronouncements by state officials that all LGBT teachers could be found to be “immoral” and fired from their positions—even after state sodomy laws have been repealed.³⁵

Sodomy laws also have served as a linchpin in discriminatory policies directed against law enforcement officers. This has been true regardless of whether the individual

³² In his book, *Dishonorable Passions*, William Eskridge summarizes an extensive and organized purge of state and local public employees, primarily in public education, in Florida:

[T]he Johns Committee engaged in a six-year campaign to remove homosexuals from state schools (1958-1964). The campaign identified suspected homosexuals who were high school teachers, college students and university professors. Most of the suspected homosexuals resigned or were dismissed. The committee also pressured the state board of education to revoke teachers' certificates, which the legislature seconded with a 1959 statute authorizing certificate revocation for “moral misconduct” and a 1961 statute setting forth expedited procedures for revocation. Near the end of its tenure, the Johns Committee announced that the board had revoked seventy-one teachers' certificates (with sixty-three more cases pending); fourteen professors had been removed from the state universities (nineteen pending); and thirty-seven federal employees had lost their jobs, while fourteen state employees faced removal in pending cases.

WILLIAM ESKRIDGE, *DISHONORABLE PASSIONS* 103. The Johns Committee also provided information to professional licensing boards about the individuals investigated for homosexuality, causing doctors, lawyers and others to lose their licenses. *Id.* At 104. Scholar Karen Graves recently published an extensive history of the Johns Committee documenting its impact on LGBT public employees in Florida. KAREN L. GRAVES, *AND THEY WERE WONDERFUL TEACHERS: FLORIDA'S PURGE OF GAY AND LESBIAN TEACHERS* (Univ. of IL Press, Urbana and Chicago 2009).

³³ For example, Oklahoma enacted a law that, by prohibiting “homosexual conduct” and defining that phrase to include advocacy of gay rights, barred openly gay teachers from Oklahoma schools. Most portions of the law were struck down by federal courts and the remainder of the law was repealed in 1990. *Nat'l Gay Task Force v. Bd. of Ed. of the City of Okla. City*, 729 F.2d 1270 (10th Cir. 1984).

³⁴ For example, in 2009, Alabama's education code continues to require that sex education in public schools include “[a]n emphasis...that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.” ALA. CODE § 16-40A-2(C)(8) (2008).

³⁵ In 1983, the West Virginia Attorney General issued an opinion that gay and lesbian teachers could be fired by their districts under a state law that authorized school districts to fire teachers for “immorality.” He opined that homosexuality was immoral in West Virginia even though the state had de-criminalized same-sex sexual behavior in 1976. While the Attorney General said homosexuality must be shown to affect the person's fitness to teach, that could be shown if the teacher was “publicly known to be homosexual” as opposed to “private, discreet, homosexuality.” He also noted that there were some jobs where “even such publicized sexual deviation” might not interfere with employment in the public sector, such as “university drama teacher(s)” and “custodians.” 60 W. Va. Op. Atty. Gen. 46, 1983 WL 180826 at * 1 (W.Va.A.G. February 24, 1983)(Sexual Offenses: *A county board of education may dismiss a teacher who engages in sexually deviant conduct if the teacher's conduct substantially adversely affects his fitness to teach.*)

worked for a state³⁶ or local³⁷ agency, or whether he served in a police precinct³⁸ or she was an attorney representing the state.³⁹ A deputy sheriff in Florida learned this lesson when she was fired after her boss learned that she was lesbian. A federal court dismissed her case challenging the firing, saying that equal protection guarantees did not avail when the conduct that defined the class could be criminalized, concluding that “[i]n the context of both military and law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end.”⁴⁰

³⁶ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967 (D.S.C. Apr 6, 1992).

³⁷ *Woodward v. Gallagher*, No. S9-5776 (Orange Co., Fla. Cir. Ct., filed June 9, 1992) (discussed in 21 FORDHAM URB. L.J. 997, 1035 (1994) (In Florida, the Orange County Sheriff fired a deputy, despite his concededly “exemplary” record, when it was discovered that he was gay. The sheriff’s office cited the existence of sodomy laws as a justification for the dismissal, noting that Florida prohibits oral or anal sex, and that deputies might have to work with agencies in other states that also have such laws. The court rejected these arguments and found that the anti-gay discrimination violated the state constitutional right to privacy.)

³⁸ *Childers v. Dallas Police Dep’t*, 513 F. Supp. 134 (N.D. Tex. 1981). In *Childers*, the plaintiff was not hired for a position with the Dallas Police Department following his disclosure during his interview that he was gay. Among the reasons stated for the Department’s refusal to hire Childers were that the interview took, from his statement that he was “married” to a man that he was a “habitual lawbreaker” because “his sexual practices violated state law.” The interviewer also considered that he would be a security risk “because of the kind of contraband that the property room controls [which included sexual paraphernalia] and because Childers might warn other homosexuals of impending police raids.” In upholding the Department’s refusal to hire Childers against Childers’s due process challenge, the court noted that he had admitted conduct that violated the Police Department Code of Conduct in a number of ways, including by violating Texas’s sodomy laws and “cohabit[ing] with a sex pervert of the same sex.” It also held that “tolerance of homosexual conduct might be construed as tacit approval, rendering the police department subject to approbation and causing interference with the effective performance of its function.”

³⁹ *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997). Shahar’s offer to work at the Attorney General’s office in Georgia was rescinded after she made comments to her coworkers about her upcoming wedding to her same-sex partner. The Attorney General’s office revoked the offer because employing Shahar “would create the appearance of conflicting interpretations of Georgia law and affect public credibility about the Department’s interpretations [and] . . . interfere with the Department’s ability to enforce Georgia’s sodomy law.” In an *en banc* decision, the Eleventh Circuit accepted the Attorney General’s arguments and held that the discrimination against Shahar was justified based in large part on the existence of sodomy laws in Georgia. For example, in rejecting Shahar’s attempted analogy between her case and *Loving v. Virginia* as “not helpful,” the court noted “concerns about public perceptions about whether a Staff Attorney in the Attorney General’s office is engaged in an ongoing violation of criminal laws against homosexual sodomy-- which laws the Supreme Court has said are valid.” In addition, in referring to the U.S. Supreme Court’s 1986 decision in *Bowers v. Hardwick* (in which the Georgia Attorney General was the defendant), the court noted that hiring Shahar would not only have raised issues of perception but also of morale, given that the lawyers in the department had worked hard to ensure that sodomy could still be constitutionally criminalized.

⁴⁰ *Todd v. Navarro*, 698 F. Supp. 871, 875 (S.D.Fla. 1988).

Lastly, classifications as between state and local governments vary from state to state for the same, not just similar, jobs. For example, in at least one state, Hawai'i, teachers are state employees.⁴¹ Additionally, the Ninth Circuit has held that under California law, school districts are state agencies entitled to Eleventh Amendment immunity.⁴² Further, sheriffs employed at the county level may nonetheless be treated as state employees for Eleventh Amendment purposes.⁴³

For all these reasons, a full comprehension of discrimination based on sexual orientation and gender identity against state government employees requires consideration of the policies in effect in local government agencies as well.

Attached are nearly 400 examples of discrimination against state and local employees on the basis of their sexual orientation or gender identity.

⁴¹ Hawaii Department of Education, Introduction, Organization, http://doe.k12.hi.us/about/intro_org.htm (last visited Sept. 21, 2009).

⁴² *Belanger v. Madera Unif. Sch. Dist.*, 936 F.2d 248, 253 (9th Cir. 1992).

⁴³ *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003)(county sheriff in Georgia “is an arm of the State, not Clinch County, in establishing use-of-force policy at the jail and in training and disciplining his deputies in that regard”), *cert. denied*, 540 U.S. 1107 (2004); *Lancaster v. Monroe County*, 116 F.3d 1419, 1429 (11th Cir. 1997) (county jailers in Alabama “are state officials entitled to Eleventh Amendment immunity when sued in their official capacities”); *see also Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996) (sheriffs in South Carolina are arms of the State); *Wilkerson v. Hester*, 114 F. Supp. 2d 446, 464-465 (W.D.N.C. 2000) (sheriffs in North Carolina are arms of the State).

1. Alabama

- An employee of the University of Alabama’s campus police department did not have his complaint of same-sex sexual harassment against his supervisor taken seriously and was fired for making the complaint. The 11th Circuit rejected a motion to dismiss and allowed his claim to proceed.⁴⁴
- A receptionist at the Alabama Bureau of Tourism and Travel was the brunt of a sexually oriented joke and then fired based on a false accusation that he had made a homosexual advance. The accusation had been made by one of the coworkers who played the joke. He was later reinstated to his position by an Alabama appellate court.⁴⁵
- In 2007, a city communication technician reported that she had experienced workplace harassment based on her gender identity when a new supervisor was hired.⁴⁶
- A closeted gay teacher in an Alabama school district reported that he had been discharged because of his sexual orientation in 2002, after two successful years of teaching in the district. A United State District Court judge allowed his claim to proceed under a “John Doe” filing to protect him in from further discrimination in his new job teaching at a public school in Alabama.⁴⁷

⁴⁴*Downing v. Board of Trustees of the Univ. of Alabama*, 321 F.3d 1017 (11th Cir. 2003)

⁴⁵*State Pers. Dep’t v. Mays*, 624 So.2d 194 (Ala. Civ. App. 1993).

⁴⁶E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

⁴⁷Lesbian & Gay L. Notes (June 2002), available at <http://www.qrd.org/qrd/usa/legal/lgln/2002/06.02>.

2. Alaska

- At public hearing in Anchorage in June 2009, a letter was submitted by a transgender woman who had been denied multiple state jobs because of her gender identity. She was a former Marine and had been told she was highly qualified for a position at the McLaughlin Youth Center. However, after she transitioned her repeated applications for a position there were rejected. She did get a job as a psychiatric nursing assistant at Alaska Psychiatric Institute, a state-run facility. However, she was fired after three weeks when a problem arose because of her social security number. She explained that her name change had caused the issue and then thought everything was fine. However, she was terminated without explanation a few days later with a letter that said her “services were no longer needed.” Later, she heard that a co-worker had been going around calling her “he/she.” After she was terminated she was unable to find work in any of the fields she had experience in: security, corrections, youth corrections, or mental health counselor. Instead she works as a cabdriver. She has over \$100,000 in student loans for degrees she cannot use in her employment.”⁴⁸
- An African-American gay male inmate assigned to the Spring Creek Correctional Center worked for a nominal salary as a barber, cutting other inmates’ hair. On August 4, 1997, he received a memo from his supervisor which read:

This memorandum is to inform you that you have been fired as an

⁴⁸ Letter from Laura E. O’Lacy to Anchorage Assembly, June 2009, *available at* <http://www.bentalaska.com/search/label/Testimony%20AO-64> (last visited Sept. 16, 2009) (writing in support of Anchorage Ordinance 64).

APS barber/rec worker. You are a lop, lame, sissy, cake-boy, and your girl is a mud-duck. You are in fact a no talented bum...In fact one of the brother's [sic] told me that you were white, and just had a really good tan. Maybe the kitchen is looking for a new pots and pans man!⁴⁹

After reading the memo as “containing racial and sexual slurs and as being intended to terminate his employment,”⁵⁰ he stopped reporting for work. Although he did not report the incident, he kept the memo, which was discovered when he was transferred to another facility; a departmental investigation resulted in his supervisor’s termination. He subsequently sued the state, alleging intentional infliction of emotional distress and unlawful termination for racial or sexual reasons in violation of the Alaska Human Rights Act. The state made a settlement offer, which he rejected, and the trial jury returned a verdict for him for the unlawful termination.⁵¹

- The City of Soldotna paid \$50,000 in 1995 to settle a sex discrimination claim brought by police officer that the police department discriminated against her because officials thought that she was in a same-sex relationship.⁵²
- An applicant for a clerk-typist position with the Alaska State Troopers in 1984 was asked in her interview if she was a lesbian. When she said yes, the inter-

⁴⁹ *Jones v. State Dep’t of Corr.*, 125 P.3d 343, 345 (Alaska, 2005). The plaintiff had explained that he understood “sissy” and “cake-boy” to be derogatory terms for homosexual, “mud-duck” as a reference to someone who engaged in anal sex, and that the remainder of the memo’s content was racially offensive – an attack on his African-American cultural identity. *See id.* at 345 n.1.

⁵⁰ *Id.*

⁵¹ *Id.* at 350.

⁵² *State News*, ANCHORAGE DAILY NEWS, Oct. 2, 1995.

viewer told her that she was well-qualified for the position, and that she would consider her for it, if she agreed to stop going to any of the gay bars in town. When she did not agree, on the grounds that a gay bar was one of the few places where she could publicly socialize with her friends without fear of harassment, she was told she would not be considered further for the position. She said that she did not believe the interviewer would even have thought about placing a similar restriction on a non-gay employee who frequented heterosexual bars.⁵³

- In 1984, a gay youth counselor for the State of Alaska, who had worked in his position since early 1981, was told he could not take the youth he counseled out on “pass” to go out to movies or to shop, in order to reward them for their good behavior. The counselor learned that he was considered a risk because had been the leader of a “militant homosexual group” in Fairbanks. The only organization he could think of that might have caused that concern was his position as a discussion group leader for a sexual identity support group composed of young gays and lesbians. His facility director told him there was no way he would be granted a pass for his counselees because he was gay. Eventually he learned that the Anchorage Police Department had reported to his facility that he had been seen in gay bars. After his complaints about the unfairness of the restriction were rejected, he ultimately resigned because the incident, and the denial of what he considered “an important treatment tool,” had undermined his ability to do his job well.⁵⁴

⁵³ MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 53 (Identity Inc., 1989).

⁵⁴ *Id.*

- After she was seen celebrating following a softball tournament by one of her co-workers, a lesbian was terminated by the Alaska Marine Highway in 1981. She had been at a “non-gay” bar, on the weekend, dancing with her friends in a circle when seen by her co-worker, who stared at her throughout the night to such an extent she eventually left. When she came to work the following Monday, her co-workers would not make eye-contact or talk with her. She felt they behaved as if she had “leprosy.” Just after lunch she was given a written note that she had been terminated on the grounds that she was not strong enough for the job. However, her co-workers had given her no previous indication that she was not ‘pulling her weight’ or that her job performance was less than adequate. She has performed much heavy physical work in subsequent jobs, and has never had any problems with it. When she contacted her union representative he told her that the union could provide her with no protection from discrimination on the basis of her sexual orientation. She was told that she could make a complaint of sex discrimination. Because she felt that she would further “out” herself if she made a complaint, she decided not to take any further action.⁵⁵
- When a woman applied to be on the Alaska State Commission on the Status of Women in 1981 (now the Alaska Women’s Commission), she became one of two finalists out of 80 applicants. The Commission met and voted that she should get the position, but as they were leaving one of the Commissioners mentioned that the woman was a lesbian. That night another one of the Commissioners called the

⁵⁵ *Id.*

chairperson at home to say that she had changed her vote to the other candidate. The woman says the Chair had already left a message for her to call on her answering machine; and had she called back immediately, the job would have been hers. As it happened, she did not return the call until after the chair permitted the vote change. She later learned about the vote alteration through another Commissioner. She went to an attorney, who advised her that she had a strong case and could potentially win both the job and money damages due to the Commission's inappropriate handling of the matter after an official adjournment. However, she did not feel up to a court battle. Instead she asked for an apology and a policy statement that the Commission would never again discriminate on the basis of sexual orientation. The Commission agreed to this compromise.⁵⁶

3. Arizona

- In 2009, an Arizona crime scene investigator was fired on account of her sexual orientation.⁵⁷
- In 2007, a lesbian employee of the state child support enforcement agency sought counsel after suffering prolonged harassment by co-workers who used epithets in speaking to her and spread false rumors about her, including that she was mentally ill, after she disclosed that she was a lesbian.⁵⁸

⁵⁶ *Id.*

⁵⁷ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁵⁸ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

- In 2006, a transgender nurse was fired by an Arizona county hospital on account of her gender identity.⁵⁹
- A male-to-female transsexual, who had legally changed her sex to female, filed suit against a community college claiming the college had violated Title VII's proscription against discrimination because of sex when it required her to use the men's restroom until such time as she provided proof that she did not have male genitalia, and subsequently terminated her upon her refusal to comply with this directive. The District Court allowed the plaintiff's suit to proceed, holding that an individual who fails to conform to sex stereotypes may state a claim for discrimination "because of" sex under 42 U.S.C. §2000(e) *et seq.* The court reasoned that "[t]he presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification."⁶⁰
- An undercover narcotics officer with the Mesa Police Department, who had been awarded the Bronze Star during military service in Vietnam and had a perfect record during his employment with the police department, was fired soon after disclosing to the police chief that he was gay. He was told that, as a homosexual, he was in violation of Arizona's law against sodomy, even though the law applied equally to heterosexuals and homosexuals. The officer filed a lawsuit against the

⁵⁹ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁶⁰ *Kastl v. Maricopa County Community College Dist.*, F.Supp.2d, 2004 WL 2008954 (D. Ariz. 2004).

city, but the trial court ruled against him and an Arizona appellate court upheld the decision.⁶¹

4. Arkansas

- A counselor and eighth-grade teacher applied for teaching job and was told by the principal and assistant principal that they had heard he was gay. Despite assurances that he would be hired, he was not offered the job.⁶²
- When the Supreme Court of Arkansas struck down that state's sodomy law in 2002,⁶³ it noted the impact of the state law on employment. The opinion discusses the fact that the plaintiffs "fear prosecution for violations of the statute and claim that such prosecution could result in their loss of jobs" and "professional licenses."⁶⁴ Three of the plaintiff/appellees brought up employment discrimination as they set forth the harms they had suffered because of the law.⁶⁵ One plaintiff/appellee had been hired as a school counselor, but when school administrators learned he was gay, they refused to honor his contract⁶⁶; another had to conceal her relationship because her lover was afraid she would be fired from her teaching job if her sexual orientation became known⁶⁷; and a third feared that if his sexual

⁶¹ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), available at <http://bit.ly/kThbS>.

⁶² *Id.*

⁶³ *Jegley v. Picado*, 349 Ark. 600, 608 (Supreme Court of Arkansas, 2002).

⁶⁴ *Id.* at 609.

⁶⁵ Appellee's Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815).

⁶⁶ Aff. of Brian Manire, *Jegley*, 349 Ark. 600 (No. 01-815).

⁶⁷ Aff. of Charlotte Downey, *Jegley*, 349 Ark. 600 (No. 01-815).

orientation became known, he would be reported to the State Board of Nursing and lose his nursing license.⁶⁸

5. California

- A captain in the Los Angeles Fire Department with 36 years of experience was retaliated against, and his career prematurely ended, because he reported sexually inappropriate comments and racial, sexual, and sexual orientation harassment aimed at a firefighter in the Department. A jury awarded the captain damages of \$1,730,848 under the California Fair Employment and Housing Act, and the court of appeal affirmed the award.⁶⁹
- An openly gay police officer was denied a promotion after he had been subjected to anti-gay comments by co-workers. In 2009, he brought suit against the police department for discrimination based on his sexual orientation. The court dismissed his claim, finding that he had been subjected to anti-gay comments but concluding that there was insufficient evidence to suggest that the workplace had been intolerably polluted.⁷⁰
- In 2009, a Superior Court jury in Newport Beach ruled in favor of a veteran police officer who claimed he was denied promotions several times because he was incorrectly perceived by the police department as being gay. Despite his outstanding annual evaluations, the sergeant was stereotyped as being gay and denied promotion because he was single and physically fit. The jury ruled for the

⁶⁸ Aff. of George Townsend, *Jegley*, 349 Ark. 600 (No. 01-815).

⁶⁹ *Bressler v. City of Los Angeles*, 2009 WL 200242 (Jan. 29, 2009) (unpublished).

⁷⁰ *Smolinski v. City of Pacific Grove*, 2009 WL 3353327 (N.D. Cal. Oct. 16, 2009).

sergeant on claims of discrimination based on perceived sexual orientation and retaliation, and awarded \$8,000 in past lost earnings, \$592,000 in future earnings, and \$600,000 for noneconomic losses, for a total verdict of \$1.2 million.⁷¹

- A gay police officer for the city of Huntington Beach was subjected to disparaging and harassing comments and conduct regarding his sexuality, but no action was taken against the perpetrators in response to his complaints. In 2008, the city settled a discrimination suit brought by the officer, for a sum that reportedly could eventually reach \$2.15 million, including a \$150,000 lump sum payment to end the lawsuit, and a lifetime monthly disability entitlement of \$4,000.⁷²
- An employee of the Los Angeles Police Department (LAPD) filed a suit alleging that the LAPD discharged her in retaliation for her complaints about mistreatment due to her sexual orientation. In 2008, a superior court judge rejected a motion to dismiss the lawsuit.⁷³
- In 2008, a new teacher in the Ravenswood City School District was pressured into quitting his job after revealing to students that he had been gay while instructing the students not to use derogatory language in reference to gay men. He filed a lawsuit and the School District settled the case, agreeing to pay the teacher a year's salary.⁷⁴
- In 2008, two lesbian public school bus drivers reported being subjected to a

⁷¹ LESBIAN & GAY L. NOTES (May 2009).

⁷² LESBIAN & GAY L. NOTES (Summer 2008).

⁷³ LESBIAN & GAY L. NOTES (Mar. 2008).

⁷⁴ LESBIAN & GAY L. NOTES (Mar. 2008).

hostile work environment because of their sexual orientation.⁷⁵

- In 2008, a lesbian corrections officer reported that she was subjected to a hostile work environment because of her sexual orientation.⁷⁶
- In 2008, a deputy fire marshal passed test for the position of Battalion Chief, but was not promoted. He subsequently learned that the fire chief told another employee that he believed the deputy was not promotable due to his being gay. After the deputy filed an internal complaint, the work environment became progressively more hostile.⁷⁷
- In 2007, a volleyball coach was awarded \$5.85 million in damages in her discrimination suit against Fresno State University after the University refused to renew her contract. The coach had alleged that this was a result of her advocacy of gender equity and her perceived sexual orientation.⁷⁸
- A California Highway Patrol Motor Carrier Inspector claimed differential treatment, retaliation and constructive transfer. Upon disclosure of the employee's sexual orientation during an internal investigation, the employee's government issued computer was taken, Department of Transportation overtime was halted, and the employee was interrogated. The case was closed because the complainant

⁷⁵ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

⁷⁶ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

⁷⁷ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

⁷⁸ LESBIAN & GAY L. NOTES (Summer 2007).

elected court action. A right to sue was issued.⁷⁹

- In 2007, the head women's basketball coach and her domestic partner were unlawfully fired by San Diego Mesa College after the coach repeatedly advocated for equal treatment of female student-athletes and women coaches, and following publication in a local paper of an article identifying the two women as domestic partners.⁸⁰
- In 2007, an African-American lesbian firefighter who sued the Los Angeles Fire Department on charges of racial and sexual orientation harassment was awarded \$6.2 million in compensatory damages and \$2,500 in punitive damages by a jury. Two other firefighters who filed lawsuits contending they suffered retaliation for supporting her also won a \$1.7 million jury verdict and a \$350,000 settlement, respectively.⁸¹
- In 2007, a police chief decided not to promote an officer to a position she was qualified for, and for which no other qualified person was found, and instead eliminated the position, because the officer was transgender.⁸²
- In 2007, the San Jose Public School District fired two openly gay women claiming they violated the dress code, but they believed it was because they were

⁷⁹ Complaint of Discrimination under the Provisions of the California Fair Employment and Housing Act, [Redacted] v. California Highway Patrol, Department of Fair Employment and Housing, Case No. E2000607H0121-00-se (Aug. 10, 2007).

⁸⁰ Nat'l Center for Lesbian Rts., Employment Case Docket: *Sulpizio v. San Diego Mesa College*, <http://bit.ly/LoLOt> (last visited Sept. 5, 2009).

⁸¹ LESBIAN & GAY L. NOTES (Summer 2007).

⁸² E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

openly gay.⁸³

- A police sergeant was transferred to South Lake Tahoe where she allegedly experienced a hostile environment due to her gender (female) and sexual orientation (homosexual). Allegedly, she was disciplined for conduct that male officers were not, and was forced to transfer to a clerical position in another office. The Department of Fair Employment and Housing (DFEH) case was closed because an immediate right to sue was requested.⁸⁴
- An employee alleged wrongful termination by University of California Food Stamp Nutrition Education Program on the bases of sex (male), and sexual orientation (gay). He alleged that he was terminated after complaining about anti-gay material on a computer. The case was close by administrative decision and a right to sue was issued.⁸⁵
- A conservationist in the California Conservation Corps alleged that after her sexual orientation was revealed after she had a friend spend the night with her at a camp, she received numerous reprimands damaging to her career and her ability to supervise was questioned. In addition, she alleged that the next week an investigation was conducted by senior supervisors, who spoke with other conservationists about how they felt about the lesbian conservationist having her “girlfriend” spend the night. A policy was then issued that no overnight guests

⁸³ *Id.*

⁸⁴ Complaint of Discrimination under the Provisions of the California Fair Employment and Housing Act, [Redacted] v. California Highway Patrol, Department of Fair Employment and Housing, Case No. E200708e0853-00-sc (Dec. 18, 2007).

⁸⁵ Complaint of Discrimination under the Provisions of the California Fair Employment and Housing Act, [Redacted] v. California Highway Patrol, Department of Fair Employment and Housing, Case No. E200708C014900b (Aug. 28, 2007).

were to be allowed. Previously, overnight guests had been allowed for heterosexual couples. The case was closed because the DFEH could not conclude there was a violation of the statute. A right to sue was issued.⁸⁶

- A police officer was denied promotion, and an external candidate was selected in one of the few instances in the department's history. The officer alleged racial and sexual orientation discrimination. The Department of Fair Employment and Housing case was closed because an immediate right to sue was requested.⁸⁷
- A Program Technician alleged retaliation and a hostile work environment by the California Department of Health Services based on sexual orientation (lesbian), marital status (domestic partner), and religion (Baptist) after putting up a Lavender Committee (Union) poster, which she was asked to remove because it was controversial. Allegedly, her supervisor made remarks like "God don't like the ugly," or "the Lesbian is here, let's go." The Department of Fair Employment and Housing case was closed by administrative decision and a right to sue was issued.⁸⁸
- A University of California, Davis, police officer brought suit against the university for harassment based on his sexual orientation in 2005, alleging that when other officers discovered he was gay, they subjected him to harassment

⁸⁶Complaint of Discrimination under the Provisions of the California Fair Employment and Housing Act, [Redacted] v. California Highway Patrol, Department of Fair Employment and Housing, Case No. E200607E0372-00 (Oct. 15, 2007).

⁸⁷ Complaint of Discrimination under the Provisions of the California Fair Employment and Housing Act, [Redacted] v. California Highway Patrol, Department of Fair Employment and Housing, Case No. E200607E0174-00-rc (July 28, 2006).

⁸⁸ Complaint of Discrimination under the Provisions of the California Fair Employment and Housing Act, [Redacted] v. California Highway Patrol, Department of Fair Employment and Housing, Case No. E200506E1408-00-b (Apr. 6, 2006).

including homophobic slurs and a death threat, and his supervisor referred to him as a "fucking faggot" and retaliated against him after he lodged complaints in response to the treatment from other officers. The University of California Regents settled the case in 2008 for \$240,000.⁸⁹

- A gay man working as a cook for the California Youth Authority was awarded one million dollars in non-economic damages after a jury and court found that he was subjected to severe sexual orientation harassment on a daily basis.⁹⁰ While at work he was called a number of names with the word "faggot" in it. He estimated that one coworker call him one term with "faggot" over 150 times. He was threatened a number of times at work, but his supervisors never helped him. He testified that his situation never improved: "It was like a bad dream that I couldn't wake up from . . . I said I deserve to be here. They're not going to chase me out. I stuck it out. Somebody is going to listen to me one day. Things are going to get better. . . . [I]t was like one thing after another and it never got better. It just got worse and worse and worse but I hung in there."
- In 2005, a department supervisor at the University of California, Davis drew up a dress code specifically targeting one gay male employee prohibiting him from wearing mid-length pants. The supervisor also forbade him from bringing the Gay and Lesbian Yellow Pages into the office.⁹¹
- In 2004, the city of Los Angeles agreed to pay out \$200,000 and \$450,000 to

⁸⁹ *Former UC Davis Officer Sues Cops, University*, KCRA 3, <http://bit.ly/vwA4u>.

⁹⁰ *Hope v. California Youth Auth.*, 36 Cal. Rptr. 3d 154 (Cal. Ct. App. 2005).

⁹¹ *Former UC Davis Officer Sues Cops, University*, KCRA 3, <http://bit.ly/vwA4u>.

settle sexual orientation discrimination claims by two police officers. Both claimed that they were harassed and suffered career setbacks due to homophobia in the police department. According to an Associated Press report on Dec. 27, 2004, these settlements added to others would total nearly \$3 million paid out by the city to settle sexual orientation discrimination claims brought by eight different police officers in recent years.⁹²

- In 2004, a lesbian teacher who did not fit traditional gender norms was repeatedly transferred from site to site and once thrown against the wall by a principal. The school district and the union refused to intervene.⁹³
- In 2004, a gay man faced harassment and isolation at work in a county department, causing him stress-related health problems. Although he knew California law had sexual orientation protections, he was afraid that the county and union would not enforce the law.⁹⁴
- A municipal worker who had been harassed based on other employees' perception that he was gay was discharged in connection with allegations that he had inappropriately sexually harassed volunteers in the department. He contested the allegations and the court determined that the city had violated his due process rights.⁹⁵
- A state agency employee reported that he had tried to persuade the agency to

⁹² LESBIAN & GAY L. NOTES (Jan. 2005), available at <http://bit.ly/vwBVH>.

⁹³ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

⁹⁴ *Id.*

⁹⁵ *Martinez v. Personnel Board of the City of Loma Linda*, 2003 WL 429505 (Cal. Ct. App. Feb. 24, 2003).

provide domestic partner benefits in 2002. This caused conflict with his boss and he was put on administrative leave and eventually terminated.⁹⁶

- A police cadet for the City of Oakland was forced to resign after being harassed by training instructors because of his perceived sexual orientation. A jury returned a verdict in favor of the plaintiff on his discrimination and harassment claims in the amount of \$500,000, and the appellate court affirmed the judgment.⁹⁷
- In 2001, the Beverly Hills School Board paid a gay man formerly employed as the superintendent of schools \$159,000 to settle his discrimination complaint against the school district. He was discharged as superintendent after allegations surfaced that he had misused a district credit card, but he claimed that story was a pretext for anti-gay discrimination, arguing that all the expenses incurred on the card were legitimate business expenses. After being discharged, he was hired as superintendent of a school district in Long Island, New York.⁹⁸
- A lesbian employed by the San Jose Police Department alleged that when she objected to performing strip searches, she was referred to internal affairs rather than being provided with counseling and training, as would normally be the case. She also said her attempts to transfer to other units where she would not have to perform such searches were thwarted because of her sexual orientation. In 2001, she won a \$935,000 jury verdict in her sexual orientation discrimination case

⁹⁶ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

⁹⁷ *Hoey-Custock v. City of Oakland*, 2002 Cal. App. pub. LEXIS 7692 (2002).

⁹⁸ LESBIAN & GAY L. NOTES (May 2001), available at <http://bit.ly/41pXwR>.

against the San Jose Police Department, but the superior court judge found that the verdict was not supported by the evidence and ordered a new trial.⁹⁹

- Parents in the San Leandro Unified School District complained to the school board about a public high school English teacher who helped establish a Gay-Straight Alliance at the school to provide support and protect students from harassment. After the teacher discussed these events with his class, the school issued the teacher a letter of censure, and the school board adopted a new policy requiring that undefined “controversial issues” need to be cleared with the principal before they were broached in class.¹⁰⁰
- An award-winning high school teacher experienced severe and continuing harassment and discrimination at Oceanside High School because of her sexual orientation. Administrative officials failed to investigate this harassment or take corrective action, refused to promote her because of disapproval of her lifestyle, and threatened retaliation if she pursued her complaints. After the Court of Appeal rejected the district's attempt to dismiss her discrimination claim, the district reached a settlement with the teacher under which she resigned and the district paid her \$140,000 and provided annual sensitivity training to its employees of issues of sexual orientation discrimination.¹⁰¹
- In 2000, a lesbian high school teacher filed a complaint with the California Labor Commission against the Hemet Unified School District charging that

⁹⁹ LESBIAN & GAY L. NOTES (Dec. 2001), available at <http://www.qrd.org/qrd/usa/legal/lgl/2001/12.01>.

¹⁰⁰ *Debro v. San Leandro Unif. Sch. Dist.*, 2001 U.S. Dist. LEXIS 17388 (N.D. Cal. Oct. 11, 2001).

¹⁰¹ *Murray v. Oceanside Unif. Sch. Dist.*, 79 Cal. App. 4th 1338, 95 Cal. Rptr. 2d 28 (Cal. App. 4th Dist., Div. 1 2000).

administrators had discriminated against her when they removed a female student from her class whose parents objected to their daughter being taught by a lesbian. The teacher had assigned students to talk about an important person in their lives, and she voluntarily discussed her same-sex partner as an example. The California Labor Commission ruled in favor of the teacher and the school board appealed that decision.¹⁰²

- A gay teacher filed a discrimination claim with the California State Labor Department after the Rio Bravo-Greeley Union School District granted the requests of parents to remove students from his classes bases solely on their perception that the was gay. The Labor Commissioner ordered the district to stop removing students from the teacher's classes and to cease treating employees differently based on their sexual orientation. A settlement was then reached under which the district agreed to adopt a non-discrimination policy, to reject any parental request to transfer students based on the "ethnicity, race, national origin, age, sex, actual or perceived sexual orientation, disability, or political or religious beliefs of classroom teachers," and to make a public statement in support of the teacher.¹⁰³
- A highway patrol officer was harassed by his co-workers for five years, including finding anti-gay pornographic cartoons taped to his mailbox, urine in his locker, and a ticket for “sex with dead animals” on his windshield. After he complained, the harassment continued and he resigned in 1993. In 1999, a state court jury

¹⁰² PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 96 (2000 ed.).

¹⁰³ LESBIAN & GAY L. NOTES (Apr. 1999), *available at* <http://bit.ly/4EkQci>.

awarded him \$1.5 million in damages and legal fees for the harassment to which he was subjected by his co-workers, under the state statute prohibiting employment discrimination based on sexual orientation.¹⁰⁴

- An elementary school teacher alleged that the school board failed to renew her contract because of "her relationship with a lesbian teacher at the school." After a closed hearing on the matter, a school board member told a local citizen on the street, "If you knew what I knew, you'd know that we made the right decision." The teacher sued for wrongful discharge and defamation.¹⁰⁵
- A commander in the California National Guard, the state military force under control of the California governor, with a record of "outstanding performance" was pressured by his commanding officer "to communicate to members of [his] unit that [he] was not homosexual." As a result, he sent a letter to his commanding officer, in which he stated: "I am compelled to inform you that I am gay." His commanding officer instituted proceedings to withdraw his federal recognition as an officer with the United States Army National Guard, and he was terminated from the California National Guard.¹⁰⁶
- When a teacher notified officials at Center High School that she was going to begin the process for gender reassignment surgery, the district distributed a letter to all district parents. After four parents complained, the school board voted to

¹⁰⁴ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), available at <http://bit.ly/kThbS>.

¹⁰⁵ *Songer v. Dake*, 1999 WL 603796 (Cal. Ct. App. July 29, 1999).

¹⁰⁶ *Holmes v. Cal. Nat. Guard*, 124 F.3d 1126 (9th Cir. 1997), *reh'g, en banc denied*, 155 F.3d 1049 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999).

- fire the teacher, citing her “evident unfitness for service.” The teacher filed a complaint with the state labor commissioner seeking to be reinstated to her teaching position, and later reached a settlement with the school board in which she agreed to resign.¹⁰⁷
- A lesbian claimed she was constructively discharged by the West Contra Costa County Unified School District after she told her immediate supervisor that she was a lesbian. In 1997, a jury awarded her a \$360,000 award in her sexual orientation discrimination suit against the District.¹⁰⁸
 - In the late 1990s, a Bay Area public school teacher was unable to secure a full-time teaching contract in any of the several school districts to which she applied after she had transitioned from male to female. She then applied for an entry-level federal job, and after two days and multiple hours of interviews and screening, she was turned down for the position immediately after she disclosed her transgender status on a comprehensive medical questionnaire.¹⁰⁹
 - In 1996, a controversy arose in Los Angeles about personally invasive questions to which a lesbian police officer was subjected when she filed claims about harassment on the job based on her gender and sexual orientation. The ACLU wrote to the city on her behalf, resulting in a City Attorney move to narrow the scope of questions asked "in areas involving personal relationships" and to train

¹⁰⁷ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 92 (2000 ed.).

¹⁰⁸ LESBIAN & GAY L. NOTES (Summer 1997), *available at* <http://bit.ly/ZUFT3>.

¹⁰⁹ SHANNON MINTER & CHRISTOPHER DALEY, *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES* (Nat'l Center for Lesbian Rts. & Transgender L.Center 2003).

lawyers in the worker's compensation division on how to elicit relevant information without invading the privacy rights of claims applicants.¹¹⁰

- In 1995, a committee on teacher credentials recommended to the California Teacher Credentialing Commission that two San Francisco high school science teachers have their teaching credentials revoked as a result of a 1992 incident when a classroom speaker from Community United Against Violence, a gay anti-violence group, made sexually explicit comments to a class of eleventh graders during a discussion with the class. Parent complaints to the school administration about the incident were rebuffed on the ground that the teachers themselves had done nothing wrong. But the parents then filed charges with the credentialing commission. A spokesperson for the San Francisco Unified School District cited the good records of the teachers and urged that the commission "let them continue their careers."¹¹¹
- In 1994, two Los Angeles police officers filed suit alleging physical and verbal harassment on the basis of sexual orientation. They alleged that the LAPD had done nothing to implement guidelines for treatment of gays and lesbians on the job that were adopted as part of the settlement of a previous lawsuit. One of the officers had experienced verbal and physical harassment, other officers refusing to speak or work with him, and a supervisor continually greeting him in an effeminate tone with a lisp. The other officer had been advised to conceal her homosexuality because the department was "not yet ready to accept gays" and she

¹¹⁰ LESBIAN & GAY L. NOTES (Feb. 1996), *available at* <http://bit.ly/hVma6>.

¹¹¹ LESBIAN & GAY L. NOTES (Oct. 1995), *available at* <http://bit.ly/1D2Hvo>.

would not make it through the academy or probation if her sexual orientation were known. Although she followed this advice, she was subjected to frequent anti-gay harassment that escalated when she participated in an investigation of anti-gay harassment of a fellow officer, and she was later denied a promotion because of her sexual orientation. At a press conference announcing the suit, another officer alleged that in the past year five gay or lesbian police officers had been forced off the job, out of the department, or to sick leave status due to anti-gay harassment.¹¹²

- The first openly gay officer in the Los Angeles Police Department (LAPD), who had graduated from the Academy at the top of his class, experienced severe harassment and hostility on the basis of sexual orientation, including other officers refusing to back him up in life-threatening situations. After the department refused to investigate, he believed his life was in danger, and he left the department. He filed a sexual orientation employment discrimination lawsuit against the city of Los Angeles. In 1993, he settled the case, leading to his reinstatement to the force, but he then filed a second lawsuit, charging the city and numerous police staff with violating the settlement agreement, as well as his federal and state constitutional and state statutory rights. He also challenged the LAPD's decision to suspend him for "unauthorized recruiting" of lesbians and gay men to join the force, and for allegedly wearing his uniform without permission in a photo in a gay weekly, and at gay pride and AIDS-awareness events. The Court ordered the LAPD to rescind his suspension and pay him for

¹¹² LESBIAN & GAY L. NOTES (Sept. 1994), *available at* <http://bit.ly/adQhm>.

the time lost. This second lawsuit prompted the city to make widespread improvements in its sexual orientation employment policies. Settlement discussions to make further improvements to city and LAPD employment policies continued for years.¹¹³

- A lesbian who worked in the Los Angeles Police Department experienced ongoing harassment based on her sexual orientation after she was outed by her roommate to her classmates at the police academy. For example, it took nearly twice as long for backup to arrive as it should have when she responded to a burglary call. Several of her colleagues made comments about physically harming a gay speaker to her class at the academy, including comments such as placing bombs in bodily orifices and shutting “that fag up.” As a result of the harassment she faced, she said that she wouldn’t recommend law enforcement as a career. She suffered from ulcers, shingles, and high blood pressure and felt as though she had no other career options.¹¹⁴
- A videotape showing Simi Valley police officers ridiculing gays and other groups emerged as a lawsuit alleging discriminatory attitudes and practices was filed against the department. Although the tape’s producers claimed it was intended as a joke for a departing officer, other officers say it revealed widespread intolerance. One scene in the video, which takes place in the police chief’s office, suggests a male officer wants to return to work so that he can continue an affair

¹¹³ Lambda Legal, All Cases: *Groberson v. City of Los Angeles*, <http://bit.ly/1mcZ82> (last visited Sept. 5, 2009); HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES (2001), available at <http://bit.ly/kThbS>.

¹¹⁴ ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 33-38 (Routledge 1996).

with a male police investigator. In it, one officer says “A lot of people don’t want to work with a coke freak.” Another responds, “Or a [homosexual].” Reportedly, an anti-gay slur was used repeatedly.¹¹⁵

- A gay man in a city police department in Southern California reported that instructors in the police academy made comments to his class about gay people, including "Did you did hear that they're actually letting fags on this department now? Isn't that disgusting? That's really sick." During a conversation about hate crimes, the Sergeant raised the example of someone being physically assaulted for being gay and that such an incident would be considered a hate crime. Several of the officers responded with comments such as "[t]hat's a matter of opinion" and "Oh, yeah. Cruelty to animals." He brought the comments to the attention of the sergeant in charge, who responded that he hadn't heard the comments.¹¹⁶
- A gay man who was placed with a more experienced teacher when he first began teaching in a public high school in Santa Clara was notified by the supervisor after only one day of teaching that things weren't working. The more experienced teacher stated that he was uncomfortable with the new teacher’s “alternative lifestyle,” which he said he picked up from the new teacher’s mannerisms, and the experienced teacher “[didn’t] want [the gay teacher] influencing his students.”¹¹⁷

¹¹⁵ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 113-114 (2000 ed.).

¹¹⁶ ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 58-62 (Routledge 1996).

¹¹⁷ WARREN J. BLUMENFELD, ONE TEACHER IN 10 58-64 (Kevin Jennings, ed., Alyson 1994).

6. Colorado

- In 2007, a professor at a Colorado state university was harassed on the job, denied promotion, and stripped of his courses because he was gay. The professor had been teaching for more than two decades and had long been open about being gay. He began to experience problems when the former provost of the university retired. Thereafter, the dean began making derogatory comments about him in meetings, including referring to him as a girl. He was then passed over as chair of his department in favor of a heterosexual woman with much less tenure, even though he previously had been the chair of a related department. The professor was also stripped of graduate courses that he taught for years and was given only undergraduate courses to teach, based on a false claim that he did not turn his lesson plans on time.¹¹⁸
- An employee of the Colorado Division of Youth Services was harassed by co-workers based on his perceived sexual orientation. The employee's co-workers subjected him to derogatory comments and gestures because they believed him to be a gay man. An internal investigation uncovered a pattern of inappropriate conduct towards the employee that precipitated a directive to cease all conversations regarding an employee's sexual orientation in the workplace. The court dismissed

¹¹⁸ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

the employee's constitutional and Title VII claims after he was later terminated because he failed to exhaust administrative remedies on time and because the court found that his allegations that defendants had not adequately investigated and addressed his complaints was not supported by the record.¹¹⁹

- A gay public high school teacher testified during a school board meeting in 2000 that he was subjected to anti-gay taunts while teaching at Denver's high schools.¹²⁰
- A female nurse employed by the Elbert County was discharged from her employment based upon her sexual orientation, age, race, sex and handicapped status, thereby violating her constitutionally protected rights of due process and equal protection. At trial, a jury returned a verdict for the nurse on her claim that the County had violated her due process rights by failing to provide her with an adequate opportunity to be heard, but not on any of her other counts and awarded attorneys fees to the county.¹²¹ On appeal, the court reversed the judgment awarding attorney's fees to the defendants but affirmed in all other respects.
- A librarian at the University of Colorado Law School was forced out of her job after publishing an article about Amendment 2 in the newsletter of the American Association of Law Libraries. In 1994, the ACLU of Colorado announced that it settled the case. Under the settlement, the librarian received \$25,000, the retri-

¹¹⁹ *Doerr v. Colo. Div. of Youth Serv.*, 2004 WL 838197 (10th Cir. Apr. 20, 2004).

¹²⁰ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 123 (2000 ed.).

¹²¹ *Langseth v. County of Elbert*, 916 P.2d 655 (Colo. App. 1996).

mand was removed from her file, and she received a favorable recommendation letter for use in her job search.¹²²

- An employee of the Denver Department of Health and Hospitals was denied sick leave to care for his same-sex domestic partner. The Colorado Court of Appeals held that the denial of “family sick leave” did not violate the State Career Service Authority Rule 19-10(c) forbidding discrimination in state employment.¹²³
- A lesbian police officer with a long and distinguished record of reliable service with the Denver Police Department struggled for more than four years to keep her job and withstand insults and constant surveillance. As a member of the department’s school resource program, the officer taught public safety to local public school students. She was consistently praised by the schools where she taught and was promoted. One day in 1986, she bought a few books in a lesbian bookstore, and soon afterward, her supervisors transferred her to street patrol. They told her that they had “damaging information” about her that could impair her integrity on the job. During roll call, other police officers began to make disparaging comments about lesbians. While on street patrol, her calls for backup often went unanswered, leaving her in serious danger. When she reported these incidents to her supervisors, they responded by stationing unmarked police cars at her home and the homes of friends she visited. When she consulted outside agencies,

¹²² LESBIAN & GAY L. NOTES (July/August 1994), *available at* <http://www.qrd.org/qrd/usa/legal/lgln/1994/07.and.08.94>.

¹²³ *Ross v. Denver Dept. of Health and Hospitals*, 883 P.2d 516, 18 Empl. Benefits Cases (BNA), 1434 (Colo. Ct. App. 1994); *reh'g denied*, May 12, 1994.

she was told that the law gave little protection against harassment based on sexual orientation and the local American Civil Liberties Union would not take her case. Finally, Denver enacted an anti-discrimination ordinance, and the police department approved new anti-discrimination and anti-harassment guidelines in 1990.¹²⁴

7. Connecticut

- In 2009, a Connecticut public school teacher with excellent evaluations was dismissed shortly after mentioning in class when Connecticut began to allow same-sex couples to marry that Spain also allowed this. Although the school said the dismissal was based on poor performance, the teacher felt it was sexual orientation discrimination. The teacher filed a complaint with the Connecticut Commission of Human Rights & Opportunities.¹²⁵
- In 2008, a gay man, working in the Connecticut State Maintenance Department, reported that he had been harassed by his coworkers for being gay. He was tied by his hands and feet and locked in a closet. He filed a complaint, and the department is investigating this incident as a possible hate crime. His assaulters were placed on administrative leave.¹²⁶
- In 2008, a gay man reported that he had endured harassment and discrimination based on his sexual orientation while working for sixteen years in the State of Connecticut Department of Developmental Disabilities. In 1996, he was given a

¹²⁴ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* <http://bit.ly/kThbS>.

¹²⁵ E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

¹²⁶ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Sept. 9, 2008) (on file with GLAD).

promotion. Upon telling his new Program Supervisor that he was gay, he was immediately notified that the promotion was going to be given to another staff person instead. Additionally, on the same day he that put a rainbow sticker on his car, the employee overheard many inappropriate comments about his sexual orientation, such as “[t]hey put those on their cars so they can spot each other to have sex.” In 2007, the employee was promoted and moved to new group home. As part of his job responsibilities, the employee was asked to shave a total care client. However, he was told that it was inappropriate for him to shave another male client because he was gay, and that if were to do that, he would be turned in for abuse. Other staff members, who are heterosexual, were not prohibited from shaving clients of a different-sex. The employee felt “totally isolated and helpless” and had trouble sleeping as a result of this work environment. His attempts to work with supervisors and human resource personnel have resulted in no difference in climate, and he was told to “keep my personal business to myself.”¹²⁷

- In 2008, an employee who had worked for the Connecticut Department of Developmental Services for just over one year reported that he had experienced discrimination and harassment based on his sexual orientation. The employee filed a complaint, and based upon the investigation, the State of Connecticut Department of Developmental Services Equal Employment Opportunity Division found sufficient evidence of harassment and discrimination to move forward.¹²⁸

¹²⁷ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 12, 2009) (on file with GLAD).

¹²⁸ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Sept. 29, 2008) (on file with GLAD).

- In 2008, a gay teacher in a Connecticut public school reported that she was one of three gay teachers to be "treated badly" by her coworkers. She was singled out through selective enforcement of rules, such as taking down decorations in her classroom. The principal of the school told the teacher that she would only provide her with a letter of recommendation if she resigned.¹²⁹
- In 2008, a transgender woman working for a Connecticut Police Training Academy reported that her supervisor harassed her based on her gender identity. He called her into a dorm room, lay down on a bed, and asked her personal questions about her family, their approval, and what she does in her free time. This lasted for more than two hours. After the incident, her supervisor cited her for taking too long to change ceiling tiles and stripping the floors, despite her having accomplished the task and receiving praise from others for doing a good job. She was also instructed to use the men's restroom. She filed a complaint, in which she disclosed her status as transgender. She noted that she felt afraid to be alone with her supervisor. After submitting this complaint, she was fired.¹³⁰
- In 2005, a teacher brought federal and state claims against his former employer, the Norwalk Board of Education, accusing it of sexual orientation discrimination. The plaintiff taught math and science at one of the defendant's middle schools, and was also the program facilitator for the Connecticut Pre-Engineering Program. The principal told the plaintiff that the Program was primarily aimed at

¹²⁹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (May 22, 2008) (on file with GLAD).

¹³⁰ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Aug. 27, 2008) (on file with GLAD).

African-American students and that those students should be given preference for admission. When the plaintiff refused to give such preferences, he was subject to various retaliatory actions. The principal gave him a negative job evaluation and insinuated that he had HIV/AIDS when he became ill as a result of the hostile environment he was encountering. When the teacher returned from medical leave, he was terminated. After receiving a release from the Connecticut Commission on Human Rights and Opportunities and a right to sue letter from the EEOC, he brought a lawsuit. His claims survived a motion to dismiss.¹³¹

- In 2005, a City of New Haven employee brought a lawsuit against the City accusing her supervisor of denying her equal terms and conditions of employment and harassing her based on her sexual orientation. The City moved to dismiss, which the Court denied, finding that the plaintiff had sufficiently alleged facts supporting her discrimination claim.¹³² The parties filed a joint stipulation of dismissal on September 10, 2007, but our research was not able to ascertain the substantive terms of the stipulation.
- In 2003, a police department applicant filed a complaint with the Connecticut Commission on Human Rights and Opportunities accusing the town and several police department personnel of refusing to hire her because of her sexual orientation. The parties entered into settlement discussions and reached an agreement. Before the plaintiff signed the agreement, the defendants demanded that she sign a statement saying that she was not hired for legitimate non-discriminatory reasons.

¹³¹ *DeMoss v. City of Norwalk Bd. of Educ.*, 2007 WL 3432986, at *1-3 (D. Conn. Nov. 14, 2007).

¹³² *Marcisz v. City of New Haven*, 2005 WL 1475329, at *1-2 (D. Conn. June 22, 2005).

When the plaintiff refused to sign, the defendants filed suit seeking to enforce the settlement agreement. The Superior Court found that the plaintiff had never agreed to sign the statement and denied the motion to enforce. The Court added that “[i]t has not been demonstrated that plaintiff’s sexual orientation is a relevant factor that the defendants could consider in her employment and [to do so] would be contrary to the public policy of the state.”¹³³

- In 2003, a transgender woman, working as a police officer in Hartford, reported that she suffered harassment as a result of her gender identity. She was denied career advancement despite being qualified. She approached her chief regarding the situation, but was "brushed off."¹³⁴
- In 2001, a teacher brought a lawsuit against the New Britain Board of Education alleging, among other things, sexual orientation discrimination. The plaintiff, a lesbian, was employed as a special education teacher at a New Britain public school and accused the superintendent of transferring her to a lesser position based on her sexual orientation.¹³⁵ The Court denied the school board’s motion to strike her right of privacy and intentional infliction of emotional distress actions, allowing her to proceed on those claims in addition to her sexual orientation discrimination claim.¹³⁶

¹³³ *Skorzewski v. Town of Guilford*, 2007 WL 901822, at *1-2 (Conn. Super. Ct. Mar. 8, 2007).

¹³⁴ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (June 2, 2003) (on file with GLAD).

¹³⁵ *Kavy v. New Britain Bd. of Educ.*, 2001 WL 688622, at *1 (Conn. Super. Ct. May 21, 2001).

¹³⁶ *Kavy v. New Britain Bd. of Educ.*, 2003 WL 721565, at *1 (Conn. Super. Ct. Jan. 22, 2003).

- In a book published in 1996, one of the only openly lesbian state troopers in Connecticut recounted the harassment and discrimination she faced in her division. During her admittance exam, she was required to take a polygraph exam. Several of the questions asked about sexual practices, including whether she had ever had sex with someone of the same-sex. She approached her department about wearing her uniform in a gay rights parade. She was told that she could not wear her uniform, despite the fact that other officers had worn their uniforms in other parades, including a Jamaican/West Indies parade and a St. Patrick's Day parade. In response to writing an article about her experiences as an openly gay state trooper, she was reprimanded and a negative review was placed in her file. She contacted a legal rights organization, whose challenge brought about the removal of the negative review. However, several weeks later, she was transferred to another division.¹³⁷
- In 1995, an employee of the City of Hartford brought sex, sexual orientation, and disability discrimination claims against the city, which had fired him after nine years of employment. The employee's disability claim was based on his gender identity.¹³⁸ Two years prior to his termination, the plaintiff had undergone a sex change operation.¹³⁹ His work environment was hostile from that point until he was terminated under the pretext of departmental downsizing.¹⁴⁰ Following his termination, he filed a complaint with the Connecticut Commission on Human

¹³⁷ ROBIN A. BUHRKE, *A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT* 117-24 (Routledge 1996).

¹³⁸ *Conway v. City of Hartford*, 1997 WL 78585 (Conn. Super. Ct. Feb. 4, 1997).

¹³⁹ *Conway v. City of Hartford*, 760 A.2d 974, 975-77 (Conn. App. Ct. 2000).

¹⁴⁰ *Conway*, 1997 WL 78585.

Rights and Opportunities, and then a lawsuit in state court after receiving a release from the Connecticut Commission on Human Rights and Opportunities.¹⁴¹ In 1997, the court denied the defendant's motion to strike his disability discrimination claim and his sexual orientation claim.¹⁴² Subsequently, based on the plaintiff's failure to comply with discovery requests, the trial court entered a judgment of non-suit against the plaintiff, which the appellate court affirmed.¹⁴³

- In 1995, after a police department applicant was denied a job, she filed a right to privacy action against a police official. She alleged that during her application for a job as a police officer, she was questioned about her "marital status and fidelity" and was asked the question, "What exactly are your sexual practices and preferences?" She argued that such inquiries were designed to "elicit information about her sexual orientation," and as such, they violated her right to privacy. The District Court held that such inquiries had, indeed, violated her right to privacy. However, the court held that the police official was entitled to qualified immunity. On appeal to the Second Circuit, the court affirmed, reasoning that public officials are not liable under section 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Since the conduct at issue had occurred in 1995, a reasonable official would not have known the conduct was constitutionally proscribed.¹⁴⁴

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Conway*, 760 A.2d at 975-77.

¹⁴⁴ *Eglise v. Culpin*, 2000 WL 232798, at *1 (2d Cir. Feb. 28, 2000).

- An applicant to police department was denied employment despite exceptional test results. His background investigation was said to reveal issues regarding his “integrity” because the applicant was gay.¹⁴⁵
- In October 1994, John Doe of North Haven took the Hamden Police Department qualifying exam and scored higher than any other applicant. He was in good physical condition and maintained a 3.5 grade point average in a graduate-level criminal justice program. Based on his outstanding record, Doe was offered “conditional employment” as a police officer in March 1995 — subject to the completion of psychological, medical and polygraph examinations. During the polygraph test, Doe was directly asked his sexual orientation. He responded that he was gay. After the revelation, the Hamden police chief told Doe that he was not the “best candidate for the job.” “Let’s get one thing straight. I’m not going to enter a dialogue with you,” the police chief told Doe when he pressed the issue. “The interview process is over and you didn’t get the job.” Doe asked for a copy of his polygraph report through the state’s freedom of information commission. The very first paragraph included the statement, “He is gay.”¹⁴⁶

8. Delaware

- In 2001, a Delaware public high school teacher alleged that the school principal forced her to remove a “Safe Space” rainbow triangle sticker from her classroom

¹⁴⁵ H.R. Hrg. 104-87, pp. 163–165, Prepared Testimony of Michael Proto, Hearing before the House Committee on Small Business, Subcommittee on Government Programs re: H.R. 1863: The Employment Non-Discrimination Act, Wed., Jul. 17, 1996, 104th Congress, 2nd Session, Referenced at 142 Cong. Rec. D 755, D 760. *See In the News*, FED. NEWS SERV., Jul. 17, 1996.

¹⁴⁶ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES (2001), available at <http://bit.ly/kThbS>.

door.¹⁴⁷ Although the school permitted the display of stickers of other clubs and organizations, the school district did not want to appear as an advocate of “Safe Space” associated with gay people.¹⁴⁸

9. Florida

- In 2009, two years after she started working at a college, a transgender woman was forced to resign because of her gender identity. She received praise for her work and was given a letter stating that she was dependable, able to work independently, and a skilled technician. Approximately two months before she was fired, she notified her boss that she would be transitioning from male to female. In March 2009, she was called in on her day off to attend a staff meeting. She did not have a clean uniform to wear and told her boss that she would wear women’s clothes, which she wore in her day-to-day life but not on the job, and he said it was fine. When she arrived on campus, members of the faculty and staff gave her hostile looks and she felt unsafe. She called a co-worker friend to ask for support, but he hung up on her. Her boss then accused her of harassing her co-worker because she had called him after he hung up and moved her to an unfavorable shift that her friend did not work. The new shift interfered with her medical appointments, which were crucial to her transition, and she was forced to resign.¹⁴⁹
- In 2007, after she notified her supervisors that she planned to transition, a city manager in Largo was fired because of her gender identity. News of her decision

¹⁴⁷ “EMcG,” *Tell Your Story*, TOWARD EQUALITY, <http://bit.ly/zqBIU>.

¹⁴⁸ *Id.*

¹⁴⁹ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

to transition leaked to the local media shortly after she discussed it with her supervisors. When the City Commission heard the news, it voted 5-2 to suspend her. During the suspension meeting, one of the Commissioners who voted in favor of the suspension stated: “His [sic] brain is the same today as it was last week. He [sic] may be even able to be a better city manager. But I sense that he’s [sic] lost his [sic] standing as a leader among the employees of the city.”¹⁵⁰ She declined to sue the city after she was terminated, saying that bringing suit against it would be “like suing my mother.”¹⁵¹

- In 2007, a sheriff’s department applicant was offered positions at two sheriff’s offices which were then rescinded because they found out he was living with a man whom they assumed was his partner.¹⁵²
- In 2007, a lesbian social worker at a county agency suddenly had problems at work upon disclosing her sexual orientation following ten years of employment without issue. When she disclosed her sexual orientation, her supervisor started giving her bad reviews, and stood in the bathroom with her while she urinated for a drug test which was not standard procedure at the agency.¹⁵³
- An employee of the Escambia County Utilities Authority brought a claim under Title VII for the workplace harassment he endured because co-workers presumed him to be gay. The court granted summary judgment to the defendant because

¹⁵⁰ Lorri Helfand, *Commission Moves to Fire Stanton*, ST. PETERSBURG TIMES, Feb. 27, 2007.

¹⁵¹ *Id.*; See also Jillian Todd Weiss, *The Law Covering Steve (Susan) Stanton, City Manager Dismissed In Largo, Florida*, STANTON LEGAL, <http://bit.ly/186I3m>.

¹⁵² E-mail from Ming Wong, Nat’l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

¹⁵³ *Id.*

none of the scenarios established in *Oncale v. Sundowner Offshore Services, Inc.* were present.¹⁵⁴ In rejecting the claim, the court stated that “[the employee’s] characteristics [that were targeted in the harassment] may reflect stereotypes associated with a homosexual lifestyle, but they are not stereotypes associated with a feminine gender.”¹⁵⁵

- In 2006, an employee of the Department of Children and Family Services was terminated after she was seen hugging a female on the premises. Her supervisor stated before she was terminated that there was a “rumor” that the two women were in a relationship.¹⁵⁶
- In 2006, an applicant to the police department was accused of being “dishonest” when she informed them of her transgender status after completing her application.¹⁵⁷
- In 2005, eight years after he had been hired by the Hillsborough County School District, a teacher protested the dismantling of a gay pride book display at the local public library. He was quoted in the local paper for saying that, as a gay man and a school librarian, he was upset that the book display had been taken down prematurely. The school superintendent saw that he was quoted in the paper and proceeded to have his behavior reviewed by the school district’s Professional Standards Office. Though the teacher was not disciplined for discussing the book

¹⁵⁴ 523 U.S. 75 (1998) (claim of same-sex sexual harassment actionable under Title VII).

¹⁵⁵ *Mowery v. Escambia County Util. Auth.*, 2006 U.S. Dist. LEXIS 5304 (N.D. Fla. Feb. 10, 2006).

¹⁵⁶ *Sampson v. Dep’t of Children and Family Servs.*, 2006 Fla. Div. Adm. Hear. Lexis 466 (Sept. 29, 2006).

¹⁵⁷ E-mail from Ming Wong, Nat’l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

display with the paper, he was told that he was not to bring “the issue” into the workplace. This censorship has caused him a great deal of distress and he worries that his professionalism will be called into question repeatedly because he is gay.¹⁵⁸

- In 2005, a gay employee of the Pinellas County Water Quality Department reported that he was terminated after the employee’s neighbor disclosed his sexual orientation to his supervisor.¹⁵⁹
- In 2004, an administrative hearing officer held that a post-operative transsexual woman employed by the Brevard County Sheriff’s Department, had no claim based on sex or disability, but, on appeal, the Commission reversed as to the claim of sex discrimination. The administrative law judge concluded that transsexuality was not a disability under the Florida Civil Rights Act because it is not within the purview of the ADA or the Rehabilitation Act. The judge limited the holding in *Smith v. Jacksonville Correctional Institution*,¹⁶⁰ defining “disability” according to whether or not the employee had undergone sex reassignment surgery (Smith had not, while Fishbaugh had). As to the sex discrimination claim, the administrative law judge found that she was unable to claim sex discrimination because the employee had been discriminated against because she was transsexual, not because she was a woman, and that gender identity receives no protection under the Florida Civil Rights Act. On appeal, the Commission panel held that the employee

¹⁵⁸ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

¹⁵⁹ E-mail from Ming Wong, Nat’l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

¹⁶⁰ See *Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991).

could bring a claim for sex discrimination because she was “perceived not to conform to sex stereotypes or because [she] has changed sex”.¹⁶¹

- In 2004, a gay officer with the Tampa Police Department experienced harassment and was terminated when he disclosed his sexual orientation to his supervisors. He was also arrested for lewd and lascivious conduct for informing street youth about “safer sex.”¹⁶²
- In 2004, a Sarasota public school teacher who had agreed to let students use her classroom for “Gay-Straight Alliance” meetings was harassed by other teachers to such an extent that she felt she had to leave. After she resigned, the school refused to give her a positive recommendation.¹⁶³
- In 2004, a Department of Corrections employee was compelled to resign by his supervisors when they discovered that he occasionally wore women’s clothes outside the office.¹⁶⁴
- In 2003, a transgender employee of the Pasco County Sheriff’s Department reported instances of harassment to her supervisors, who allegedly forced her to resign. Co-workers intentionally used the “wrong” pronoun when she was out on patrol, hence outing her to officers on the receiving end of police calls. She com-

¹⁶¹ *Fishbaugh v. Brevard County Sheriff’s Dep’t*, Fla. Comm’n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).

¹⁶² E-mail from Ming Wong, Nat’l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

plained to superiors, but the conduct continued. When co-workers started a rumor that she had posed topless online, she resigned.¹⁶⁵

- In 2002, an applicant for a Florida nursing license was denied because of his sexual orientation. The applicant had already procured a nursing license in Indiana.¹⁶⁶
- In 2002, a transgender public school employee experienced harassment by co-workers and superiors; she was called a “thing,” and was taunted about which bathroom she should be permitted to use.¹⁶⁷
- In 2002, an openly lesbian firefighter was repeatedly passed over for promotion in favor of less-qualified employees. She was eventually fired for “low test scores,” even though her scores were consistently superior to those of other officers.¹⁶⁸
- In 2002, a gay firefighter reported that he had been harassed when colleagues found his personal ad online and circulated it around the office. The firefighter’s supervisor “wrote him up” for infractions which he later admitted were frivolous.¹⁶⁹
- In 2002, a gay firefighter reported that he was discriminated against after disclosing his sexual orientation at work. Before he had disclosed his sexual orientation, the firefighter received excellent assessments and was, in fact, promoted. After he revealed his sexual orientation, however, he was told to either resign or accept a

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

demotion. The firefighter accepted the demotion in an effort to retain his retirement benefits.¹⁷⁰

- In 2001, an employee of the Florida Department of Agriculture reported that he had been the target of virulently anti-gay comments from a colleague. When he complained, he was reprimanded and told to drop the complaint. The employee refused and was terminated shortly thereafter.¹⁷¹
- In 2001, a supervisor at the Florida Department of Health said he would try to “rid” the department of gays. When an employee complained, the employee was reprimanded and eventually terminated after enduring an extended period of workplace harassment.¹⁷²
- In 2001, employees in two separate state agencies – the Department of Agriculture and the Department of Health – were fired after complaining of anti-gay harassment.¹⁷³
- In 2001, a transgender city public works department supervisor was fired on account of her gender identity.¹⁷⁴
- In 2001, a city government employee was forced to resign when superiors learned the employee enjoyed dressing in women’s clothes outside the office and threatened to publicly disclose such discovery.¹⁷⁵

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

- In 2000, a lesbian firefighter was subjected to a hostile work environment on account of her sexual orientation.¹⁷⁶
- In 1996, an employee of a county clerk's office was fired because of his sexual orientation.¹⁷⁷
- In a book published in 1996, Pete Zecchini, a gay man, described his experience as a Miami Beach police officer as "miserable." When Zecchini inquired as to why his cases had been reassigned and his work schedule had been rearranged, his supervisor told Zecchini it was because of his homosexuality. When Zecchini complained to his chief about this supervisor, the supervisor flatly denied saying any such thing. At shooting practice, Zecchini overheard his coworkers saying, "faggot this," "faggot that," and "Miami Beach is turning into a bunch of faggots." Zecchini alleged that he was the only officer on the force denied a pay raise for using too many sick days.¹⁷⁸
- In 1994, a U.S. District Court jury in Florida decided that the Sunrise, Florida, Police Department unlawfully discriminated against Darren Lupo, an unmarried lesbian patrolwoman, by requiring that she work a Christmas shift in place of a married policeman with children, but rejected her broader claim of a pattern of dis-

¹⁷⁵ E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

¹⁷⁶ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

¹⁷⁷ *Id.*

¹⁷⁸ ROBIN A. BUHRKE, *A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT* 102-106 (Routledge 1996).

crimination based on her sex and sexual orientation. The jury awarded \$56,250 in compensatory damages.¹⁷⁹

- In 1992, an administrative hearing officer ordered reinstatement and back pay for a second grade teacher who had been fired because he had allegedly committed a crime involving moral turpitude. The teacher had been charged with battery for touching an undercover officer's clothing while flirting with the officer. The school became aware of the incident when an account of the arrest was published in the newspaper. The Hearing Officer noted that "for the most part, the negative comments about Mr. Madison involved not the criminal charge, but the homosexual nature of the event" and concluded that the school had impermissibly discriminated against him based on his lifestyle.¹⁸⁰
- A deputy sheriff brought suit in 1992 after he was constructively terminated because of his sexual orientation. In the first portion of a bifurcated trial, the jury found that the sheriff was constructively terminated because he was gay. The court then found that the termination violated his constitutional right to privacy and, applying heightened scrutiny because of the plaintiff's sexual orientation, the Equal Protection Clause. The court found that the constructive termination violated the deputy sheriff's constitutional rights.¹⁸¹
- In 1991, an administrative judge held that a pre-operative female transsexual, who had been fired from her job as a corrections officer, could bring a claim against

¹⁷⁹ LESBIAN AND GAY L. NOTES (Oct. 1994) (citing FT. LAUDERDALE SUN-SENTINEL, Sept. 5 1994).

¹⁸⁰ *Sch. Bd. of Escambia County v. Madison*, 1992 Fla. Div. Adm. Hear. LEXIS 6879 (1992).

¹⁸¹ *Woodard v. Gallagher*, 59 Emp. Prac. Dec. (CCH) ¶ 41, 652, 1992 WL 252279 (Fla. Cir. Ct. 1992).

her employer, the City of Jacksonville, based on disability discrimination. The plaintiff had found it necessary to conceal her gender identity in order to keep her job and suffered from severe physical reactions as a result. One night, while dressed in women's clothes, she was assisted by a passing patrolman when she stopped to change a tire on the side of the road. The patrolman ran a report on her driver's license and discovered that she was classified as a male. Thereafter, when the incident was relayed to her supervisors, she approached her supervisors to tell them that she planned to transition. When she refused to resign at their insistence, they terminated her. At the administrative hearing, the city asserted a BFOQ defense with the stated qualification being "absence of transsexuality." In rejecting the argument, the hearing officer stated, "Simply put, prejudice cannot be a basis for a BFOQ."¹⁸²

- A deputy sheriff was fired after her boss learned that she was lesbian. She lost her case challenging the dismissal when the court ruled that "in the context of law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end."¹⁸³
- A lawyer was denied admission to the Florida Bar after he disclosed that the Military Selective Service assigned him to a classification indicating "physical problem or homosexuality." The Bar pressed the lawyer for details about his past sexual conduct, and though he said he preferred men, he declined to provide more detail. The Florida Supreme Court held that the Florida Board of Bar Examiners

¹⁸² *Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991).

¹⁸³ *Todd v. Navarro*, 698 F. Supp. 871 (S.D. Fla. 1988).

should be limited to inquiries which bear a rational relationship to an applicant's fitness to practice law, stating that "private noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law."¹⁸⁴

10. Georgia

- A Legislative Editor for the Georgia General Assembly's Office of Legislative Counsel was fired after she was diagnosed with Gender Identity Disorder and began appearing (upon a doctor's orders) at work as a woman prior to undergoing gender reassignment surgery. Since 2005, she had been responsible for editing proposed legislation and resolutions for the Georgia Assembly. In 2009, in rejecting the state's motion to dismiss, a U.S. District Court ruled that the editor's complaint "clearly states a claim for denial of equal protection" under the 14th Amendment on alternative theories of discrimination on the basis of sex and a medical condition.¹⁸⁵ The court summarized the grounds for termination as, "In the view of Glenn's employers, gender transition surgery and presentation as a woman in the workplace would be seen as immoral... and would make other employees uncomfortable."¹⁸⁶ The court the held that "Unequal treatment fails even the most deferential equal protection review when the disadvantage imposed is born of animosity toward the class of persons affected," quoting the Supreme Court's opinion in *Romer v. Evans*^{187 188}.

¹⁸⁴ *Fla Bd. of Bar Exam'rs Re N.R.S.*, 403 So.2d 1315 (Fla. 1981).

¹⁸⁵ *Glenn v. Brumby*, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009).

¹⁸⁶ *Id.*

¹⁸⁷ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁸⁸ *Glenn*, 2009 U.S. Dist. LEXIS 54768.

- In February, 2009, an openly gay University of Georgia, Athens, professor was accused by two Georgia state representatives of recruiting “young teenage gays” to accompany him on international trips, despite the fact that he is not involved with study abroad programs and teaches graduate level classes. The professor was cleared of any misconduct after an investigation. The state representatives also said they would pressure the University of Georgia in Athens, Georgia State University, and Kennesaw State University to terminate any professors who teach “queer theory” courses. The University of Georgia defended its course offerings and the professors. The legislators also called three other professors into the State Senate to defend their research on sexuality and the outbreak of HIV and AIDS.¹⁸⁹
- A Georgia Division of Family and Child Services (DFCS) employee who reported in 2006 that after other employees complained about working with her because she was a lesbian, she was subjected to a humiliating and invasive four-hour interrogation during which she was asked if she was a lesbian, who looked after her children, who she lived with and who her friends were. She was then told not to tell anybody else about what happened during the interview. Two weeks later DFCS suspended her for “alleged misconduct.”¹⁹⁰
- In 2006, five years after a bus driver was hired by public school district in McDonough, Georgia, a co-worker found a personal ad he had posted six years earlier on a gay dating site. The co-worker printed the ad and distributed it at one of the

¹⁸⁹ *Pulpit Power: Does the Religious Right Still Control Georgia?*, SOUTHERN VOICE, Mar. 13, 2009; *Georgia Lawmakers Clash Over Queer Theory, Academic Freedom*, SOUTHERN VOICE, Feb. 11, 2009; *Sex Research Puts University of Georgia Professors in Hot Seat*, DIGITAL J., Febr. 23, 2009; *Professor cleared of allegations*, RED & BLACK, Feb. 17, 2009.

¹⁹⁰ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

high schools in the district. Immediately after the posting was passed around, he was fired. When he asked for a reason, school officials told him it was “in the best interests of the school system” and that he already “knew the answer.” He made a complaint to the Board of Education, but received no response. He has not been able to get another job at a school in the area since.¹⁹¹

- In 2005, a woman applied for a job as a Disease Investigator with the Fulton County Health Department. When she applied for the job, she was using a male name, but by the time they called her back, she had transitioned and had legally changed her name. The first month went well, but the supervisor at the department was showing increasing discomfort with her transition. He began to make her work life miserable and he forbade her from using the female restroom. Belcher complained to Human Resources, but they did nothing except repeat her complaint to the supervisor without her consent. In February 2006, she was fired without cause and replaced by an untrained and under-qualified employee. Without her job, she was unable to take care of herself and her children financially.¹⁹²
- An attorney, prior to the Supreme Court’s decision in *Lawrence v. Texas*, had her offer of employment withdrawn from the Georgia Attorney General’s Office after she had participated in a wedding ceremony, recognized by her congregation, with her same-sex partner. The Attorney General withdrew the employment offer after concluding that the attorney’s participation in the ceremony would interfere with the Department’s ability to enforce Georgia’s sodomy law, and in general, create

¹⁹¹ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

¹⁹² *Id.*

difficulties maintaining a supportive working relationship among the office lawyers. In 1997, the Eleventh Circuit upheld a district court decision allowing the Georgia Attorney General to withdraw the offer of employment with three judges dissenting from the majority en banc decision.¹⁹³

11. Hawaii

- When an openly gay teacher at the Nanakuli High and Intermediate School complained to the administration about harassment and homophobic gossip by students, the principal responded by barring him from tutoring students after class and forcing him to remove decorations and books not directly related to coursework from his classroom. Other students at the school circulated a petition “calling for an end to the discriminatory atmosphere on campus” and other teachers at the school agreed that he was being discriminated against on the basis of his sexual orientation.¹⁹⁴ In Hawai'i public school teachers are state employees.

12. Idaho

- In 1997, a Power County Probation Department employee was fired immediately after supervisors discovered her sexual orientation. She had been employed by the county for six months prior to her termination and had disclosed her sexual orientation only to one trusted co-worker. Two days prior to her termination, while accompanied off-duty by her female partner, she ran into a co-worker in a store. She introduced the co-worker to the woman as her partner. Following the

¹⁹³ *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

¹⁹⁴ Leland Kim, *Nanakuli Students Rally Around an Openly-Gay Teacher*, KHNL NBC 8 HONOLULU (n.d.) available at <http://www.khnl.com/Global/story.asp?S=7230012> (last visited Sept. 17, 2009).

interaction, three Power County Commissioners confronted her, telling her that they were “unhappy” and that she “could either quit or be fired.” The officer refused to quit, and the Commissioners fired her.¹⁹⁵

13. Illinois

- In 2008, a fire department paramedic reported that he had experienced harassment based on his sexual orientation. Co-workers made comments such as, “I wish all fags would die of AIDS.” The fire chief said to him: “I want to give you some advice. You need to tone it down a bit.” When the paramedic asked if he was being too loud, or if the chief meant he should “gay it down” and the chief responded, “I can't say that, but I'm going to tell you to tone it down.” The chief added, “[a]ny other chief would find you unfit for duty” and told the paramedic to “change the way you are.” In addition, the paramedic’s bedding was removed from the firehouse sleeping quarters and his car window was broken in the department’s parking lot. The harassment became so bad that he would sleep in the ambulance during his downtime to avoid his co-workers. He believed that he was being set up for termination through an investigation of a false positive drug test that would not have been handled as it was if he were not gay.¹⁹⁶
- In 2008, a public school teacher reported that he was repeatedly harassed at work because he was perceived to be gay. Students wrote on the tables in his classroom that “[teacher’s name] is a fag” and included similar derogatory phrases in text-

¹⁹⁵ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

¹⁹⁶ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

books in his class, among other things. The teacher made complaints to the administration about this harassment, but received no response. The teacher is perceived to be gay but is heterosexual.¹⁹⁷

- In 2008, a gay professor at an Illinois community college was subjected to a hostile environment because of his sexual orientation.¹⁹⁸
- In 2008, a lesbian public school teacher was subjected to a hostile environment because of her sexual orientation.¹⁹⁹
- In 2007, a corrections officer reported that he was being harassed at work based on his sexual orientation. A fellow officer repeatedly referred to him as a “motherfuckin’ faggot” in front of other officers and inmates. The officer who did this was not suspended, even though two employees who had used the “N-word” around the same time had been immediately terminated. After the corrections officer commenced a union grievance, shift commanders told him to “leave it alone” and warned him that he was “playing with fire.” Thereafter, even though he was qualified for a promotion, the position was awarded to a heterosexual candidate from outside of the department with much less experience than he had. The corrections officer eventually resigned because of the harassment.²⁰⁰

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

- In 2007, a transgender city agency chief naturalist was fired because of her gender identity.²⁰¹
- An employee of the Illinois Gaming Board alleged that he was denied a promotion in 2004 because of his sexual orientation, thereby depriving him of his federally protected right to equal protection.²⁰² The plaintiff never disclosed his sexual orientation at work, and no one at work ever asked about it, but plaintiff cited several incidents which formed the basis of his belief that his employers were aware of his sexual orientation. In one incident, he had a conversation with a co-worker in which he asked if the co-worker knew whether shoes thrown over a telephone line outside a house meant that drugs were sold there, to which the co-worker responded: “I don’t know. Do you know what a rainbow flag mean [sic] when it’s on a bar window? ... That means it’s a gay bar.” Finally, a co-worker referred to an openly gay actor from Star Trek as a “faggot.” In another incident, a co-worker cut out an article in which a homosexual police applicant received a job, and wrote on the top of the article that the “good guys” were not going to get the job – implying that only homosexuals would receive consideration because of their sexual orientation. Further, he overheard someone saying, “Don’t worry, help is on the way,” which he interpreted as meaning he would soon be replaced. When applications were taken to fill the permanent position, another applicant was chosen, and plaintiff alleged that due to his sexual orientation, his competitor

²⁰¹ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

²⁰² *Hamlin v. Tigera*, 2008 U.S. Dist. LEXIS 3926 (C.D. ILL 2008).

was “pushed through.” The court denied relief on the ground that plaintiff had failed to establish that his homosexual orientation was known.

- A gay male administrator sued the Suburban Bus Division of the Regional Transportation Authority, claiming that he was subjected to adverse employment actions and hostile work environment due to his sexual orientation.²⁰³ The court found that the evidence of homophobic comments and jokes was insufficient to avoid summary judgment, because it failed to show harassment that is sufficiently severe or pervasive. “First, the comments were few, and very far between. Paquet claims that there were between 18 and 36 total instances in which an offensive joke or comment was uttered, over the course of approximately twelve years. . . . More importantly, none of the jokes or comments were ever directed at Paquet personally.” The court also found that plaintiff was not retaliated against, in violation of his First Amendment rights, when efforts were made to remove him from training session after he asked leader to comment on applicability to homosexuals of a city anti-discrimination ordinance.
- A former probationary city police officer brought action against the superintendent of the Chicago Police Department under the Illinois Human Rights Act and Chicago’s human rights ordinance, alleging, among other claims, discrimination on the basis of sexual orientation.²⁰⁴ Flynn was terminated after four days during the probationary period following his being hired as a police officer. The state circuit court granted the city’s motion to dismiss. With regard to the claims re-

²⁰³ *Paquet v. Pace*, 156 F.Supp.2d 761 (N.D. Ill. 2001).

²⁰⁴ *Flynn v. Hillard*, 303 Ill.App.3d 119 (1999).

lated to sexual orientation, the appellate court affirmed the judgment on the basis that Chicago's Commission on Human Relations had exclusive jurisdiction over claims arising under the ordinance, and Flynn failed to exhaust his remedies under the ordinance before bringing the claim to the circuit court. Furthermore, the appellate court concluded that because nothing in the Human Rights Act at that time prohibited discrimination based on sexual orientation, the court lacked jurisdiction over that claim.

- Two 16-year-old twin brothers who were subject to “a relentless campaign of harassment by their male co-workers,” sued a city as their employer, alleging intentional sex discrimination.²⁰⁵ Although the district court granted summary judgment in favor of the defendants, holding that victims of same-sex sexual harassment may not claim discrimination because of sex under Title VII, the Seventh Circuit reached the opposite conclusion. The plaintiffs alleged that their harassment included being called “queer” and “fag,” comments such as, “[a]re you a boy or a girl?” and talk of “being taken ‘out to the woods’” for sexual purposes. One plaintiff wore an earring and was subject to more ridicule than his brother, the second plaintiff, who was overweight and was once asked whether his brother had passed a case of poison ivy to him through anal intercourse. The verbal taunting turned physical when a co-worker grabbed one of the plaintiffs’ genitals to determine “if he was a girl or a boy.” When the plaintiffs failed to return to work, supervisors terminated their employment. The Seventh Circuit noted that “a homophobic epithet like ‘fag,’ ... may be as much of a disparagement of a man’s per-

²⁰⁵ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

ceived effeminate qualities as it is of his perceived sexual orientation.” The court found that a “because of” nexus between the allegedly proscribed conduct and the victim’s gender could be inferred “from the harassers’ evident belief that in wearing an earring, [the brother] did not conform to male standards.” The U.S. Supreme Court vacated and remanded to the Seventh Circuit for further consideration in light of *Oncale v. Sundowner Offshore Services*²⁰⁶.²⁰⁷

- James Shermer, an employee of the Illinois Department of Transportation, asserted that he had been subjected to sexually offensive remarks by his male supervisor, who perceived him as gay and ridiculed him for having sex with other men.²⁰⁸ (Shermer did not state for the record whether he was in fact gay.) Shermer sued under Title VII, alleging sexual harassment that had the effect of creating a hostile environment. The court ruled for defendant, finding that “all the evidence suggests Plaintiff was harassed not because of his gender but because of his sexual orientation....[D]iscrimination based on sexual orientation, real or perceived, however, is simply not actionable under Title VII.”
- Jeffrey Cash, a nurse’s aide in the Murray Development Center, a home for developmentally disabled people in Centralia, Illinois, sued the state agency for discrimination suffered because he was perceived to be gay. In the summer of 1995, plaintiff invited a fellow employee, Donny Hodge, for a Saturday fishing trip on his boat. They spent the day fishing then returned to Hodge's house. Since Cash's

²⁰⁶ *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

²⁰⁷ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

²⁰⁸ *Shermer v. Illinois Department of Transportation*, 937 F.Supp. 781 (C.D.Ill.,1996)

wife and children were away visiting grandparents for the weekend, Hodge invited Cash to stay overnight, and they continued their fishing trip on Sunday. Hodge is an openly gay man, and was known as being gay in their workplace. Cash began to take flak from a group of female co-workers about his perceived failure to emerge from the closet and embrace his homosexuality. Cash's tormentors made the next year of his life at work miserable. They laughed at Cash while simulating fellatio or male masturbation, called him a "he/she" or "the evil one," and bared their breasts and shook them at him while laughing. One woman even rubbed her bare breasts against Cash's arm following a union meeting. Over time, Cash became short-tempered, paranoid, and depressed. He eventually sought psychiatric counseling, which both he and his therapists say stemmed from his stressful working conditions. The court rejected plaintiff's hostile environment claim, finding that the harassment was insufficiently pervasive to state a Title VII claim, and that it was not directed at Cash "because of" sex.²⁰⁹

14. Indiana

- A gay special education aide in the Clark County Schools was hounded out of his job after teenage boys who crashed his Halloween party alleged that he tried to molest them. The aide sued the school district and various named defendants on various constitutional and tort theories, including defamation per se and intentional infliction of emotional distress. Ruling on various pretrial defense motions, the

²⁰⁹ *Cash v. Ill. Div. of Mental Health*, 209 F.3d 695 (7th Cir. 2000).

court rejected his per se defamation claim but allowed the rest of his claims to proceed.²¹⁰

- The State of Indiana denied employee Jana Cornell's request for bereavement leave so she could attend the funeral of her partner's father. Cornell sued the state arguing that the exclusion of same-sex partners from the bereavement leave policy violated the state constitution's protection of equality. Her claim was rejected on the ground that the discrimination was based on marriage rather than sexual orientation.²¹¹
- In 2000, an openly lesbian probation officer was not promoted by her employers, two Carroll County judges, because of her sexual orientation. The judges together decided against promoting her to chief probation officer. The officer requested the job and the superior court judge told her that they would not promote her because she was a lesbian. Further, the superior court judge told her that she was embarrassing the court by dating a woman, and that he had asked other court employees about her sexual orientation and personal life. A man with no prior probation experience was promoted to the position.²¹²

²¹⁰ *Badger v. Greater Clark County Schools*, 2005 WL 645152 (S.D. Indiana Feb 15, 2005).

²¹¹ *Cornell v. Hamilton*, 791 N.E.2d 214 (Ind. App. 2003).

²¹² PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 179 (2000 ed.).

- From 1997 through 2000, a gay public school principal and a gay public school teacher were subjected to a hostile work environment on account of their sexual orientation.²¹³

15. Iowa

- A veteran of the Iowa National Guard was fired by an Iowa state university in 2002 after she informed her superiors that she was a transitioning.²¹⁴ Her supervisor, a surgeon for whom she conducted research, stopped coming to the lab after she told him about her plan to transition and her department administrator told her that her condition was such that they didn't feel that she "could give sufficient effort to the department."²¹⁵ She was fired on the spot.²¹⁶ Although she reported the firing to the university's affirmative action office, it did not order that she be reinstated and instead only suggested that she seek employment in a different department of the university.²¹⁷ After her efforts to do so failed, she ultimately left Iowa altogether.²¹⁸
- An employee of a state-operated casino in Council Bluffs whose employers did not take appropriate action to stem rumors that she was a lesbian, subjected her to

²¹³ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

²¹⁴ DEBORAH J. VAGINS, *WORKING IN THE SHADOWS* 19 (2007); *see also* HEARING BEFORE THE S. COMM. ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS, 110th Cong. (2008) (statement of Shannon Miller, Legal Director for the Nat. Center for Lesbian Rights).

²¹⁵ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

²¹⁶ *Id.*

²¹⁷ DEBORAH J. VAGINS, *WORKING IN THE SHADOWS* 19 (2007); *see also* HEARING BEFORE THE S. COMM. ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS, 110th Cong. (2008) (statement of Shannon Miller, Legal Director for the Nat. Center for Lesbian Rights).

²¹⁸ *Id.*

harassment and emotional distress, and ultimately retaliated against her for complaining by denying her a promotion.²¹⁹ In 2000, she was awarded \$54,493 by a federal district court jury.

- A worker at a tax-supported nursing home in Davenport was fired in 1996 because his employer wanted to “weed[] out employees who lack good moral character,” including gay men and lesbians who he said were “not part of the Bible” and “not part of society.” In an interview, the nursing home administrator commented, “When I first came here, there [were] probably at least three, excuse my French, faggots working here, and I had at least three dykes working here This isn’t the kind of atmosphere that I want to project when a client or family member comes to my nurses’ station and sees a 45-year-old-faggot that has got better skin than you and I, and is a man but presents itself more like a woman. This is no way to perceive my operation.”²²⁰ The state of Iowa did not take any action against the nursing home for this action.²²¹

16. Kansas

- 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

²¹⁹ *Montagne v. Iowa* (D. Iowa, Oct. 25, 2000).

²²⁰ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 64-65 (1997 ed.).

²²¹ See Cedar Rapids Gay & Lesbian Resource Center, <http://www.crglrc.org/aboutus.php> (last visited Sept. 4, 2009).

supervisor constantly criticized his work. The employee then found the state discrimination office to be unreceptive to his complaint.²²²

- 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.²²³
- 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."

²²² 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").

²²³ 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>.

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."²²⁴

- 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 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.²²⁵ 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.

²²⁴*Miller v. Brungardt*, 916 F.Supp. 1096 (D. Kan. 1996).

²²⁵*Wible v. Widnall*, 1998 U.S. Dist. LEXIS 7541 (D. Kan. 1998)

- In 1991, in *Jantz v. Muci*,²²⁶ a federal district court in Kansas found that a Kansas school teacher did have an equal protection claim actionable under 42 U.S.C. § 1983²²⁷ because he had been denied a teaching position because of a principal's perception that he had "homosexual tendencies."²²⁸ The court further held that the principal was not entitled to a qualified immunity defense²²⁹ and denied his motion for summary judgment. The Tenth Circuit reversed, finding that the principal was entitled to qualified immunity.²³⁰
- In 1987, in *In re Smith*,²³¹ 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 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.

²²⁶ 759 F. Supp. 1543 (D. Kan. 1991).

²²⁷ *Id.*

²²⁸ *Id.* at 1545.

²²⁹ *Id.* at 1552.

²³⁰ 976 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).

²³¹ 757 P.2d 324 (Kan. 1988).

These are legitimate concerns and they provide sufficient justification for the action taken against the plaintiff.”²³²

17. Kentucky

- In 2008, a gay public school administrator and a bisexual public school administrator reported being subjected to a hostile work environment and denied job-related travel funding on account of their sexual orientation.²³³

18. Louisiana

- In 2006, a gay man was hired as a faculty member and coordinator of the 4-H Program at Louisiana State University. He implemented successful youth programs in his position, was promoted in 2007, and received a Distinguished Service Award. At the meeting during a camp event supervised by the faculty member, the Human Resources Manager told him that the school had received an anonymous letter saying that the faculty member had a personal ad on a gay dating website. The faculty member was immediately put on administrative leave without even the opportunity to collect his belongings from the campsite—because he “could not interact with the youth anymore.” He refused to quit so he was demoted from his supervisory position and all youth programs were taken away from him. His contract was not renewed for the 2009-2010 school year.²³⁴

²³² *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 1987).

²³³ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

²³⁴ *Id.*

- In 2004, a lesbian bus driver for the Monroe School District reported that she had faced harassment for gender non-conformity and sexual orientation. She complained about the adverse treatment, but her grievance was deemed invalid.²³⁵
- A tenured teacher and coach for women's sports at Oak Hill High School was fired on suspicion of being a lesbian. The teacher was suspected of having an inappropriate relationship with a student, who was actually her cousin's daughter with whom she had a close familial relationship. After being discharged on a 5-4 vote, the teacher filed suit and the trial judge found in her favor. The appeals court affirmed the trial court's decision, finding that the charges against her "are replete with insinuations and innuendos" and "the Board's case is seriously lacking in evidence, much less the 'substantial evidence' required to support the Board's actions. The court concluded that the School Board's decision "was arbitrary and an abuse of discretion," and assessed the School Board the full costs of the appeal."²³⁶

19. Maine

- A gay African-American male employee of the University of Maine, Augusta, reported in 2008 being called a "fagball" and "niggerball" and addressed in other demeaning ways by his immediate supervisor, a department dean. The employee filed a grievance with his head supervisor.²³⁷

²³⁵ E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

²³⁶ *Holt v. Rapides Parish Sch. Bd.*, 1996 WL 709720 (La. Ct. App. Dec. 11, 1996).

²³⁷ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment

- A gay firefighter in 2008 reported that he had been harassed by his coworkers when his sexual orientation was disclosed at work. He was "outed" and then his coworkers made offensive and hostile comments. He met with department heads and expressed his discomfort several times, but allegedly the job environment has not changed.²³⁸
- In 2007, a gay employee of the Maine Department of Corrections reported that he had experienced harassment and discrimination based on his sexual orientation at work, causing him to go on medical leave. The employee reported that inmates treated him badly because of his perceived sexual orientation and that his supervisors did nothing to address this harassment. He filed a complaint with the Maine Human Rights Commission and was successful in his case.²³⁹
- The head coach of a high school varsity softball team alleges that in 2006 she was not rehired after twelve successful years of coaching because of her sexual orientation. In 2009, the Supreme Judicial Court of Maine reversed a lower court's grant of summary judgment for the defendant school district and superintendent, and remanded the case for trial.²⁴⁰
- In 2006, a staff member at a county recycling center reported being denied bereavement leave when her same-sex partner's father passed away. She knew that heterosexual coworkers, whose unmarried partner's relatives have passed away,

Discrimination (Apr. 11, 2008) (on file with GLAD).

²³⁸ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 19, 2008) (on file with GLAD).

²³⁹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Oct. 31, 2007) (on file with GLAD)

²⁴⁰ Lesbian & Gay L. Notes (Summer 2009); *Cookson v. Brewer School District*, 2009 WL 1532949 (Me. June 2, 2009).

had been able to use bereavement time. For example, a coworker was permitted to take bereavement leave for the death of his girlfriend's father.²⁴¹

- A gay police officer in Maine reported in 2002 that he was being harassed at work based on his sexual orientation. He was called a "fudgepacker" and a "faggot" by his coworkers.²⁴²

20. Maryland

- A correctional officer in a state prison alleged that she was harassed in the workplace by her co-officers, including being subjected to lewd comments, pornography, and sexual advances, and comments that all short haired female guards were lesbians. Her supervisor and co-workers regularly made comments regarding her own and other officers' sexual conduct, her appearance, the female anatomy, the unfitness of women to serve as police officers, the presumed lesbianism of female officers, prostitution, and other inappropriate sexual references and behaviors. In 2003, the officer was forced to work under a supervisor who demeaned her and ordered her and another female officer to shower together with "soap on a rope."²⁴³ In dismissing her complaint against individual defendants in 2005, a United States District court stated that while unpleasant, the stereotyping comments were an example of "the sporadic use of abusive language, gender-related

²⁴¹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Apr. 5, 2007) (on file with GLAD).

²⁴² GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (May 16, 2002) (on file with GLAD).

²⁴³ Complaint at 17, 18, 20, 26 & 30, *Ensko v. Howard County*, 423 F. Supp.2d 502 (D. Md. 2005) (No. 04 Civ. 03464).

jokes, and occasional teasing” that did not rise to the level of a Title VII action.²⁴⁴

The court allowed her Title VII hostile environment claim against the county to proceed.²⁴⁵

- When the Maryland sodomy law was overturned in *Williams v. Glendening*, four of the plaintiffs who brought the suit were members of the Maryland bar, including one who wanted to be a judge.²⁴⁶ For those plaintiffs, loss of state licensure was a real concern.²⁴⁷ The court noted this effect of the law, and relied on the legitimacy of these fears as the basis for the plaintiffs’ standing: “Since many of the plaintiffs are lawyers, they express anxiety that a conviction might jeopardize their licenses to practice law and thereby their means of earning a livelihood. . . . This court cannot say that the concerns of these plaintiffs are not real.”²⁴⁸ On the basis of these fears, the court held that “the Plaintiffs’ concerns are real and that a justiciable issue, ripe for resolution, is presented.”²⁴⁹
- In 1994, three female state police trooper candidates were not hired as state troopers because of alleged inconsistencies in their polygraph examination questions concerning sexual orientation.²⁵⁰ Two of the officers had previously filed a complaint in state court requesting injunctive and declaratory relief for sexual orientation discrimination while they were at the Maryland State Police Academy. They

²⁴⁴ *Ensko v. Howard County*, 2005 U.S. Dist. LEXIS 37602, at *12 (N.D. Md. 2005) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

²⁴⁵ *Id.* at *8.

²⁴⁶ No. 9803 6031, 1998 WL 965992, at *1 (Md. Cir. Ct.).

²⁴⁷ *Id.* at *1 (“Since all are members of the Maryland Bar, they contend that a conviction would affect their ability to continue to practice law.”).

²⁴⁸ *Id.* at *5.

²⁴⁹ *Id.*

²⁵⁰ GAY & LESBIAN L. NOTES (Dec. 1995), available at <http://www.qrd.org/qrd/usa/legal/lgl/1995/12.95>.

claimed their treatment at the Academy violated the Maryland Declaration of Rights, the equal protection clause, the due process clause, and a Governor's Executive Order banning sexual orientation discrimination by the state government. The state settled with the two women, agreeing to the injunctive relief requested and offering the positions sought. They then successfully completed their training at the Academy, but were then denied positions as state troopers, along with a third lesbian candidate.

- An inmate at a Maryland state prison alleged that he was denied a position in the prison's education department because a guard told the head of that department that he was gay and a rapist. Twice the 4th Circuit reversed dismissals of his case by a United States District Court. The first time the Court determined that the inmate had alleged facts constituting a potentially cognizable equal protection claim. The second time the Court held that the inmate had not been presented with adequate notice about presenting his case de novo to the district court after it had been dismissed by a magistrate.²⁵¹

21. Massachusetts

- In 2009, worker at a state university for 26 years has been isolated from his fellow workers and he feels that his requests to remedy this have not been addressed because he is gay.²⁵²

²⁵¹ *Johnson v. Knable*, 934 F.2d 319 (4th Cir. 1991), 1988 WL 119136 (C.A.4 Md.).

²⁵² E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

- In 2009, a public school teacher reported that she was suspended four times due to her sexual orientation since 2003. She is the only “out” teacher in the district.²⁵³
- In 2008, a Massachusetts truck driver working for a town experienced harassment because she was a lesbian. People at work displayed pornographic images near her locker. She filed suit against the town for sexual orientation harassment and won a \$2.1 million lawsuit.²⁵⁴
- In 2008, a police officer working at a state university in Massachusetts for four years reported that during training, his drill instructor would yell, "Are you looking at me, boy? Do you like me? Are you a faggot?" After several of his coworkers became aware that the police officer was a gay man, he received phone calls at home from his coworkers, including one who called him and said, "I need a blow job" and then hung up. He eventually left the university for a job with a city police department.²⁵⁵
- In 2008, a married lesbian working for the Massachusetts State Trial Court reported that she was demoted and her pay was cut as a result of her recent marriage to a woman. The employee took time off of work for an illness with a doctor's note, but she was called by her union steward to notify her that she had been suspended and that proceedings were under way to fire her.²⁵⁶

²⁵³ *Id.*

²⁵⁴ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (June 13, 2008) (on file with GLAD).

²⁵⁵ *Id.* at 58-62.

²⁵⁶ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Jan. 24, 2008) (on file with GLAD).

- In 2007, a police officer from Massachusetts testified about his experience of discrimination at a U.S. House of Representatives hearing on ENDA. The officer testified that he lost two-and-a-half years of employment fighting to get his job back because he is gay. The officer realized soon after graduating the police academy that because he was gay, his safety as a police officer and his future as a public servant were seriously jeopardized. He worried that if he were killed in the line of duty there would be no one to tell his partner what happened to him and his partner would learn about it on the news. Because Massachusetts has an anti-discrimination law that protects against sexual orientation discrimination he was eventually able to get his job back.²⁵⁷
- In 2007, a Massachusetts deputy sheriff, who is gay, experienced two years of harassment by his chief. The chief threatened to suspend him if he continued "to see two guys at one time" because it looked bad for the department. The chief also "outed" him to his coworkers. Due to the harassment he suffered, the deputy sheriff suffered a mild heart attack, and was placed on sick leave. During that time, he was fired for abandonment of post.²⁵⁸
- In 2007, a lesbian staff member with the Massachusetts Department of Transitional Assistance applied four times for a promotion and was denied each time, despite having obtained additional training. The employee also received good eval-

²⁵⁷Transcript of Statement by Michael Carney Regarding H.R. 2015 (Employment Non-Discrimination Act of 2007), H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY, Sept. 5, 2007; Transcript of Statement by Mass. Rep. George Miller Regarding Mass. H.B. 13228 H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY, Sept. 5, 2007.

²⁵⁸ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (May 24, 2007) (on file with GLAD).

uations and received the Governor's Award for Outstanding Performance. She believed that she was denied advancement due to her sexual orientation. Another employee was, at the time the incident was reported, suing the department for discrimination based upon sexual orientation as well. That employee had already filed paperwork to start the complaint process.²⁵⁹

- In 2007, a public school teacher reported homophobic graffiti and harassment to her supervisor and then was harassed and terminated by the supervisor.²⁶⁰
- In 2007, a lesbian staff person working in a Massachusetts town's clerk office was fired after she and her partner filed a birth certificate, listing themselves as the parents of their child. She was made to feel incompetent and overworked, which resulted in her suffering a breakdown while at work. She was forced to sign a document indicating that she would not sue the town upon her termination.²⁶¹
- In 2006, the Appeals Court of Massachusetts affirmed a trial court decision awarding a Suffolk County House of Correction officer over \$620,000 in back pay and damages because his department failed to take adequate steps to remedy the harassment against him. The corrections officer had desired to keep his homosexuality private but a co-worker began spreading rumors, and he was thereafter shunned, harassed and subjected to lewd comments from co-workers. The harassment from his co-workers and supervisor included being called “fucking fag,”

²⁵⁹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Aug. 10, 2007) (on file with GLAD).

²⁶⁰ E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

²⁶¹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 20, 2007) (on file with GLAD).

and having children's toy blocks spelling "FAG" sent to his home.²⁶² Because of job-related stress, the officer attempted suicide by jumping off a bridge.²⁶³ After the suicide attempt, he went out on medical leave never to return to work.²⁶⁴ The superior court concluded that the plaintiff had been "subjected to unwelcome, severe, or pervasive conduct by the Defendant...based on sexual orientation that unreasonably interfered with the condition"²⁶⁵ of his employment. The court further found that the department knew or had reason to know of the hostile environment but failed to take adequate steps to remedy it.

- In 2005, while working at the Massachusetts Department of Social Services, a transgender man experienced discrimination in his workplace. He met with his superiors and a civil rights officer to assist in his transition (from female to male) while at work. Despite discussing a plan for his transition, such as training sessions with fellow employees and name changing procedures, no action has been taken by his workplace. His request to formally change his name has been put on hold, and he was not invited to participate in weekly meetings.²⁶⁶
- In 2005, an English teacher reported that he had been harassed almost on a daily basis by a group of students at the high school where he teaches. The students called him derogatory names, such as "faggot," left lewd notes, drawings, and pictures on his desk or bulletin board, and signed the teacher up for gay pornographic websites using his school email address. The teacher complained to the principal,

²⁶² *Salvi v. Suffolk County Sheriff's Dep't*, 67 Mass App 596 (Mass. App. Ct. 2006).

²⁶³ *Id.* at 597.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Apr. 20, 2005) (on file with GLAD).

who indicated that she would "handle it." However, after she had not addressed these issues, the teacher then sent a letter to the District Superintendent. Shortly thereafter, the teacher was notified that his position had been changed and that he was being terminated. The Superintendent told the teacher that in exchange for a signed agreement to not continue with any harassment complaints, she would offer him three weeks severance pay and allow him to collect unemployment benefits.²⁶⁷

- In 2005, a lesbian probation officer in the Suffolk County court system reported that she received a brochure in her work mailbox that touted a seminar discussing “cures for homosexuality” after she announced her marriage to her female partner. She and two other unmarried women in the department were the only employees to receive the brochure. Her union suggested that she contact the Commissioner of Probation. In response to her complaint, the Commissioner asked if she “expected the whole office to be turned upside down in order to find the culprit.” He then suggested that she take up her grievance with someone else.²⁶⁸
- In 2005, a Boston police officer, who is a lesbian, overheard and was the target of harassing comments and slurs. After verbally complaining to her supervisors about these comments, no action was taken.²⁶⁹

²⁶⁷ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 20, 2009) (on file with GLAD).

²⁶⁸ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Aug. 31, 2005) (on file with GLAD).

²⁶⁹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Oct. 13, 2005) (on file with GLAD).

- In 2005, a gay nurse working in a prison as an employee of the Massachusetts Sheriff's Department reported working in a hostile work environment. His co-workers gave him a Christmas present, which included fishnet stockings and obscene gay sex cards. He was given a bag of peanuts by a coworker and told, "Eat my nuts." When he complained, he was told that "this [was] the way prisons work" and that he shouldn't complain. He filed a complaint with the Massachusetts Commission Against Discrimination.²⁷⁰
- In 2005, a Massachusetts deputy sheriff, who is gay, reported being discriminated against after working for more than thirteen years in law enforcement. His co-workers began targeting him with "usual locker room homo talk." He was then excluded from meetings and his responsibilities were slowly taken away until finally, he was transferred to an inferior, nonsupervisory position. He was then terminated. He also reported that one other openly gay person, a lesbian, in the department was also forced out after her sexual orientation was disclosed. He reported that he was in settlement negotiations with the Sheriff's Department, but they broke down.²⁷¹
- In 2004, a lesbian teacher working in a Massachusetts public school reported that her contract was not renewed. The other lesbian teacher working at the school also did not have her contract renewed. When approached, the principal said that there were "differences in philosophies" and "overarching differences." The

²⁷⁰ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 21, 2005) (on file with GLAD).

²⁷¹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Oct. 13, 2005) (on file with GLAD).

teacher also claimed that several teachers had tried to start a gay-straight alliance at the school and had wanted to put up "safe zone" stickers, but they were told by the administration that they could not.²⁷²

- In 2004, a school psychologist working in a Massachusetts public school reported that despite positive performance reviews, his responsibilities were restricted as a result of his being gay. His office was moved and he no longer has any interactions with students. Administrators at the school told the psychologist that he should not tell students he is gay nor should he say that he is married (to a man). The principal also asked everyone to disclose their sexual orientations during a staff meeting. His union representative did not take any action and advised the psychologist to not take any further steps to address these issues.²⁷³
- In 2004, a staff member at the Massachusetts Department of Revenue reported being harassed by one of his co-workers because he was openly gay. This co-worker posted and distributed anti-gay news articles and made anti-gay remarks. The gay staff member complained to his supervisor about the harassment, but his supervisor took no steps to stop the harassment.²⁷⁴
- In 2003, a gay man, working for the Massachusetts Department of Revenue for nineteen years, reported that he had been sexually harassed at work. A supervisor called him "a loser" and a "fucking faggot" behind his back. After telling internal

²⁷² GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (May 27, 2004) (on file with GLAD).

²⁷³ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Aug. 13, 2004) (on file with GLAD).

²⁷⁴ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (July 28, 2004) (on file with GLAD).

affairs that he did not wish to work in the same space as this particular supervisor, he was asked to move to another location. He filed a formal complaint with internal affairs.²⁷⁵

- In 2003, a lesbian direct care worker for the Massachusetts Department of Social Services reported that she was one of seven lesbians fired at the same time. The employee filed a complaint with the Massachusetts Commission Against Discrimination.²⁷⁶
- In 2003, one year after a public high school teacher in Medford, Massachusetts was hired, the school became aware that he was gay. When his three-year tenure position expired two years later, he was terminated. The only reason given by the superintendent was that he “shouldn’t be known for [his] activities outside the classroom.” He brought the situation to the attention of his union, which told him that the “discrimination would be very difficult to prove.” Though the school eventually offered him tenure because of support from students and parents, school officials have continued to harass him. He has been in therapy since the incident because of the harassment he endures at work.²⁷⁷
- In 2003, a gay teacher working in a Massachusetts public school was forced to resign because of his sexual orientation. He was the target of several anti-gay remarks and vandalism. Someone keyed "Gay Faggot" into the paint of his car.

²⁷⁵ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Apr. 28, 2003) (on file with GLAD).

²⁷⁶ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Jan. 15, 2003) (on file with GLAD).

²⁷⁷ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

The teacher brought these incidents to the attention of the school administration, which did nothing. The union representing the teacher was also made aware of these incidents but did nothing. Even after leaving his job, the teacher continues to receive harassing phone calls.²⁷⁸

- In 2003, a facilities employee in a Massachusetts public school district experienced regular harassment by his coworkers because he is gay. One co-worker called the facilities worker a "faggot." He reported that other co-workers drank on the job and then threatened him physically. One coworker pushed him. This incident was caught on video, but the school district now claims that they cannot locate the tape. He started having panic attacks as a result of the harassment and, at the time the incident was reported, was on leave from work. He filed a complaint with the school district and his union, but neither had taken steps to stop the harassment.²⁷⁹
- In 2002, a sixteen year veteran of the Massachusetts Highway Department was harassed by his immediate supervisor, his boss, and several co-workers. They asked him several questions, including "Are you gay?," "Do you swing both ways?," and "If a girl strapped on a dildo, would that get you excited?" He was offered a lateral transfer, however the harassment continued. As a result of the ha-

²⁷⁸ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 6, 2003) (on file with GLAD).

²⁷⁹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (July 10, 2003) (on file with GLAD).

rassment, he was diagnosed with high blood pressure. He felt that he could not file a complaint with the union because his steward was one of the harassers.²⁸⁰

- In 2000, a lesbian working for a city department for sixteen years was harassed by one of her co-workers. The co-worker treated her differently than her co-workers and made comments including, "You just want to give me a hard time; you want a man; you want the forbidden fruit." She filed a grievance with her department and with the Massachusetts Commission Against Discrimination.²⁸¹
- In 2000, a Boston firefighter was awarded \$50,000 in damages by the Massachusetts Commission Against Discrimination for being harassed in the workplace, including being subjected to profanity and pornography and being taunted that "lesbians are not women."²⁸² Her co-workers also referred to her as "one way Wanda," referred to her female partner as "Pinky," and placed a picture of two women engaged in sexual relations in her sleeping bag.
- A book published in 1996 reports discrimination against and harassment of a prison kitchen guard working for the Massachusetts Department of Corrections. An employee began working for the Massachusetts Department of Corrections as a kitchen guard in 1990. His superiors and other officers began to harass him when he arrived to work with a pierced ear. The food service director ordered him to leave the earring at home, despite that it was not against the dress code and other

²⁸⁰ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Aug. 8, 2002) (on file with GLAD).

²⁸¹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (date unknown) (on file with GLAD).

²⁸² *Moore v. Boston Fire Dep't*, 22 MDLR 294 (2000).

officers wore them, saying, "I don't care what you do in private, being a fag or whatever, but you're going to leave it at home." Other officers made remarks about his taking a personal day to attend "the fag parade" and referred to his vitamins as "homo pills." One officer attached a picture of a woman's body with his face to his timecard. The employee recounts that homophobic banter quickly turned into severe harassment when one officer "was telling the inmates to whip their dicks out at [the employee]"-- the inmates complied. This practice was common in the kitchen, where inmates would lift their aprons to expose themselves to him when instructed to do so by another officer. When he reported the harassment to the food service director, he was accused of fondling the inmates. During a discussion of the 1992 presidential election, a lieutenant told him, "Perot doesn't like you fags," and proceeded to then grab his testicles in front of several other officers who all laughed along with the lieutenant. The lieutenant continued to grope him inappropriately thereafter. When he reported the lieutenant's behavior to the superintendent because he began to fear the inmates who no longer respected him, he was told that "this stuff happens all the time" and to "go back to work." Eventually he sought help from the Gay and Lesbian Alliance Against Defamation who confronted the superintendent. Some of the officers were then disciplined; others were not. Following an uninvestigated false accusation of harassment by an inmate after GLAAD's well publicized intervention, the superintendent attempted to transfer him involuntarily to Massachusetts Department of Corrections-Shirley— the facility "known for having a lot of gay people." The

employee refused to "be segregated" and then suffered a nervous breakdown as a result of the harassment.²⁸³

- A book published in 1994 records the story of a teacher in a Boston area high school who was discriminated against and harassed at work because he is gay. After appearing on the news while at a Boston Pride Parade, the teacher noticed that the students didn't react negatively, but some of his fellow teachers did. On the entrance to the women's restroom, someone wrote his name under the sign. A student told him that another teacher said that he was gay, asked why would anyone want to be in his class and shouted across the gym "If you take off your pants for [the teacher], he'll give you an A!" The teacher spoke with the principal of the school and said that he would be staying home from work until he could be assured a safe workplace. A hearing was arranged during which the teacher harassing him was represented by the teachers' union, whereas he had to represent himself. The teacher who harassed him was required to write a letter of apology and a negative review was placed in his file. His district also agreed to anti-homophobia training and issued anti-harassment guidelines.²⁸⁴
- In 1986, a professor who was a lesbian was hired as an assistant professor at the University of Massachusetts at Lowell. When she was hired, the dean acknowledged her credentials and accomplishments and promised to promote her within one year. But a student began threatening her life, carrying a gun onto the campus and saying the God had "ordained" him to "kill all homosexuals." Soon after-

²⁸³ ROBIN A. BUHRKE, *A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT* 156-159 (Routledge 1996).

²⁸⁴ ARTHUR LIPKIN, *ONE TEACHER IN TEN* 39-49 (Kevin Jennings ed., 1994).

wards, the university notified her that the school no longer needed her courses or her services and that it was terminating her contract. But the university never canceled her courses after it terminated her. Instead, the university hired another professor, who had no background in the course subjects, to teach the same courses.²⁸⁵

22. Michigan

- In 2008, a gay police officer reported that he was forced to resign because of his sexual orientation.²⁸⁶
- In 2007, a professor filed suit against the University of Michigan Law School for unlawfully denying him tenure based on his sexual orientation. He alleged that he was the first openly gay professor to be considered for tenure at the University of Michigan Law School, and the first man in the history of that institution to be denied tenure. He was denied tenure by a faculty vote, which at 18-12 in favor of tenure, fell two votes short of the 2/3 majority required by the school's rules. He had been recommended for tenure with a 4-1 vote from the tenure committee. His complaint alleges breach of contract, predicated on representations of non-discrimination during pre-employment negotiations, as well as University policies and by-laws prohibiting discrimination on the basis of sexual orientation. Rather than building an affirmative case that no discrimination took place, the Universi-

²⁸⁵ HUMAN RIGHTS CAMPAIGN, HRC PUBLICATION: DOCUMENTED CASES OF JOB DISCRIMINATION BASED ON SEXUAL ORIENTATION (1995).

²⁸⁶ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

ty's initial stance was to maintain that its by-laws and non-discrimination policies had no legal meaning and created no rights. The Law School filed motions for summary judgment were denied. The trial court ruled that the professor had established a legitimate claim of discrimination and that a trial on the merits was warranted.²⁸⁷

- In 2007, a lesbian corrections officer reported that she was forced to resign because of her sexual orientation.²⁸⁸
- In 2004, a public school teacher was terminated after telling students he was gay and had a partner. After the ACLU of Michigan wrote a letter to the school district demanding that the teacher be reinstated, the school district invited him back.²⁸⁹
- In 2002, in *Pettway v. Detroit Judicial Council*,²⁹⁰ plaintiff, a court reporter, brought a lawsuit against his employer, supervisor, the Detroit Judicial Council and the City of Detroit alleging sexual orientation discrimination, retaliation, intentional infliction of emotional distress, and tortious interference with a business relationship.²⁹¹ The plaintiff brought this suit pursuant to the Detroit Human Rights Ordinance.²⁹² At trial, the trial court granted the employer's motion for summary judgment and held that the Human Rights Ordinance only applied to

²⁸⁷ LESBIAN & GAY L. NOTES (Oct. 2007).

²⁸⁸ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

²⁸⁹ *Docket: Discrimination*, ANNUAL UPDATE 39, 43(ACLU, 2004).

²⁹⁰ No. 226616, 2002 WL 652125 (Mich. Ct. App. Apr. 19, 2002).

²⁹¹ *Id.* at *1.

²⁹² DETROIT CODE Ch. 27, Art. 3, §§ 3-1, 3-2.

employees and that the plaintiff was a contractor.²⁹³ The Michigan Court of Appeals affirmed.

- In 2000, the Michigan Supreme Court issued an opinion dismissing the claims of a Detroit police officer who had been subjected to discrimination and harassment. She alleged that after she was assigned to the sex crimes unit, numerous male officers began hitting on her for sexual favors. She declined, stating that she was a lesbian. She then suffered further discrimination, including being assigned away from law enforcement to busy-work desk jobs. She also alleged that supervisors refused to handle her grievances because of her sexual orientation. Ultimately, she retired from the police force and filed a lawsuit. The officer alleged that she was harassed after she rebuffed the advances of a supervisor because she is a lesbian, and that the consequent harassment violated the city charter's ban on sexual orientation discrimination. The trial judge granted the city's motion to dismiss the claim, finding that the charter provision did not provide a private right of action, and that the officer's exclusive remedy was to file a discrimination complaint with the city's human rights agency. However, the Court held that she could still pursue a sex discrimination claim under the state's civil rights law.²⁹⁴
- In 1993 in *Barbour v. Department of Social Services*,²⁹⁵ a Department of Social Services employee filed a lawsuit against his employer alleging sexual harassment and sex discrimination in violation of the Michigan Civil Rights Act. He alleged

²⁹³ *Pettway*, No. 226616, 2002 WL 652125 at *1.

²⁹⁴ *Mack v. City of Detroit*, 243 Mich. App. 132 (Mich. Ct. App. 2000).

²⁹⁵ 497 N.W.2d 216 (Mich. Ct. App. 1993).

that throughout his employment his coworkers and the supervisor subjected him to unremitting verbal and nonverbal harassment based on his perceived sexual orientation.²⁹⁶ Specifically, plaintiff alleged that the various forms of harassment were made by coworkers and supervisor to get him to “come out of the closet . . . and to engage in homosexual sex. . . .” At trial, the court determined, as an issue of first impression, that the Michigan Civil Rights Act’s prohibition on sexual harassment does not include a proscription on discrimination or harassment “due to a person’s sexual orientation or perceived sexual orientation.”²⁹⁷ On appeal, the Michigan Court of Appeals upheld the trial court’s ruling;²⁹⁸ however, it also held that the employee could bring a gender discrimination claim pursuant to the Michigan Civil Rights Act based on incidents of homosexual advances that directly related to his gender.²⁹⁹ The court found that the supervisor’s actions were directly related to plaintiff’s status as a male, and thus rendered the act applicable.³⁰⁰

- In 1993, Byron Center High School hired a teacher to revive its floundering music program.³⁰¹ The teacher was a tenured music teacher described by many as one of the best teachers on staff and a good role model for students.³⁰² Two years later in 1995, after he successfully revitalized the Center’s music program, he and

²⁹⁶ *Id.* at 217.

²⁹⁷ *Id.*

²⁹⁸ MICH. COMP. LAWS 37.2101, *et seq.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Christine Yared, *Where Are the Civil Rights for Gay and Lesbian Teachers*, 24 Hum. Rts. 3 (ABA 1997), available at <http://www.abnet.org/irr/hr/yared.html>.

³⁰² *Id.*

his partner planned for a commitment ceremony.³⁰³ Before the event took place, someone at the high school learned of the commitment ceremony and spread word to staff, parents and students. At a school board meeting, a few angry parents demanded that the music teacher be fired. The school board did not take immediate action, but issued a statement that said, “The board firmly believes that homosexuality violates the dominant moral standard of the district’s community. Individuals who espouse homosexuality do not constitute proper role models as teachers for students in this district” and warned the teacher that they would “investigate and monitor” the situation.³⁰⁴ In the months that followed the board meeting, many parents removed their children from the teacher’s class and he became the center of media attention. After a school official released the names and addresses of his students, parents received antigay letters and videos. While he struggled to maintain his classroom for the remainder of the school year, he ultimately relented at the end of the school year and entered into a settlement agreement with the school district: he agreed not to sue or seek employment in the district in exchange for one year’s salary, health benefits and a letter of reference to leave the school district.³⁰⁵ Five months later, he collapsed, went into a coma and died days later at the age of thirty-two. A forensic pathologist concluded that his died from a congenital malfunctioning heart valve, adding that this condition was

³⁰³ Jill Smolowe, et al., *The Unmarrying Kind*, TIME, Apr. 29, 1996, available at <http://www.time.com/time/printout/0,8816,984469.00.html>; Yared, *supra* at Note 255.

³⁰⁴ Christine Yared, *Where Are the Civil Rights for Gay and Lesbian Teachers*, 24 Hum. Rts. 3 (ABA 1997), available at <http://www.abnet.org/jrr/hr/yared.html>.

³⁰⁵ *Id.*

typically not fatal, but the stress from his public struggle may have contributed to his death.³⁰⁶

23. Minnesota

- In 2007, a lesbian public school teacher was subjected to a hostile environment because of her sexual orientation.³⁰⁷
- A teacher was discriminated against by her principal based on sexual orientation.³⁰⁸ In 2002, the Duluth School Board voted unanimously to approve a \$30,000 settlement of the claim pending against the school before the Minnesota Department of Human Rights.
- When the Minnesota state sodomy law was invalidated in 2001 by a statewide class action suit,³⁰⁹ the Minnesota Supreme Court used the possibility of adverse effects on the plaintiffs' employment to give them standing. The plaintiffs here represented a wide variety of professions--teachers and doctors joined lawyers in fighting the state sodomy law. These being licensed professions, the court notes that the "state-mandated application for a medical license requires applicants to swear under oath that they have 'not engaged in any of the acts prohibited by the statutes of Minnesota'" and that the lawyers must adhere to their rules of professional conduct, which dictates that all attorneys will "follow the requirements of

³⁰⁶ *Id.*

³⁰⁷ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

³⁰⁸ LESBIAN & GAY L. NOTES (Dec. 2002), *available at* <http://www.qrd.org/qrd/usa/legal/lgl/2002/12.02>.

³⁰⁹ *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minneapolis District Court, May 15, 2001).

the law.”³¹⁰ The court then details these “collateral injur[ies]”: “Dr. Krebs, who is now in her residency, faces the prospect of having to state under oath, as part of her application later this year for a physician license from the Minnesota Board of Medical Practice, that she has ‘not engaged in any of the acts prohibited by the statutes of Minnesota.’ Similarly...Mr. Roe,³¹¹ a licensed elementary school teacher, and Mr. Duran and Ms. Doe, licensed Minnesota lawyers, fear adverse licensure consequences from any disclosure, voluntary or otherwise, of their past and future violations” of the state sodomy statute.³¹²

- An academic counselor at the University of Minnesota sued the university alleging discrimination based on his sexual orientation. The university settled with him during the trial for \$80,000.³¹³ The counselor had been working with various athletes since 1984. The university forbade him from rooming with anyone when he traveled with the teams on road trips, and forbade him from participating in athletes’ academic meetings held in school locker rooms, both of which he contends were discriminatory measures. In his lawsuit, the counselor contended that he was denied fair pay and subjected to working in a hostile environment because of his sexual orientation, and his suit alleged that “homophobic attitudes of administrators at Minnesota deprived him of advancement.”³¹⁴

³¹⁰ *Id.* at *1.

³¹¹ It should be noted that in the case of Mr. Roe, the adverse effect on employment could not be linked to his sexual orientation--he is a heterosexual, married man, and therefore outside the class of plaintiffs who make up the focus of this memorandum.

³¹² *Id.* at *4.

³¹³ LESBIAN & GAY L. NOTES (Table of Cases 2000), *available at* <http://www.qrd.org/qrd/usa/legal/lgln/case.table-2000> (citing STARTRIBUNE, June 28, 2000).

³¹⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 159-

- A transgender middle school teacher resigned facing mounting pressure from her school and the surrounding community. The teacher, a male who planned to undergo gender reassignment surgery, was living as a woman when she interviewed for the teaching position at Roosevelt Middle School. After an open house for parents at Roosevelt, one parent asked the school principal about the teacher's gender. The principal then contacted the teacher, and upon learning that she was transitioning, immediately placed her on two months' administrative leave while school officials devised a way for her to "come out" to parents, students, and school staff. In November, the school held a meeting for her and school administrators to meet with teachers and a handful of parents and explain the process she was undergoing. A second meeting drew 400 parents. Some parents excoriated the school for permitting a transgendered teacher to work with children, while others objected to the intolerant vilification of the teacher. She resigned in February 1999, citing pressure from a parents' group.³¹⁵
- A transsexual Minneapolis police trainee was denied appropriate restroom and shower facilities,³¹⁶ even though the training program required use of the shower facilities.³¹⁷ The trainee filed a discrimination suit against the Department and city claiming unlawful discrimination. The city ultimately won on summary judgment

160 (1999 ed.).

³¹⁵ *Id.* at 157-58.

³¹⁶ Rosalind Bentley, *Transgendered Worker Sues Minneapolis Police*, STAR TRIBUNE, Jan. 21, 1999.

³¹⁷ *Id.*

on the grounds that the city was entitled to vicarious official immunity.³¹⁸ As such, no determination was made as to the veracity of the complaint's allegations.

- A Minneapolis police officer, according to Senator Paul Wellstone in 1997, said this about the sexual orientation discrimination in her workplace: "I seem to represent everything that the old boys hate in this department -- female, black and gay. The thing that makes it worst of all is I'm a good cop. When I first came to this shift, my sergeant was like, 'When I saw your name on my list, I tried everything I could to get you the hell out of my precinct. I didn't want you here. I've heard all those bad things about you. You were a trouble maker and you brought the morale down. I'm glad I got you because there's not one person on this shift that won't work with you.'"³¹⁹

24. Mississippi

- A social worker at a state-funded center for mentally retarded children near Jackson was fired after she put photos of her family on her desk. When the social worker, an African-American lesbian, interviewed for the position, an official said, "We will not tolerate discrimination based on race, sex or sexual orientation." She responded, "I'm a lesbian; I have a white lover, and I don't think you'll have any problems with discrimination from me." Two days later, she got the job. At the center, she continually saw photos of co-workers' families. When a coworker asked to see photos of her partner, she brought in an album of pictures

³¹⁸ *Doe v. City of Minneapolis*, 2002 WL 31819236 (Minn. App. Dec. 17, 2002).

³¹⁹ S. Hrg. 105-279, p. 17, Senator Paul Wellstone, Hearing before the Senate Committee on Labor and Human Resources re: S.869: The Employment Non-Discrimination Act of 1997, Thurs., Oct. 23, 1997, 105th Congress, 1st Session. Reprinted in Federal News Service, In the News, Thurs., Oct. 23, 1997.

of herself, her partner and her two dogs. She was discreet with the photos and showed them only to those who asked. But while she was away from her desk, several co-workers looked at the photo album. Some expressed discomfort that she was in a mixed-race relationship, and one complained to management about the photos. Her boss asked her not to bring them to work. She agreed but suggested it was unfair that she was the only one not allowed to bring in family photos. She was fired 10 days later. The manager praised her work, however, saying she was one of the center's best employees. He claimed he took the step because she brought in photos of her partner, not because she was gay. He alleged that some were obscene, although he had never seen them.³²⁰

25. Missouri

- In 2008, a public school physical education teacher reported that she did not have her contract renewed because of her sexual orientation. During the time that she was still employed by the school, she overheard one of the school board members say that, had he known she was a “dyke,” he would never have hired her in the first place.³²¹
- In 2008, a teacher reported that he was not hired by a public school because the administration perceived him to be gay.³²²

³²⁰ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), *available at* <http://bit.ly/kThbS>.

³²¹ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

³²² E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

- In 2008, an applicant for a prosecutor position reported that he had his job offer revoked because he was gay.³²³
- In 2007, two sheriff's office kitchen workers reported that they were fired because they were lesbians.³²⁴
- In *Counce v. Kenna*,³²⁵ an inmate claimed he was not promoted in the prison's kitchen to a higher-paying position as a cook because he was homosexual. In an unreported opinion, the Court granted the defendant's motion for summary judgment because the inmate had not established that the "denial of prison jobs to homosexuals because of their sexual orientation is a violation of the United States Constitution."
- Kelley, a gay inmate employee at a correctional facility in Missouri, brought a lawsuit alleging discrimination in violation of the equal protection clause and Title VII when he was terminated from his facility bakery job because of his sexual orientation.³²⁶ The court, in deciding whether Kelley was entitled to unconditional leave to proceed *in forma pauperis*, found that his claim alleging discrimination on the basis of his sexual orientation when he was removed from his job as a bakery worker was not frivolous under the equal protection clause.
- In 1994, a high school history teacher in Mehlville was reprimanded after he informed his students that he was gay. In a class on the Holocaust, the teacher ex-

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Counce v. Kenna*, 2005 WL 579588 (W.D. Mo. 2005) (unreported).

³²⁶ *Kelley v. Vaughn*, 760 F.Supp. 161 (W.D. Mo. 1991).

plained that if he had lived during World War II, he could have been persecuted for being gay. Though the students were supportive, several other teachers expressed dismay, and the gay teacher received a memorandum from the assistant superintendent and a school district lawyer informing him that the district “considers it inappropriate conduct for a teacher to discuss facets and beliefs of a personal nature . . . in the classroom.” Though the memo did not specifically mention homosexuality, the school’s principal requested that the teacher not bring up the topic of homosexuality again in class unless it was relevant to the existing curriculum. Two months later, the teacher received a letter from the school district’s law firm reiterating that “Mehlville School District considers your classroom conduct of March 22, 1994 to be inappropriate...” No further action was taken, but another teacher warned, “next year, he’d better watch his step because they may be looking to nab him on some pretense.”³²⁷

26. Montana

- A transgender applicant for a position in the Montana state attorney general’s office was not hired on account of her gender identity in 2008.³²⁸
- In 1997, the Montana Supreme Court recognized the combined impact that the state's sodomy law and licensing requirements had on LGBT employees with professional licenses. The issue of employment discrimination came via arguments for standing to challenge the sodomy law statute: “[Respondents] contend that the

³²⁷ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 51 (1994 ed.).

³²⁸ E-mail from Ken Choe, Senior Staff Attorney, ACLU, to Brad Sears, Executive Director, the Williams Institute (Sept. 22, 2009 11:08:00 PST).

damage to their self-esteem and dignity and the fear that they will be prosecuted or will lose their livelihood or custody of their children create an emotional injury that gives them standing to challenge the statute. For example, two Respondents are employed or are seeking employment in positions requiring state licenses. Because they engage in conduct classified as a felony, they fear they could lose their professional licenses.”³²⁹ The specifics of the respondents’ fears were laid out with greater detail in the filings leading up to the opinion. The two respondents who needed to be licensed by the state were a high school history teacher with more than 25 years experience, and a midwife seeking certification. Neither of these respondents could attain licensure if they were convicted of a felony (which sodomy was under then-existing Montana law).³³⁰ Not only would they have been unable to attain licensure were they prosecuted and convicted under the statute, but they could have had their licensure revoked at any time, even without prosecution: “[C]ertification in both professions requires that the individual be ‘of good moral and professional character.’”³³¹ “Even if they are never prosecuted, the statute could be used to support a finding that they are engaged in immoral conduct.”³³²

27. Nebraska

- An openly gay and HIV-positive man was recently terminated from his position as a volunteer firefighter when a city employee learned of his HIV status and sexual

³²⁹ *Id.* at 441.

³³⁰ Br. of Resp’t at 7, *Gryczan v. State*, 283 Mont. 433, No. 96-202 (Supreme Court of Montana, 1997).

³³¹ *Id.* at 8.

³³² *Id.*

orientation. He was eventually reinstated after ACLU Nebraska contacted the city.³³³ The firefighter later decided to run for office in city government and won.³³⁴

- An academic advisor in 2002 sued Metropolitan Community College (“Metro”), alleging that he had suffered harassment because he was gay.³³⁵ According to the advisor, he began to receive anonymous harassing correspondence after he attended a staff meeting during which he came out to other staff members. He reported the situation to his supervisors, who responded by investigating his claims and disciplining a specific employee who had made fun of him. Nonetheless, the harassment continued, so the advisor resigned. He filed suit, claiming that Metro violated his substantive due process rights, since no state law prohibited sexual orientation discrimination. The court granted summary judgment to Metro, finding that the harassment did not “shock the conscience” as would be required for a substantive due process violation and that Metro had done enough to address it.³³⁶

28. Nevada

- In 2008, a transgender public school teacher was fired because of her gender identity.³³⁷

³³³ See ACLU Nebraska Legal Program, GLBT Rights, <http://www.aclunebraska.org/glb.htm> (last visited Sept. 4, 2009).

³³⁴ See *id.*

³³⁵ *Cracolice v. Metropolitan Community College*, No. 8:01CV3240, 2002 WL 31548706 (D. Neb. Nov. 15, 2002).

³³⁶ *Id.* at 4.

³³⁷ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

29. New Hampshire

- In 2009, a transgender public school teacher began to transition and was fired because the principal said that "things were not working out." She had received no complaints or warnings prior to being let go.³³⁸
- In 2009, a teacher, working at the school for nineteen years, was terminated when a new superintendent and principal were hired who said disparaging things about his being gay.³³⁹
- In 2008, a teacher was being considered for tenure at a public school. He had favorable reviews and compliments from his co-workers. The principal said it wasn't the "right fit" and he was denied tenure.³⁴⁰
- In 2007, a nurse at a public school in New Hampshire was harassed by the principal at her school because of her sexual orientation. The principal asked several coworkers about the nurse and her partner, who is a special education teacher at the school. Specifically, the principal asked about their sexual orientation and the nature of their relationship. The principal told a coworker that if they were lesbians, they must be doing something inappropriate behind closed doors. The principal also noted that she didn't understand why they "had to hire" lesbians. The nurse complained to her union and to the human resource staff at the school, but she was told to "make nice."³⁴¹

³³⁸ E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment

- In 2007, a transgender correctional officer resigned after she endured three years of harassment and physical abuse based on her gender identity. Her immediate supervisor harassed her, saying "[y]our tits are growing" and "[y]ou look gay when you walk." Other coworkers then began physically assaulting her - kicking her, snapping her in the breasts, and threatening to handcuff her to a flagpole and take off her clothes. One officer grabbed her and slammed her into a concrete wall while her coworkers watched. No one reported this event. She was later placed on a shift with the abusive officer. She resigned as a result of the harassment she faced.³⁴²
- In 2007, a corrections department applicant reported that she was discriminated against based on her sexual orientation. In applying for a position with a corrections department, she was required to take a polygraph test. During the test, she was asked twice about her marital status, through which she disclosed that she was a lesbian. She was then not hired for the job.³⁴³
- In 1995, Penny Culliton, a high school English teacher in New Ipswich, was fired for "gross insubordination" for using three novels with gay themes as optional reading in her classes after the principal had ordered her not to. The books in question were selected by a school board committee that included school board members, parents, students and community members and were purchased by Culliton with money from a grant from the Respect for All Youth Fund. According

Discrimination (Mar. 19, 2007) (on file with GLAD).

³⁴² GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Nov. 26, 2007) (on file with GLAD).

³⁴³ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Oct. 15, 2002) (on file with GLAD).

to Culliton, the principal informed her after the books had been purchased that the school board did not want books with gay and lesbian characters in the classroom. At that time, Culliton questioned the principal, the superintendent, and the school board chair with little response. Later in the school year, when they were scheduled to be read, she decided to use them as planned. The books had already been distributed to students by the time the school board ordered their recall. At the next board meeting, students and community members accused the board of censorship and presented a petition in protest. Subsequently, the superintendent recommended that Culliton be dismissed. The board agreed with that recommendation following a public dismissal hearing. Approximately 40 students walked out of class to protest her firing; they were suspended.³⁴⁴

30. New Jersey

- In 2009, former police officer Robert Colle received a \$415,000 settlement against his New Jersey town after he was discriminated against by the force because of his sexual orientation. Colle was ridiculed by his chief and other officers because of his sexual orientation and was refused back-up when a woman he was apprehending bit his finger to the bone.³⁴⁵

³⁴⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 79-80 (1995 ed.).

³⁴⁵ Negotiated Settlement and General Release, *Colle v. City of Millville*, D. Conn., Civil Action No. 07-5834.

- In 2009, a transgender public school teacher in New Jersey was censored from expressing pro-LGBT viewpoints.³⁴⁶
- In 2008, the town of Dover agreed to settle a discrimination claim brought by a lesbian former police sergeant for \$750,000, according to an announcement on July 31 by the Civil Service Commission. Sharon Whitmore was to receive compensation for salary, pension and promotional pay dating back to her suspension from duty in 2004, which she challenged first in an administrative hearing and then a lawsuit in Superior Court, Morris County. Whitmore, described in a report by the Newark Star-Ledger as an openly gay woman who was the only female member of the Dover police force, alleged that she had been subjected to “discriminatory, retaliatory or harassing conduct” by the male town supervisor, the police chief, and other department officials. Under the terms of the settlement, she was to be reinstated to the active payroll of the department as a sergeant for nine months, during which she was to be actively seeking work, as her pay would terminate when she found a new job or by the end of the nine months, whichever came first. Whitmore was a twelve-year veteran of the department.³⁴⁷
- In 2008, a gay public school bus driver reported that he was subjected to a hostile work environment and was fired because of his sexual orientation.³⁴⁸

³⁴⁶ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009, 5:11:00 PST) (on file with the Williams Institute).

³⁴⁷ LESBIAN & GAY L. NOTES (Sept. 2008).

³⁴⁸ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

- In 2007, the borough of Haledon and Sergeant James Len reached a settlement of Len's sexual orientation discrimination case while it was pending in Superior Court. Len, who had worked for the department since 1986, came out to his family as gay in 2002. Len claimed that soon after word spread about his being gay, he began to suffer on-the-job harassment and discrimination at the hands of various co-workers and local government officials, including the mayor and a city council member. Under the terms of the settlement, Len received \$450,000 and was entitled to be considered for promotion without discrimination.³⁴⁹
- In 2006, an employee of a New Jersey State Department reported that she was demoted and made to do menial tasks below her skill level because she was a lesbian.³⁵⁰
- In 2005, a lesbian employee of the New Jersey Department of Youth and Family Services Office of Revenue Development brought suit after being subjected to harassment by her co-workers because of her sexual orientation. Co-workers referred to her as a "dyke" and a "nazi dyke" and said they would not work for a "dyke supervisor". After complaining to supervisors, she was reassigned to a position that required her to do menial tasks and all of her supervisory responsibilities were taken away. Co-workers continued to make comments about her sexual orientation. The trial court granted summary judgment to the defendants because

³⁴⁹ LESBIAN AND GAY L. NOTES (Feb. 2007).

³⁵⁰ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

the employee had failed to file within the 2 year statute of limitations period, thus the merits of the case were never reached.³⁵¹

- A gay high school Spanish teacher who was “outed” by one of his students sued the Collingswood Board of Education for violating the Family & Medical Leave Act (FMLA) by refusing to allow him to return to work after taking a medical leave of absence.³⁵² The plaintiff, Daniel Curcio, was harassed by students and fellow teachers once rumors of his homosexuality began to circulate throughout the school. In response to a question from a student, Curcio disclosed his sexual orientation to the class and proceeded to inform each of his classes that he was gay. Rather than ending the rumors, these frank discussions exacerbated the problem. The school issued Curcio a formal reprimand for discussing his homosexuality during class time, and he was put on administrative leave. At the start of the following school year, Curcio again informed his students that he was gay, and again he was issued a reprimand. Although Curcio stated that he did nothing more than state that he was gay, the school determined that he was misusing class time by discussing his sexuality with students. The school’s continued hostility and student harassment caused Curcio to suffer from a severe anxiety disorder and several stress-induced panic attacks, which required him to take a doctor-recommended medical leave of absence. When Curcio was medically cleared to return to work, the school refused to reinstate him unless he presented written medical reports indicating his diagnosis and fitness for duty. In addition, the

³⁵¹ *Stahl v. State of New Jersey Department of Human Services*, 2009 WL 3429795 (Wash. Ct. App. Feb. 12, 2009).

³⁵² *Curcio v. Collingswood Bd. of Educ.*, 2006 WL 1806455 (D.N.J. Jun 18, 2006).

Board reserved the right to conduct its own evaluation of Curcio's fitness for duty. Based on his prior dealings with the school, Curcio determined that the Board was attempting to bar him from returning based on his sexual orientation. The District Court found that his leave of absence qualified under the FMLA and that, therefore, the Board interfered with his FMLA rights by refusing to allow him to return to work. The Court found that a genuine issue of material fact existed regarding Curcio's claim of retaliation under the FMLA.

- DePiano, a corrections officer since 1987, brought an action against the County of Atlantic and Gary Merline, Warden of the Atlantic County Justice Facility ("ACJF"). DePiano alleged, *inter alia*, that Merline showed pictures of him in women's clothes to other employees, and circulated rumors that he was a cross-dresser. In allowing a sex stereotyping harassment claim to proceed, the court specifically that "the LAD prohibits discrimination, including harassing conduct, on the basis of gender stereotyping. From the record, one could conclude that Merline and his staff harbored negative perceptions of DePiano as a male who did not conform to the male stereotype because he wore women's clothes." The court also found that "the record in this case permits the conclusion that DePiano was subjected to severe and pervasive harassment because of his cross-dressing. DePiano was taunted throughout the facility by numerous officers. Furthermore, the inmates also knew of DePiano's cross-dressing and subjected him to their own taunts. Though Defendants do not acknowledge that the taunts of prisoners may create a hostile working environment, there appears no more effective a way to engender horrible working conditions for a prison guard than to reveal one of his

embarrassing secrets to the general population. The cumulative effects of the frequent taunting endured by DePiano may have created a hostile work environment. For that reason, the Court will deny Defendants' motion for summary judgment on this claim.”³⁵³

- Karen Caggiano, an Essex County Sheriff’s officer who is a lesbian, filed suit under the New Jersey Law Against Discrimination, claiming harassment and discrimination based on gender and sexual orientation.³⁵⁴ A jury awarded her nearly \$3 million in 2004.³⁵⁵ Her complaint detailed various incidents in which she was verbally and sexually harassed based relating to her gender and sexual orientation. All but the last of the incidents on which she based her hostile environment claim occurred prior to the cut-off date set by the two-year statute of limitations, and the Superior Court dismissed the hostile environment claim, finding it could only consider the last incident which, by itself, was insufficient to sustain a hostile environment claim. The appellate court found, in line with the U.S. Supreme Court’s reasoning under Title VII, that a sensible interpretation of the statute would allow the claim to relate back to all the conduct contributing to the hostile environment, so long as at least some of that conduct occurred within the time limit.³⁵⁶
- In 1997, fifteen years after he was hired by the New Jersey State Police, a trooper was attacked by other troopers while on assignment because of his sexual orientation. The troopers were to join Schmitt in a sting operation, but instead headed

³⁵³ *DePiano v. Atlantic County*, 2005 WL 2143972 (D.N.J. 2005).

³⁵⁴ *Caggiano v. Fontoura*, 2002 WL 1677472 (July 25, 2002).

³⁵⁵ *Caggiano v. County of Essex*, No. L-1608-00, 42 (2084) G.E.R.R. (BNA) 1106 (N.J. Super. Verdict 11/15/04).

³⁵⁶ *Caggiano*, 2002 WL 1677472.

straight for him when they arrived and began beating him with their batons. They knocked him to the ground and continued to beat and kick him while shouting anti-gay slurs. The incident made Schmitt fear for his safety and he suffered depression as a result of the hostility he faced at work.³⁵⁷

- George DeCarlo, a former substitute teacher frequently harassed by students based on his perceived sexual orientation, sued Watchung Hills Regional High School District. In June 1994, he received a letter approving him to be a substitute in the district for the following school year. However, in September, he never received a request to teach. In January 1995, he was informed that he never should have been approved to teach in the 1994-95 school year, and that his services were no longer needed by the district. DeCarlo filed a complaint with the State Division on Civil Rights. The agency found: “It is reasonable to conclude that complainant was denied reappointment as a substitute because of his sexual orientation and as an act of reprisal.” DeCarlo then filed the sexual orientation discrimination lawsuit against the district. In February, the court ruled that DeCarlo could not seek punitive damages from the school district, but that he could seek lost and future wages and compensation for emotional distress.³⁵⁸
- A heterosexual pilot filed a lawsuit in a county court alleging that he had been the victim of anti-gay harassment by staff at the New Jersey Air National Guard and that his complaints about that had been ignored. Maj. Robert Scott sued four of-

³⁵⁷ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

³⁵⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 88 (1997) .

ficers in the 177th Fighter Wing in March, saying he had been harassed by his peers who assumed he was gay because he was not married, did not have a girlfriend, and lived with female flight attendants. Scott claimed that fellow enlistees suggested he had a boyfriend and that his supervisor had retaliated against Scott for complaining by issuing a written reprimand about his relationship with an unmarried woman. A spokesperson said that the Air National Guard had completed its own investigation into the allegations but did not make public its findings. The court denied the state's motion to dismiss Scott's claim and rejected the state's argument that this was an internal military matter that should not be handled in the courts.³⁵⁹

31. New Mexico

- In 2008, a gay employee of a state university was constructively discharged due to his sexual orientation.³⁶⁰
- In 2007, the *Santa Fe New Mexican* featured a story about Thomas Williams, a school counselor in Santa Fe who had filed a lawsuit against the New Mexico Public Education Department in state court. Williams claimed that he was discriminated against by two female supervisors because he was gay. In his complaint, Williams alleged that before he “came out,” one supervisor said that “[g]ays

³⁵⁹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 238 (2000) .

³⁶⁰ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

would be better off if they stayed in the closet. . .[C]oming out only makes life more difficult.” Another supervisor commented that it would be hard for her to work with a gay counselor because “they are a negative example for kids.” After Williams came out, he noticed that his supervisors became “openly hostile,” deriding him with epithets like “you’re nothing but a sick faggot,” and “gays should go to hell because they are sinful.” One supervisor also told Williams, “I can’t stand working with men, especially gay men like you.” In May of 2006, supervisors told Williams that his contract would not be renewed because of “performance concerns” even though his most recent evaluation indicated that he met or exceeded expectations in 31 out of 32 performance categories.³⁶¹ The case is currently pending.

- On November 16, 2006, a state of New Mexico employee filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that he had been discriminated against on the basis of his sexual orientation.³⁶² The employee had been continuously employed by the state from 1994 through the filing date. His supervisor failed to promote him in favor of a less qualified candidate six months after a colleague disclosed to the Office of the Secretary that the employee was gay.³⁶³ The State of New Mexico settled with

³⁶¹ Tom Sharpe, *School Counselor Sues, Says He Was Fired For Being Gay*, SANTA FE NEW MEXICAN, Dec. 29, 2007, at C1; *see also Williams v. N.M. Public Educ. Dep’t* (D. N.M. Dec. 21, 2007).

³⁶² In a second complaint submitted to the agency, the employee alleged that he had also been discriminated against because of his race (white), sex (male), and age (58). Charge of Discrimination, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, Charge No. 06-10-16-0579 (Nov. 16, 2006).

³⁶³ Charge of Discrimination, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, Charge No. 06-10-16-0579 (Nov. 16, 2006).

- the employee, granting him a ten percent pay increase and requiring diversity training for management and line staff in exchange for a promise not to sue.³⁶⁴
- On March 2, 2006, a state of New Mexico employee filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that she had been discriminated against on the basis of her sexual orientation. The woman, who had been an employee of the state for six years at the time of filing, reported that she had been harassed at work because she was a lesbian. She was put on administrative leave following an unsubstantiated charge that she had assaulted a co-worker.³⁶⁵ The state of New Mexico settled with the employee, agreeing to allow her to remain in the position she held before the administrative leave was imposed, to change a rating on an employee evaluation form, and to reissue 68 hours of administrative leave that she was denied while on medical leave, in exchange for a promise not to sue.³⁶⁶
 - On January 31, 2006, a manager at the State of New Mexico Taxation & Revenue Department filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor alleging that she had been discriminated against on the basis of her sexual orientation. At the time of filing, the manager had been employed by the Taxation & Revenue Department for thirteen years and was passed over for the position of Bureau Chief on numerous occasions because

³⁶⁴ Settlement Agreement, [Redacted] v. State of New Mexico, Department of Human Services, New Mexico Department of Labor, Human Rights Division, HRD No. 06-10-16-0579 (Jan. 1, 2007).

³⁶⁵ Charge of Discrimination, [Redacted] v. State of New Mexico Department of Motor Vehicles, New Mexico Department of Labor, Human Rights Division, Charge No. 06-03-02-0103 (Mar. 2, 2006).

³⁶⁶ Settlement Agreement, [Redacted] v. State of New Mexico Department of Motor Vehicles, New Mexico Department of Labor, Human Rights Division, HRD Nos. 06-03-02-0103 & 06-04-13-0177 (June 22, 2006).

she was a lesbian. She filed a complaint after a male candidate was promoted despite the fact that she and another female (who later declined the interview) were the only candidates chosen for interviews based on their qualifications.³⁶⁷ On August 20, 2006, the Human Rights Division determined, based on its own investigation, that there was probable cause to support the woman's charge. The Division determined that she was the most qualified candidate, had received excellent marks on her employee evaluations, and that, although the Department had set forth non-discriminatory reasons for choosing the male candidate, she should have been promoted before he was.³⁶⁸

- On July 18, 2005, a patrolman and canine handler with the State Police Division filed an administrative complaint with the Human Rights Division of the New Mexico Department of Labor, alleging that he had been discriminated against based on his sexual orientation. When the employee transferred to a new location after five years with the department, his new training supervisor began to harass him by making insinuations about his personal life. The employee, after being taunted for seven months, told the supervisor he was gay. The supervisor did not speak to the employee for a month after the revelation, and the employee was undeservedly disciplined at work on several occasions. The supervisor encouraged a police lieutenant to file false charges against him regarding a traffic stop he had made, in which the police lieutenant claimed that the employee had accused the traffic offender of being a drug smuggler. Another false charge was filed against

³⁶⁷ Charge of Discrimination, [Redacted] v. State of New Mexico Taxation & Revenue, New Mexico Department of Labor, Human Rights Division, Charge No. 06-02-01-0055 (Jan. 31, 2006).

³⁶⁸ Determination of Probable Cause, [Redacted] v. State of New Mexico Taxation & Revenue Department, New Mexico Department of Labor, Human Rights Division, HRD No. 06-02-01-0055 (Aug. 30, 2006).

the employee, stating that he had failed to respond to a call. The employee believed these actions were taken in an effort to set him up for termination.³⁶⁹ The state of New Mexico settled with the employee, agreeing to transfer him to a precinct not under the control of the offending supervisor, training as the employee requests and as feasible, and \$400.00, in exchange for a promise not to sue.³⁷⁰

- In 2006, the ACLU of New Mexico reported that it was representing an employee of the Bernalillo County Assessor's office who was subjected to threatening comments by coworkers and other discriminatory work conditions related to his sexual orientation. In April of 2005, the employee filed an internal complaint; in retaliation, the Assessor's office discharged him. The affiliate sent a demand letter seeking reinstatement of the employee and back pay.³⁷¹
- An employee of the New Mexico Juvenile Justice Division alleged that she was continually harassed, especially by her supervisor, after it became known that she was a lesbian. The employee alleged that she was falsely accused of misconduct, profanity and insubordination. She was also known in the workplace as a "dyke bitch," was accused of "carpet munching in the control room," and co-her supervisor commented about how she "didn't know if she was a man or a woman." In July of 2004, the employee was placed on administrative leave, pending an investigation of the supervisor's alleged conduct. On August 30, 2004, she received

³⁶⁹ Charge of Discrimination, [Redacted] v. State of New Mexico Department of Public Safety- State Police Division, New Mexico Department of Labor, Human Rights Division, Charge No. 05-07-28-0434 (July 18, 2005).

³⁷⁰ Settlement Agreement, [Redacted] v. State of New Mexico Department of Public Safety- State Police Division, New Mexico Department of Labor, Human Rights Division, HRD No. 05-07-28-0434 (Nov. 12, 2005).

³⁷¹ *Docket: Discrimination*, ANNUAL UPDATE 50, 54 (ACLU 2006).

notice that her employment had been terminated. She requested a waiver of her right to an administrative hearing.³⁷²

32. New York

- In 2010, a judge ordered the New York State Thruway Authority to pay a transgender woman \$55,000 in damages for fostering a hostile work environment. Her co-workers called her a “drag queen” and a “freak” and used state-owned computers to view information about her after they discovered that she was transgender.³⁷³
- The Associated Press ran a story on July 16, 2009 of a transgender woman who had been fired from her job as a mailroom clerk with the New York City Department of Parks and Recreation because she had transitioned. The 27-year-old Harlem resident was also made fun of and called vulgar names by co-workers because of her gender change. At the time of press, she had filed a discrimination suit in Manhattan.³⁷⁴
- An employee of the New York State courts settled his claim of sexual orientation discrimination in the promotion process. He later challenged the validity of a

³⁷² Charge of Discrimination, [Redacted] v. State of New Mexico Juvenile Justice Division, New Mexico Department of Labor, Human Rights Division, HRD No. 04-09-22-0519 (Sept. 17, 2004).

³⁷³ Michelle Garcia, *Judge Awards \$55K to Harassed Trans Worker*, Jan. 14, 2010, available at http://www.advocate.com/News/Daily_News/2010/01/14/Judge_Awards_55K_to_Harassed_Trans_Worker/.

³⁷⁴ Associated Press, *Transsexual Sues NYC Parks Department over Firing*, July 16, 2009, available at http://www.silive.com/news/index.ssf/2009/07/transsexual_sues_new_york_city.html (last visited Sept. 8, 2009).

verbal settlement of his case. The court held that the verbal agreement was binding.³⁷⁵

- A lesbian corrections officer employed by the New York State Department of Correctional Services alleged discrimination based both on her gender and sexual orientation. The Division of Human Rights found that her supervisor had engaged in unlawful discrimination and retaliation against her. The woman was subjected to a fellow officer's obscene language and offensive conduct. The co-worker persistently and relentlessly demeaned the woman, scrawled sexually explicit graffiti in her workplace, and filed a baseless internal complaint against her. While the Department promptly processed the co-workers claim against the woman, even though they admitted it was "bogus," they failed to take any steps towards remedying her grievances. Despite her numerous complaints, the Department did not discipline the co-worker and instead retaliated against the woman for complaining. Due to the harassment, the woman suffered from increased stress, sleeping and eating difficulties, nosebleeds, and she was diagnosed with "adjustment disorder with depressive features." A unanimous five-judge panel of the New York Appellate Division affirmed, but reduced her damages from \$850,000 to \$200,000, finding them disproportionate compared to awards based on similar claims.³⁷⁶

³⁷⁵ *Aguiar v. State of N.Y.*, 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).

³⁷⁶ *New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights*, 2008 WL 2682073 (July 10, 2008).

- In 2008, two lesbian police officers were subjected to hostile work environments because of their sexual orientation.³⁷⁷
- An NYPD police officer brought an action against the City of New York claiming he was discriminated against based on his perceived sexual orientation.³⁷⁸ He was denied his application to transfer to the NYPD Office of Community Affairs' Youth Services Section ("YSS") because he was incorrectly perceived to be a child molester due to his perceived sexual orientation, and was retaliated against after filing an internal complaint against a police officer with the NYPD's Office of Equal Employment Opportunity.³⁷⁹ The jury's verdict was in favor of plaintiff finding that CITY/NYPD had discriminated against him based upon his "perceived sexual orientation and CITY/NYPD employees retaliated against him for engaging in protected activity resulting in emotional damages."³⁸⁰ The court determined the jury was "able to assess the long term effects of [defendant's] harmful stereotyping of [plaintiff] and discriminatory denial of [plaintiff's] career opportunity with YSS has had on his mental and emotional state and which was compounded by CITY/NYPD employees' ongoing retaliatory acts of 'abuse, intimidation and humiliation.'"³⁸¹
- A railroad ticket agent sued the Long Island Railroad and one of its managers for constitutional and statutory sexual orientation harassment. The court denied the

³⁷⁷ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

³⁷⁸ *Sorrenti v. City of N.Y.*, 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 at *1 (N.Y. Sup. 2007).

³⁷⁹ *Id.* at *1.

³⁸⁰ *Id.* at *7.

³⁸¹ *Id.* at *8.

defendant's summary judgment motion, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans*,³⁸² and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.³⁸³ The harassment began in 1996 when the ticket agent's supervisor began making derogatory comments related to his sexual orientation. The ticket agent was referred to by several people in the office, including his supervisor, as a "fucking faggot" and "a queer." The ticket agent reported the harassment to his manager, and though the manager decided to send the supervisor to sensitivity training classes, she never followed through. Later, the same supervisor continued to harass him in retaliation, and the ticket agent's complaints about the supervisor's conduct were never addressed.

- In 2005, the plaintiff, a bisexual man, sued the Suffolk County Police Department alleging that he was subjected to harassment based on sexual orientation. A federal jury awarded the plaintiff \$260,000 in damages. Post-verdict, an attorney for the Department indicated that its policies had been under review since the election of Suffolk County Executive Steve Levy, a Democrat whose predecessor had a much less supportive record on lesbian and gay rights. The attorney said that the goal of the "review" was to "avoid any of these lawsuits in the future." She also noted that the jury verdict related solely to workplace harassment, and did not find

³⁸² 517 U.S. 620 (1996).

³⁸³ *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).

that the plaintiff was discharged because of his sexual orientation or as retaliation for complaining about the harassment.³⁸⁴

- On August 23, 2005, an employee of the Department of Correctional Services filed an administrative complaint with the State Division of Human Rights alleging that he had been harassed because of his sexual orientation. The employee was a Head Cook at a state correctional facility where, at the time of filing, he had been employed for seven years. The employee's co-workers began to harass him because of his sexual orientation approximately one year before the complaint was filed. They posted pictures in the Department that had been altered to make it look as though the employee was engaging in sexual intercourse with the inmates. Comments such as, "No more head cooks in the pc unit ha-ha how do you like that fag boy," were written on the employee bathroom walls and co-workers made lewd comments in the presence of other employees and inmates about the employee's sexual activity, including an accusation "that [the employee] was screwing [a female co-worker] because she was tighter than his boyfriend." The employee reported the harassment to two supervisors, but no corrective action was taken and the harassment continued. Thereafter, the employee had to take medical leave due to the effects of the harassment.³⁸⁵ The Division investigated the matter and determined that there was probable cause to support the employee's

³⁸⁴ LESBIAN & GAY L. NOTES (Mar. 2005).

³⁸⁵ Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Aug. 23, 2005).

charge. The state of New York settled the matter privately with the employee in exchange for discontinuing the proceeding.³⁸⁶

- On March 5, 2007, the employee described above filed a second complaint with the State Division of Human Rights alleging that he had been retaliated against based on his complaint of August 23, 2005. After the settlement was reached in that matter, he was passed over for overtime and was made to perform tasks outside of his job description, and was unfairly issued notices of discipline on multiple occasions.³⁸⁷ Again, the Division's investigation revealed probable cause to support the employee's charge. Again, the parties entered into a private settlement.³⁸⁸

- A former art teacher who brought an action against a school district based on allegations that she was subjected to a hostile work environment because of her sexual orientation.³⁸⁹ She also alleged the school district retaliated against her for speaking out against such discrimination.³⁹⁰ She alleged a number of incidents involving students harassing her on the basis of her sexual orientation.³⁹¹ One student told her she was "disgusting." Another asked her if she was a "dyke." A third student, when reprimanded by Lovell, called her a racist and a man-hater.

The teacher's complaints to the school administration were not addressed. The

³⁸⁶ Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Jan. 28, 2008).

³⁸⁷ Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Mar. 5, 2007).

³⁸⁸ Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Jan. 28, 2008).

³⁸⁹ *Lovell v. Comsewogue Sch. Dist.*, 2005 WL 1398102 at *1 (E.D.N.Y. 2005).

³⁹⁰ *Id.* at *1.

³⁹¹ *Id.* at *1-3.

teacher also found graffiti in her classroom that read, “Lovell is a stupid dyke.” As a result, she had to request a catastrophic leave after a psychiatric evaluation determined that her condition was of a “mixed anxiety and depressed mood.”³⁹² The court held that the school teacher successfully alleged sexual orientation discrimination, thereby defeating defendant’s summary judgment motion arguing that the principal and other school officials had acted reasonably under the circumstances. The court determined that a jury could find defendant condoned and enabled a “continuous campaign of harassment by some students against [Lovell] on the basis of her sexual orientation.”³⁹³ Further, the court determined that “even if [defendant] did not know in 2001 that he had to protect [Lovell] against the students’ discrimination, he is presumed to have known of his obligation not to engage in such discrimination himself.”³⁹⁴

- A white Jewish gay male and a former administrative law judge for the State Department of Motor Vehicles brought an action claiming racial, religious and sexual orientation discrimination. The court found he could proceed with his hostile environment claim, mainly based on the anti-Semitic comments that he was subjected to in the workplace repeatedly. Since the New York State Human Rights Law also prohibited sexual orientation discrimination he was allowed to include anti-gay harassment in his hostile environment claim, as well as racist harassment. He contended that hostile attitudes toward homosexual persons pervaded the office—that the words “fag” or “faggot” were used in his presence at least three

³⁹² *Id.* at *4.

³⁹³ *Id.* at *9.

³⁹⁴ *Id.* at *10.

times, that he was advised not to be "openly gay," and that another employee made at least three hostile references to his sexual orientation. In addition, he alleged that after he was terminated, he learned that a clerk referred to him as "that faggot judge" in the public area of the office.³⁹⁵

- In 2002, an openly-gay highway employee was suspended from work for three and a half days for wearing a baseball hat embroidered with a symbol of a half-red, half-rainbow-colored ribbon symbolizing the fight against AIDS. The *Rochester Democrat and Chronicle* reported that the employee's foreman had asked the gay man three years earlier not to wear a cap with a rainbow pride flag logo, which the employee said he had agreed not to wear. The suspension was rescinded after the employee's union argued that town rules make no mention of hats whatsoever. The man was reimbursed for lost wages and the suspension was removed from his personnel file. The man also received an apology from the town, a promise of no future retribution, and a monetary settlement to assist with lawyer fees.³⁹⁶
- A police officer employed by the Port Authority of New York & New Jersey alleged that harassment by co-workers due to his perceived homosexuality or failure to conform to "traditional male stereotypes" eventually led superiors to terminate his employment in violation of the Equal Protection Clause. The court denied the Port Authority's summary judgment motion, holding that sexual orientation is a viable basis for an equal protection claim, even if the police officer him-

³⁹⁵ *Feingold v. State*, 366 F.3d 138, 150 (2d Cir. 2004).

³⁹⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 198-99* (2002 ed).

self was not a homosexual. Specifically, the officer alleged that his co-workers disseminated “computer-altered pictures” of his face on figures posed in a variety “of homosexual and/or deviant sexual practices” and put them in his locker. In addition, co-workers affixed a pair of women’s panties and a condom to his locker. The plaintiff also discovered a “Pee-Wee Herman” doll, representing him, “in a sexually provocative pose.” Upon complaining to a superior, the superior joked about the incidents before an audience of the plaintiff’s co-workers.³⁹⁷

- A principal at a public school in New York sued the school district and teachers’ union upon termination of her employment and denial of her tenure appointment, claiming sexual orientation discrimination and discrimination on the basis of sex under Title VII. She settled her claims with the school district for an undisclosed amount. The court granted summary judgment in favor of the teacher’s union holding, in part, that Title VII does not provide protection against discrimination on the basis of sexual orientation.³⁹⁸
- A correctional officer for the New York State Department of Correctional Services alleged his fellow employees routinely called him names such as “faggot, pervert, homo, queer, fucking faggot, cock-sucker, fudge-packer, and you gay bastard.” They also left sexually explicit photos at the officer’s work area, on restroom walls, and in his mailbox. One co-worker grabbed his own nipple, remarking to the officer, “like what you see?” He also alleged that he experienced physical assaults by co-workers and reported incidents to supervisors and the un-

³⁹⁷ *Emblen v. Port Auth. of N.Y/N.J.*, 2002 WL 498634 (S.D.N.Y. 2002).

³⁹⁸ *Byars v. Jamestown Teachers Assoc.*, 195 F. Supp. 2d 401 (W.D.N.Y. 2002).

ion, who failed to properly address the issue.³⁹⁹ He brought a sex stereotyping claim under 42 U.S.C. § 1985, Title VII, and the New York State Human Rights Law.⁴⁰⁰ The court found that the officer failed to assert evidence that he was discriminated against based on his perceived lack of masculinity, and that he was seeking to “bootstrap” a claim of discrimination based on sexual orientation under Title VII (which is not cognizable) to a sexual stereotyping claim (which is cognizable). However, as to his union which ignored his complaints, the court found that it is possible for an employee to state a retaliation claim based on the union's reaction to his complaints, even if Title VII would not cover the underlying discrimination claims.⁴⁰¹ The court determined that he failed to establish a prima facie case for the 42 U.S.C. § 1985 claim, since homosexuality did not fall under a suspect classification such as race, national origin, or sex.⁴⁰² Later in the case, a court granted summary judgment in favor of the defendants.

- In 2001, after she had been employed as a planner with the City of Buffalo for fourteen years, a transgender woman was forced to resign because of hostile workplace treatment that began immediately after she began to transition. By 2001, she had a distinguished career and received a county-wide civic award for her improvement of a federal program that sought to reduce homelessness among people living with HIV/AIDS. In 2001, she informed the Mayor of Buffalo that she would be transitioning from male to female. After she transitioned she was demoted. Though she had an unblemished record when she presented as a man,

³⁹⁹ *Martin v. New York State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002).

⁴⁰⁰ *Martin v. New York State Dep't of Corr. Servs.*, 115 F.Supp.2d 307 (N.D.N.Y. 2000).

⁴⁰¹ *Id.* at 315-16.

⁴⁰² *Id.* at 316.

she received unwarranted criticism and faced workplace hostility immediately after she transitioned. One “casual Friday” she wore a gay pride t-shirt to work. When she refused to change after she was told that the shirt made a co-worker uncomfortable, she was charged with insubordination and harassment. She was required to attend an informal hearing as a result of the charge, where she was told that the charges would be dropped if she agreed not to sue for any past grievances. She refused to sign and the harassment and hostility increased. She was unable to sleep and was diagnosed with depression. Eventually, worn down by stress and mistreatment, she resigned.⁴⁰³

- A lesbian police officer brought an action against the NYPD alleging claims of employment discrimination, hostile work environment, and retaliation on the basis of her sexual orientation under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and the N.Y.C. Human Rights Law.⁴⁰⁴ She alleged fellow employees made derogatory comments concerning her sexual orientation.⁴⁰⁵ The court concluded defendants were motivated by their “invidious and discriminatory animus towards homosexuals,” and that they conspired to discriminate against the plaintiff solely on the basis of her sexual orientation.⁴⁰⁶ The court also concluded that the defendants permitted the practice of discrimination to continue for a long enough period of time so as to warrant the application of the continuing violation doctrine.⁴⁰⁷

⁴⁰³ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁴⁰⁴ *Salgado v. City of N.Y.*, 2001 WL 290051, at *1 (S.D.N.Y. 2001).

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at *4.

⁴⁰⁷ *Id.* at *7.

- An employee of the New York Transit Authority alleged that he had been discriminated against based on his sexual orientation. The court granted the defendants' summary judgment motion, finding that the employee's claim for sexual orientation discrimination under Title VII was not cognizable because the statute does not prohibit discrimination on that basis and his suit appeared to be based largely on offensive comments made to him by a co-worker, which the court characterized as isolated and not actionable.⁴⁰⁸
- In 2000, two years after he was hired, an English teacher at a New York public school was forced to resign. During his tenure, he intentionally disclosed his sexual orientation to only a few colleagues, but believed that the school principal knew he was gay. In April 2000, he was called into a meeting with the assistant principal. The assistant principal commended him for his hard work and conscientiousness, but told him that he would not be returning to work the following year because of "classroom management issues." The assistant principal told the teacher that he would "do [him] a favor" and let him resign. If he did not agree to resign, he was told that he would receive an unfavorable evaluation. His union representative discouraged him from taking up his grievance. Two days after the meeting, his class room was vandalized and the word "faggot" was written across the chalkboard. Fearing that he would be terminated, he felt he had no option other than to resign.⁴⁰⁹

⁴⁰⁸ *Trigg v. New York City Transit Auth.*, 2001 WL 868336 (E.D.N.Y. July 26, 2001).

⁴⁰⁹ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

- In 2000, a corrections officer with the Nassau County Sheriff's Department brought equal protection and Section 1983 claims based on anti-gay harassment in the workplace. A federal jury awarded him \$1.5 million, finding the harassment at the county jail so widespread that it constituted a "custom and practice" to discriminate against gay men. He presented evidence demonstrating that he encountered almost daily harassment from his co-workers for almost four years, including being called offensive names and the display of pornographic images depicting him as a pedophile, a transsexual and someone who engaged in bestiality. The plaintiff repeatedly complained to his superiors about the harassment, but they ignored him. Ultimately, a fellow corrections officer attacked him with a chair and injured his knee. The officer left work and later went on disability leave. A doctor certified that he suffered from post-traumatic stress disorder.⁴¹⁰
- In 1999, a Saratoga Springs police officer, who alleges he was derided and harassed because he was perceived to be gay, sued the city and several fellow officers for slander and sexual harassment. The officer, an eight-year veteran of the Saratoga Springs force, asserted that he became the target of anti-gay harassment by his colleagues after he was honored for his involvement in a robbery investigation in 1992. According to the officer, harassment consisted of references to him as "queenie," and to his friends as his "boyfriends." Other officers allegedly ridiculed him by blowing kisses to him derisively over the police radio, stalking him, and telling members of the community that he was gay. He claims that the ha-

⁴¹⁰ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), available at <http://bit.ly/kThbS>.

rassment irreparably tarnished his reputation in the community and caused him “enormous emotional distress.” He also asserts that a city employee told a youth organization with which he was involved that he was “light in the loafers” and therefore “should not be considered as a chaperone for a camping trip the organization was having.”⁴¹¹

- A lesbian police officer sued the NYPD for harassment based on her sexual orientation for over two years. She ultimately settled the case for \$50,000 and was permitted to resign. She alleged that the harassment began after her same-sex marriage ceremony in Central Park to a fellow officer. She claimed that obscene pictures of women with her face pasted on them were hung in her Bronx precinct house, that other officers refused to ride with her on patrols, and that she was assigned to cleaning duties in the precinct. She also claimed that one co-worker assaulted her and that officers repeatedly taunted her with derogatory names. “When I complained, everyone turned their backs on me,” she said, adding that her commanding officer told her, “No one wants to ride with a dyke.” She maintained that the abuse, which continued for over a year, worsened after it was reported, and that the police department had not taken proper action to address the harassment and unequal treatment.⁴¹² She was also reassigned to another location.
- A former Nassau County police officer claimed that his fellow officers and supervisors “embarked on a vicious campaign of harassment against him because of his

⁴¹¹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 183-84 (1999 ed.).

⁴¹² *Bryant v. City of N.Y.*, 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).

sexual orientation.” In 1999, a jury awarded him \$380,000. The jury found that members and supervisors committed discriminatory acts demonstrating an ongoing policy or practice of sexual orientation discrimination against him; that such acts were condoned by his supervisors; that in the Nassau County Police Department there was a custom, policy or decision to permit sexual orientation harassment; and that the unwelcome harassment against the plaintiff was severe or pervasive. The court upheld the jury award and denied the dismissal motions to all but one defendant. It was demonstrated in the trial that the plaintiff initially kept his sexual orientation hidden from his colleagues, but it eventually was revealed when an arrestee told officers that he was gay. This began nine years of harassment. Fellow police officers hung pornographic pictures and doctored records on the stationhouse bulletin board, portraying the police officer as a child molester and a sadomasochist. At least nineteen of the pictures were produced at trial. They hid his uniform, put rocks in his hubcaps and once placed a nightstick—labeled “P.O. Quinn’s Dildo”—in his squad car. His supervisor admitted to seeing the posted pictures and, according to another sergeant in the precinct, engaged in the harassment by referring to him as “dick smoker.” The precinct Lieutenant admitted at trial that he had seen pictures depicting him unfavorably, but not those presented at trial. He stated, though, that had he seen them, he would not have felt obligated to remove them because he did not view them as offensive.⁴¹³

- In 1999, two New York police officers filed a lawsuit for sexual harassment and violations of their civil rights. One of the officers, a thirteen-year veteran, had

⁴¹³ *Quinn v. Nassau Police Dep't*, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).

joined East Harlem's 23rd Precinct in 1989 and was allegedly the target of relentless harassment because he was gay. He asserted that he was the victim of verbal anti-gay harassment and that he was repeatedly forced into his own locker. In addition, he asserts that on two occasions he was handcuffed and hung from a coat rack in the precinct lunchroom where he was subject to the ridicule of his coworkers and other officers once tried to physically force him to simulate an oral sex act with another officer. The second officer, who was not gay, asserted that he was nonetheless the victim of sexual harassment by other officers simply because he was willing to work with the first officer. According to the second officer, other officers called him "Camacho homo," drew pictures depicting him engaged in sex acts with the first officer on precinct walls, and wrote graffiti on police station walls that read, "Camacho is a butt pirate."⁴¹⁴

- A gay physician and former intern at Coney Island Hospital brought suit alleging sexual orientation discrimination. The court, ruling on cross summary judgment motions, ruled that he was entitled to pursue his sexual orientation discrimination against his employer pursuant to New York City's human rights law. He had not disclosed his sexual orientation when he was hired as an intern under a one-year contract. Midway through the contract, he received an offer of employment at another hospital. In seeking permission from his supervisor to terminate his internship early in order to take the other position, he disclosed his sexual orientation and asserted that in the other hospital, he would be able to be more open about being gay. The supervisor's response was allegedly to characterize him as

⁴¹⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 179 (1999 ed.).

"ungrateful" and deny his request. The physician attributed the various faults in his subsequent performance, to the extent they existed, to depression over having lost the opportunity with the other hospital, and alleges that the change in his evaluations and his treatment by his supervisor all post-dated his revealing his sexual orientation. Within a few months, his performance so deteriorated that he was pressured to quit or be fired and was subsequently terminated in a hospital proceeding.⁴¹⁵

- A former police officer alleged that he was constructively discharged by the New York City Police Department because he is gay. The harassment included the marking of his locker with graffiti, the placement of garbage cans in front of his locker, and the protest of a fellow officer to his sleeping in the officers' lounge area between shifts, even though such practice was customary. He reported the harassment to his supervisor who did nothing. Following his complaint, he arrived at work to find his locker broken into and a handwritten note left for him which read "Testa Blood Guts" and depicted skull and crossbones. Again, his reports of harassment went unanswered. After disparaging graffiti about the plaintiff was found on the bathroom wall, he was involuntarily transferred to another precinct where the harassment still continued. His new locker was broken and the words "coward" and "fag" were written on it. He eventually told his captain that he did not want to resign, but was under enormous stress and fear due to the harassment. As a result, he was demoted to an unarmed position. In denying the police department's motion to dismiss in part, the court held that there was an is-

⁴¹⁵ *Sussman v. N.Y.C. Health & Hosps. Corp.*, 1997 WL 334964 (S.D.N.Y. June 16, 1997).

sue of fact as to whether the police department maintained a policy of discrimination against homosexuals, noting that, as alleged, the plaintiff's working conditions, which were imposed on the basis of his sexual orientation, were made so unpleasant as to effectively force him to resign.⁴¹⁶

- In 1996, the Public Employees Federation, a union representing employees of the State Law Department, filed an unfair practice charge against the Department, asserting that a change in policy, which omitted "sexual orientation" from the executive order governing discrimination law in the Department, violated the Department's duty to bargain over changes in terms of employment. The change was made after Dennis C. Vacco was elected Attorney General of the State of New York in 1994 in a campaign where some of his supporters attacked his opponent, Karen Burstein, because she was a lesbian. Shortly after taking office, Vacco replaced his predecessor's executive order governing discrimination policy. Subsequently, several openly lesbian or gay employees of the Department were fired in the course of a purported reorganization of the Department that generally downgraded civil rights enforcement functions.⁴¹⁷ Two women, a lieutenant and a detective in the New York City Police Department, have filed a \$5 million lawsuit against the city, the Police Department, Police Chief Raymond Abruzzi and Commissioner William Bratton, charging their male coworkers with sexist and homophobic harassment. The officers in their Queens precinct allegedly hung a sign that said "NLA" for "No Lesbians Allowed," spread rumors that the two women were lovers, referred to the Police Women's Endowment Association as

⁴¹⁶ *Tester v. City of New York*, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).

⁴¹⁷ *Public Employees Fed'n v. State of N.Y.*, PERB Case No. U-16702 (1996).

“Lesbians R Us” and called the lieutenant’s phone “the lesbian hotline.” Both the lieutenant, who commanded the precinct detective squad for nearly two years, and the detective were transferred by Chief Abruzzi after several male officers asked to be transferred because of the women.⁴¹⁸

- In 1995, Justice Sotomayor, while a judge for the Southern District of New York, denied a motion to dismiss a case where the plaintiff had been fired from his job as a prison kitchen worker because he was gay. Criticizing the defendants’ argument that removing the plaintiff was rationally related to preserving mess hall security, the court stated that a "person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security." Justice Sotomayor denied the defendants’ motion to dismiss stating that the pro se plaintiff could use the services of a lawyer "to explore fully the substantial questions raised by this case" and that the Supreme Court’s then-pending decision in *Romer v. Evans*⁴¹⁹ would provide further guidance on the scope of equal protection rights afforded to lesbians and gay men. The court also rejected the defendants’ qualified immunity defense, stating that the "constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law."⁴²⁰

⁴¹⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 83 (1995 ed.).

⁴¹⁹ 517 U.S. 620 (1996).

⁴²⁰ *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

33. North Carolina

- In *Hensley v. Johnston*, a case pending before the United States District Court for the Eastern District of North Carolina, a public school teacher brought suit against the Johnston County Board of Education after she was transferred from her position following complaints by a student's parents regarding her perceived "antagonism toward a Christian belief system, her 'alternative life views'" and her perceived sexual orientation.⁴²¹ The teacher alleges that "she was the 'target' of discriminatory animus because she 'did not deny that her religious beliefs did not include a view that homosexuality was a sin.'"⁴²²
- Anne Marie Clukey had worked for the City of Charlotte at a maintenance facility for two years before she was fired in December 2006. Clukey, who was born a male and underwent gender reassignment surgery in May 2001, claims that she was fired "because she did not conform to her supervisor's 'gender stereotype'."⁴²³ City Attorney Mac McCarley stated that "transgendered individuals do not have any rights under federal employment discrimination laws."⁴²⁴
- John Peter Bradley, who described himself as a whistle-blower who reported official corruption while working for law enforcement in various capacities, claimed that one government official had written a letter identifying Bradley as a bisexual, and that ultimately the letter was used to harm him when he had obtained em-

⁴²¹ *Hensley v. Johnston County Bd. of Educ.*, 2007 WL 4717527, Trial Motion, Memorandum and Affidavit (E.D.N.C. Aug. 21, 2007).

⁴²² *Id.*

⁴²³ Franco Ordonez & Maria David, *Ex-City Worker Says She Was Fired for Sex Change*, CHARLOTTE OBS., Feb. 12, 2009, available at: <http://bit.ly/rEfNo>.

⁴²⁴ Matt Comer, *Transgender Worker Sues Charlotte for Job Discrimination*, Q-NOTES, Feb. 12, 2009, <http://bit.ly/Oe2jA>.

ployment as police chief in Woodfin, North Carolina. Ruling on motions to dismiss by various defendants, the court ruled that Bradley may pursue his constitutional claims against certain named government officials sued in their individual capacities, despite Eleventh Amendment immunity, since he was seeking prospective injunctive relief. However, his claims for compensation would be barred by immunity,⁴²⁵

- In 1991, a gay North Carolina county deputy planning director was fired because of his sexual orientation.⁴²⁶

34. North Dakota

35. Ohio

- In 2008, a lesbian employee of a state department reported that she faced daily harassment including threats and intimidation because of her sexual orientation.⁴²⁷
- In 2006, a transgender electrician was not hired by an Ohio state university because of her gender identity.⁴²⁸
- A lesbian teacher was fired after she had preliminarily decided to include materials related to anti-gay bias in the readings for a unit on civil rights, despite the

⁴²⁵ *Bradley v. North Carolina Dept. of Transp.*, 286 F. Supp. 2D 697 (W.D.N.C. 2003).

⁴²⁶ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁴²⁷ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

⁴²⁸ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

fact that she had shown them in advance to the principal and withdrew them from her teaching plans after he objected.⁴²⁹

- A court ruled that a Cincinnati police officer had a viable claim of sex stereotype discrimination based on the harassment she suffered after telling supervisors that she was transgender and would soon be transitioning. She was fired on the ground that she “lacked command presence.”⁴³⁰ A jury awarded the officer \$320,511 on her discrimination and harassment claims. Further, the court awarded the officer \$527,888 in attorneys’ fees and \$25,837 in costs.⁴³¹
- A firefighter in Salem, Ohio, sued on the ground of sex discrimination for sex stereotype discrimination after he informed his supervisors that he was a pre-operative transsexual. As a result, he was forced to undergo multiple psychological examinations. A federal court ruled that he could sue based on sex stereotype discrimination.⁴³²
- A gay male teacher was fired because of a false rumor that he was holding hands with another man at a holiday party.⁴³³ He sued in federal court and won an award of over \$70,000 for back pay and damages.⁴³⁴

⁴²⁹ *Beall v. London City School District Board of Education*, No. 2:04-cv-290, 2006 WL 1582447 (S.D. Ohio June 8, 2006).

⁴³⁰ *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

⁴³¹ *Id.* at 733.

⁴³² *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

⁴³³ *Glover v. Williamsburg Local School District Board of Education*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

⁴³⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 188 (1999 ed.).

36. Oklahoma

- In 2008, a municipal police officer transitioned from male to female while on the job. Thereafter, she experienced severe harassment based on her gender identity. After her transition, the police department also insisted that she undergo psychological evaluations. They transferred her to an unfavorable position.⁴³⁵
- In 2007, a gay electronics technician who worked out of a city firehouse reported, after another employee learned that he was gay, that he began to experience harassment from co-workers. He was called a “cocksucker,” was whistled at, was told that “[q]ueers are just shit; people like you float,” was lectured about same-sex attraction being “against the Bible,” and was told that gay people are “an abomination to god.” When a new employee complained about having to clean the showers at the firehouse, the technician commented that they were so filthy that he wouldn’t take a shower there. The new employee replied that, according to what he had heard from others, he had thought that “you'd like that [implying a shower with other men].” One coworker repeatedly screamed at the technician, physically intimidated him, and twice threatened to kill him. When the individual complained, his shift was changed against his wishes so that he would not work the same time as that co-worker. The department administrator refused to give him a copy of the employer’s policy vis-à-vis sexual harassment and nondiscrimination.⁴³⁶

⁴³⁵ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

⁴³⁶ *Id.*

- In 2004, Oklahoma City reached a settlement with a transgender police officer who was harassed and fired because of her gender identity. The officer, a decorated army veteran, was fired even though she had received an award from the Department of Justice for her service as a police officer. In *Schonauer v. City of Oklahoma, ex. rel. Oklahoma City Police Department*,⁴³⁷ the plaintiff sued the Oklahoma Police Department and the City of Oklahoma, her employer of more than ten (10) years, for gender discrimination, hostile work environment and disparate treatment, based on gender.⁴³⁸ When Schonauer was first hired by the police department in 1992, she was male; in 2001, she underwent gender reassignment surgery.⁴³⁹ After the surgery, she faced constant harassment from her co-workers, which she alleged interfered with her ability to do her job.⁴⁴⁰ However, she continued performing her job and even improved relations between the police department and the Asian, Hispanic, and gay and lesbian communities.⁴⁴¹ Despite this achievement, and her exceptional performance prior to 2001,⁴⁴² the police department removed her from patrol duties, gave her an interim clerical position, and then placed her on paid administrative leave.⁴⁴³

⁴³⁷ Case No. CIV-05-104-W (W.D. Okla. 2005).

⁴³⁸ Memorandum from the City of Oklahoma City Office of the Municipal Counselor to Mayor and Council (Sept. 27, 2005), <http://bit.ly/3IVVNk> (last visited Sept. 6, 2009).

⁴³⁹ Richard Green, *Transgender Officer Sues Police in OKC*, TULSA WORLD, Dec. 29, 2004, at A15.

⁴⁴⁰ Reuters, *Sex-Change Oklahoma Officer Files Harassment Suit*, EXP. INDIA, Dec. 29, 2004, <http://bit.ly/aW3mM> (last visited Sept. 6, 2009).

⁴⁴¹ Oklahoma Office of Personnel Management Affirmative Action Plan, <http://bit.ly/sKEIp> (last visited Sept. 6, 2009).

⁴⁴² See Chad Graham, *Gays in the Red States*, ADVOCATE, Feb. 15, 2005, available at <http://bit.ly/NFRP1> (stating that Ms. Schonauer received an award from the Department of Justice for her performance as an Oklahoma police officer).

⁴⁴³ Oklahoma Office of Personnel Management Affirmative Action, *supra* note 441.

- In 2004, a librarian, employed at the Oklahoma City Branch of Langston University—Oklahoma’s only historically black college and university—for approximately three years, began the process of transitioning from male to female. After she returned from a professional conference, she discovered that a student had circulated over 100 copies of a hate-filled petition calling for her removal from campus and had posted flyers to the same effect around the campus. Every reason cited in support of the librarian’s removal was related to her gender identity. When the librarian confronted the library director about the situation, he told the librarian that the student had a right to freedom of speech and that he would not do anything. When other students complained to the library director about the flyers, he supported the student who had passed them out. The student then printed a second flyer stating that “God wished [her] dead” and that he hoped she would die. When she confronted administrators about the second flyer, she was told her concerns were unwarranted and she was the one creating problems. The following semester, her schedule was changed so that she would have to leave the building at 10:00PM—long after other staff and faculty had gone home. Fearing that she would be unsafe on campus at that hour, she had no choice but to resign.⁴⁴⁴
- In *Lankford v. City of Hobart*,⁴⁴⁵ two female dispatchers for the Hobart City police station in Oklahoma brought suit against the City and their supervisor, the former police chief, alleging that the police chief had violated their privacy rights and

⁴⁴⁴ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁴⁴⁵ 27 F.3d 477 (10th Cir. 1994).

created a hostile and abusive work environment by sexually harassing them.⁴⁴⁶ One of the plaintiffs alleged that after she spurned the supervisor's advances, he became angry and spread rumors that she was a lesbian.⁴⁴⁷ He then used his position as police chief to gain access to her medical records in order to verify his claim.⁴⁴⁸

37. Oregon

- A housing and nuisance inspector for the Bureau of Development Services of Portland filed a suit based on sexual orientation and sex stereotyping harassment and settled for \$150,000 after her Title VII claim survived summary judgment in a U.S. District Court.⁴⁴⁹ The inspector's co-workers were aware she was a lesbian because she had disclosed that she had a female domestic partner. At work, she did not wear makeup, had short hair and wore men's clothing. Her supervisors made remarks such as that her shirt looked "like something her father would wear" and "are you tired of people treating you like a bull dyke[?]" On another occasion her supervisor stated: "I'm a man, you are a woman. I'm the man. I don't have to listen to anything you say. You are a woman. You don't know anything." She also alleged her co-workers harassed her, calling her a "bitch," saying loudly that they were "surrounded by all these fags at work," that she "just needed to get some dick and she wouldn't be gay anymore," and asking her "would a woman wear a man's shoes?" In holding for the inspector, the court noted that, for the

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ LESBIAN & GAY L. NOTES (Dec. 2004), available at <http://www.qrd.org/qrd/usa/legal/lgln/12.04>.

purpose of Title VII analysis, it was irrelevant whether or not the harassers were motivated by the plaintiff's sexual orientation, as sexual orientation, alone, is not actionable under Title VII. However, the court held that gender stereotyping "constitutes actionable harassment."⁴⁵⁰

- A firefighter was harassed for incorrectly being presumed to be gay. In 2003, Senator Ted Kennedy, when speaking about the Employment Non-Discrimination Act in the Senate, recounted the discrimination and harassment faced by this firefighter because of his perceived sexual orientation: "His co-workers saw him on the local news protesting an antigay initiative, and incorrectly assumed he was gay himself. He began to lose workplace responsibilities and was the victim of harassment, including hate mail. After a long administrative proceeding, the trumped-up charges were removed from his record, and he was transferred to another fire station."⁴⁵¹
- From 1980 to 1996, a transgender woman worked for the Josephine County Sheriff's Office in Grant's Pass, Oregon. She received numerous commendations for her work—including praise for rescuing a person from a burning vehicle and delivering a baby on the side of the road. During a leave following an on-duty injury, her storage unit was broken into and several items of women's clothing were stolen. Within a week of the break in, her supervisor called her into the Sheriff's Office for a meeting. She was taken to an interrogation room where she was informed that her stolen clothes, along with identifying photographs, had been dis-

⁴⁵⁰ *Fischer v. City of Portland*, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).

⁴⁵¹ Statements by U.S. Sen. Ted Kennedy, 149 CONG REC. §§ 12377, 12382 (Oct. 2, 2003).

covered alongside the railroad tracks. At that point, her supervisor told her that the sheriff believed she would no longer be able to perform her duties because she dressed as a woman. She was told that it would be “a big mistake to return to work.” When she attempted to return to work, she was forced to undergo a psychiatric examination. She appeared in front of a panel of doctors selected by the Sheriff’s Office who determined that she was unfit for duty. She was told that the Office attorney was in the process of putting together a settlement package in exchange for her resignation.⁴⁵²

- A police captain filed a federal lawsuit against the City of Portland claiming that the mayor and police chief discriminated against him because he was gay. Prior to his demotion, the officer, a 21-year decorated veteran of the Portland police force, was put on leave and investigated on charges that he had solicited male prostitutes. In August 1996, a Multnomah County grand jury refused to indict him on the charges. He was then permitted to work, but he was demoted in early 1997. According to the officer, his police chief forbade him to call the chief at home because the officer was gay, and the chief told the officer he was not his “special friend.” He also alleged that during an internal affairs investigation the officer was interrogated, “in a manner calculated to greatly embarrass and humiliate” him, about his sex life, including his sexual positions and the names of his partners. He also alleged that his safety was jeopardized when he was issued a

⁴⁵² Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

squad car lacking a police radio, emergency lights and a siren, and that he was publicly humiliated by the police chief.⁴⁵³

- A coordinator of Umatilla County’s commission on children and families was terminated after being asked if he was gay. The coordinator was hired on a temporary basis in January 1993 by the Umatilla County Board of Commissioners to coordinate the commission. In June 1993, after securing additional grant money to fund the commission, the board interviewed him again before granting him the position on a permanent basis. After official questioning had finished, one of the commissioners asked him if he was gay. Presuming the question to be illegal, an attorney interceded to block the coordinator’s response. The board rehired him fulltime. Over the next several months, he worked to improve the quality of services and the integrity of the commission’s grant-making process, and won praise from around the state, including from the commission’s executive director. In March 1994, he received a pay raise. In May, at the insistence of one of the commissioners, the board ordered an evaluation of his performance. In the review, he received ratings from satisfactory to excellent. In no category was his work rated “unacceptable.” Despite this positive review, the board fired him ten days later.⁴⁵⁴

⁴⁵³ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 194 (1999 ed.).

⁴⁵⁴ HUMAN RIGHTS CAMPAIGN, *DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES* (2001), <http://bit.ly/kThbS> (last visited Sept. 6, 2009).

38. Pennsylvania

- In 2010, the State of Pennsylvania settled a case brought by a state prison guard who was discriminated against because he was perceived to be gay.⁴⁵⁵ Other guards subjected the victim to rumors, innuendo, and other ill treatment based on their perception of his sexual orientation.
- In 2008, a transgender applicant for a state agency database analyst position was not hired because of his gender identity.⁴⁵⁶
- In 2006, an employee of the Philadelphia Police Department filed a complaint with the City of Philadelphia alleging that he had been discriminated against on the basis of his sexual orientation.⁴⁵⁷ The city settled with the employee.⁴⁵⁸
- A former policeman for the town of Walnutport alleged that borough officials violated his free speech rights by retaliating against him when he complained about attempts to pry into his sexual orientation and off-duty conduct in response to a demand by a city council member. The claim was settled for \$5,000.⁴⁵⁹
- On January 31, 2003, an employee of the Free Library of Philadelphia filed a complaint with the Pennsylvania Human Rights Commission alleging that she had been discriminated against on the basis of gender identity. The employee was ha-

⁴⁵⁵ *Pa. Prison Guard Settles Sex Perception Bias Suit*, CBS3, May 6, 2010,

<http://cbs3.com/wireapnewspa/Western.Pa.prison.2.1678589.html> (last visited May 12, 2010).

⁴⁵⁶ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

⁴⁵⁷ Complaint, [Redacted] v. Philadelphia Police Department, Philadelphia Human Relations Commission, Complaint No. SGEN-6NQLXT (Apr. 10, 2006).

⁴⁵⁸ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

⁴⁵⁹ LESBIAN & GAY L. NOTES (Feb. 2005), available at <http://www.qrd.org/qrd/www/legal/lgl/02.2005.pdf>.

rassed after she began to transition from male to female and was involuntarily transferred to an undesirable worksite.⁴⁶⁰ The Commission found probable cause to support the charge.⁴⁶¹ On July 8, 2003, the employee filed a second complaint against the Free Library of Philadelphia alleging that that the library continued to discriminate against her and her co-workers continued to harass her, despite her previous complaint. She also alleged that the library was treating her badly in retaliation for filing the previous complaint.⁴⁶² Again, the Commission found that there was probable cause to support the charge.⁴⁶³ On May 7, 2004, the employee filed a third complaint against the Free Library of Philadelphia alleging continued discrimination on the basis of sexual orientation and further retaliation based on her previous complaints.⁴⁶⁴ For the third time, the Commission determined that there was probable cause to support her charge.⁴⁶⁵

- In *Bianchi v. City of Philadelphia I*, a male firefighter brought a § 1983 action against the city asserting claims under Title VII, the Pennsylvania Human Rights Act (“PHRA”), and the state and federal constitutions.⁴⁶⁶ Bianchi had been subjected to a pattern of gross and abusive harassment (including used condoms in his desk, urine or feces in his gear, and threatening letters), which he alleged was

⁴⁶⁰ Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. PWIS-5JBKJJ (Jan. 31, 2003).

⁴⁶¹ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

⁴⁶² Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5P8LUH (July 8, 2003).

⁴⁶³ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

⁴⁶⁴ Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5YMHDX (May 7, 2004).

⁴⁶⁵ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep’t, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

⁴⁶⁶ *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002).

rooted in a belief that he was homosexual. While the Court recognized that the actions taken against Bianchi “constituted harassment,” the court held that the conduct was not actionable as sex discrimination under Title VII or the PHRA. However, the due process and First Amendment claims survived summary judgment and furnished the basis for an award of more than \$1 million in damages, which was upheld by the U.S. Court of Appeals for the Third Circuit in *Bianchi v. City of Philadelphia II*.⁴⁶⁷

- In *Taylor v. City of Philadelphia*,⁴⁶⁸ an employee of the City of Philadelphia Free Library alleged discrimination based on his sexual orientation. The District Court dismissed intentional infliction of emotional distress and punitive damages claims against the City. However, it is unclear from the opinion whether other claims were allowed to go forward, and no further opinions or rulings were available online. Before bringing suit, the plaintiff had filed a complaint in 1999 with the Philadelphia Human Relations Commission alleging that he had been discriminated against on the basis of his sexual orientation. The Commission determined that there was probable cause to support the charge.⁴⁶⁹ In 2000, the employee filed a second complaint against the Free Library of Philadelphia for discrimination on the basis of sexual orientation and for retaliation in response to his pre-

⁴⁶⁷ *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).

⁴⁶⁸ *Taylor v. City of Philadelphia*, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).

⁴⁶⁹ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep’t, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

vious filing. Again, the Commission determined that there was probable cause to support the charge.⁴⁷⁰

- In 1996, a gay nurse at an adult health services center was subjected to a hostile work environment because of his sexual orientation.⁴⁷¹
- Although not involving the state as an employer, in 1995 a state appellate court ruled that it was not against the public policy of the state for a private sector employer to specify in its employment contract that homosexuality was a ground for termination of employment.⁴⁷²
- A plaintiff filed suit alleging that he was denied a proper pre-termination hearing on the same-sex sexual harassment charges filed against him at a community college. A jury awarded the plaintiff reinstatement of his tenured teaching position and \$134,081 back pay, but denied relief on his claims of emotional and reputational harm. The plaintiff filed a motion for a new trial, pointing to defense counsel's summation, which included statements that he actually may have committed the sexual harassment for which he was terminated. The court denied the motion, ruling that these statements did not require a new trial since they were not materially prejudicial as they were part of the evidence and were somewhat relevant.⁴⁷³

39. Rhode Island

⁴⁷⁰ *Id.*

⁴⁷¹ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁴⁷² *DeMuth v. Miller*, 438 Pa. Super. 437 (1995).

⁴⁷³ *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

- A teacher alleged that the Cranston Public Schools unlawfully discriminated against her based on sexual orientation in violation of Rhode Island’s anti-discrimination law. The Rhode Island Commission for Human Rights found probable cause to believe that the teacher had been unlawfully discriminated against before the case was transferred to the Superior Court. The teacher was denied family medical leave when she took time off work to care for her ill same-sex partner. The Superintendent stated that family medical leave could only be granted where there is an “illness in the family” and not for “non-related individuals living in the household.”⁴⁷⁴ The hearing on the teacher’s motion for summary judgment was scheduled for March 3, 2009.⁴⁷⁵
- In 2007, a gay man working for the State of Rhode Island Department of Corrections reported having problems at work because of his sexual orientation. He was called "gay cop," "cum swallowing pig," and other derogatory names in front of inmates by his coworkers.⁴⁷⁶
- A gay male public employee was terminated from his job as a beach manager after three years. His employer publicly informed him that he was under investigation for sexual harassment, due to a complaint made by a male ex-employee. In the past, his employer had referred to homosexuals as “fags.” The employee

⁴⁷⁴ See Plaintiff’s Memorandum of Points and Authorities In Support of Motion for Summary Judgment, *D’Amico v. Cranston Sch. Comm.*, P.C.C.A. No. 06-5997 (R.I. Super. Ct. 2009).

⁴⁷⁵ Charge of Discrimination Form, R.I. Comm’n on Human Rts. (May 26, 2004) (on file with the Williams Institute).

⁴⁷⁶ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 22, 2007) (on file with GLAD).

stated that similarly situated heterosexuals were not accused of sexual harassment.⁴⁷⁷

- In 2004, a Rhode Island State Trooper, who was a lesbian, reported that she was harassed and ultimately fired because of her sexual orientation. The trooper was concerned that if she filed a complaint, she would not be able to get another job in law enforcement in the state.⁴⁷⁸
- A lesbian public employee was terminated from her job as a certified nursing assistant. Her employer's stated reason for her termination was that her sexual orientation made other employees uncomfortable.⁴⁷⁹
- In 2003, a woman working for a state agency overheard a conversation in the cafeteria at work in which an employee made derogatory comments about gay people, such as "homosexuals are pedophiles." She complained to her supervisor, who scheduled a mediation session. However, the person who made the comment refused to participate, and the matter was dropped. She feared retaliation if she filed another complaint.⁴⁸⁰

⁴⁷⁷ Charge of Discrimination Form, R.I. Comm'n on Human Rts. (Aug. 16, 2006, as amended) (on file with the Williams Institute).

⁴⁷⁸ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 18, 2004) (on file with GLAD).

⁴⁷⁹ Charge of Discrimination Form, R.I. Comm'n on Human Rts. (Nov. 1, 2004) (on file with the Williams Institute).

⁴⁸⁰ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (July 17, 2003) (on file with GLAD).

- In 2002, a science teacher came out to his colleagues and his principal began to harass him. As the harassment continued, the teacher became more depressed and anxious and began to stay out of school and then was fired.⁴⁸¹
- In 2002, a teacher at a Rhode Island public school, who was gay, reported that several of his coworkers made anti-gay comments to him, such as “What, are you a homo?” “Where are your wife and kids?” and “We can't deal with this gay and lesbian shit.” In response to his complaints, the teacher's classroom and teaching schedule were changed without notice, he was screamed at, and he was warned to “not get into a pissing match” with them. The teacher reported that he felt intimidated and was treated differently and passed over for other work opportunities because of his sexual orientation. After filing a complaint with his union and the school district, union officials and the principal wrote the teacher up for insubordination. The teacher spoke to someone in the Rhode Island Department of Education, but he feared that if he filed an official complaint, the Department of Education would take the school's side.⁴⁸²
- A lesbian public employee was harassed and subjected to discriminatory terms and conditions of employment by her supervisor. Since her supervisor learned of her sexual orientation, she has been treated in a demeaning and harassing manner.

⁴⁸¹ E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

⁴⁸² GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Oct. 30, 2002) (on file with GLAD).

She was constantly questioned about time, work assignments, and her manner of dress and was the only employee not allowed to wear jeans to work.⁴⁸³

- A lesbian public employee was subjected to discriminatory terms and conditions of employment. The employee stated that her supervisor was jealous of her relationship with a female coworker and so harassed her and issued inappropriate disciplinary actions. The supervisor also harassed her outside of work, following her home and to her partner's house on numerous occasions.⁴⁸⁴
- A public employee was terminated and her supervisor stated that the reason for termination was that employee threw a snack at a patient. However, prior to termination, her supervisor told her that she would not tolerate the employee's homosexuality.⁴⁸⁵

40. South Carolina

- A lesbian police officer who reported in 2007 that when she applied to a police department in South Carolina, she underwent a routine polygraph exam and was asked if she was a lesbian. She responded truthfully that the answer was "yes." She thereafter was not selected for the position. She learned from references she had given that they had not been contacted.⁴⁸⁶ She had quit the state police acad-

⁴⁸³ Charge of Discrimination Form, R.I. Comm'n on Human Rts. (June 1, 1999) (on file with the Williams Institute).

⁴⁸⁴ Charge of Discrimination Form, R.I. Comm'n on Human Rts. (Dec. 1, 1997) (on file with the Williams Institute).

⁴⁸⁵ Charge of Discrimination Form, R.I. Comm'n on Human Rts. (Oct. 18, 1997) (on file with the Williams Institute).

⁴⁸⁶ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

emy in another state to move to South Carolina, received a good reference from her former employer, and had a clean background and a degree.

- In 2006, a gay emergency medical technician was fired by a county department because of his sexual orientation.⁴⁸⁷
- In 1996, a junior high school teacher in Union County was suspended and put on probation for showing the Oscar-winning film *Philadelphia*, about a gay man with AIDS, to seventh and eighth graders. Parents and a local pastor complained that the film was vulgar and promoted homosexuality. The school superintendent criticized the teacher for not getting permission from the principal, the health committee, or the school board to show the film, but he did not agree that the teacher was trying to promote homosexuality. One of the parents who complained said she had not wanted the teacher suspended. “We felt like she owed an apology to those students and those parents,” she said, stating that she will be satisfied if the school district prevents the showing of such films in the future.⁴⁸⁸
- An employee of the State Law Enforcement Division (“SLED”) alleged that he was constructively discharged because of his perceived sexual orientation -- after allegations that he had slept with a co-worker’s husband and was then harassing her at work.⁴⁸⁹ The employee denied the allegations, but the court found that the truth or falsity of the basis upon which the employee was discharged “neither en-

⁴⁸⁷ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁴⁸⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 96 (1995 ed.).

⁴⁸⁹ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *1-2 (D.S.C. April 6, 1992).

hances nor diminishes” his claim because he was gay.⁴⁹⁰ The Court stated that it was not willing to extend the right of privacy to include the conduct at issue in this case, because such “activity clearly bears no relationship to marriage, procreation, or family life”⁴⁹¹ and held that homosexual conduct is not protected under the due process clause of the Fourteenth Amendment.⁴⁹² The Court also stated that “the constitutional right of privacy and free association do not preclude a law enforcement agency from inquiring into an officer’s off-duty same-sex relationships.”⁴⁹³ Further, it stated that the employee’s equal protection rights had not been violated because, in discharging the employee based on his perceived engagement in homosexual activity, SLED had the “legitimate purpose of maintaining its order, discipline and mutual trust.”⁴⁹⁴

41. South Dakota

- A teacher was terminated after twenty-nine years of service because he answered a question about same-sex sexual activity during an annual question and answer session, which he was asked to lead by his school for over fifteen years, following a sex education video.⁴⁹⁵ The South Dakota Supreme Court reversed the termination as arbitrary. Since 1980, the Faith School Board had made it a practice to contract with the community health nurse to provide sex education for elementary students. Following the sex education presentation, the boys then went to the

⁴⁹⁰ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *5.

⁴⁹¹ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *6.

⁴⁹² *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *1-2.

⁴⁹³ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *5, citing *Walls v. Petersburg*, 895 F.2d 188 (4th Cir.1990).

⁴⁹⁴ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *6.

⁴⁹⁵ *Collins v. Faith Sch. Dist.*, 574 N.W.2d 889 (1998).

classroom for a question and answer session led by the teacher, as requested by the health nurse. The teacher was instructed to answer the boys' questions as honestly as possible and he continued to carry out what had been an established practice for fifteen years. During the session in 1995, one of the boys related that he had heard that two men could have sex and asked how this was possible. The teacher preceded his explanation with the disclaimers that this type of conduct is frowned upon, most people do not believe in it, and the boys would find it gross. He then described oral and anal sex in explicit language. In response to complaints by parents, a termination hearing was held and the teacher was terminated. The Supreme Court reversed, indicating that it was arbitrary for the Board to ignore the teacher's twenty-nine years of faithful service purely based on his indiscreet answer.

42. Tennessee

- In 2007, an employee of a state-supported women and children's center came out to colleagues as lesbian after she witnessed them ridiculing a lesbian client. They then started harassing her, including questioning her religious beliefs. She was later terminated.⁴⁹⁶
- Paul Scarbrough, a director/superintendent of schools for the Morgan County School Board, was not selected to continue in his position because of the public outrage that resulted after he was invited to speak at a church with predominantly gay and lesbian members. In early 2000, Scarbrough was asked by a friend to

⁴⁹⁶ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

speak at a convention held by a church. At the time, Scarbrough was unaware that the church had a predominately gay and lesbian congregation. Scarbrough agreed to consider the request, but ultimately was unable to accept the invitation and so declined. However, approximately a month later, a newspaper published an article announcing—incorrectly—that Scarbrough would be a speaker at the convention, which was sponsored by the church. After this article ran, school board members began receiving criticisms and concerns regarding Scarbrough continuing on as superintendent. The board members also questioned Scarbrough’s judgment and thought the article undermined public confidence in Scarbrough. In response, Scarbrough provided written statements to two newspapers explaining the inaccuracies of the article and noting that while he did not endorse homosexuality, he would not refuse to associate with gay people. When Scarbrough was then not selected by the school board to continue as Superintendent/Director, he sued and won a judgment from the U.S. Court of Appeals for the Sixth Circuit.⁴⁹⁷

- The impact of Tennessee's state sodomy law on employment was mentioned several times in the state court case striking it down. In the opinion, the Tennessee Court of Appeals noted that the identity of one of the plaintiffs had been sealed “due to concern that he would be fired from his job if his violation of the [Homosexual Practices Act] became known to his employer.”⁴⁹⁸ Next, the court noted that the plaintiffs “believe they are threatened with prosecution for violations of

⁴⁹⁷ *Scarbrough v. Morgan County Bd of Educ.*, 470 F.3d 250 (6th Cir. 2007).

⁴⁹⁸ *Campbell v. Sundquist*, 926 S.W.2d 250, 253 n.1 (Court of Appeals of Tennessee, 1996).

the statute, which could result in plaintiffs losing their jobs, professional licenses, and/or housing should they be convicted.”⁴⁹⁹

- Ray Bush, an inmate employee at a state facility, brought suit alleging discrimination based on his actual or perceived sexual orientation. Bush alleged that he was fired from his job in the facility kitchen because he was perceived to be homosexual, and that defendants subjected him to verbal abuse and slander, and placed him in fear of sexual assault because they believed him to be gay.⁵⁰⁰ The Sixth Circuit upheld the trial court’s dismissal of his claim for lack of a basis in law, stating that “[i]nmates have no constitutional right to a particular prison job and verbal abuse does not constitute punishment which is subject to Eighth Amendment scrutiny” and “mere defamation does not invoke the guarantee of procedural due process.”

43. Texas

- In 2009, a lesbian public school teacher was subjected to a hostile work environment because of her sexual orientation.⁵⁰¹
- In 2009, a public school teacher was censored for expressing pro-LGBT viewpoints.⁵⁰²

⁴⁹⁹ *Id.* at 253.

⁵⁰⁰ *Bush v. Potter*, 875 F. 2d 862 (6th Cir. 1989).

⁵⁰¹ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁵⁰² *Id.*

- In 2009, a lesbian public school guidance counselor was subjected to a hostile work environment because of her sexual orientation and was censored for expressing pro-LGBT viewpoints.⁵⁰³
- In April 2008, the head of the Collin County’s teen court program resigned under pressure after it was revealed that he was gay during his campaign for Plano City Council.⁵⁰⁴
- A federal court ruled that a transgender employee of a state agency could bring an employment discrimination claim alleging a hostile work environment by utilizing sex discrimination law.⁵⁰⁵
- Since 2007, a teacher at Keller Learning Center has been experiencing harassment based on his sexual orientation at his workplace. Approximately one year after he began teaching at Keller in 2006, a student asked him if he was gay. He truthfully answered “yes.” The assistant principal, having heard about the conversation between him and the student, implored him to keep his sexual orientation a secret because his job would be in danger if he were “out” at work and he might also be in physical danger. In response, he wrote a letter stating that he felt it would be disingenuous and would work a disservice to the students if he acted like there was something shameful about being gay. Thereafter, three students were allowed to transfer out of his class and his request to conduct a diversity training was de-

⁵⁰³ *Id.*

⁵⁰⁴ Justin Nichols lost his race for City Council. Although he does not believe this loss was a result of his sexual orientation, the campaign against him and his supporters did at times focus on this fact. See John Wright, *Attack E-mail Implies Gay Candidate is Child Molester*, DALLAS VOICE, Mar. 28, 2008, available at http://www.dallasvoice.com/artman/publish/article_8481.php.

⁵⁰⁵ *Trevino v. Center for Health Care Services*, 2008 WL 4449939 (W.D.Tex., Sept. 29, 2008).

- nied. The discrimination makes him feel isolated at work and unable to interact with his colleagues.⁵⁰⁶
- In 2007, a code compliance inspector reported that after she designated her same-sex partner as a beneficiary for certain employment benefits, the officer administrator told everyone that she was a lesbian, after which she became a target for harassment and other negative treatment on the job.⁵⁰⁷
 - In December 2004, the women's high school basketball coach in Bloomburg, who been named both "Teacher of the Year" in 2004 and "Coach of the Year" was placed on administrative leave and later dismissed after rumors started spreading around the town regarding her sexual orientation.⁵⁰⁸
 - In 1997, two former employees of the Texas governor's office in Austin filed a lawsuit alleging that their former supervisor used hostile language to describe victims' assistance programs for homosexuals. The women were fired from the governor's Criminal Justice Division after complaining about abusive language and attitudes towards gays and lesbians by the division's executive director.⁵⁰⁹
 - In a 1994 report, it was reported that the Dallas County Sheriff's Department suspended a bailiff after he was heard making derogatory remarks about a lesbian rape victim. The bailiff joked to the rapist's attorney that 'if it was me [on the

⁵⁰⁶ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁵⁰⁷ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, The Williams Institute (Feb. 11, 2009) (on file with The Williams Institute).

⁵⁰⁸ NCLR, Employment Case Docket: *Stephens v. Bloomburg School District*, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_stephens.

⁵⁰⁹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 100-101 (1997 ed.).

jury], I'd only give him 30 days for raping a lesbian.' A review board suspended the bailiff for ten working days and ordered him to undergo sensitivity training and apologize in writing to the woman.⁵¹⁰

- Dallas police officers have twice sued the department alleging anti-gay discrimination. In both instances, in 1981⁵¹¹ and 1993,⁵¹² the police department asserted that state's sodomy law permitted it to discriminate based on sexual orientation.

44. Utah

- A bus driver employee of the Utah Transit Authority was terminated for being transsexual. Despite her spotless employment record, the bus driver was fired after she began living as a woman and using women's restrooms while on the job. The Transit Authority claimed that they terminated her because they were concerned that her continued employment could expose them to liability from other employees based on the plaintiff's restroom usage; however, no complaints had been made regarding her restroom usage. The transit authority told her that she would be eligible for rehire only after undergoing sex reassignment surgery. The bus driver filed suit in federal court, but the court rejected her argument that Title

⁵¹⁰ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 70 (1994 ed.).

⁵¹¹ *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981).

⁵¹² *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993).

VII sex discrimination claims could apply to transsexuals, construing the term “sex” to equate to biological sex at birth “and nothing more.”⁵¹³

- In 2007, a gay deputy sheriff was subjected to a hostile work environment based on his sexual orientation.⁵¹⁴
- A tenured public school teacher and volleyball coach was removed from her coaching position by the school after she admitted to a player, in response to a direct and unsolicited question, that she was gay. When the player refused to play on the team, claiming discomfort because of the teacher’s sexual orientation, the teacher was removed from her coaching position and informed that if she discussed her sexual orientation with anyone else, whether on or off-duty, she would face disciplinary action or termination with regard to her teaching position. The teacher sued, alleging discrimination and violation of her First Amendment rights. The court held that the school district had no rationally related basis for the plaintiff’s dismissal, because outdated prejudices and vague claims of disruption without any evidence of actual disruption (aside from one student) did not constitute a rational basis under the Equal Protection Clause. The court ordered the District to rescind its gag order, remove certain letters from the teacher’s file, pay her the \$1,500 she would have been paid had she coached the team in the year in question, and appoint her to coach for the 1999-2000 school year. Following the federal court’s decision, a local citizens’ group calling itself “Citizens of Nebo School District for Moral and Legal Values” filed a lawsuit against the state seeking revo-

⁵¹³ *Etsitty v. Utah Trans. Auth.*, 502 F.3d 1215 (10th Cir. 2007).

⁵¹⁴ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

cation of her teaching license on grounds of moral unfitness. The plaintiffs alleged, in part, that the teacher violated the state's sodomy law and the certification requirement that teachers and psychologists possess good moral character. The Utah Supreme Court threw the case out of court because the plaintiffs raised no justiciable controversy.⁵¹⁵

45. Vermont

- In 2008, a public school teacher who works with autistic children was harassed and ultimately terminated because he was gay. He filed a complaint with the attorney general's office.⁵¹⁶
- In 2008, a teacher came out to a colleague and after this perceived a hostile work environment. The teacher tried to get the union to intercede on his behalf, but the union refused.⁵¹⁷
- In 2003, a lesbian employee of the Vermont State Department of Corrections reported that a co-worker used derogatory language about her and another co-worker in regards to their sexual orientation. The employee filed a formal complaint, however there was no investigation.⁵¹⁸

⁵¹⁵ *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Miller v. Weaver*, 66 P.3d 592 (Apr. 4, 2003).

⁵¹⁶ E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

⁵¹⁷ *Id*

⁵¹⁸ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 12, 2009) (on file with GLAD).

- In 2002, a transgender officer was told that the police chief was being pressured to run him off the force because he was transgender.⁵¹⁹ The officer began working at the Hardwick Municipal Police Department in April 2002. Shortly after he began employment, town officials doing an internet search on him found a website that described him as “transsexual.” Based on the information, town officials presumed his inability to do the job. Following the dissemination of the information to senior police department personnel, he was subjected to a continuous pattern of harassment and inferior work conditions that became so severe he had to leave his job. In issuing its probable cause ruling, the Attorney General credited testimony of a former police chief that a town official had directed him to make the transgender officer so uncomfortable that he would leave the force. The Town of Hardwick settled the claim.⁵²⁰
- A judicial law clerk alleged that she was told, *inter alia*, that she may not wear buttons or affix bumper stickers to her car tending to indicate her sexual orientation, use her residence as a “safe home” for lesbians or gay men needing shelter, or write articles for a monthly newspaper serving Vermont’s lesbian and gay population, because doing so violated Canon 6 which provides that “a law clerk should refrain from inappropriate political activity.” She also alleged she was reprimanded for these activities, and that she was told that one or more violations would result in immediate dismissal. The Vermont Supreme Court dismissed her claim that Canon 6 was unconstitutional because the action should have first been

⁵¹⁹ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Sept. 9, 2002) (on file with GLAD).

⁵²⁰ Press Release, GLAD, Vermont Attorney General Issues Landmark Ruling Prohibiting Discrimination of Transgender Employees (Apr. 23, 2004), *available at* <http://bit.ly/1LIrql>.

filed as a grievance under procedures designed to serve state employees and then been commenced in superior court.⁵²¹

46. Virginia

- An employee of the Virginia Museum of Natural History, a state agency, was forced to resign because of his sexual orientation in 2009 shortly after receiving a positive evaluation that otherwise would have resulted in a raise. The Executive Director of the Museum expressed concerns that the employee's sexual orientation would jeopardize donations to the museum. A Virginia appellate court dismissed his sexual orientation employment discrimination claim because of the Virginia Attorney General's Opinion that the governor's executive order prohibiting such discrimination order did not create a private right of action.⁵²²
- In 2009, a lesbian public school teacher was subjected to a hostile work environment on account of her sexual orientation.⁵²³
- In 2009, a Virginia state agency retaliated against an employee for supporting a claim of discrimination based on sexual orientation by a gay employee.⁵²⁴
- A police officer reported in 2008 that she was harassed by her captain and made to work long shifts without breaks because of her sexual orientation. When she tried

⁵²¹ *Aranoff v. Bryan*, 153 Vt. 59 (1989).

⁵²² Va. Dept. of Hum. Res. Mgmt. O.E.E.S, Priv. Ltr. Rul. 0107-038 (Jan. 7, 2009); Final Order, *Moore v. Virginia Museum of Natural History*, No. 690CL09000035-00 (Va. Cir, June 15, 2009).

⁵²³ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

⁵²⁴ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009, 5:11:00 PST) (on file with the Williams Institute).

to leave and apply for another job, the captain accosted her future employer in a restaurant and announced that she was a lesbian.⁵²⁵

- In 2008, a Virginia state corrections psychologist, who was a lesbian, was subjected to a hostile work environment because of her sexual orientation.⁵²⁶
- In 2008, an athletic trainer at a Virginia state military academy was subjected to a hostile work environment on account of her association with lesbians.⁵²⁷
- In 2007, a gay public school teacher was subjected to a hostile work environment on account of his sexual orientation.⁵²⁸
- In 2006, a transgender scientist was not hired by a Virginia state agency on account of her gender identity.⁵²⁹
- An administrator of the City of Petersburg's Community Diversion Incentive Program was fired in 1986 for refusing to answer questions about her sexual orientation as part of a city background check. She had already been in her position for three years when she was asked to complete a questionnaire for the background check. When she initially refused, she was suspended without pay but then reinstated with back pay by the City Manager because he determined that her position did not require a background check. However, at the same time he changed city policy to require her to have a background check. When she again refused to an-

⁵²⁵E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

⁵²⁶Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁵²⁷*Id.*

⁵²⁸*Id.*

⁵²⁹*Id.*

swer the question about whether she had had sex with someone of the same sex, she was terminated. In 1990, analyzing her claim under the United States constitutional right to privacy, with respect to the question about same-sex behavior, the 4th Circuit relied upon *Bowers v. Hardwick* in holding that she had no right to privacy with respect to this information although it did note that the relevance of this information was "uncertain."⁵³⁰ In 2003, the United States Supreme Court held that *Bowers v. Hardwick* was wrong when it was decided in 1986.⁵³¹

47. Washington

- In *Smith*, a 2008 complaint to the Washington State Human Rights Commission, a gay male alleged employment discrimination based on sexual orientation. An employee of WorkSource Thurston County, a state agency that provides resources to job-seekers, alleged that his supervisor had treated him differently ever since she became aware of his sexual orientation. This supervisor allegedly restricted his work hours and deprived him of support staff. Smith also alleged that another co-worker had made derogatory comments about his sexuality. The public employee alleged that he was asked if he had “personal relationships” with any of the customers that he served. The employee felt that he was being accused of soliciting sex from customers. He also alleged that he was being investigated for ethics violations concerning his partner’s interview at this workplace, even though he took

⁵³⁰ *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

⁵³¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

no part in the selection process. The administrative disposition of this case was unavailable.⁵³²

- In *Spring*, a 2008 complaint to the Washington State Human Rights Commission, a transgender female alleged employment discrimination and harassment based on sexual orientation and gender identity. An employee of the Washington Department of Social & Health Services, she alleged that in a new employee orientation, her supervisor asked “what’s your real name? Robert or Roberta?” She also alleged that her supervisor did nothing when she reported that she was being harassed by other employees. When she went home because of illness one day, her supervisor allegedly yelled: “I’m sick of your excuses. Get off the island.” The administrative disposition of this case was unavailable.⁵³³
- In a court case decided in 2008, an employee of the Snohomish County Center for Battered Women sued alleging that her supervisor created a hostile work environment by making racist and homophobic comments in violation of the state anti-discrimination law. The employee alleged that her supervisor once asked aloud why the domestic violence movement attracted so many lesbians and commented that she did not understand why “they” (the lesbians) “all had tattoos and dressed so poorly.” This supervisor later transferred one lesbian woman from her position, stating that she dressed poorly. The Court of Appeals held that no hostile work environment existed, noting that “the supervisor’s allegedly discriminatory

⁵³² Wash. State Hum. Rights Comm’n Complaint, *Smith v. WorkSource Thurston County*, No. 34Ex-0238-08-9 (Sept. 3, 2008).

⁵³³ Wash. State Hum. Rights Comm’n Complaint, *Spring v. Wash. State Dep’t of Social & Health Svc’s*, Washington State Human Rights Commission, No. 27EX-0186-08-9 (Aug. 22, 2008).

comments were not sufficiently severe and pervasive to alter the terms and conditions of Pedersen's employment."⁵³⁴

- In *Collins*, a 2007 complaint to the Washington State Human Rights Commission, an employee of the Washington Department of Corrections alleged employment discrimination based on sex and sexual orientation. She alleged that she was subjected to hostile treatment by subordinate staff and colleagues because of her sexual orientation. She alleged that a colleague told other staff that she was a lesbian who "hated men" and that male members of her staff would not get ahead working for her. When she complained about this colleague's comments, she was told to "pick her battles wisely" and "take the high road." She also alleged that one supervisor suggested that she use the men's restroom instead of the women's and another challenged her ability to manage her subordinates.⁵³⁵
- In *Day*, a 2007 complaint to the Washington State Human Rights Commission, a lesbian cook and driver who worked at the Economic Opportunity Commission alleged discrimination based on sexual orientation. She alleged that after she questioned her supervisor about pay discrepancies in the workplace, her supervisor said "don't you make enough money for (name of her female partner)"? She alleged that she was treated differently by supervisors after this conversation. She

⁵³⁴ *Pedersen v. Snohomish County Ctr. for Battered Women*, 2008 Wash. App. LEXIS 1040 (Wash. Ct. App. May 5, 2008).

⁵³⁵ Wash. State Hum. Rights Comm'n Complaint, *Collins v. Wash. State Dep't of Corr.*, Washington State Human Rights Commission, No. 34ESX-0319-07-8 (Oct. 20, 2007).

was moved to a different worksite, avoided by supervisors, and not given timely updates about trainings.⁵³⁶

- In *McGlumphy*, a 2007 complaint to the Washington State Human Rights Commission, a lesbian truck driver employed by the Washington Department of Social and Health Services alleged employment discrimination based on sex and sexual orientation. She alleged offensive and hostile environment in which employees were allowed to participate in making inappropriate comments about gays and lesbians. Her shift supervisor used the term “homo” and other employees made offensive jokes about a man stereotyped to be “gay.” Her employment was terminated on January 5, 2007.⁵³⁷
- In *Hayes*, a 2007 complaint to the Washington State Human Rights Commission, a lesbian operations assistant for the City of Tieton alleged employment discrimination based on sexual orientation. She alleged that when the Mayor of Tieton discovered she was a lesbian, the Mayor forbade her from going to City Hall to collect mail, making copies, and also was forbade from meter reading. Her request for a pay raise was also denied. She was the fired on August 23, 2006 and the official reason given was that she lied about requesting time off.⁵³⁸
- In *Miller*, a 2006 complaint to the Washington State Human Rights Commission, an openly gay public safety officer at Washington University Harborview Medical

⁵³⁶ Wash. State Hum. Rights Comm’n Complaint, *Day v. Economic Opp. Comm’n*, Washington State Human Rights Commission, No. 06EX-0647-06-7 (Feb. 26, 2007).

⁵³⁷ Wash. State Hum. Rights Comm’n Complaint, *McGlumphy v. Wash. State Dep’t of Social & Health Svc’s*, Washington State Human Rights Commission, No. 27ESX-0610-06-7 (Feb. 9, 2007).

⁵³⁸ Wash. State Hum. Rights Comm’n Complaint, *Hayes v. City of Tieton*, Washington State Human Rights Commission, No. 39EX-0365-06-7 (Oct. 30, 2006).

Center alleged employment discrimination and retaliation based on sex and sexual orientation. The officer was subjected to constant verbal harassment by an administrator. He was called a “faggot” and other demeaning remarks related to his sexual preference. He alleged that the administrator made several attempts to sabotage his employment. He lodged an internal complaint, but the administrator continued to supervise him.⁵³⁹

- In a case decided in 2005, one member of a couple who were volunteer firefighters brought suit when his application to be a full-time firefighter was rejected. The couple began living together in early 2003 and was married in Canada in 2004. He filed his claim not as a sexual orientation discrimination claim, but a claim that he had suffered sex discrimination in violation of Title VII. A United States District Court did not accept his argument, finding that any discrimination based on the relationship of the two men would be sexual orientation discrimination, which is not actionable under Title VII.⁵⁴⁰
- In 2001, a lesbian brought an action against her former employer, a public hospital district, for wrongful termination based on sexual orientation under 42 U.S.C. section 1983 and the federal equal protection clause. The plaintiff, Davis, and her co-plaintiff and her immediate supervisor, Nan Miguel, were both terminated for opposing the hospital’s discriminatory treatment of Davis. The director of the radiology department at the hospital where Davis worked made several derogatory comments to her throughout the course of her employment. On a number of oc-

⁵³⁹ Wash. State Hum. Rights Comm’n Complaint, *Miller v. Univ. of Wash./Harbor View Med. Ctr.*, Washington State Human Rights Commission, No. 17EXZ-0876-06-7 (May 29, 2007).

⁵⁴⁰ *Haladay v. Thurston County Fire Dist. No. 1*, 2005 WL 3320861 (W.D.Wash., Dec 7, 2005).

casions, he called her a “fucking faggot,” a “fucking dyke,” and a “queer.” He also said “I don’t think that fucking faggot should be doing vaginal exams and I’m not working with her.” One time when she did not come to work, her department director remarked that it was gay pride week and “she was probably off marching somewhere.” When her supervisor sent a memo to an administrator objecting to the department director’s behavior, the hospital responded by reducing her hours to three-quarters time. She later filed a grievance against the hospital and copied information from patient files to show that her reduction in hours was the result of the department director’s animus toward her. The hospital later fired her and Miguel. The Washington Court of Appeals held that she had raised material issues of fact with respect to whether the hospital and the doctor were “state actors” under section 1983 and remanded the case for trial on Davis’s 1983 claims. The court refused to find, however, that her discharge violated a clear mandate of Washington public policy, which at that time did not have a state law prohibiting sexual orientation discrimination.⁵⁴¹ The hospital eventually settled with Davis for \$75,000.⁵⁴²

- In 1997, a gay man brought an action against his employer alleging that he was unlawfully terminated based on his sexual orientation in violation of public policy and Seattle Municipal Code section 14.04.⁵⁴³ He had been employed by Puget Sound Broadcasting Company as a radio host. On one occasion, the Company

⁵⁴¹ *Miguel v. Guess*, 112 Wn. App. 536, (Wash. Ct. App. 2002); *Miguel v. Guess*, 51 P.3d 89 (Wash. Ct. App. 2002).

⁵⁴² ACLU, *Following ACLU Lawsuit, Lesbian Illegally Fired from Washington Hospital Received Generous Settlement* (Oct. 8, 2003), <http://www.aclu.org/lgbt/discrim/12359prs20031008.html>.

⁵⁴³ § 14.04 of the Seattle Municipal Code declares that it is the policy of the city of Seattle to “assure equal opportunity to all persons, free from restrictions because of ... sexual orientation ...” SEATTLE MUN. CODE § 14.04.

accused him of airing an abundance of shows with “gay themes” before they terminated him. The Washington Court of Appeals held for the Broadcasting Company, noting that the radio show host “did not cite any constitutional, statutory, or regulatory provision establishing that discharging an employee based on his sexual orientation contravened a clear mandate of public policy.”⁵⁴⁴

- In 1996, a county firefighter was subjected to a hostile work environment based on his sexual orientation.⁵⁴⁵

48. West Virginia

- In 2009, a state employee was not allowed to use his sick leave to attend his partner’s surgery because they were not legally married.⁵⁴⁶ The West Virginia Public Employees Grievance Board denied his claim of sexual orientation discrimination, citing the “very specific” personnel regulations that provide that sick leave cannot be approved for an employee to attend to another person’s medical care except for those family members listed in the policy.⁵⁴⁷
- A police officer for the Pineville City Police Department reported his harassment, physical assault, and termination in a 1996 book. When the officer’s coworkers became suspicious about his sexual orientation, he was sent on calls without any backup. After he was tricked into disclosing his sexual orientation to a coworker, the coworker proceeded to hit him across the face with a night stick, breaking his

⁵⁴⁴ *Webb v. Puget Sound Broad. Co.*, 138 Lab. Cas. (CCH) P58, 612 (Wash. Ct. App. Dec. 28, 1998).

⁵⁴⁵ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

⁵⁴⁶ West Virginia Grievance Board Database, <http://www.state.wv.us/admin/grievance/Database> (last visited Sept. 3, 2009).

⁵⁴⁷ *Id.*

glasses and cutting his eye. When the officer asked him why he was being attacked, the co-worker responded, "You're a faggot." The next day, the officer was asked for his resignation, and when he refused, he was fired. The officer then filed a grievance against the city, which he won.⁵⁴⁸

- In 1983, the West Virginia Attorney General issued an opinion⁵⁴⁹ that gay and lesbian teachers could be fired by their districts under a state law that authorized school districts to fire teachers for "immorality."⁵⁵⁰ The Attorney General opined that homosexuality was immoral in West Virginia even though the state decriminalized same-sex sexual behavior in 1976. While the Attorney General said homosexuality must be shown to affect the person's fitness to teach, that could be shown if the teacher was "publicly known to be homosexual" as opposed to engaging in "private, discreet, homosexuality." He also noted that there were some jobs where "even such publicized sexual deviation" might not interfere with employment in the public sector, such as "university drama teacher(s)" and "custodians."
- A school teacher brought a discrimination suit against her school board in 1986 after she resigned under duress. Her resignation came after years of public and internal scrutiny following a rumor that she had been romantically involved with another female teacher and complaints from the community that her manner of dress was "too masculine." The school board asked her to appear and explain her

⁵⁴⁸ ROBIN A. BUHRKE, *A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT* 93-97 (Routledge 1996).

⁵⁴⁹ 60 W. Va. Op. Atty. Gen. 46, 1983 WL 180826 *1 (W.Va.A.G.), Office of the A. G., W. Va. (Feb. 24, 1983) ("Sexual Offenses: *A county board of education may dismiss a teacher who engages in sexually deviant conduct if the teacher's conduct substantially adversely affects his fitness to teach.*")

⁵⁵⁰ CODE OF W. VA., Ch. 18A, Art. 2, § 8 (1931).

personal situation involving the other female teacher. She did, and assured them that she was not involved in any inappropriate behavior. Later, she was given an improvement plan that called for her to change her style of dress to something more feminine, something that the kindergarten students would "be comfortable with." Just prior to her resignation, approximately 400 people appeared to protest her continued presence in the classroom. According to the court, the public outcry arose because of the West Virginia Attorney General opinion which stated that a school board could use public reputation in the community to establish a teacher's homosexuality and could dismiss a "reputed homosexual teacher" for immorality. A trial jury was held and the jury returned a verdict for the board on Conway's claim of duress. The court of appeals affirmed.⁵⁵¹

49. Wisconsin

- On March 23, 2005, an employee of the State of Wisconsin Department of Corrections filed an administrative complaint with the Department of Workforce Development (DWD) alleging that she had been discriminated against on the basis of her sexual orientation. The state settled with the employee in a private settlement with undisclosed terms.⁵⁵² The employee began to experience hostile treatment from an office mate when she joined the Psychological Services Unit at the Oshkosh correctional facility. The co-worker would abruptly leave the office when the employee would enter the office. After the pattern had persisted for several

⁵⁵¹ *Conway v. Hampshire County Bd of Educ.*, 352 S.E.2d 739 (W. Va. 1986).

⁵⁵² Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (May 3, 2006).

months, the co-worker approached the employee and told her that “something had been bothering [her] about [the employee].” She proceeded to tell her that the fact that the employee was in a relationship with another female made her “extremely uncomfortable” and she could not work around her. The co-worker began to treat the employee differently than the other employees, making it difficult for the employee to work in the office. The employee reported the co-worker’s behavior to her supervisor, who agreed to handle the matter formally. However, the employee’s complaint was never addressed. The co-worker’s harassing behavior did not stop and the employee eventually suffered a breakdown for which she had to be placed on medical leave for nearly a month. Though the employee again requested that the matter be handled formally, a warden urged her to mediate instead. The mediation failed and no further action was taken by the employer.⁵⁵³

- On July 23, 2004, an employee of the State of Wisconsin Department of Health & Family Services filed an administrative complaint with the DWD alleging that he had been discriminated against on the basis of his sexual orientation. The state of Wisconsin settled with the employee, agreeing to let him tender a letter of resignation in lieu of termination and pay his legal fees in exchange for his promise not to sue.⁵⁵⁴ At the time of filing, the employee had been a Public Health Educator for the HIV/AIDS program for two years. One co-worker made the employee’s

⁵⁵³ Discrimination Complaint, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).

⁵⁵⁴ Settlement Agreement and Release, [Redacted] v. Wisconsin Department of Health & Family Services, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR 200403028 (Mar. 7, 2006).

work environment particularly difficult, often making derogatory comments to and about the employee, including calling him a “fag,” “punk ass,” “punk bitch,” and “bitch.” The co-worker also lodged complaints about the employee’s work performance which were later found by a supervisor to be unsubstantiated. Co-workers complained that it was inappropriate for the employee to have a book about anal sex on his desk, which the employee was using to prepare for a work-related presentation about HIV transmission. The employee also was forced to take down a desk calendar of men in fitness clothes, while another male employee had a calendar of women in swimming suits at his desk and was not confronted. The Department ultimately terminated the employee alleging that he had been “disrespectful” to a co-worker during a meeting in which he voted against an event she proposed.⁵⁵⁵

- A heterosexual male professor at University of Wisconsin-Whitewater filed suit under Title VII, claiming he had suffered retaliation for complaining about sex discrimination, and claiming that as a heterosexual he suffered discrimination at the hands of the lesbians who were running his department. He also claimed that two straight women in the department were denied tenure because they were friendly with him. He asserted that the lesbians gave him a low merit pay raise and refused to allow him to teach some summer classes that he had taught in the past. University officials denied discrimination or retaliation, but the jury ruled

⁵⁵⁵ Discrimination Complaint, [Redacted] v. Wisconsin Department of Health & Family Services, Department of Workforce Development, Equal Rights Division, ERD No. CR 200403028 (July 23, 2004). *Brown v. Wis. Dep’t of Health & Family Serv.*, ERD Case No. CR200403028, EEOC Case No. 26GA401756.

- for Albrechtsen on his retaliation charge, awarding him \$250,000 for emotional distress, \$43,840 for lost income, and \$150,000 for legal fees.⁵⁵⁶
- In *Racine Unified School District v. Labor and Industry Review Commission*,⁵⁵⁷ decided in 1991, the Racine school board enacted a policy that “excluded” all HIV-positive staff from regular attendance at work.⁵⁵⁸ The DWD administrative law judge determined that the policy had a disparate impact on gay employees because: (a) seventy-three percent of persons with AIDS are homosexual and bisexual males; (b) one school board member was quoted in a local newspaper as saying he voted for the policy because “he did not believe that homosexuals should be allowed to teach in the school district”; and (c) no other school official attempted to retract that statement.⁵⁵⁹ An appeals court reversed that holding⁵⁶⁰ but found that the policy discriminated based on handicap.⁵⁶¹
 - A teacher filed a federal lawsuit against the Hamilton School District for failing to respond to severe harassment based on his sexual orientation from students, parents, fellow teachers and administrative staff during his tenure at the school from 1992 to 1995. He alleged that such harassment eventually resulted in a nervous breakdown that led to his termination. The middle school teacher said that he reported the harassment – including a death threat from a student – and sought to have the district’s anti-discrimination policies enforced, but no action was taken.

The incidents began soon after he disclosed to a few faculty members that he was

⁵⁵⁶ LESBIAN & GAY L. NOTES (Summer 2001), available at <http://bit.ly/1OELhH>.

⁵⁵⁷ 476 N.W. 2d 707 (Wis. Ct. App. 1991).

⁵⁵⁸ *Racine*, 476 N.W.2d 707, 712 (Wis. App. 1991).

⁵⁵⁹ *Racine*, 476 N.W.2d at 718.

⁵⁶⁰ *Racine*, 476 N.W.2d at 719.

⁵⁶¹ *Racine*, 476 N.W.2d at 722-723.

gay. According to the lawsuit, constant verbal harassment with slurs like “faggot” and “queer” soon followed. The teacher said he began to seek professional help and repeatedly requested a transfer to another school, but “each request was either ignored or denied.” The teacher further asserted that when he reported that a student threatened to kill him because he was gay, the associate principal told him that “[W]e can’t stop middle school students from talking. Boys will be boys.” The teacher accepted a transfer to an elementary school in 1996 despite his concerns that younger siblings of the same students attend the school. After the transfer, the harassment continued until he ultimately suffered a breakdown and resigned. Upon his resignation, the teacher filed a lawsuit alleging that the school district had violated his right to equal protection by failing to take reasonable measures to prevent further harassment after he reported such conduct to his supervisors. On summary judgment, the District Court held that he failed to raise a genuine issue of material fact and granted the motion in favor of the defendants. On appeal to the Seventh Circuit, the teacher argued that the defendants had “failed to address his complaints in the same manner that they handled complaints of harassment based on race or gender.” The Seventh Circuit disagreed, finding that the evidence on record demonstrated that the school had actually made an effort despite limited resources. As such, Court of Appeals affirmed the summary judgment ruling in favor of the defendants.⁵⁶²

50. Wyoming

⁵⁶² *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002).

- Two lesbian school administrators from the Sheridan County School District were terminated after a student complained that they had been seen “holding hands and walking into a Victoria’s Secret store.”⁵⁶³ The superintendent then spoke to the women individually about the allegations, angrily stating that he “knew all about” them. The women were known to be a couple. The following year the school underwent reorganization and both of their positions were eliminated. The women then applied to several job openings but were not selected for any of them. They filed suit alleging violation of their equal protection rights on the basis of sexual orientation. Following a trial on the merits, the jury found that the school superintendent had unconstitutionally discriminated against the women, awarding them \$160,515 in damages. On appeal, the Tenth Circuit held that the superintendent was not the final policymaker for the district and, thus, the district could not be liable for his actions. The Tenth Circuit court further concluded that in 2003 discrimination on the basis of sexual orientation was not clearly established to be unconstitutional - as *Bowers v. Hardwick*⁵⁶⁴ had not been overturned - and, therefore, qualified immunity protected the superintendent from personal liability.
- An employee of the Wyoming Department of Family Services alleged gender discrimination based on comments made by a supervisor about her perceived lesbianism. She originally framed her claim as one of discrimination and retaliation under Title VII of the Civil Rights Act, alleging that she was subjected to a hostile work environment because of her supervisors’ misapprehension that she was gay. She subsequently altered her claim to allege that she was discriminated against

⁵⁶³ *Milligan-Hitt v. Bd. of Tr. of Sheridan County Sch. Dist. No. 2*, 523 F.3d 1219 (10th Cir. 2008).

⁵⁶⁴ 478 U.S. 186 (1986).

“because her personal characteristics did not conform to those that her supervisors believed to be appropriate for a woman in society.”⁵⁶⁵ The District Court granted summary judgment to defendants, holding that “[s]exual orientation is conspicuously and intentionally absent from the list of protected categories under Title VII,” and that “[r]ecasting allegations of homophobia as ‘sex stereotyping’ does not of itself bring the action under the purview of the Civil Rights Act.”⁵⁶⁶ The Tenth Circuit affirmed the decision, and the U.S. Supreme Court denied the employee’s writ of *certiorari*.⁵⁶⁷

51. Puerto Rico

- In 2009, a longtime municipal co-worker in San German brought suit against the town after being mercilessly harassed by co-workers based on his sexual orientation. When he first complained of the treatment several years earlier, his supervisors transferred him to an inferior position where he was subject to further harassment by other co-workers and began to suffer from panic attacks and anxiety. The town’s mayor, who worked with the supervisor to reassign the employee, stated at the time of the transfer that the employee’s sexual orientation was the real problem—not those responsible for the harassment. When he brought suit against the town, the federal district court dismissed his case because discrimination based on sexual orientation is not federally prohibited. The court further determined that, even though the employee alleged sex discrimination, he failed to

⁵⁶⁵ *Brockman v. Wyoming*, No. 00-cv-0087-B, slip. op. (D. Wyo. May 9, 2001).

⁵⁶⁶ *Id.*

⁵⁶⁷ *Brockman v. Wyoming*, 342 F.3d 1159, 1169 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004); *Brockman v. Wyoming Dep’t of Family Serv.*, 478 U.S. 186 (1986).

state a claim because he offered only evidence that the discrimination was based on his sexual orientation rather than evidence of sex stereotyping.⁵⁶⁸

- The First Circuit upheld the District Court decision to declare unconstitutional a police department regulation barring officers from associating with homosexuals. The First Circuit noted in its decision that the policy had a chilling effect on First Amendment rights even if, as the Commonwealth claimed, it was an unenforced policy. The court cast doubt on the Commonwealth's assertion that the policy was a dead letter, observing that the case history revealed a bitter fight on part of the Commonwealth to maintain the policy, including an offer to rewrite the regulation to prohibit association with "persons of dubious reputation."⁵⁶⁹

⁵⁶⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

⁵⁶⁹ *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001).



Chapter 13: Voters’ Initiatives to Repeal or Prevent Laws Prohibiting Employment Discrimination Against LGBT People, 1974-Present

One marker of the hostility and animus directed towards LGBT Americans is the proliferation of attempts to use state and local ballot measures to repeal or preclude protection against employment discrimination based on sexual orientation or gender identity. The pattern of outcomes has slowly shifted in the last 30 years from a majority of these attempts succeeding to a majority failing.¹ Nonetheless, proponents of workplace equality for the LGBT minority have had to respond – more frequently than any other group - to repeated, well-funded campaigns to erect barriers against basic civil rights protections.

According to University of Michigan political scientist Barbara S. Gamble, “[g]ay men and lesbians have seen their civil rights put to a popular vote more often than any other group. Almost 60 per cent of the civil rights[-related ballot] initiatives have involved gay rights issues... Of the 43 gay rights initiatives that have reached the ballot, 88% have sought to restrict the rights of gay men and lesbians by repealing existing gay rights laws or forbidding legislatures to pass new ones.”²

In this chapter,³ we expand and update Gamble’s analysis, documenting 120 ballot measures from 1974 to 2009. Most of these, 92, were at the local level, with 28 at the state level.

In this analysis we do not include the many ballot measures to repeal or prevent the extension of marriage to same-sex couples. Our findings include:

- One hundred fifteen of these measures sought to repeal prohibitions of discrimination against LGBT people in the workplace, prevent or inhibit such prohibitions from being passed, or even

¹ See Tables 15-A and 15-CII, *infra*.

² Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AMER. J. POL. SCI. 245, 257-58 (1997).

³ See Tables 15-A, 15-B, 15-C, and 15-D, *infra*.

mandate discriminatory or stigmatizing conduct or speech towards LGBT people. Of the ballot measures that were initiated, 58 passed, or 50% of those attempted. While the ballot measures were proposed in eighteen different states, most were in Oregon, Michigan, Maine, Washington, Florida, and California.

- During this same period, we document only five ballot measures that would have provided protections to LGBT people in the workplace, four of which passed. Only one such ballot measure was proposed prior to 1998.
- Fifty-five percent of these ballot measures were initiated during a five-year period from 1991 to 1995. However, the most recent two were in 2009 -- an effort to repeal protections for LGBT people in Gainesville, Florida that failed, and a similar effort to repeal a civil rights law in Kalamazoo, Michigan that will be voted on this year.
- Not all of these measures were voted on. Nineteen did not qualify for the ballot, five more were disqualified by courts, three were withdrawn, and one has not been voted upon yet. When these twenty-eight measures that did not reach the ballot box are excluded, over two thirds (66%) of the measures were passed. Four of the measures that passed resulted in changes to state law protections for LGBT people, at least temporarily, in Colorado, Oregon, and Maine.

Ballot initiatives aimed at preventing the LGBT population from gaining legal protection from discrimination in the workplace and other settings began as attempts to repeal specific civil rights-protective legislation or executive orders. Over time, however, these initiatives have often gone beyond the goal of simple repeal. First, an increasing number of campaigns have attempted to undermine traditional mechanisms of majoritarian democracy by preemptively blocking *future* legislative adoption of measures to guarantee equality in the workplace, as well as in other venues such as housing and public accommodations. Second, several of the ballot measures have sought to chill or prohibit the

expression of messages of tolerance or even discussion of sexual orientation in certain venues. Another mechanism for repressing speech has been a strategy to outlaw use of government funds for any organization that is supportive of LGBT groups.⁴

A. Ballot Initiatives 1974 to 1992

The first repeal of an ordinance protecting LGBT rights occurred in Florida in 1977, with the “Save Our Children” campaign led by entertainer Anita Bryant. The campaign was filled with religious rhetoric and stereotypical inflammatory allegations, and resulted in the repeal of a Dade County ordinance that prohibited sexual orientation discrimination.⁵ Similar outcomes around the country followed shortly thereafter, including the repeal of local anti-discrimination laws in St. Paul, Minnesota, Wichita, Kansas, and Eugene, Oregon in 1978.⁶ The first defeat of an anti-gay ballot measure also occurred that year, when California voters rejected the Briggs Initiative, a statewide initiative that sought to give school boards the right to fire or refuse to hire teachers for “soliciting, imposing, encouraging, or promoting homosexual conduct.”⁷

Efforts to deny LGBT people legal protection continued and increased through the 1980s and early 1990s. Voters in San Jose and Santa Clara Counties, California, repealed local anti-discrimination legislation in 1980.⁸ In Oregon, after the governor issued an executive order banning sexual orientation

⁴William E. Adams, *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583, 584-85 (Summer 1994).

⁵ Gamble, *supra* note 2, at 258.

⁶ William E. Adams, Jr., *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 458 (Summer/Fall 1998) (citing Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 18 n.71 (1978)); *St. Paul Citizens for Human Rights v. City Council*, 289 N.W.2d 402 (Minn. 1979) (denying an injunction prohibiting the city council from placing an initiative question repealing a city gay rights ordinance on the ballot), and noting that voters in Seattle rejected a repeal attempt that year). See also Gamble, *supra* note 2, at 258.

⁷ Adams, *supra* note 7, at 458 (citing Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalentents*, 29 HARV. C.R.-C.L. L. REV. 283, 288 & n.34 (1994)).

⁸ Adams, *supra* note 7, at 458 (citing Gamble, *supra* note 2, at 258).

discrimination in state hiring, voters in 1988 repealed the order by referendum.⁹ Proposed statewide initiatives in Washington and Nevada in 1994 contained identical text transparently reflecting animus and hostility toward the gay community:¹⁰

“[I]nappropriate sexual behavior does not form an appropriate basis upon which to construct a minority or class status relation to civil rights;” and

“To identify oneself as a person who participates in or who expresses openly a desire for inappropriate sexual behavior, such as homosexuality, fails to constitute a legitimate minority classification.”

In 1992, two statewide measures, one in Oregon and one in Colorado, took even broader aim at dismantling protections against discrimination. The two measures had similar goals, seeking not only to repeal all existing state legal protections for LGBT people, but also to block all future enactment of protections in their states.¹¹ Oregon's Measure 9, which voters rejected, contained overtly hostile, condemning language, including the following:

State, regional and local governments and their departments, agencies and other entities, including specifically the State Department of Higher Education and the public schools, shall assist in setting a standard for Oregon's youth that **recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.**¹²

⁹ Adams, *supra* note 7, at 458 (citing Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 372 (1997)).

¹⁰ See Tables 15-A and 15-B, *infra* – 1994 Nevada measure, 1994 Washington measures (2) and 1996 Oregon measure.

¹¹ Adams, *supra* note 7, at 459.

¹² See Table 15-A and Exhibit 15-B below (emphasis added).

Colorado's Amendment 2,¹³ which voters adopted, avoided directly condemning language. Instead, its proponents utilized the rhetoric of "no special rights," suggesting that gay men and lesbians were asking for special treatment, rather than for protection against being singled out for discrimination in employment, housing and public accommodation.¹⁴

B. Colorado Amendment 2 and *Romer v. Evans*

At the time that Colorado Amendment 2 was passed, there were only minimal protections against anti-gay discrimination in Colorado. Three communities - Aspen, Boulder and Denver - had local ordinances which protected "individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation."¹⁵ Statewide, the only protections were a Governor's Executive Order issued in 1990, which prohibited "discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees,"¹⁶ and a single statute that prohibited health insurance companies from determining insurability based on an individual's sexual orientation.¹⁷

Amendment 2 would have rendered unconstitutional (under the Colorado Constitution) the Aspen, Boulder and Denver municipal ordinances and the two statewide protections. Eventually the lawsuit challenging it reached the United States Supreme Court, which struck Amendment 2 down as

¹³ See Table 15-A and Exhibit 15-B below. Colorado's Amendment 2 stated:

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION.
Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

¹⁴ Adams, *supra* note 7, at 459 (citing John Gallagher, *Are We Really Asking for Special Rights*, THE ADVOCATE at 24 (Los Angeles, Cal., Apr. 14, 1998) (explaining that the "special rights" slogan has become a winning one for opponents of gay rights in ballot initiative and referendum campaigns)).

¹⁵ THE REPORT ON BALLOT PROPOSALS OF THE LEGISLATIVE COUNCIL OF COLORADO GENERAL ASSEMBLY, AN ANALYSIS OF 1992 BALLOT PROPOSALS, RESEARCH PUBL. NO. 369, 9-12 (1992).

¹⁶ *Id.*

¹⁷ *Id.*

unconstitutional under the United States Constitution, concluding that it was “a denial of equal protection of the laws in the most literal sense.”¹⁸ Writing for the Court, Justice Kennedy stated that the amendment's “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.”¹⁹ Thus, in the Court's opinion, Amendment 2's scope was too expansive to rationally relate to any acceptable state purpose.²⁰ The Court also specifically rejected the “special rights” logic behind Amendment 2, stating:

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.²¹

C. Cincinnati Charter Amendment 3

In 1991, the Cincinnati City Council passed the Equal Employment Opportunity Ordinance (“EEO”) prohibiting discrimination in city employment and appointments to city commissions and boards on the basis of sexual orientation. In 1992, these protections were expanded by the Council to prohibit discrimination based on sexual orientation in private employment, public accommodations, and housing with the Human Rights Ordinance (“HRO”).

In response, local voters in 1993 adopted an initiative – entitled Issue 3²² - to amend the Cincinnati city charter. Issue 3 was designed to nullify the EEO and HRO on the issue of discrimination

¹⁸ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

¹⁹ *Id.* at 632.

²⁰ *Id.* .

²¹ *Id.* at 631.

²² See Table 15-C and Exhibit 15-D, *infra*. The Cincinnati amendment read:

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual

on the basis of sexual orientation, and to prevent the passage of similar legislation in the future. Issue 3 added “Article XII” to the City Charter, declaring that the city could not “enact, adopt, enforce, or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.”

In the federal constitutional challenge which followed, the Sixth Circuit upheld the validity of Issue 3 shortly before the Supreme Court issued its decision in *Romer*.²³ After the *Romer* decision was announced, the Supreme Court remanded the Cincinnati case to the Sixth Circuit for further consideration.²⁴

On remand from the Supreme Court, the Sixth Circuit again upheld the Cincinnati city charter amendment.²⁵ The Court of Appeals distinguished Issue 3 from Colorado’s Amendment 2 by finding, *inter alia*, that the *Romer* holding was specific to *state* government processes not being structured to burden the ability of citizens to participate in political life, whereas the Cincinnati ordinance “merely reflects the kind of social and political experimentation that is such a common characteristic of *city* government.”²⁶ The Supreme Court then denied *certiorari* from the Sixth Circuit’s post-*Romer* decision.²⁷

D. Post-*Romer* Anti-Gay State and Local Initiatives

orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

²³ *Equal. Found. for Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

²⁴ *Equal. Found. for Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).

²⁵ *Equal. Found. for Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

²⁶ *Order, Equal. Found. for Greater Cincinnati, Inc. v. City of Cincinnati*, No. 94-3855, 94-3973, 94-4280, 1998 WL 101701, *2 (6th Cir. Feb. 5, 1998), *cert. denied*, 525 U.S. 943 (1998); *see also Equal. Found. for Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

²⁷ *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943 (1998).

In the wake of *Romer* and the Sixth Circuit’s decision in the Cincinnati case distinguishing local laws, the primary focus of campaigns to block anti-discrimination protections shifted from the state to the local level. Two exceptions to that trend during the late 1990s were statewide campaigns to repeal or block anti-discrimination legislation in Maine and Oregon.²⁸ However, by far the majority of recent initiatives to repeal or preemptively block enactment of anti-discrimination employment and other protections for LGBT people have occurred at the city and county levels.²⁹

The overall use of ballot measures has continued. Since 1992, initiatives to repeal or block anti-discrimination laws have gone on the ballot in approximately 60 city and county jurisdictions.³⁰ Among those are more than two dozen ordinances introduced in cities and counties in Oregon between 1992 and 1994.³¹ Since the Supreme Court decision in 1996, there have been close to two dozen such initiatives introduced around the country, with the latest occurring in Gainesville, Florida, in February 2009.³²

The Supreme Court’s reasoning in *Romer* notwithstanding, anti-gay organizations have continued to use the “no special rights” theme, even to the point of including the language in the

²⁸ See Table 15-A, *infra*.

²⁹ See Table 15-A and Table 15-C, *infra*.

³⁰ See Table 15-C, *infra*.

³¹ See Table 15-C, *infra*.

³² See Table 15-C, *infra*. The proposed Gainesville amendment followed the Cincinnati model in voiding any existing protections and barring enactment of future protections based on any LGBT status unless such status was recognized by the Florida State Constitution as being protected, which it is not. The language of the proposed statute is the following:

CITY OF GAINESVILLE CHARTER AMENDMENT 1

Amendment to City Charter Prohibiting the City from Providing Certain Civil Rights

SHALL THE CITY CHARTER BE AMENDED TO PROHIBIT THE ADOPTION OR ENFORCEMENT OF ORDINANCES, REGULATIONS, RULES OR POLICIES THAT PROVIDE PROTECTED STATUS, PREFERENCES OR DISCRIMINATION CLAIMS BASED ON CLASSIFICATIONS, CHARACTERISTICS OR ORIENTATIONS NOT RECOGNIZED BY THE FLORIDA CIVIL RIGHTS ACT? THE ACT RECOGNIZES RACE, COLOR, CREED, RELIGION, GENDER, NATIONAL ORIGIN, AGE, HANDICAP, MARITAL AND FAMILY STATUS. ADDITIONALLY THIS AMENDMENT VOIDS EXISTING ORDINANCES CONCERNING SEXUAL ORIENTATION, GENDER IDENTITY, AND OTHER ORDINANCES INCONSISTENT WITH THIS AMENDMENT.

proposed bills or their titles.³³ For example, a measure proposed in Washington State in 1994 and 1995 that did not qualify for the ballot was expressly entitled “THE EQUAL RIGHTS, NOT SPECIAL RIGHTS ACT”;³⁴ and the 2001 Kalamazoo, Michigan initiative was entitled “Adoption of Special Class Status Based on Sexual Orientation, Conduct, or Relationship Prohibited.”³⁵

Another recent strategy, deemed a “stealth” approach,³⁶ has been to draft an initiative which does not mention sexual orientation and appears to champion civil rights for a list of other groups, but which in fact blocks enactment of protections for GLBT people by omission of those classes from the enumerated list of protected status groups:

Appearing to champion other groups' civil rights was explicitly evident in Florida's proposal in 1994 and Maine's in 1995. These proposals failed to even mention homosexuality. Instead, they catalogued all of the categories of persons already protected by existing discrimination statutes in those states and sought to forbid their respective state legislatures from adding any new groups. Although more benign on the surface, the effect of these measures on gays and lesbians is more sweeping. In an effort to deny protection for gays and lesbians, initiators were willing to deny other groups protection absent a constitutional amendment. To the extent that

³³ Legal scholar William Adams has noted the effect of this approach: “The coded rhetoric of 'special rights' permits opponents of gay rights to tap into deep and powerful reservoirs of social anxiety and anger about other antidiscrimination laws based on race, gender, and disability - particularly affirmative action measures - even as these opponents claim to champion existing civil rights protections.” Adams, *supra* note 7, at 459.

³⁴ See Table 15-A, *infra*.

³⁵ See Table 15-C, *infra*.

³⁶ See, e.g., ELLEN ANN ANDERSEN, *OUT OF THE CLOSET AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 147-48 (University of Michigan Press 2004) (citing William E. Adams, *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583 (Summer 1994).

this approach reflects a general mistrust of civil rights laws in general is even more troubling.³⁷

The initiative at issue in Gainesville in 2009 was similar to this “blocking by omission” strategy. It asked voters “to prohibit the adoption or enforcement of ordinances, regulations, rules or policies that provide protected status, preferences or discrimination claims based on classifications, characteristics or orientations not recognized by the Florida civil rights act.” The initiative listed the classes covered by the Florida civil rights act, which does not include sexual orientation or gender identity, and also made clear that the amendment would void existing protections based on sexual orientation or gender identity.

38

Another strategy that has been employed is to sponsor anti-gay initiatives that target expression of ideas that are tolerant, accepting or supportive of equality rights. Lumping sexual orientation together with “homosexuality, pedophilia, sadism or masochism,” Oregon’s Measure 9 would have prohibited recognition of any protections based on such status, barred the use of public funds to “promote or encourage” anything to do with a homosexual sexual orientation and required the state to assist in broadcasting the message that homosexuality is “abnormal, wrong, unnatural, and perverse” and “to be discouraged and avoided”.³⁹ It further sought to suppress and censor information about sexual orientation, declaring “sexual orientation as it relates to homosexuality and bisexuality” as divisive and not necessary to the instruction of students in public schools, and would have been enforced by seeking to denying school funding to any school that “encouraged”, “promoted” or “sanctioned” such behavior.⁴⁰

³⁷ Adams, *supra* note 7, at 460 (citing Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 374 (1997) (footnote omitted), and Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 259 (1997)).

³⁸ See Table 15-C, *infra*. See also *supra* note 33.

³⁹ See Table 15-A, *infra* – 1992 Oregon Measure 9.

⁴⁰ See Table 15-A, *infra*. The text of the 2000 Oregon ballot measure read:
Section 1. ORS 336.067 is amended to read (new section):

E. Form and Scope of Anti-Gay Ballot Initiatives

Forms of Anti-Gay Ballot Measures

Anti-gay ballot measures have typically taken one of two basic forms:

Referenda provide voters the opportunity to repeal or uphold laws enacted by legislatures. In practice, with respect to laws protecting LGBT rights, such referenda are generally a reaction to laws that have been recently enacted by a council or legislature, or in some cases adopted by executive order. They occur at both the local and state-wide level.

Initiatives seek to make new law, although they may also contain provisions that would in effect repeal existing law. Like referenda, anti-gay ballot initiatives have generally arisen following enactment of civil rights laws, although the relationship is not as direct. Many communities have voted on and enacted anti-gay initiatives without ever having any anti-discrimination laws in place, particular in local communities.⁴¹

Scope of Anti-Gay Ballot Measures

It is useful to distinguish several goals and approaches of anti-gay initiatives.⁴²

- *Repeal* measures seek to overturn existing laws, executive orders, policies and the like that have been enacted by some legislative or executive governing body. This category includes basic referenda that seek to repeal one specific law as well as initiatives that directly repeal

(e) Sexual Orientation as it relates to homosexuality and bisexuality, is a divisive subject matter not necessary to the instruction of students in public schools. Notwithstanding any other law or rule, the instruction of behaviors relating to homosexuality and bisexuality shall not be presented in a public school in a manner which encourages, promotes or sanctions such behaviors.

Section 2. ORS 659.155 is amended to read (new section):

(1) Any public elementary or secondary school determined by the Superintendent of Public Instruction or any community college determined by the Commissioner for Community College Services to be in noncompliance with provisions of ORS 336.067 (e) or ORS 659.150 and this section shall be subject to appropriate sanctions, which may include withholding of all or part of state funding, as established by rule of the State Board of Education.

⁴¹ ANDERSEN, *supra* note 37, at 147.

⁴² This discussion is heavily based on ANDERSEN, *supra* note 37, at 147-49, and Adams, *supra* note 5, at 585-90. Andersen and Adams refer to the categories as **specifically targeted** (corresponds to “Blocking” above), **overtly hostile** (corresponds to “Stigmatizing” above), and **stealth initiatives** (corresponds to “Blocking by Omission” above).

existing laws along with enactment of new measures or that have the implicit effect of repealing or voiding existing law.

- *Preemptive Blocking* initiatives seek to remove power from governmental decision makers to take any future actions to prohibit discrimination based on sexual orientation. There are two types of blocking initiatives – *Blocking* and *Blocking by Omission*:
 - *Blocking*: Colorado's Amendment 2 was a Blocking initiative. It prohibited state and local governments in Colorado from enacting, enforcing, or adopting any law that prohibited discrimination based on “homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships” or giving LGBT people any claim to “minority status, quota preferences, [or] protected status” based on their sexual orientation. The phrasing of Amendment 2 was subsequently copied by antigay activists in several other locales, including Cincinnati (1993), Arizona (1994), and Missouri (1994).
 - *Blocking by Omission*: This type of initiative takes the opposite tack from overtly blocking initiatives. These initiatives do not explicitly mention homosexuality or sexual orientation, instead proposing to enact civil rights law granting non-discrimination protections to a list of named groups, but never including sexual orientation or gender identity among the list. These initiatives appear neutral on their face but are nonetheless designed to repeal existing gay rights laws and prevent the passage of future ones by limiting the future scope of non-discrimination and civil rights laws to the specified classifications. The letter accompanying a 1994 petition to place such a Blocking by Omission initiative on Florida's ballot illustrates the initiative's underlying purpose: “This petition is designed to stop homosexual activists and other special interest groups from improper inclusion in discrimination

laws. Therefore, this amendment would prevent homosexuality and other lifestyles from gaining special protection in discrimination laws”⁴³.

- *Stigmatizing*: The third type of initiative also seeks to limit governmental ability to remedy discrimination based on sexual orientation. In addition, this type seeks to maintain or enforce social stigmatization of LGBT status and can be further analyzed in two distinct types: Condemning and Censoring.
 - *Condemning*: These initiatives either contain overtly hostile language in the initiative, including in its ballot title (*e.g.*, the 1993 Anchorage, Alaska initiative entitled “Petition to Repeal A Special Homosexual Ordinance,” which was ordered removed from the ballot due to presentation of the issue in a biased and partisan light)⁴⁴, and/or mandate that state or governmental entities must express and promote a negative view of LGBT status. The 1992 Oregon Measure 9, voted on the same day as Amendment 2, is the paradigmatic example of an overtly Stigmatizing/Condemning initiative. The proposed amendment to Oregon’s state constitution provided that all levels of government, including public educational systems, must assist in setting a standard for Oregon’s youth which recognizes that these “behaviors” are “abnormal, wrong, unnatural, and perverse,” and that they are to be “discouraged and avoided.”
 - *Censoring*: These initiatives seek to control the public message regarding sexual orientation by prohibiting state or governmental entities from expressing neutral, positive or accepting views of LGBT status, including prohibitions on state funding of gay-positive organizations or activities, restrictions on messages that can be

⁴³ ANDERSEN, *supra* note 37, at 148 (quoting Adams, *supra* note 5, at 590).

⁴⁴ See Table 15-C, *infra*.

provided in public schools and bans on expression that compares LGBT discrimination to other civil rights struggles. Oregon's Measure 9 also contained Stigmatizing/Censoring elements including the restriction that governments in Oregon could not use their monies or properties to promote, encourage, or facilitate homosexuality. Idaho's 1994 ballot forbade all public school employees from sanctioning homosexuality as a "healthy, approved, or acceptable behavior" (Proposition One), language mirrored by a proposed Washington initiative that same year (Initiative 608).⁴⁵

F. Tables and Exhibits

The attached tables list and summarize state and local ballot measures targeting the repeal and preemptive blocking of non-discrimination protections for LGBT people from the 1970s to the present. The list is representative and is not intended to be taken as a complete or exhaustive list of such measures.

⁴⁵ See Table 15-A, *infra*.

State and Local Anti-Gay Ballot Referenda and Initiatives Related to Employment⁴⁶

- **Table 15-A – State-Wide Anti-Gay Ballot Measures and Outcomes**
- **Table 15-B – Text of Selected State-Wide Ballot Measures**
- **Table 15-C – Local (City and County) Anti-Gay Ballot Measures and Outcomes**
- **Exhibit 15-D – Text of Selected Local Ballot Measures**

⁴⁶ Data compiled based on ELLEN ANN ANDERSEN, *OUT OF THE CLOSET AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 144-145 Table II (University of Michigan Press at 144-45 2004); Donald P. Haider-Markel, Alana Querze, and Kara Lindaman, *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, POLITICAL RESEARCH QUARTERLY Supplemental Appendix: Pro- and Anti-Gay Ballot Initiatives, 1972-2006 (2007) (); William E. Adams, *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583, 584-85 Appendices A-J (Summer 1994).

Key to Table Headings and Abbreviations

| Column heading | Key to abbreviations and terms used |
|----------------|---|
| Form | R = referendum I = initiative |
| Scope | <p><u>Repeal</u> = Ballot measures that seek to repeal existing LGBT-rights law.</p> <p><u>Overtly Discriminatory</u> = Ballots measures that seek to enact overt discrimination against LGBT group members. Most frequently, measures that include provisions that call for firing or refusal to hire LGBT educators or that bar LGBT individuals from adopting, marrying and other basic legal activities.</p> <p><u>Blocking</u> = Ballot measures that seek to block future enactment of protections based on LGBT status.</p> <p><u>Blocking by Omission</u> = Ballot measures that seek, often covertly under the guise of protecting civil rights, to block protections for LGBT groups by means of initiative language that does not expressly mention sexual orientation or LGBT groups but which seeks to enact laws that enumerate all and only the groups that are covered by anti-discrimination protections and leaves LGBT groups out.</p> <p><u>Stigmatizing</u> = Ballot measures that seek to maintain and enforce stigmatization of LGBT status either by:</p> <p style="padding-left: 40px;"><u>Condemning</u>: including overtly hostile language in the initiative and/or mandating that the state express and promote a negative view of LGBT status.</p> <p style="padding-left: 40px;"><u>Censoring</u>: prohibiting the state from expressing neutral, positive or accepting views of LGBT status, including prohibitions on state funding and bans on expression that compares LGBT discrimination to other civil rights struggles.</p> |
| Outcome | <p>DNQ = Did Not Qualify for Ballot</p> <p>JDQ = Judicially disqualified</p> <p>TBD=To be determined</p> <p>Passed/Failed = Unless otherwise expressly noted in the table, Outcome designates the success (“Passed”) or failure (“Failed”) of the anti-gay repeal/blocking or otherwise discriminatory effort, rather than the specific ballot measure. Therefore, in some cases, due to the wording of the ballot measure, “Outcome” will differ from the electoral result. For example, if a ballot referendum asked voters to “repeal” an LGBT non-discrimination ordinance, a successful vote to repeal would be designated “Passed” and a defeat of the repeal effort would be designated “Failed”. In contrast, if a referendum asks voters whether they want to enact an LGBT non-discrimination ordinance, a vote against the ordinance would be designated “Passed” and a vote to uphold the ordinance would be designated “Failed”, unless expressly noted otherwise.</p> |

Table 15-A. STATE-WIDE BALLOT MEASURES⁴⁷

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort⁴⁸</u> | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|--|---|--|
| 1978 | CALIFORNIA | I | <p>STIGMATIZING AND OVERTLY DISCRIMINATORY.</p> <p>California Proposition 6 (“Briggs Initiative”), to bar gay and lesbian people from teaching in public schools</p> <p>Overtly Discriminatory – The measure sought to require firing of school employees for “homosexual activity or conduct”</p> <p>Stigmatizing / Condemning – Preamble described purpose as “<i>to protect its impressionable youth from influences which are antithetical to [the preservation of the family]</i>”.</p> <p>Homosexual activity defined as an act of “sodomy or perversion”</p> <p>Censoring – School employees would be fired for speaking publicly in a positive way about being homosexual, including “advocating” “encouraging” or “promoting” private sexual behavior.</p> | Failed | |
| 1988 | OREGON | R | <p>REPEAL AND BLOCKING.</p> <p>Measure 8, to revoke an executive order barring state agencies from discriminating against gay men and lesbians because of their sexual orientation.</p> <p>Repeal: Revoked governor’s executive order banning discrimination on the basis of sexual orientation.</p> <p>Blocking: The measure would have also prohibited any job protection for gay people in state government:</p> | Passed | Subsequently overturned as violation of Oregon constitution on free expression grounds in <i>Merrick v. Board of Higher Education</i> , 116 Or. App. 258; 841 P.2d 646 (1992). |

⁴⁷ The list is representative and is not intended to be taken as a complete or exhaustive list of such measures. It focuses on efforts to repeal or block employment discrimination legislation, including domestic partner benefits legislation, and does not include efforts to repeal or block the extension of marriage or civil unions to same-sex couples.

⁴⁸ Unless otherwise expressly noted in the table, “Outcome” designates the success (“Passed”) or failure (“Failed”) of the anti-gay repeal/blocking or otherwise discriminatory measure. In some cases, due to the wording of the ballot measure, “Outcome” will differ from the electoral result. For example, if a ballot referendum asked voters to “repeal” an LGBT non-discrimination ordinance, a vote to repeal would be designated “Passed” and a defeat of the repeal would be designated “Failed”. In contrast, if a referendum asks voters whether they want to “enact” an LGBT non-discrimination ordinance, a vote against the ordinance would be designated “Passed” and a vote to enact the ordinance would be designated “Failed”, unless expressly noted otherwise.

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|--|--|--|
| | | | “No state official shall forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee.” | | |
| 1990 | MASSACHUSETTS | R | REPEAL. Citizens for Families First collected signatures to put referendum on ballot with intent to repeal a 1989 statute prohibiting discrimination on the basis of sexual orientation in credit, housing, public accommodation and jobs. | JDQ | <i>Collins v. Secretary of the Commonwealth</i> , 556 N.E.2d 348 (Mass. 1990). – Referendum blocked by Massachusetts Constitution provision barring from referendum any law that relates to religion. |
| 1992 | ARIZONA | I | REPEAL AND BLOCKING. | DNQ | |
| 1992 | COLORADO | I | REPEAL AND BLOCKING. Amendment 2, to repeal all gay rights ordinances within the state and to enact a state constitutional amendment preventing the state or any political subdivision from passing new gay rights ordinances. Repeal: Intended to override existing municipal non-discrimination measures in Colorado cities. Blocking: Sweeping ban intended to prevent the state or any subdivision from attempting to “enact, adopt or enforce” any law granting any protection or remedy for discrimination on the basis of sexual orientation and to block any “minority status quota preferences, protected status or claim of discrimination.” | Passed | Struck down by U.S. Supreme Court in <i>Romer v. Evans</i> , 517 U.S. 620 (1996). |
| 1992 | FLORIDA | I | REPEAL AND BLOCKING. | DNQ | |
| 1992 | OREGON | I | REPEAL AND BLOCKING STIGMATIZING. Measure 9: To prevent enactment or granting of any protections on the basis of LGBT status, and to require the state to overtly disapprove of LGBT status. Blocking: “Quotas, minority status, affirmative action, or any similar concepts, shall not apply to these forms of conduct, nor shall government promote these behaviors.” Government monies not to be used to “promote, encourage or facilitate” homosexuality. | Failed | |

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|---|--|---|
| | | | Stigmatizing/Condemning: Grouped classification based on sexual orientation with “pedophilia, sadism or masochism”; government agencies, particularly public schools and higher education departments, required to “assist in setting a standard for Oregon’s youth that recognizes homosexuality ... as abnormal, wrong, unnatural and perverse... and that these behaviors are to be discouraged and avoided.” | | |
| 1994 | ARIZONA | I | <p>REPEAL AND BLOCKING.</p> <p>A “clone” of Colorado Measure 2, the purpose was to repeal all gay rights ordinances within the state and to amend the state constitution to prevent the state or any political subdivision from passing new gay rights ordinances.</p> <p>Blocking: “Neither this state, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby pedophile, homosexual, lesbian or bisexual orientation, are the basis of, or entitle any person or class of persons to status or claim of discrimination.”</p> <p>Stigmatizing: Grouped gay sexual orientation with “pedophile orientation”.</p> | DNQ | |
| 1994 | FLORIDA | I | <p>REPEAL AND BLOCKING.</p> <p>Constitutional amendment to repeal existing anti-discrimination laws covering LGBT populations and to prevent future enactment of laws protecting such groups from discrimination.</p> <p>Blocking by Omission: Entitled “LAWS RELATED TO DISCRIMINATION ARE RESTRICTED TO CERTAIN CLASSIFICATIONS,” making clear the intent to deny non-discrimination protection to unnamed groups. The amendment did not overtly mention LGBT groups but would have resulted in eliminating all possibility of legal protection: “The state, political subdivisions of the state, municipalities or any other governmental entity shall not enact or adopt any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status.”</p> | JDQ | In re Advisory Opinion To Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994). |
| 1994 | IDAHO | I | <p>REPEAL AND BLOCKING. STIGMATIZING.</p> <p>Initiative designed to prevent applicability of any anti-discrimination laws to sexual orientation, and to censor messages provided in schools. It also banned marriage and recognition of domestic partnerships.</p> | Failed | |

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|---|--|------------------------------------|
| | | | <p>Blocking: Entitled “SPECIAL RIGHTS FOR PERSONS WHO ENGAGE IN HOMOSEXUAL BEHAVIOR PROHIBITED.” The initiative stated that “classifications such as ‘sexual orientation’ or similar designations shall not be established.”</p> <p>Condemning/Censoring: Public school employees not allowed to “promote, sanction, or endorse homosexuality as a healthy, approved or acceptable behavior.”</p> | | |
| 1994 | MAINE | I | REPEAL AND BLOCKING. | DNQ | |
| 1994 | MICHIGAN | I | REPEAL AND BLOCKING. | DNQ | |
| 1994 | MISSOURI | I | <p>REPEAL AND BLOCKING.</p> <p>A “clone” of Colorado Measure 2, the purpose was to repeal all gay rights ordinances within the state and to amend the state constitution to prevent the state or any political subdivision from passing new gay rights ordinances.</p> <p>Blocking: “Neither the State of Missouri, through any of its branches, departments or agencies, nor any of its political subdivision, including counties, municipalities and school districts, shall enact, adopt or enforce any statute, order, regulation, rule, ordinance, resolution or policy whereby homosexual, lesbian or bi-sexual activity, conduct or orientation shall entitle any person or class of persons to have or demand any minority status, protected status, quota preference, affirmative action or claim of discrimination.”</p> | DNQ | |
| 1994 | NEVADA | I | <p>REPEAL AND BLOCKING. STIGMATIZING.</p> <p>A constitutional amendment that sought to block non-discrimination protection based on sexual orientation, expressly condemn homosexuality and establish anti-homosexual bias as a right. Very similar to the 1996 Oregon measure.</p> <p>Blocking: “MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED”; No use of classifications such as “sexual orientation” as a basis for class protections.</p> <p>Stigmatizing/Condemning: Entitled “CHILD PROTECTION ACT”, the preamble stated “The People of the State of Nevada find that inappropriate sexual behavior does not form an appropriate basis upon which to construct a minority or class status relation to civil rights. To identify oneself as a person who participates in</p> | DNQ | |

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|---|--|------------------------------------|
| | | | <p>or who expresses openly a desire for inappropriate sexual behavior, such as homosexuality, fails to constitute a legitimate minority classification.”</p> <p>A special provision would have established anti-homosexual bias as a right: “The People establish that objection to homosexuality based upon one's convictions is a Liberty and Right of Conscience and shall not be considered discrimination.”</p> <p>Stigmatizing/Censoring: No governmental unit would be permitted to advise children, students or employees that “homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin; nor shall public funds be expended in a manner that has the purpose of [sic] effect of promoting or expressing approval of homosexuality.”</p> | | |
| 1994 | OHIO | I | REPEAL AND BLOCKING. | Withdrawn | |
| 1994 | OREGON | I | <p>BLOCKING.</p> <p>Measure 7 – Intended to block extension of equal protection to groups, including based on sexual orientation.</p> <p>Blocking by Omission: This measure enumerated a short list of classes to be covered by equal protection. It would have added a new section to the Constitution’s Bill of Rights, leaving out sexual orientation, among other traditionally protected categories (e.g., marital status): “The equal protection of the laws shall not be denied or abridged by any public entity in this state on account of race, color, religion, gender, age or national origin.”</p> | JDQ | |
| 1994 | OREGON | I | <p>REPEAL AND BLOCKING. STIGMATIZING.</p> <p>Measure 13 – Second state-wide attempt to pass a Constitutional Amendment blocking government at all levels from enacting legislation that would be protective of LGBT class members. This is considered a “toned down” version of Measure 9, described above.</p> <p>Blocking: “minority status shall not apply to homosexuality; therefore, affirmative action, quotas, specials class status or special classifications such as 'sexual orientation,' 'domestic partnerships,' or similar designations shall not be established on the basis of homosexuality.”</p> <p>Stigmatizing/Condemning: The measure was entitled the “Child Protection Act.”</p> | Failed | |

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|---|--|------------------------------------|
| | | | Stigmatizing/Censoring: “Children, students, and employees shall not be advised, instructed or taught by any government agency, department or political unit in the State of Oregon that homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin; nor shall public funds be expended in a manner that has the purpose or effect of promoting or expressing approval of homosexuality.” | | |
| 1994 | WASHINGTON (1) | I | <p>REPEAL AND BLOCKING. STIGMATIZING AND OVERTLY DISCRIMINATORY.</p> <p>WASHINGTON PROPOSED INITIATIVE 608 – Sweeping anti-gay legislation to block protective classifications, repeal existing protections, censor state speech and declare a state of emergency.</p> <p>Overtly Discriminatory: The measure declared a “legitimate and compelling state interest ... in preventing special rights based on any homosexual, bisexual, transsexual, or transvestite status, preference, orientation, conduct, act, practice, or relationship.”</p> <p>Blocking: Sweeping denial of legal protections, status and benefits: “Neither the State of Washington, nor its political subdivisions ..., shall by any means or instrumentality, enact or enforce a policy whereby any homosexual, bisexual, transsexual, or transvestite status ... shall be a basis for a person to maintain any special classification or privilege; minority status; quota preference; affirmative action right; legal standing; public benefit; marital, spousal, parental, familial or domestic privilege, advantage, entitlement, benefit, position, or status; claim of discrimination; or special right or protection.”</p> <p>Stigmatizing/Censoring: “the sincerely-held values and beliefs of citizens regarding homosexuality, bisexuality, transsexuality, or transvestism are not denigrated or denied by the public schools and that homosexuality, bisexuality, transsexuality, or transvestism are not presented, promoted or approved as positive, healthy or appropriate behavior.”</p> <p>School employees, volunteers or guests not permitted to “present, promote or approve homosexuality, bisexuality, transsexuality, or transvestism, or any such conduct, act, practice, or relationship, as a positive, healthy, or appropriate behavior or lifestyle.”</p> | DNQ | |

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|--|--|------------------------------------|
| | | | “EMERGENCY CLAUSE. This act is necessary for the immediate preservation of the public peace, health, morals, or safety, or the support of the state government and its existing public institutions, and shall take effect immediately.” | | |
| 1994 | WASHINGTON (2) | I | <p>REPEAL AND BLOCKING. STIGMATIZING AND OVERTLY DISCRIMINATORY.</p> <p>PROPOSED INITIATIVE 610 – Similar to the 1996 Oregon/1994 Nevada “Child Protection” bills, with additional restrictions on marriage and adoptions and discrimination against LGBT status.</p> <p>Repeal effect on existing local protections and domestic partner benefits.</p> <p>Overtly discriminatory: In addition to the text quoted below, the law banned marriage, domestic partner benefits and adoption/foster parenting by LGBT individuals and couples.</p> <p>Blocking: ”THE SPECIAL RIGHT OF MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED.” “... minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as 'sexual orientation,' 'sexual preference,' 'domestic partnerships' or similar designations shall not be established on the basis of homosexuality.”</p> <p>The law expressly allows “private, lawful sexual behavior” to be used as grounds for job termination: “With regard to public employees, no agency ... shall forbid generally the consideration of private lawful sexual behaviors as non-job related factors, provided that such consideration does not violate the provisions and purposes of this Act and that such factors do not disrupt the workplace.”</p> <p>Stigmatizing/Condemning: Called “CHILD PROTECTION ACT”; “The People find that inappropriate sexual behavior does not form an appropriate basis upon which to construct a minority or class status relating to civil rights. To identify oneself as a person who participates in or who expresses openly a desire for inappropriate sexual behavior, such as homosexuality, fails to constitute a legitimate minority classification.”</p> <p>“The People establish that objection to homosexuality based upon one's</p> | DNQ | |

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|--|--|------------------------------------|
| | | | <p>convictions is a Right of Conscience and shall not be considered discrimination relating to civil rights by any unit, branch department or agency of state or local government.”</p> <p>Stigmatizing/Censoring: No public funds shall be expended in a manner that has the purpose or effect of promoting or expressing approval of homosexuality.</p> <p>Contained an entire section requiring censoring of any gay-positive messages in the schools: “THE PUBLIC EDUCATIONAL SYSTEM SHALL NOT PROMOTE OR EXPRESS APPROVAL OF HOMOSEXUALITY. The People establish that no person representing the state educational system as an employee, student, volunteer or guest shall undertake any activity that would in any manner advise, instruct, teach or promote to any child, student or employee that homosexuality is a positive or healthy lifestyle, or an acceptable or approved condition or behavior.”</p> | | |
| 1995 | MAINE | I | <p>REPEAL AND BLOCKING.</p> <p>To prevent extension of anti-discrimination protections based on sexual orientation.</p> <p>Blocking: Entitled “AN ACT TO LIMIT PROTECTED CLASSES UNDER THE MAINE HUMAN RIGHTS ACT” -- the initiative would have changed Maine law to limit protections to only an enumerated list of classifications which did not include sexual orientation.</p> <p>The initiative did not expressly mention sexual orientation, but would have preemptively limited the legislatures and the courts from extending protection based on sexual orientation: “protected classes or suspect classifications under state or local human rights laws, rules, regulations, ordinances, or policies, shall be limited to race, color, sex, physical or mental disability, religion, age, ancestry, national origin, familial status, and marital status.” Drafters acknowledged this was intentional.</p> | Failed | |
| 1995 | WASHINGTON | I(2) | <p>REPEAL AND BLOCKING. STIGMATIZING AND OVERTLY DISCRIMINATORY.</p> <p>Measure 166 and 167 were a repeat of the 1994 Measure 608 that did not qualify for the ballot, and the portions of 610 that banned adoption/foster parenting by LGBT individuals or couples, as described above for Washington State.</p> | DNQ | |

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|--|--|------------------------------------|
| 1996 | IDAHO | I | | DNQ | |
| 1996 | OREGON | I | <p>REPEAL AND BLOCKING. STIGMATIZING AND OVERTLY DISCRIMINATORY.</p> <p>Constitutional Amendment to block protective legislation, censor educational messages, outlaw marriage and domestic partner benefits and create a right to anti-gay bias. Language similar to 1994 Nevada measure.</p> <p>Blocking: “MINORITY STATUS BASED ON SEXUAL BEHAVIOR PROHIBITED.”</p> <p>Stigmatizing/Condemning: Entitled “CHILD PROTECTION ACT”; created a right to anti-gay bias: “The People find that to be morally opposed to certain sexual behaviors such as homosexuality, when based upon a person's convictions, is a Right of Conscience ... Such objection produced by one's moral standards and values is therefore not discrimination relating to civil rights, nor shall it be considered so by any unit of state or local government.”</p> <p>Stigmatizing/Censoring: “Children, students and employees shall not be advised, instructed or taught by any government agency, department or political subdivision that a person's sexual behavior is the legal or social equivalent to existing minority civil rights classifications.” Prohibits use of public funds for any gay-positive message: “Public funds shall not be expended in a manner that has the purpose or effect of expressing approval of homosexuality.”</p> | Withdrawn | |
| 1998 | MAINE | R | <p>REPEAL.</p> <p>The Maine Sexual Orientation Discrimination Referendum, on the ballot as Question 1 (Special) - a veto referendum to reject a recently-enacted law passed by the Maine State Legislature that added sexual orientation to the list of bases on which it is illegal to discriminate in Maine, in terms of jobs, housing, public accommodations and credit.</p> <p>Repeal: The ballot question asked: “Do you want to reject the law passed by the Legislature and signed by the Governor that would ban discrimination based on sexual orientation with respect to jobs, housing, public accommodations and credit?”</p> | Passed | |
| 2000 | OREGON | I | REPEAL. STIGMATIZING AND OVERTLY DISCRIMINATORY. | Failed | |

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome of Anti-LGBT Effort</u> ⁴⁸ | <u>Developments/ Related Cases</u> |
|-------------|-----------------|-------------|---|--|------------------------------------|
| | | | <p>Measure 9: Measure to censor messages about sexual orientation that are permitted to be expressed in public schools.</p> <p>Overtly Discriminatory: Applies to “sexual orientation” but only “as it related to homosexuality and bisexuality” – does not restrict discussions of heterosexuality in any way.</p> <p>Stigmatizing/Censoring: Declares sexual orientation is “divisive subject matter not necessary to the instruction of students in public schools.” Requires negative messages about LGBT orientation: “the instruction of behaviors relating to homosexuality and bisexuality shall not be presented in a public school in a manner which encourages, promotes or sanctions such behaviors.”</p> | | |
| 2000 | MAINE | R | <p>REPEAL.</p> <p>Question 6 Referendum</p> <p>Repeal: Voters were asked to ratify “the action of the 119th Legislature whereby it passed an act extending to all citizens regardless of their sexual orientation the same basic rights to protection against discrimination now guaranteed to citizens on the basis of race, color, religion, sex or national origin in the areas of employment, housing, public accommodation and credit and where the act expressly states that nothing in the act confers legislative approval of, or special rights to, any person or group of persons.”</p> | <p>Passed*</p> <p>*LGBT rights law repealed</p> | |
| 2005 | MAINE | R | <p>REPEAL.</p> <p>The Maine Sexual Orientation Referendum, on the ballot as Question 1.</p> <p>Repeal: Voters were asked whether they wished to reject a recently-enacted law passed by the Maine State Legislature that made it illegal to discriminate on the basis of sexual orientation in the state.</p> | <p>Failed*</p> <p>*LGBT rights law upheld</p> | |

EXHIBIT 15-B: TEXT OF SELECTED STATE BALLOT MEASURES

| State | Text of Measure |
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| <p>1978 – CALIFORNIA Proposition 6 “Briggs Initiative”</p> <p>(Source: Hastings School of Law, DATABASE OF CALIFORNIA BALLOT PROPOSITIONS (1911-PRESENT), <i>available at</i> http://holmes.uchastings.edu/cgi-bin/starfinder/8380/calprop.txt).</p> | <p>Title School Employees. Homosexuality</p> <p>Summary: Official Title and Summary Prepared by the Attorney General</p> <p>SCHOOL EMPLOYEES. HOMOSEXUALITY. INITIATIVE STATUTE. Provides for filing charges against schoolteachers, teachers' aides, school administrators or counselors for advocating, soliciting, imposing, encouraging or promoting private or public sexual acts defined in sections 286(a) and 288a(a) of the Penal Code between persons of same sex in a manner likely to come to the attention of other employees or students; or publicly and indiscreetly engaging in said acts. Prohibits hiring and requires dismissal of such persons if school board determines them unfit for service after considering enumerated guidelines. In dismissal cases only, provides for two-stage hearings, written findings, judicial review. Financial impact: Unknown but potentially substantial costs to State, counties and school districts depending on number of cases which receive an administrative hearing.</p> <p>Full Text: This initiative measure proposes to add sections to the Education Code. It does not expressly amend any existing law; therefore, the provisions to be added are printed in <i>italic type</i> to indicate that they are new.</p> <p>Proposed Law</p> <p>SECTION 1. Section 44837.5 is added to the Education Code, to read:</p> <p><i>44837.5 One of the most fundamental interests of the State is the establishment and the preservation of the family unit. Consistent with this interest is the State's duty to protect its impressionable youth from influences which are antithetical to this vital interest. This duty is particularly compelling when the state undertakes to educate its youth, and, by law, requires them to be exposed to the state's chosen educational environment throughout their formative years.</i></p> <p>A schoolteacher, teacher's aide, school administrator or counselor has a professional duty directed exclusively towards the moral as well as intellectual, social and civic development of young and impressionable students.</p> <p>As a result of continued close and prolonged contact with schoolchildren, a teacher, teacher's aide, school administrator or counselor becomes a role model whose words, behavior and actions are likely to be emulated by students coming under his or her care, instruction, supervision, administration, guidance and protection.</p> <p>For these reasons the state finds a compelling interest in refusing to employ and in terminating the employment of a</p> |

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| | <p>schoolteacher, a teacher's aide, a school administrator or a counselor, subject to reasonable restrictions and qualifications, who engages in public homosexual activity and/or public homosexual conduct directed at, or likely to come to the attention of, schoolchildren or other school employees.</p> <p>This proscription is essential since such activity and conduct undermines that state's interest in preserving and perpetuating the conjugal family unit.</p> <p>The purpose of sections 44837.6 and 44933.5 is to proscribe employment of a person whose homosexual activities or conduct are determined to render him or her unfit for service.</p> <p>SECTION 2. Section 44837.6 is added to the Education Code, to read:</p> <p><i>44837.6 (a) The governing board of a school district shall refuse to hire as an employee any person who has engaged in public homosexual activity or public homosexual conduct should the board determine that said activity or conduct renders the person unfit for service.</i></p> <p>(b) For purposes of this section, (1) "public homosexual activity" means the commission of an act defined in subdivision (a) of Section 286 of the Penal Code, or in subdivision (a) of Section 288a of the Penal Code, upon any other person of the same sex, which is not discreet and not practiced in private, whether or not such act, at the time of its commission, constituted a crime;</p> <p>(2) "Public homosexual conduct" means the advocating, soliciting, imposing, encouraging, or promoting of private or public homosexual activity directed at, or likely to come to the attention of schoolchildren and/or other employees; and</p> <p>(3) "Employee" means a probationary or permanent certificated teacher, teacher's aide, school administrator or counselor.</p> <p>(c) In evaluating the public homosexual activity and/or the public homosexual conduct in question for the purposes of determining an applicant's unfitness for service as an employee, a board shall consider the factors delineated in Section 44933.5(f).</p> <p>SECTION 3. Section 44933.5 is added to the Education Code, to read:</p> <p><i>44933.5 (a) In addition to the grounds specified in Sections 44932, 44948 and 44949, or any other provision of law, the commission of "public homosexual activity" or "public homosexual conduct" by an employee shall subject the employee to dismissal upon a determination by the board that said activity or conduct renders the employee unfit for service. Dismissal shall be determined in accordance with the procedures contained in this section.</i></p> <p>(b) For the purposes of this section, (1) "public homosexual activity" means the commission of an act defined in</p> |
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| | <p>subdivision (a) of Section 286 of the Penal Code, or in subdivision (a) of Section 288a of the Penal Code, upon any other person of the same sex, which is not discreet and not practiced in private, whether or not such act, at the time of its commission, constituted a crime;</p> <p>(2) "public homosexual conduct" means the advocating, soliciting, imposing, encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of, schoolchildren and/or other employees; and</p> <p>(3) "Employee" means a probationary or permanent certificated teacher, teacher's aide, school administrator or counselor.</p> <p>(c) Notwithstanding any other provision of law regarding dismissal procedures, the governing board, upon the filing of written charges that the person has committed public homosexual activity or public homosexual conduct, duly signed and verified by the person filing the charges, or upon written charges formulated by the governing board, shall set a probable cause hearing on the charges within fifteen (15) working days after the filing or formulation of written charges and forward notice to the employee of the charges not less than ten (10) working days prior to the probable cause hearing. The notice shall inform the employee of the time and place of the governing board's hearing to determine if probable cause exists that the employee has engaged in public homosexual activity or public homosexual conduct. Such notice shall also inform the employee of his or her right to be present with counsel and to present evidence which may have bearing on the board's determination of whether there is probable cause. This hearing shall be held in private session in accordance with Govt. Code 54957, unless the employee requests a public hearing. A finding of probable cause shall be made within thirty (30) working days after the filing or formulation of written charges by not less than a simple majority vote of the entire board.</p> <p>(d) Upon a finding of probable cause, the governing board may, if it deems such action necessary, immediately suspend the employee from his or her duties. The board shall, within thirty-two (32) working days after the filing or formulation of written charges, notify the employee in writing of its findings and decision to suspend, if imposed, and the board's reasons therefor.</p> <p>(e) Whether or not the employee is immediately suspended, and notwithstanding any other provision of law, the governing board shall, within thirty (30) working days after the notice of the finding of probable cause, hold a hearing on the truth of the charges upon which a finding of probable cause was based and whether such charges, if found to be true, render the employee unfit for service. This hearing shall be held in private session in accordance with Govt. Code 54957, unless the employee requests a public hearing. The governing board's decision as to whether the employee is unfit for service shall be made within thirty (30) working days after the conclusion of this hearing. A decision that the employee is unfit for service shall be determined by not less than a simple majority vote of the entire board. The written decision shall include findings of fact and conclusions of law.</p> <p>(f) Factors to be considered by the board in evaluating the charges of public homosexual activity or public homosexual conduct in question and in determining unfitness for service shall include, but not be limited to: (1) the likelihood that the activity or conduct may adversely affect students or other employees; (2) the proximity or remoteness in time or</p> |
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| | <p>location of the conduct to the employee's responsibilities; (3) the extenuating or aggravating circumstances which, in the judgment of the board, must be examined in weighing the evidence; and (4) whether the conduct included acts, words or deeds, of a continuing or comprehensive nature which would tend to encourage, promote, or dispose schoolchildren toward private or public homosexual activity or private or public homosexual conduct.</p> <p>(g) If, by a preponderance of the evidence, the employee is found to have engaged in public homosexual activity or public homosexual conduct which renders the employee unfit for service, the employee shall be dismissed from employment. The decision of the governing board shall be subject to judicial review.</p> <p>SECTION 4. Severability Clause</p> <p>If any provision of this enactment or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this enactment which can be given effect without the invalid provision of application, and to this end the provisions of this enactment are severable.</p> |
| <p>1988 OREGON MEASURE 8</p> | <p>Be It Enacted by the People of the State of Oregon</p> <p>SECTION 1. Executive Order No. EO-87-20 be, and hereby is, revoked.</p> <p>SECTION 2. No state official shall forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee.</p> <p>SECTION 3. The measure shall not be deemed to limit the authority of any state official to forbid generally the taking of personnel action against state employees based on nonjob related factors.</p> <p>SECTION 4. For purposes of this measure, "sexual orientation" means heterosexuality, homosexuality or bisexuality.</p> <p>SECTION 5. The various provisions of this measure are severable; therefore, if any provision of this measure be declared unconstitutional by any court of competent jurisdiction, the remaining provisions shall be unaffected by such declaration.</p> |
| <p>1992 COLORADO Measure 2</p> | <p>COLORADO AMENDMENT TWO</p> <p>Be it Enacted by the People of the State of Colorado:</p> <p>Article 2, of the Colorado Constitution is amended by the addition of Sec. 30, which shall state as follows:</p> <p>NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the</p> |

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| | <p>basis of, or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.</p> |
| <p>1992 OREGON Measure 9</p> | <p>OREGON: MEASURE NINE TO AMEND CONSTITUTION</p> <p>Be it Enacted by the People of the State of Oregon:</p> <p>PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article I and to read:</p> <p>SECTION 41 (1) This state shall not recognize any categorical provision such as "sexual orientation", "sexual preference", and similar phrases that includes homosexuality, pedophilia, sadism or masochism. Quotas, minority status, affirmative action, or any similar concepts, shall not apply to these forms of conduct, nor shall government promote these behaviors.</p> <p>(2) State, regional and local governments and their properties and monies shall not be used to promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism.</p> <p>(3) State, regional and local governments and their departments, agencies and other entities, including specifically the State Department of Higher Education and the public schools, shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.</p> <p>(4) It shall be considered that it is the intent of the people in enacting this section that if any part thereof is held unconstitutional, the remaining parts shall be held in force.</p> |
| <p>1994 OREGON Measure 7 and Measure 13</p> | <p>TEXT of Measure 7</p> <p>QUESTION: Shall Oregon's constitution forbid government from denying equal protection of laws due to race, color, religion, gender, age, national origin?</p> <p>TEXT: The Measure would add a new section to the Constitution's Bill of Rights: "The equal protection of the laws shall not be denied or abridged by any public entity in this state on account of race, color, religion, gender, age or national origin."</p> <p>TEXT of Measure 13:</p> <p>QUESTION: Shall constitution bar governments from creating classifications based on homosexuality or spending public funds in manner expressing approval of homosexuality?</p> <p>TEXT: THE MINORITY STATUS AND CHILD PROTECTION ACT</p> <p>Be it enacted by the People of the State of Oregon:</p> <p>The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article</p> |

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| | <p>1. The new section shall be known as "The Minority Status and Child Protection Act" and will read as follows:</p> <p>SECTION 41: MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED.</p> <p>(1) In the State of Oregon, including all political subdivisions and the government units, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, specials class status or special classifications such as "sexual orientation," "domestic partnerships," or similar designations shall not be established on the basis of homosexuality.</p> <p>(2) Children, students, and employees shall not be advised, instructed or taught by any government agency, department or political unit in the State of Oregon that homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin; nor shall public funds be expended in a manner that has the purpose or effect of promoting or expressing approval of homosexuality.</p> <p>(a) The State of Oregon, political subdivisions and all units of state and local government shall not grant marital status or spousal benefits of homosexuality.</p> <p>(b) The State of Oregon, political subdivisions and all units of state and local government, with regard to public employees, shall generally consider private lawful sexual behaviors as non-job related facts, provided such factors do not disrupt the workplace and that such consideration does not violate subsections (1) and (2).</p> <p>(c) Though subsections (1) and (2) are established and in effect, no unit of state or local government shall deny to private persons business licenses, permits or services otherwise due under existing statutes; nor deprive, nullify, or diminish the holding or exercise of any rights guaranteed by the Constitution of the State or Oregon or the Constitution of the United States of America.</p> <p>(d) Though subsections (1) and (2) are established and in effect, this section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standard as established through the existing library review process.</p> <p>(3) The PEOPLE INTEND, that if any part of this enactment be found unconstitutional, the remaining parts shall survive in full force and effect. This Section shall be in all parts self-executing.</p> |
| <p>1994 ARIZONA</p> | <p>Arizona's Proposed Initiative</p> <p>PROPOSED INITIATIVE AMENDMENT TO THE CONSTITUTION OF THE STATE OF ARIZONA</p> <p>TEXT OF PROPOSED AMENDMENT</p> <p>Be it enacted by the people of Arizona: The following amendment to the Constitution of Arizona, amending Article II, Section 13 to become valid when approved by the majority of the qualified electors voting thereon and upon proclamation of the governor:</p> |

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| | <p>Section 13. Equal privileges and immunities</p> <p>(1) No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.</p> <p>(2) NEITHER THIS STATE, THROUGH ANY OF ITS BRANCHES OR DEPARTMENTS, NOR ANY OF ITS AGENCIES, POLITICAL SUBDIVISIONS, MUNICIPALITIES OR SCHOOL DISTRICTS, SHALL ENACT, ADOPT OR ENFORCE ANY STATUTE, REGULATION, ORDINANCE OR POLICY WHEREBY PEDOPHILE, HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION, ARE THE BASIS OF, OR ENTITLE ANY PERSON OR CLASS OF PERSONS TO STATUS OR CLAIM OF DISCRIMINATION. THIS PARAGRAPH SHALL BE IN ALL RESPECTS SELF EXECUTING.</p> |
| <p>1994 FLORIDA</p> | <p>Florida's Proposed Initiative (struck down by Florida Supreme Court)</p> <p>TITLE:</p> <p>LAWS RELATED TO DISCRIMINATION ARE RESTRICTED TO CERTAIN CLASSIFICATIONS</p> <p>SUMMARY:</p> <p>Restricts laws related to discrimination to classifications based upon race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. Repeals all laws inconsistent with this amendment.</p> <p>FULL TEXT OF PROPOSED AMENDMENT:</p> <p>BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:</p> <p>Therefore, to the extent permitted by the Constitution of the United States, the people of Florida, exercising their reserved powers, hereby declare that:</p> <p>1) Article 1, Section 10 of the Constitution of the State of Florida is hereby amended by:</p> <p>a) inserting "(a)" before the first word thereof and,</p> <p>b) adding a new sub-section "(b)" at the end thereof to read:</p> <p>"(b) The state, political subdivisions of the state, municipalities or any other governmental entity shall not enact or adopt any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. As used herein the term "sex" shall mean the biological state of being either a male person or a female person; "marital status" shall mean the state of being lawfully married to a person of the opposite sex, separated divorced, widowed or single; and "familial status" shall mean the state of being a person domiciled with a minor, as defined by law, who is the parent or person with legal custody of such minor or who is a person with written permission from such parent or person with legal custody of such minor."</p> <p>2) All laws previously enacted which are inconsistent with this provision are hereby repealed to the extent of such inconsistency.</p> <p>3) This amendment shall take effect on the date it is approved by the electorate.</p> |

1994 IDAHO

Proposed Title 67, Chapter 80, Idaho Code

Section 67-8001: PURPOSE OF ACT. The provisions of Title 67, Chapter 80 of the Idaho Code are enacted by the people of the State of Idaho in recognition that homosexuality shall not form the basis for the granting of minority status. This chapter is promulgated in furtherance of the provisions of Article 3, Section 24 of the Constitution of the State of Idaho.

Section 67-8002: SPECIAL RIGHTS FOR PERSONS WHO ENGAGE IN HOMOSEXUAL BEHAVIOR PROHIBITED. No agency, department, or political subdivision of the State of Idaho shall enact or adopt any law, rule, policy, or agreement which has the purpose or effect of granting minority status to persons who engage in homosexual behavior, solely on the basis of such behavior; therefore, affirmative action, quota preferences, and special classifications such as "sexual orientation" or similar designations shall not be established on the basis of homosexuality. All private persons shall be guaranteed equal protection of the law in the full and free exercise of all rights enumerated and guaranteed by the U.S. Constitution, the Constitution of the State of Idaho, and federal and state law. All existing civil rights protection based on race, color, religion, gender, age, or national origin are reaffirmed, and public services shall be available to all persons on an equal basis.

Section 67-8003: EXTENSION OF LEGAL INSTITUTION OF MARRIAGE TO DOMESTIC PARTNERSHIPS ON HOMOSEXUAL BEHAVIOR PROHIBITED. Same-sex marriages and domestic partnerships are hereby declared to be against public policy and shall not be legally recognized in any manner by any agency, department, or political subdivision of the State of Idaho.

Section 67-8004: PUBLIC SCHOOLS. No employee, representative, or agent of any public elementary or secondary school shall, in connection with school activities, promote, sanction, or endorse homosexuality as a healthy, approved or acceptable behavior. Subject to the provisions of federal law, any discussion of homosexuality within such schools shall be age-appropriate as defined and authorized by the local school board of trustees. Counseling of public school students regarding such students' sexual identity shall conform in the foregoing.

Section 67-8005: EXPENDITURE OF PUBLIC FUNDS. No agency, department or political subdivision of the State of Idaho shall expend public funds in a manner that has the purpose or effect of promoting, making acceptable, or expressing approval of homosexuality. This section shall not prohibit government from providing positive guidance toward persons experiencing difficulty with sexual identity. This section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the normal library review process.

Section 67-8006: EMPLOYMENT FACTORS. With regard to public employees, no agency, department or political subdivision of the State of Idaho shall forbid generally the consideration of private sexual behaviors as nonjob factors, provided that compliance with the Title 67, Chapter 80, Idaho Code is maintained, and that such factors do not disrupt the workplace.

Section 67-8007: SEVERABILITY. The people intend, that if any part of this enactment be found unconstitutional, the remaining parts shall survive in full force and effect. This section shall be in all parts self-executing.

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| <p>1994 MISSOURI</p> | <p>Neither the State of Missouri, through any of its branches, departments or agencies, nor any of its political subdivision, including counties, municipalities and school districts, shall enact, adopt or enforce any statute, order, regulation, rule, ordinance, resolution or policy whereby homosexual, lesbian or bi-sexual activity, conduct or orientation shall entitle any person or class of persons to have or demand any minority status, protected status, quota preference, affirmative action or claim of discrimination.</p> <p>This section shall be in all respects self-executing. This section is severable, and should any portion hereof be found unconstitutional, the remainder shall in all respects remain in force.</p> |
| <p>1994 NEVADA</p> | <p>THE MINORITY STATUS AND CHILD PROTECTION ACT</p> <p>The Constitution of the State of Nevada is amended by creating a new section to be added to and made a part of Article 1. The new section shall be known as "The Minority Status and Child Protection Act" and will read as follows:</p> <p>The People of the State of Nevada do enact as follows:</p> <p>Section 21: MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED</p> <p>(1) The People of the State of Nevada find that inappropriate sexual behavior does not form an appropriate basis upon which to construct a minority or class status relation to civil rights. To identify oneself as a person who participates in or who expresses openly a desire for inappropriate sexual behavior, such as homosexuality, fails to constitute a legitimate minority classification. The People establish that objection to homosexuality based upon one's convictions is a Liberty and Right of Conscience and shall not be considered discrimination relating to civil rights by any unit, branch department or agency of state or local government. The People further establish that in the State of Nevada, including all political subdivisions and units of state and local government, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as "sexual orientation," "sexual preference," "domestic partnerships" or similar designations shall not be established on the basis of homosexuality.</p> <p>(2) Children, students and employees shall not be advised, instructed or taught by any government agency, department or political unit in the Stat [sic] of Nevada that homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin; nor shall public funds be expended in a manner that has the purpose of [sic] effect of promoting or expressing approval of homosexuality.</p> <p>(a) The State of Nevada, political subdivisions and all units of state and local government shall not grant marital status or spousal benefits on the basis of homosexuality.</p> <p>(b) The State of Nevada, political subdivisions and all units of state and local government, with regard to public employees, shall generally consider private lawful sexual behaviors as non-job related factors, provided such factors do not disrupt the work place and such consideration does not violate subsections (1) and (2).</p> <p>(c) Though subsections (1) and (2) are established and in effect, no unit of state or local government shall deny to private persons business licenses, permits or services otherwise due under existing statutes;</p> |

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| | <p>not deprive, nullify, or diminish the holding or exercise of any rights guaranteed by the Constitution of the State of Nevada or the Constitution of the United States of America.</p> <p>(d) Though subsections (1) and (2) are established and in effect, this section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the existing library review process.</p> <p>(3) The PEOPLE INTEND, that if any part of this enactment be found unconstitutional, the remaining parts shall survive in full force and effect. This Section shall be in all parts self-executing.</p> <p>(4) Any person residing in the State of Nevada or non-profit entity doing business in this State has standing to bring suit to enforce the provision and policies of this Act.</p> |
| <p>1994 WASHINGTON (1)</p> <p>Initiative 608</p> | <p>AN ACT relating to prohibiting special rights for homosexuals; adding new sections to chapter 49.60 RCW[;] and declaring an emergency. Be it Enacted by the People of the State of Washington</p> <p>NEW SECTION. Sec. 1.THE EQUAL RIGHTS, NOT SPECIAL RIGHTS ACT. This act shall be known and cited as the Equal Rights, Not Special Rights Act.</p> <p>NEW SECTION. Sec. 2.A new section is added to chapter 49.60 RCW to read as follows:</p> <p>PROTECTING CITIZEN'S CONSTITUTIONAL AND CIVIL RIGHTS. Neither the State of Washington, nor its political subdivisions, shall deny any right expressly guaranteed by the Constitution of the State of Washington or the Constitution of the United States of America. Persons who commit acts of violence against the person or property of others should be prosecuted and appropriately punished in order to protect law-abiding citizens and to ensure the guarantee of equal justice for all.</p> <p>NEW SECTION. Sec. 3.A new section is added to chapter 49.60 RCW to read as follows:</p> <p>ENSURING EQUAL PROTECTION OF THE LAW. The people find that equal protection of the law, not special rights, is a fundamental principle of constitutional government and is essential to the well-being and perpetuation of a free society.</p> <p>The people further find that there is a legitimate and compelling state interest in ensuring equal protection of the law for all citizens and in preventing special rights based on any homosexual, bisexual, transsexual, or transvestite status, preference, orientation, conduct, act, practice, or relationship.</p> <p>The people further find that there is a legitimate and compelling state interest in ensuring that the rights of parents to control the education of their children and that the sincerely-held values and beliefs of citizens regarding homosexuality, bisexuality, transsexuality, or transvestism are not denigrated or denied by the public schools and that homosexuality, bisexuality, transsexuality, or transvestism are not presented, promoted or</p> |

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| | <p>approved as positive, healthy or appropriate behavior.</p> <p>The people further find that "the duty of all teachers" as required in RCW 28A.405.030 "to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism" and "to teach them to avoid idleness, profanity and falsehood" is an indispensable prerequisite for providing a sound education, maintaining a virtuous and ethical society, and guaranteeing the rights of all citizens.</p> <p>NEW SECTION. Sec. 4. A new section is added to chapter 49.60 RCW to read as follows:</p> <p>PROHIBITING SPECIAL RIGHTS FOR HOMOSEXUALS. Neither the State of Washington, nor its political subdivisions, including counties, cities, towns, and school districts, shall by any means or instrumentality, enact or enforce a policy whereby any homosexual, bisexual, transsexual, or transvestite status, preference, orientation, conduct, act, practice, or relationship shall be a basis for a person to maintain any special classification or privilege; minority status; quota preference; affirmative action right; legal standing; public benefit; marital, spousal, parental, familial or domestic privilege, advantage, entitlement, benefit, position, or status; claim of discrimination; or special right or protection.</p> <p>A school, through any employee, volunteer, guest, or other means or instrumentality, shall not present, promote or approve homosexuality, bisexuality, transsexuality, or transvestism, or any such conduct, act, practice, or relationship, as a positive, healthy, or appropriate behavior or lifestyle. As used in this section, "school" means any common school of the [S]tate of Washington.</p> <p>NEW SECTION. Sec. 5. CONSTRUCTION CLAUSE. The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act. In the event of conflict between this act and any other provision of law, the provisions of this act shall govern.</p> <p>NEW SECTION. Sec. 6. SEVERABILITY CLAUSE. If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances is not affected.</p> <p>NEW SECTION. Sec. 7. EMERGENCY CLAUSE. This act is necessary for the immediate preservation of the public peace, health, morals, or safety, or the support of the state government and its existing public institutions, and shall take effect immediately.</p> |
| <p>1994 WASHINGTON (2) Initiative 610</p> | <p>A Legislative Act by the People of the State of Washington.</p> <p>AN ACT relating to how homosexuality will be viewed in law and in the public policy of the State of Washington. In this Act, homosexuality is defined as sexual desire for a person of the same gender, as determined by the individual's willingness to be openly self-identified with those desires, or sexual activity with individuals of the same gender.</p> <p>Be it Enacted by the People of the State of Washington</p> |

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| | <p>New Section 1: THE MINORITY STATUS AND CHILD PROTECTION ACT This act shall be known and cited as The Minority Status and Child Protection Act.</p> <p>New Section Section 2: A new section is added to chapter 49.60 RCW to read as follows: THE SPECIAL RIGHT OF MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED.</p> <p>The People find that inappropriate sexual behavior does not form an appropriate basis upon which to construct a minority or class status relating to civil rights. To identify oneself as a person who participates in or who expresses openly a desire for inappropriate sexual behavior, such as homosexuality, fails to constitute a legitimate minority classification.</p> <p>The People establish that objection to homosexuality based upon one's convictions is a Right of Conscience and shall not be considered discrimination relating to civil rights by any unit, branch department or agency of state or local government.</p> <p>The People further establish that in the State of Washington, including all political subdivisions and units of state and local government, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as "sexual orientation," "sexual preference," "domestic partnerships" or similar designations shall not be established on the basis of homosexuality.</p> <p>No public funds shall be expended in a manner that has the purpose or effect of promoting or expressing approval of homosexuality. This provision shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the existing library review process.</p> <p>With regard to public employees, no agency, department or political subdivision of the State of Washington shall forbid generally the consideration of private lawful sexual behaviors as non-job related factors, provided that such consideration does not violate the provisions and purposes of this Act and that such factors do not disrupt the workplace.</p> <p>New Section Section 3: A new section is added to chapter 28A.150 RCW to read as follows: THE PUBLIC EDUCATIONAL SYSTEM SHALL NOT PROMOTE OR EXPRESS APPROVAL OF HOMOSEXUALITY. The People establish that no person representing the state educational system as an employee, student, volunteer or guest shall undertake any activity that would in any manner advise, instruct, teach or promote to any child, student or employee that homosexuality is a positive or healthy lifestyle, or an acceptable or approved condition or behavior. The educational system is to be in full compliance with chapter 49.60 RCW.</p> <p>New Section Section 4:A new section is added to chapter 26.33 RCW to read as follows: FOSTER PARENT STATUS AND ADOPTION BY PERSONS PARTICIPATING IN HOMOSEXUALITY PROHIBITED. The People find that there is a compelling state interest in placement of minor children, where at all possible, in sound, married, male-female households and that such children must never be placed in households where homosexuality is present in any</p> |
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| | <p>manner whatsoever. Any person participating in homosexuality shall not be an adoptive, foster or placement parent. The People further establish that, upon the dissolution of a marriage in which one of the natural parents or other legal classification of parent is participating in homosexuality, the minor child, wherever legally possible, will be placed in the custody of the parent not participating in homosexuality. Where both parents are unqualified, custody shall be awarded to the next closest natural relative; such as, grandparents, brothers or sisters, aunts or uncles and so forth. All consideration is to the well being of the minor child and it is the policy of the State of Washington that sound natural family relationships are the most important initial consideration that will maintain that well being. Where this is not possible, an adoptive or foster parent situation is to be ensured. Every appropriate court and government agency in the State of Washington shall enforce the provisions of this section and, at all placement or custody proceedings, shall enter and maintain a written finding that the prospective custodial, foster or placement parent does not participate in homosexuality.</p> <p>New Section Section 5: A new section is added to chapter 26.04 RCW to read as follows: MARRIAGE BETWEEN PERSONS OF THE SAME GENDER PROHIBITED AND NATURAL GENDER DEFINED. The People establish that same-gender marriages and domestic partnerships are hereby declared to be against public policy and shall not be legally recognized in any manner by any agency, department or political subdivision of the State of Washington. The State of Washington recognizes that the gender that is established at the conception of all persons is the only and natural gender of that person for the duration of their life. Any physical alternations to the human body do not affect the natural gender, known at birth or before, of any resident in the State of Washington. Any same-gender marriage or gender alteration obtained or recognized outside the State of Washington shall not constitute a valid or legal marriage or gender within the State of Washington.</p> <p>New Section Section 6: A new section is added to chapter 49.60 RCW to read as follows: ALL CONSTITUTIONAL RIGHTS PROTECTED FOR EVERY CITIZEN In the State of Washington and its political subdivisions, no Unit, agency, or department of government shall deny to private persons business licenses, permits or services otherwise due under existing statutes, nor deprive, nullify, or diminish the holding or exercise of any rights guaranteed by the Constitution of the State of Washington or the Constitution of the United States of America.</p> <p>New Section Section 7: SEVERABILITY AND CONSTRUCTION CLAUSE The PEOPLE INTEND that, if any part of this enactment be declared unconstitutional by a court of competent jurisdiction, the remaining parts shall survive in full force and effect. This enactment shall in all parts be self-executing. In the event that a conflict arises between this legislation and any other provision of law, the policies and purposes of this Act shall govern.</p> <p>New Section Section 8: LEGAL STANDING Any person residing in the State of Washington or non-profit entity doing business in this state has standing to bring suit to enforce the provisions and policies of this Act.</p> |
| <p>1995 MAINE</p> | <p>To the 118th Legislature of the State of Maine: In accordance with Section 18 of Article IV, Part Third of the Constitution of the State of Maine, the undersigned electors of the State of Maine, qualified to vote for Governor, residing in Maine, whose names have been certified, hereby respectfully propose to the Legislature for its consideration the following entitled bill:</p> <p>AN ACT TO LIMIT PROTECTED CLASSES UNDER THE MAINE HUMAN RIGHTS ACT The full text of this act is printed below on this petition. The question on the ballot will read as follows: Do you favor the changes in Maine</p> |

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| | <p>law concerning the limitation of protected status to the existing classifications of race, color, sex, physical or mental disability, religion, age, ancestry, national origin, familial status, and marital status proposed by citizen petition?</p> <p>Be it enacted by the People of the State of Maine: 5 M.R.S.A. Section 4552-A is enacted to read: Section 4552-A -- Limitation of protected class status. Notwithstanding any provision of this chapter or any other provision of law, protected classes or suspect classifications under state or local human rights laws, rules, regulations, ordinances, or policies, shall be limited to race, color, sex, physical or mental disability, religion, age, ancestry, national origin, familial status, and marital status. Any provision of State or local law, rule, regulation, ordinance or policy inconsistent with the preceding sentence is hereby void and enforceable. This section shall not limit the power of the Legislature to add to the list of protected classes or suspect classifications enumerated in this section through future legislation.</p> |
| <p>1996 OREGON</p> | <p><u>1996 : THE MINORITY STATUS AND CHILD PROTECTION ACT OF 1996</u></p> <p>AN ACT The People of the State of Oregon do enact as follows: The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article 1. The new section shall be known as "The Minority Status and Child Protection Act of 1996," and will read as follows:</p> <p>SECTION 41: MINORITY STATUS BASED ON SEXUAL BEHAVIOR PROHIBITED</p> <p>1. Minority status shall not be based on sexual behavior or desires; therefore,</p> <p>(a) Children, students and employees shall not be advised, instructed or taught by any government agency, department or political subdivision that a person's sexual behavior is the legal or social equivalent to existing minority civil rights classifications.</p> <p>(b) The People find that to be morally opposed to certain sexual behaviors such as homosexuality, when based upon a person's convictions, is a Right of Conscience in accord with Article 1 Section 2 and 3 of this Constitution. Such objection produced by one's moral standards and values is therefore not discrimination relating to civil rights, nor shall it be considered so by any unit of state or local government; therefore,</p> <p>(1) Public funds shall not be expended in a manner that has the purpose or effect of expressing approval of homosexuality.</p> <p>(2) Marital status shall not be recognized or spousal benefits awarded on the basis of homosexuality.</p> <p>2. Though subsection one is established and in effect, no licenses, permits, services or benefits shall be denied any person otherwise due under existing statute; nor shall the holding or exercise of any rights guaranteed by the Constitution of the State of Oregon or of the United States of America be deprived, nullified or diminished.</p> <p>3. Though subsection one is established and in effect, with regard to public employees, it shall be generally considered that a person's private lawful sexual behavior is a non-job related factor, provided such consideration does not violate any provision of this Act or of the Constitution of the United States.</p> |

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| | <p>4. Though subsection one is established and in effect, books or literature in public libraries which promote or express approval of homosexuality shall be kept from minors; access made available only under parental supervision. Such material must meet local community standards established through the existing library review process.</p> <p>5. The term minority status shall refer to any class or category of individuals created in the law as a special civil rights classification such as race, religion, gender, national origin, etc.</p> <p>6. The PEOPLE INTEND that if any part of this enactment be found unconstitutional, the remain parts shall survive in full force and effect. This Act shall be in all parts self- executing. For the purpose of this Act, every Oregon resident and non-profit entity doing business in the State of Oregon has standing.</p> |
| <p>1998 MAINE Question 1 referendum</p> | <p>Do you want to reject the law passed by the Legislature and signed by the Governor that would ban discrimination based on sexual orientation with respect to jobs, housing, public accommodations and credit?</p> <p>This legislation amends the Maine Human Rights Act to make it unlawful to discriminate against individuals based on their sexual orientation in decisions regarding employment, housing, access to public accommodations and the extension of credit. Religious organizations are exempt from this new provision. This legislation was approved by the Legislature and signed into law by the Governor in May, 1997. Petitioners subsequently collected a sufficient number of signatures of registered voters to refer the legislation to the people for approval or disapproval at a statewide election. Its effect has been suspended pending the outcome of the election. A "YES" vote is in favor of the people's veto and disapproves the legislation. A "NO" vote is in opposition to the people's veto and approves the legislation.</p> |
| <p>2000 OREGON Measure 9</p> | <p>Measure 9: Proposed by initiative petition to be voted on at the General Election, November 7, 2000.</p> <p>BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON:</p> <p>Section 1. ORS 336.067 is amended to read (new section): (e) Sexual Orientation as it relates to homosexuality and bisexuality, is a divisive subject matter not necessary to the instruction of students in public schools. Notwithstanding any other law or rule, the instruction of behaviors relating to homosexuality and bisexuality shall not be presented in a public school in a manner which encourages, promotes or sanctions such behaviors.</p> <p>Section 2. ORS 659.155 is amended to read (new section): (1) Any public elementary or secondary school determined by the Superintendent of Public Instruction or any community college determined by the Commissioner for Community College Services to be in noncompliance with provisions of ORS 336.067 (e) or ORS 659.150 and this section shall be subject to appropriate sanctions, which may include withholding of all or part of state funding, as established by rule of the State Board of Education.</p> |
| <p>2000 MAINE Question 6 Referendum</p> | <p>Do you favor ratifying the action of the 119th Legislature whereby it passed an act extending to all citizens regardless of their sexual orientation the same basic rights to protection against discrimination now guaranteed to citizens on the basis of race, color, religion, sex or national origin in the areas of employment, housing, public accommodation and credit and where the act expressly states that nothing in the act confers legislative approval of, or special rights to, any person or group of persons?</p> |

2005 MAINE
Question 1 Referendum

Question 1: People's Veto (Defeated)

Do you want to reject the new law that would protect people from discrimination in employment, housing, education, public accommodations and credit based on their sexual orientation?

TABLE 15-C: LOCAL (CITY AND COUNTY) BALLOT MEASURES⁴⁹

| <u>Year</u> | <u>Location</u> | <u>Form</u> | <u>Purpose and Scope</u> | <u>Outcome⁵⁰</u> | <u>Developments/ Related Cases</u> |
|-------------|------------------------|-------------|--|-----------------------------|------------------------------------|
| 1974 | Boulder, CO | R | REPEAL. Placed on the ballot by the Boulder city council after passage of a LGBT rights ordinance met with public outcry. | Passed | |
| 1977 | Miami-Dade County, FL | R | REPEAL. Repeal of county LGBT rights ordinance. | Passed | |
| 1978 | Wichita, KS | R | REPEAL. Repeal of city LGBT rights ordinance. | Passed | |
| 1978 | St. Paul, MN | R | REPEAL. Repeal of city LGBT rights ordinance. | Passed | |
| 1978 | Eugene, OR | R | REPEAL. Repeal of city LGBT rights ordinance. | Passed | |
| 1978 | Seattle, WA | R | REPEAL. Repeal of city LGBT rights ordinance – Initiative 13 would have repealed city ordinances protecting employment and housing rights for gays and lesbians. | Failed | |
| 1980 | Santa Clara County, CA | R | REPEAL. Repeal of county LGBT rights ordinance. | Passed | |
| 1980 | San Jose, CA | R | REPEAL. Repeal of city LGBT rights ordinance. | Passed | |
| 1982 | Austin, TX | R | REPEAL. Repeal of gay rights in housing – Proposed amendment to city’s Fair Housing Ordinance would have legalized housing discrimination on the basis of sexual orientation. | Failed | |
| 1984 | Duluth, MN | | REPEAL. Repeal of city LGBT rights ordinance | Passed | |
| 1985 | Houston, TX | R | REPEAL. Repeal of city g LGBT rights ordinance passed in 1984 by the Houston city council, prohibiting discrimination based on sexual orientation in city hiring, promotion, and contracting. | Passed | |

⁴⁹ The list is representative and is not intended to be taken as a complete or exhaustive list of such measures. It focuses on efforts to repeal or block employment discrimination legislation, including domestic partner benefits legislation, and does not include efforts to repeal or block the extension of marriage or civil unions to same-sex couples.

⁵⁰ Unless otherwise expressly noted in the table, “Outcome” designates the success (“Passed”) or failure (“Failed”) of the anti-gay repeal/blocking or otherwise discriminatory measure. In some cases due to the wording of the ballot measure, “Outcome” will differ from the electoral result. For example, if a ballot referendum asked voters to “repeal” an LGBT non-discrimination ordinance, a vote to repeal would be designated “Passed” and a defeat of the repeal would be designated “Failed”. In contrast, if a referendum asks voters whether they want to “enact” an LGBT non-discrimination ordinance, a vote against the ordinance would be designated “Passed” and a vote to enact the ordinance would be designated “Failed”, unless expressly noted otherwise.

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| 1985 | King County, WA | R | REPEAL. Repeal of county LGBT rights ordinance | DNQ | |
| 1986 | Davis, CA | | REPEAL. Repeal of city LGBT rights ordinance | Failed | |
| 1988 | St. Paul, MN | | LGBT RIGHTS LAW. Initiative to bar citizens from repealing LGBT gay rights ordinance by initiative. | Passed* * LGBT rights law rejected. | |
| 1989 | Irvine, CA | R | REPEAL. Repeal of city LGBT rights ordinance. | Passed | |
| 1989 | Athens, OH | | REPEAL. Repeal of city LGBT rights ordinance. | Passed | |
| 1989 | Tacoma, WA | R | REPEAL. Repeal of city LGBT rights ordinance. | Passed | |
| 1990 | Wooster, OH | | REPEAL. Repeal of fair housing ordinance that included sexual orientation protection. | Passed | |
| 1990 | Seattle, WA | R | REPEAL. Repeal of domestic partner benefits. Initiative 35: In 1989, the Seattle City Council extended sick and funeral leave benefits to the domestic partners of city employees. Initiative 35 sought to overturn the measure. | Failed | |
| 1991 | Concord, CA | I | BLOCKING. REPEAL. Concord Measure M sought to prevent the local government from passing any law involving sexual orientation. Measure M also sought to repeal an existing law prohibiting discrimination against gay people and people with AIDS. | Passed | Subsequently overturned as unconstitutional in <i>Bay Area Network of Gay & Lesbian Educators v. City of Concord.</i> |
| 1991 | Riverside, CA | I | BLOCKING. REPEAL, The measure sought to repeal existing ordinances prohibiting discrimination based on AIDS and sexual orientation and to forbid any future laws protecting people on either of those grounds. | JDQ | The Riverside City Council voted to keep the measure off the ballot, and a Riverside Superior Court judge and a California appellate court agreed that the measure violated the constitutional guarantee of equal protection: <i>Citizens for Responsible Behavior v. Superior Court</i> , 1 Cal. App. 4th |

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| | | | | | 1013, 1031 (1991). |
| 1991 | San Francisco, CA | R | REPEAL. Repeal ordinance providing for domestic partner registration. | Failed | |
| 1991 | Denver, CO | | REPEAL. Repeal of city LGBT rights ordinance. | Failed | |
| 1991 | St. Paul, MN | R | REPEAL. Repeal of city LGBT rights ordinance. | Failed | |
| 1992 | Tampa, FL | R | REPEAL. Repeal of city LGBT rights ordinance. | Passed | The 1992 referendum was voided for invalid signatures; it passed again in 1993. |
| 1992 | Portland, ME | R | REPEAL. Repeal of city LGBT rights ordinance. | Failed | |
| 1992 | Corvallis, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Failed | |
| 1992 | Springfield, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Anchorage, AK | R | REPEAL. Repeal of an ordinance passed by the Anchorage Municipal Assembly which prohibited discrimination in public employment on the basis of an individual's sexual orientation. | JDQ | Ordered removed from the ballot because the referendum petition presented the ordinance in a biased and partisan light, in violation of regulations. The title of the referendum petition "Petition to Repeal A 'Special Homosexual Ordinance'" was found to be partisan and potentially prejudicial. <i>Faipeas v. Municipality of Anchorage</i> , , 860 P.2d 1214 (Alaska 1993). |
| 1993 | Tampa, FL | R | REPEAL. Repeal of city LGBT rights ordinance. | Passed | The 1992 referendum was voided; it Passed again in 1993. |

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| 1993 | Lewiston, ME | R | REPEAL AND BLOCKING . Repeal and blocking: Repeal of LGBT rights ordinance – a “clone” of Cincinnati measure (Issue 3, below). | Passed | |
| 1993 | Portsmouth, NH | R | REPEAL. Non-binding referendum to reject an ordinance banning discrimination based on sexual orientation. | Passed | |
| 1993 | Cincinnati, OH | I | <p>REPEAL AND BLOCKING.</p> <p>REPEAL. “Issue 3” City Charter Amendment whose purpose was to repeal two city ordinances, the "Equal Employment Opportunity Ordinance" and “Human Rights Ordinance”, which gave LGBT individuals protection from discrimination in housing, employment and public accommodation. Nearly identical to Colorado Measure 2, it also banned future protections based on sexual orientation.</p> <p>BLOCKING. “<i>NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.</i>” The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status...”</p> | Passed | Sixth Circuit upheld amendment; appealed to the U.S. Supreme Court, which remanded for reconsideration after its decision striking down very similar Colorado Measure 2 in <i>Romer v. Evans</i> . On remand the Sixth Circuit upheld the law. |
| 1993 | Canby, OR | I | <p>BLOCKING. STIGMATIZING / CENSORING</p> <p>Part of OCA campaign to enact local ordinances or charter amendments barring governments from passing any legislation recognizing LGBT classes or granting any protected status. All Oregon local measures have the following pattern:</p> <p>BLOCKING. City or county prohibited from extending any protections based on sexual orientation:</p> <p>(a) The city or county of -----, including its council and elected or appointed officers, shall not make, pass, adopt, or enforce any ordinance, rule, regulation, policy or</p> | Passed | |

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| | | | <p>resolution that extends minority status, affirmative action, quotas, special class status, or any similar concepts, based on homosexuality or which establishes any categorical provision such as "sexual orientation", "sexual preference", or any similar provision which includes homosexuality.</p> <p>STIGMATIZING/CENSORING. Prohibited use of any government funds to “express approval” of LGBT status: (b) City funds shall not be expended to promote homosexuality or express approval of homosexual behavior.</p> | | |
| 1993 | Cornelius, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Creswell, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Douglas County, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Estacada, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Jackson County, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Junction City, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | The 1993 results were thrown out due to voting irregularities; passed again in 1994 |
| 1993 | Josephine City, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Keizer, OR | I | BLOCKING. Part of OCA campaign to enact local | Passed | |

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| | | | ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | | |
| 1993 | Klamath County, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Lebanon, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Linn County, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Medford, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Molalla, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Oregon City, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1993 | Sweet Home, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Alachua County, FL(1) | R | REPEAL. Repeal an ordinance that granted gay people protection from discrimination in housing and employment | Passed | |
| 1994 | Alachua County, FL (2) | I | BLOCKING.: Alachua County Amendment 1 banned the Board of County Commissioners from adopting any future ordinance that would create classifications based on sexual orientation or sexual preference. | Passed, overturned | The initiative was subsequently overturned in <i>Morris v. Hill</i> , where the court found “Amendment 1 is indistinguishable from the amendment struck |

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| | | | | | down in <i>Romer</i> , the Colorado amendment that the Supreme Court rejected in <i>Romer v. Evans</i> last May as a violation of the Constitution's equal protection clause.” |
| 1994 | Springfield, MO | R | REPEAL. Repeal inclusion of gays in hate crimes law. | Passed | |
| 1994 | Albany, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Cottage Grove, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Grants Pass, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Gresham, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Failed | Gresham required a 60% supermajority for passage. |
| 1994 | Junction City, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | The 1993 results were thrown out due to voting irregularities; passed again in 1994 |
| 1994 | Lake County, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Marion County, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Oakridge, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |

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| 1994 | Roseburg, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Turner, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Venetta, OR | I | BLOCKING. Part of OCA campaign to enact local ordinances barring governments from passing any legislation recognizing LGBT classes or granting any protected status. | Passed | |
| 1994 | Austin, TX | R | REPEAL. Repeal of domestic partner benefits Proposition 22: | Passed | |
| 1995 | West Palm Beach, FL | R | REPEAL. Repeal of city LGBT rights ordinance. | Failed | |
| 1996 | Broward County., FL | R | REPEAL. Repeal of ban on discrimination against gays and lesbians in housing, public accommodations and employment, passed by the County Commission in 1995. | DNQ | |
| 1996 | Lansing, MI | R | REPEAL. Repeal of city's LGBT rights ordinance (two separate initiatives, both passed). | Passed | |
| 1998 | Fort Collins, CO | R | REPEAL. Repeal of unanimously approved City Council measure extending the City's "Human Rights Code" to cover discrimination in employment, housing and public accommodations on the basis of sexual orientation. Known as Ordinance 22 | Passed* * defeated City Council LGBT rights measure | |
| 1998 | Fayetteville, AR | R | REPEAL. Repeal of Resolution 51-98, the Fayetteville Human Dignity Resolution, which would have added the categories of sexual orientation and familial status to the City of Fayetteville's non-discrimination policy for public employees. Approved by the city council but vetoed by the mayor; the city council, in a rare move, overrode the mayor's veto, effectively enacting the resolution as law. | Passed | |
| 1998 | Ogunquit, ME | R | LGBT RIGHTS LAW. Referendum Question 4: In response to the repeal of Maine's statewide civil rights law banning discrimination on the basis of sexual orientation, activists with Concerned Citizens of Ogunquit gathered enough signatures to have a human rights ordinance modeled after the former statewide non-discrimination bill placed on the ballot. he amendment | Passed* * i.e., defeated LGBT rights law | |

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| | | | would have amended the Ogunquit Municipal Code to ban discrimination on the basis of sexual orientation in the areas of employment, housing, public accommodations, and the extension of credit. | | |
| 1999 | South Portland, ME | R | LGBT RIGHTS LAW. In response to the repeal of Maine's statewide civil rights law banning discrimination on the basis of sexual orientation, the South Portland City Council decided to put the issue of reinstating anti-discrimination protections directly to the voters. The ordinance prohibits acts of discrimination in employment, housing, public accommodations, or the extension of credit. | Failed* * i.e., pro-LGBT anti-discrimination ordinance was enacted | |
| 1999 | Falmouth, ME | I | REPEAL AND BLOCKING. Repeal of ordinance unanimously adopted by the Town Council prohibiting discrimination based on sexual orientation in the areas of employment, housing, credit, education and public accommodation and amendment of the town's charter to prevent the town from making any "ordinance, policy or regulation regarding sexual orientation." If passed, the measure would have nullified the existing non-discrimination ordinance as well as preventing the further enactment of protective legislation. | Failed | |
| 1999 | Spokane, WA | R | REPEAL. Repeal of civil rights ordinance adopted by Spokane City Council which banned discrimination based on sexual orientation. | Failed | |
| 2000 | Ferndale, MI | R | REPEAL. Repeal of gay rights ordinance adopted by the City Council in 1999 that made it illegal to discriminate against anyone regarding employment, housing, public accommodations, and public services on the basis of race; color; religion; gender; age; height or weight; marital status; sexual orientation; familial status; national origin; or physical or mental disability. | Passed | |
| 2000 | Royal Oak, MI | I | REPEAL AND BLOCKING. Part of a campaign by the Michigan chapter of Mississippi-based American Family Association which tried to get ballot initiatives in several Michigan towns that would have repealed all local laws outlawing discrimination based on sexual orientation and would have prohibited local voters from adopting such laws. | DNQ | |
| 2000 | Grand Rapids, MI | I | REPEAL AND BLOCKING. Part of a campaign by the Michigan chapter of Mississippi-based American | DNQ | |

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| | | | Family Association which tried to get ballot initiatives in several Michigan towns that would have repealed all local laws outlawing discrimination based on sexual orientation and would have prohibited local voters from adopting such laws. | | |
| 2000 | Traverse City, MI | I | REPEAL AND BLOCKING. Part of a campaign by the Michigan chapter of Mississippi-based American Family Association which tried to get ballot initiatives in several Michigan towns that would have repealed all local laws outlawing discrimination based on sexual orientation and would have prohibited local voters from adopting such laws. | DNQ | |
| 2000 | Grand Ledge, MI | I | REPEAL AND BLOCKING. Part of a campaign by the Michigan chapter of Mississippi-based American Family Association which tried to get ballot initiatives in several Michigan towns that would have repealed all local laws outlawing discrimination based on sexual orientation and would have prohibited local voters from adopting such laws. | DNQ | |
| 2000 | Kalamazoo, MI | I | REPEAL. Repeal of domestic partner benefits. | DNQ | |
| 2001 | Kalamazoo, MI | I | REPEAL AND BLOCKING. OVERTLY DISCRIMINATORY. Charter Amendment to repeal previously adopted ordinances granting protections on the basis of sexual orientation and to block the city from adopting future protections based on those classifications. Entitled "Adoption of Special Class Status Based on Sexual Orientation, Conduct, or Relationship Prohibited." Used the 1993 Cincinnati ballot measure language (see above). | Failed | |
| 2001 | Traverse City, MI | I | REPEAL AND BLOCKING. Amendment to nullify city commission resolution opposing discrimination for a number of categories, including sexual orientation, and to prohibit any city body from adopting policies or rules to protect gay, lesbian and bisexual people from discrimination. Used the 1993 Cincinnati ballot measure language (see above). | Failed | |
| 2001 | Huntington Woods, MI | R | REPEAL. Referendum to uphold or reject the Human Rights Ordinance unanimously passed by the city commission, which included protections based on sexual orientation | Failed* *LGBT rights law upheld | |

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| 2001 | Houston, TX | I | BLOCKING. Charter Amendment to prohibit the city from granting same-sex domestic partner employment and health care benefits and “to address other issues” relating to sexual orientation and employment. | Passed | |
| 2002 | Ypsilanti, MI | I | REPEAL AND BLOCKING. Charter Amendment to repeal 1998 inclusive non-discrimination ordinance that protects people based on a variety of characteristics, including religion, age, race and sexual orientation. The proposed charter amendment would have removed protections, but only for gay, lesbian and bisexual people. It would have amended the city charter and nullified any ordinance (past present or future) that afforded protected or minority status to people based on sexual orientation. Measure was similar to 1993 Cincinnati measure (see above). | Failed | |
| 2002 | Miami-Dade County, FL | R | REPEAL. Repeal of the county's LGBT rights ordinance; | Failed | |
| 2002 | Tacoma, WA | I | REPEAL. Initiative 1 would have amended Tacoma’s municipal code to remove provisions barring discrimination on the basis of sexual orientation or gender identity. | Failed | |
| 2002 | Westbrook, ME | R | REPEAL. Referendum to overturn a LGBT rights ordinance that was passed by the City Council the previous summer. | Failed | |
| 2005 | Topeka, KS | I | REPEAL AND BLOCKING. To overturn existing non-discrimination ordinances and bar Topeka from recognizing sexual orientation as a protected class for ten years. | Failed | |
| 2006 | Ferndale, MI | I | LGBT RIGHTS LAW. Proposed gay rights/human rights ordinance barring discrimination in housing, employment, and public accommodation, placed on ballot by unanimous vote of the city council. | Failed* *LGBT rights law passed | |
| 2006 | Corvallis, OR | I | LGBT RIGHTS LAW. Vote to amend the city charter to provide equal protection and non-discrimination for all, inclusive of sexual orientation and gender identity or expression. | Failed *LGBT rights law passed | |
| 2009 | Gainesville, FL | I | REPEAL AND BLOCKING. Charter Amendment 1 - would have removed LGBT people from the city’s anti-discrimination ordinance, prohibited enacting protections | Failed | |

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| | | | for any groups not enumerated in the State Civil Rights Act (which does not include sexual orientation or gender identity) and repealed existing protections against discrimination in housing, employment, public accommodation, and credit extension services. | | |
| 2009 | Kalamazoo, MI | | REPEAL. Repeal of ordinance approved by unanimous Kalamazoo City Commission vote to expand legal protections for LGBT people. | TBD | Vote expected November, 2009 |

EXHIBIT 15-D: TEXT OF SELECTED LOCAL (CITY AND COUNTY) BALLOT MEASURES

| LOCALE | TEXT OF MEASURE |
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| <p>1993 Cincinnati, OH</p> | <p>CINCINNATI CHARTER AMENDMENT</p> <p>TEXT: Be it resolved by the people of Cincinnati that a new Article XII be added to the Charter of the City of Cincinnati to prohibit the City from granting special class status based upon sexual orientation, conduct or relationships, to read as follows:</p> <p>ARTICLE XII</p> <p>NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.</p> <p>The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.</p> |
| <p>1993 Anchorage, AK</p> | <p>Referendum – Ordered removed from ballot due to biased and partisan presentation of the petition gathering signatures for the referendum:</p> <p>Should AO 92-116(S), which adds sexual orientation to the list of protected classes for the purpose of public employment or municipal contractors, remain law? Yes [] No []</p> |
| <p>1993 / 1994 OR Cities and Counties</p> | <p><u>1993 – Form of Measure supplied by Oregon Citizen’s Alliance, and filed in 24 cities and 8 counties in Oregon</u></p> <p>An Act: Be it enacted by the People of the City or County of -----:</p> <p>Paragraph 1: The charter of the city or county of ----- is amended by adding a new Section ----- as follows:</p> <p>(a) The city or county of -----, including its council and elected or appointed officers, shall not make, pass, adopt, or enforce any ordinance, rule, regulation, policy or resolution that extends minority status, affirmative action, quotas, special class status, or any similar concepts, based on homosexuality or which establishes any categorical provision such as "sexual orientation", "sexual preference", or any similar provision which includes homosexuality.</p> <p>(b) City funds shall not be expended to promote homosexuality or express approval of homosexual behavior.</p> <p>(c) This Section shall not be construed to deny any citizen, based on perceived or actual private lawful sexual practices, any city</p> |

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| | <p>services, licenses, or approvals otherwise due or available.</p> <p>(d) This Section shall not be construed to limit public libraries from providing materials for adults which address homosexuality.</p> <p>(e) Subsection (a) of this Section shall not nullify or be construed to nullify any city, state, or federal civil rights protections based on race, religion, color, sex, marital status, familial status, national origin, age or disability. Neither shall Subsection (a) be construed to abrogate, abridge, impede, or otherwise diminish the holding, enjoyment, or exercise of any rights guaranteed to citizens by the Constitution of the State of Oregon or the Constitution of the United States.</p> <p>(f) Subsection (a) of this Section shall not be construed to forbid the adoption of provisions prohibiting employment decisions based on factors not directly related to employment. If such a provision is adopted, it is the intent of the People that lawful private sexual behavior, or rumor, perception, or knowledge of a person's lawful private sexual behavior, are factors not directly related to employment. If such a provision is adopted, it is the intent of the People that personal expression, conversation or any other free expression concerning private lawful sexual behavior shall also be considered factors not directly related to employment, unless such actions disrupt the workplace.</p> <p>(g) This Section shall be an explicit and necessary restriction and limitation upon the authority of the Council.</p> <p>(h) It shall be considered that it is the intent of the People in enacting this Section that if any part thereof is held unconstitutional by a court of competent jurisdiction, the remaining parts shall be held in full force and effect. This Section shall be in all parts self-executing.</p> |
| 1994 Austin, TX | <p>Proposition 22 – repealing grant of employee benefits to domestic partners:</p> <p>"Shall the City Charter of the City of Austin be amended to provide that City employee benefits shall be as provided in the approved "Personnel Policies"; provided such City Employee benefits shall in no case be extended to any persons other than an employee's parents, spouse, children (including step-children, children for whom a court ordered guardianship or conservatorship has been assigned, qualified children placed pending adoption and eligible grandchildren), sisters, brothers, grandparents, and the parents and grandparents of an employee's spouse; except as otherwise required by state or federal law and the term spouse as defined in the "Personnel Policies" shall mean the husband or wife of the employee?</p> |
| 1998 Fayetteville, AK | <p>Fayetteville Resolution 51-98, the Fayetteville Human Dignity Resolution (repealed by voters)</p> <p>The City of Fayetteville shall model for the community and encourage all other institution, organizations and businesses in the City to conduct their institutional behavior in a manner that promotes the values represented by the spirit of the resolution. The City shall therefore continue to insure that all qualified applicants for all City positions have equal access to such employment opportunities regardless of race, sex, national origin, age, ancestry, familial status, sexual orientation or disability."</p> |
| 2001 Kalamazoo, MI | <p>Ballot question: Shall the Kalamazoo City Charter be amended by the addition of a new section entitled Adoption of Special Class Status Based on Sexual Orientation, Conduct, or Relationship Prohibited, which shall provide that no special class status shall be granted based upon sexual orientation, conduct or relationships, and that the City of Kalamazoo and its various boards and commissions shall not adopt and enforce any ordinance or regulation which will afford protected status based on sexual orientation,</p> |

| | |
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| | conduct or relationships, and that any ordinance or regulation enacted before this amendment that violates this provision shall be null and void? |
| 2001 Houston, TX | Proposition 2 Shall the charter of the city of Houston be amended to deny health care and other employment benefits to same-sex domestic partners of city employees and to address other matters of city employment and contracting practices based on sexual orientation? |
| 2002 Miami-Dade County, FL | Shall County Ordinance 98-170, entitled "Ordinance amending Articles I, II, III and IV of Chapter 11A of the Code of Miami-Dade County to prohibit discrimination based on sexual orientation in housing, credit and finance, public accommodations, and employment; amending Article VI relating to the office of Fair Employment Practices to require Miami-Dade County to provide equal employment opportunity without regard to sexual orientation," be repealed? |
| 2002 Tacoma, WA | Ballot Summary: Initiative No. 1 amends Tacoma's anti-discrimination law. Initiative No. 1 removes those provisions of the Tacoma Municipal Code which prohibit discrimination in employment, housing, public accommodation, and lending based on sexual orientation or gender identity. A yes vote enacts the Initiative. A no vote defeats the Initiative. Should this Initiative become law? |
| 2005 Topeka, KS | CITY OF TOPEKA QUESTION SHALL THE FOLLOWING BE ADOPTED? The City of Topeka and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian or bisexual orientation or gender identity or expression; status, conduct or relationship; constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference, or other preferential treatment. This provision of the City Code shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this provision is adopted that violates the foregoing prohibition shall be null and void and of no force or effect. |
| 2009 Gainesville, FL | CITY OF GAINESVILLE CHARTER AMENDMENT 1 Amendment to City Charter Prohibiting the City from Providing Certain Civil Rights SHALL THE CITY CHARTER BE AMENDED TO PROHIBIT THE ADOPTION OR ENFORCEMENT OF ORDINANCES, REGULATIONS, RULES OR POLICIES THAT PROVIDE PROTECTED STATUS, PREFERENCES OR DISCRIMINATION CLAIMS BASED ON CLASSIFICATIONS, CHARACTERISTICS OR ORIENTATIONS NOT RECOGNIZED BY THE FLORIDA CIVIL RIGHTS ACT? THE ACT RECOGNIZES RACE, COLOR, CREED, RELIGION, GENDER, NATIONAL ORIGIN, AGE, HANDICAP, MARITAL AND FAMILY STATUS. ADDITIONALLY THIS AMENDMENT VOIDS EXISTING ORDINANCES CONCERNING SEXUAL ORIENTATION, GENDER IDENTITY, AND OTHER ORDINANCES INCONSISTENT WITH THIS AMENDMENT. |



Chapter 14: Other Indicia of Animus against LGBT People by State and Local Officials, 1980-Present

In this chapter, we draw from the 50 state reports to provide a sample of comments made by state legislators, governors, judges, and other state and local policy makers and officials which show animus toward LGBT people. Such statements likely both deter LGBT people from seeking state and local government employment and cause them to be closeted if they are employed by public agencies. In addition, these statements often serve as indicia of why laws extending legal protections to LGBT people are opposed or repealed.

As the United States Supreme Court has recognized, irrational discrimination is often signaled by indicators of bias, and bias is unacceptable as a substitute for legitimate governmental interests.¹ “[N]egative attitudes or fear, unsubstantiated by factors which are properly cognizable...are not permissible bases” for governmental decision-making.² This concern has special applicability to widespread and persistent negative attitudes toward gay and transgender minorities. As Justice O’Connor stated in her concurring opinion in *Lawrence v. Texas*, 539 U.S. 558, 580-82 (2003):

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.

¹ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001).

² *Id.* (quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985)).

The 50 state reports, upon which this chapter is based, contain countless examples of statements made by state legislators, judges, governors, and other state and local policy makers that LGBT people are mentally ill, pedophiles, wealthy, terrorists, Nazis, condemned by God, immoral, and unhealthy. Often, these statements are made while the speakers are opposing state or local laws that would prohibit discrimination on the bases of sexual orientation and gender identity or endorsing laws to repeal or prevent the enactment of such protections.

Some of the examples below include statements that prohibitions of employment discrimination will confer “special rights” on LGBT people. This “special rights” argument animated much of the support for the passage of Colorado’s Amendment 2, which would have repealed anti-discrimination protections for LGBT people in the state and erected new and unique barriers to enacting protections in the future. The United States Supreme Court struck Amendment 2 down as unconstitutional, finding that it was “a denial of equal protection of the laws in the most literal sense.”³ Writing for the Court, Justice Kennedy stated that the amendment’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.”⁴ The Court also specifically rejected the “special rights” logic behind Amendment 2, stating: “We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an

³ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

⁴ *Id.* at 632.

almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”⁵

While comments like those listed below occur frequently in policy discussions about prohibiting employment discrimination on the basis of sexual orientation and gender identity, we did not document any assertions made during the time frame of our study that sexual orientation and gender identity diminish an individual’s ability to perform in the workplace, except for claims based on false stereotypes or the discriminatory reactions of others. This is not surprising. Courts, individual judges, and legal scholars have found, time and again, that sexual orientation and gender identity are not related to a person’s ability to contribute in society or in the workplace.⁶ As a justice on the Montana Supreme Court wrote in 2004:

‘We the people’ rarely pass up an opportunity to bash and condemn gays and lesbians despite the fact that these citizens are our neighbors and that they work, pay taxes, vote, hold public office, own businesses, provide professional services, worship, raise their families and serve their communities in the same manner as heterosexuals.⁷

The following examples, drawn from the 50 state reports, come from every geographic region of the nation. They repeatedly invoke rationales (such as morality or sectarian beliefs) that have been rejected under the U.S. Constitution as acceptable bases for unfavorable treatment of a group of persons by arms of the state. They reinforce false and stigmatizing stereotypes about LGBT people.

⁵ *Id.* at 631.

⁶ See, e.g., *Hernandez v. Robles*, 7 N.Y.3d 338, 388 (2006) (Kaye, C.J., dissenting) (“[o]bviously, sexual orientation is irrelevant to one’s ability to perform or contribute”); *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (homosexuality “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities” (internal citations omitted)), *cert. denied*, 508 U.S. 952 (1993); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2nd Ed. 1988) § 16-33, at 1616 (“homosexuality bears no relation at all to [an] individual’s ability to contribute fully to society”).

⁷ *Snetsinger v. Mont. Univ. Sys.*, 325 Mont. 148, 455-56 (Mont. 2004) (concurring opinion).

The examples begin in 1980, but some are as current as this year and even this month. Earlier this year, for example, a Utah State Senator claimed in an interview to have killed every gay rights bill in the legislature for the last eight years, because he believes that homosexuality “will always be a sexual perversion.” He continued, “[W]hat is [sic] the morals of a gay person? You can’t answer that because anything goes.”⁸ This month in Ohio, in discussion of a bill to prohibit sexual orientation and gender identity discrimination in the workplace and other arenas, one member of the state legislature said he opposed the bill because LGBT people should “keep your immoral beliefs to yourself.” Another member said the anti-discrimination bill was about “forcing acceptance of a lifestyle that many people disagree with.”⁹

These examples are important facts for Congress to include as part of its record supporting the abrogation of states’ sovereign immunity for claims of employment discrimination. When expressed by state officials or others involved in the activities of state and local government, such animus and hostility can have a direct effect on the ability of LGBT Americans to earn a livelihood, because applicants are understandably deterred from applying for public sector jobs and, if employed, chilled from interacting honestly with their supervisors and coworkers. In addition, the sheer frequency with which these views are expressed taints the process by which state legislatures consider anti-discrimination laws.

⁸ Queerty, *Utah State Senator Chris Buttars on the Gays: “They’re the Meanest Buggers I Have Ever Seen,”* <http://www.queerty.com/utah-state-senator-chris-buttars-on-the-gays-theyre-the-meanest-buggers-i-have-ever-seen-20090218/> (last accessed on September 18, 2009).

⁹ *Gay-rights bill passes Ohio House*, Columbus Ohio Dispatch September 15, 2009, http://www.dispatch.com/live/content/local_news/stories/2009/09/15/gay_discriminate.html?type=rss&cat=&sid=101 (last accessed on September 18, 2009).

Alabama

- As of 2009, Alabama’s education code continues to require that sex education in public schools include “[a]n emphasis...that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.”¹⁰
- In August of 2008, the mayor of Birmingham was sued for discriminating against LGBT city employees by refusing to let them hang Gay Pride Week banners on city property, although no similar prohibitions were enacted to bar banners from other types of employees.¹¹ The mayor also refused to sign a parade permit for the annual Gay Pride Celebration Parade, and publicly stated that he did not condone the “lifestyle choice” represented by the parade.¹² In early December 2008, a federal judge denied the mayor’s motion to dismiss the lawsuit.¹³
- In 1996, Alabama’s governor issued an Executive Order that included the statement that “God’s law prohibits members of the same sex from having sexual relations with each other.”¹⁴

Alaska

- In 2009, Anchorage Mayor Dan Sullivan vetoed an anti-discrimination ordinance that would have prohibited discrimination on the basis of sexual orientation. He argued that there was a “lack of quantifiable evidence necessitating the

¹⁰ ALA. CODE §16-40A-2(C)(8) (2008).

¹¹ *Central Alabama Pride, Inc. v. Langford*. No. 2:2008cv01533 (N.D. Ala. filed Aug 27, 2008).

¹² *See id.* and Plaintiff’s Complaint associated therewith.

¹³ James Hipps, *Federal Judge Denies Mayor’s Request*, GAYAGENDA, Dec. 15, 2008, <http://www.gayagenda.com/tag/central-pride-alabama>.

¹⁴ ALA. CODE §16-40A-2(C)(8) (2008).

ordinance.”¹⁵ In response, one Assembly member expressed disappointment with the mayor’s use of “circular logic” regarding this statement, particularly since no method for filing complaints even existed.¹⁶

- In 2006, when the Alaska Supreme Court ruled that it was unconstitutional for the state to deny benefits to same-sex partners that were afforded to spouses, Governor Frank Murkowski called the decision “shameful.”¹⁷
- In a 1998 debate on a state constitutional provision to limit marriage to heterosexual couples, one of the bill’s supporters, State Senator Jerry Ward, said the amendment was designed to answer the question: “Do you believe that one man and one woman should be married, or do you believe a goat and a cow, or two homosexuals should be?”¹⁸
- In 1995, two members of the Anchorage Municipal Assembly proposed a broad ordinance proscribing advertisement for “any political candidate, political or public issue, religious issue or subject, or any sex or sexual orientation” and defined “sexual orientation” as including “any human or animal sexual orientation including asexual, heterosexual, homosexual and bisexual orientations.”¹⁹ When asked for an example of animal sexual orientation, Assemblyman Bob Bell said, “Well, what's the definition of sexual orientation? You can interpret sexual

¹⁵ Editorial, *Our View: Gay Rights Veto*, ANCHORAGE DAILY NEWS, Aug. 18, 2009, available at <http://bit.ly/ZWJsC>.

¹⁶ William Yardley, *Anchorage Gay Rights Measure is Set Back by Mayor’s Veto*, N.Y. TIMES, Aug. 18, 2009.

¹⁷ Anne Sutton, *Measure Denying Benefits to Gay Couples Sputters in Legislature*, A.P., Apr. 7, 2006.

¹⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 65-66 (1999 ed.).

orientation as anything -- sex with animals, sex with children, sex with dead people.”²⁰

Arkansas

- As reported in a 2009 court decision, parents brought suit against a public school on behalf of their child who had been bullied and harassed at school based on his perceived sexual orientation. The parents reported to the vice principal that children in the school had created a Facebook group with the description, “There is no reason anyone should like Billy he’s a little bitch [sic]. And a homosexual that NO ONE LIKES.” The vice principal’s response was to ask, “Well, is he a homosexual?”²¹
- In 1998, opponents of a county ordinance prohibiting discrimination on the basis of sexual orientation were successful in getting it repealed, arguing that it validated “repugnant” and “immoral” sexual behaviors.²²

Arizona

- In 1999, State Representative Karen Johnson introduced a bill that would have prohibited state municipalities from offering domestic partnership benefits to their employees. According to Johnson, gay men and lesbians do not need health or life insurance because “[t]hey can afford it,” referring to the myth that all gay men and lesbians have high incomes. Defending her attempt to exclude gay men and lesbians from state benefits, she claimed that “[h]omosexuality is the lower end of

²¹ *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 600 F.Supp.2d. 1011, 1017 (W.D. Ark 2009).

²² Michael Rowett, *Orientation on Sex Out as JPs Trim Bias Shield*, ARK. DEMOCRAT GAZETTE, July 12, 1998, at B1.

the behavioral spectrum.” Johnson linked gay men and lesbians to diseases such as AIDS, gonorrhea, anal carcinoma and something she called “gay bowel disease.”²³

- The bill’s co-sponsor, Barbara Blewster, went further. In a letter to a constituent, she compared homosexuality to “bestiality, human sacrifice and cannibalism.” Blewster claimed that ancient civilizations that embraced homosexuals also practiced sex acts with animals and human sacrifice. She wrote that homosexuality “is a high sign of the downfall of the nation.”²⁴

California

- In 1999, the California Legislature added sexual orientation to the anti-discrimination provisions of the Fair Employment and Housing Act.²⁵ During the legislature’s consideration of the bill, State Senator Richard Mountjoy claimed that being gay “is a sickness...an uncontrolled passion similar to that which would cause someone to rape.”²⁶
- In 1998, Governor Pete Wilson characterized as “unnecessary” a bill that would have moved sexual orientation protection from the California Labor Code to Fair Employment and Housing Act. The governor returned the bill, unsigned, to the legislature. State Senator Richard Mountjoy denounced the bill for giving

²³ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 78-79* (2000 ed.).

²⁴ *Id.*

²⁵ *California Gay Rights Timeline*, PINK NEWS, <http://www.pinknews.co.uk/aroundtheworld/tag/vetoes>.

²⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 89* (2000 ed.).

- “special rights” to gay men and lesbians and threatened to promote a public referendum to overturn the law if the governor failed to veto the legislation.²⁷
- In 1995, California Deputy Attorney General Andrew Loomis, representing the state in the firing of a gay California National Guardsman, filed a brief containing several anti-gay comments: “Undisputably homosexual acts are despised by a great proportion of the voters,” he wrote. “It is still OK to be prejudiced or biased against criminals, such as molesters and pederasts, and to fire them for it.” He argued that “the Constitution does not recognize anything special about [the Guardsman’s] own favorite nasty habits” and that “soldiers are still entitled to despise [homosexuality] as they choose.” Attorney General Dan Lundgren removed Loomis from the case, but did not dismiss him, and a letter of apology for “inappropriate language” went to the presiding judge.²⁸
 - In the early 1990’s, Mitchell Grobeson, a former officer of the Los Angeles Police Department, brought suit against the City of Los Angeles for the harassment and discrimination he faced while a member of the Department. Officers who testified in his case disclosed the existence of informal anti-gay policies and practices adopted by the police force. Their comments included, “The Department requires that police officers adopt a “macho” attitude, and an essential part of that “macho” attitude is the hatred of homosexuals. The Department’s

²⁷ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 30 (1998 ed.).

²⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 32 (1995 ed.).

extreme bias against homosexuals is bred into every new generation of officers”²⁹ and, “It was common to hear officers taking about ‘faggots’ and ‘bull dykes.’ These offensive remarks were made by both the cadets and the training officers, and other supervisory personnel responsible for instructing the cadets in proper police conduct.”³⁰

Colorado

- In 1999, El Paso County Commissioner Betty Beedy claimed on ABC’s *The View* that since you cannot “see” sexual orientation, gay men and lesbians cannot be discriminated against and therefore do not need legal protections against discrimination.³¹

Connecticut

- In 2009, State Representative Richard Belden voiced his reservations about a state bill prohibiting discrimination on the basis of gender identity by declaring: “[W]hat people do on their private time in their private lives is one thing. But when we get to the norm, and what we do collectively in society, be it employment, I think it’s slightly different...”³² The bill died in the Connecticut House of Representatives.³³

²⁹ Declaration of John Roe-1 (Nov. 21, 1989), *Grobesson v. City of Los Angeles*, LASC Case No. C 700134, 70-71.

³⁰ Declaration of John Doe-2 (Nov. 21, 1989), *Grobesson v. City of Los Angeles, id.*, ¶¶ 2,6-8.

³¹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 98 (1999 ed.).

³² CT H.R. Tran., June 4, 2007 (statement of State Rep. Kevin Witkos).

³³ See Daniela Altimari, *Connecticut to Consider Transgender Anti-Discrimination Proposal*, HARTFORD COURANT, Jan. 6, 2009, at A1.

- In 2000, when a rainbow flag was flown over the state Capitol to commemorate a week of lobbying for gay and lesbian rights, several state legislators objected. “Many state residents have strong moral objections to the homosexual lifestyle, and these citizens have a right to expect that the Capitol flagpole will not be used to further the gay agenda,” State Representative T.R. Rowe said, also comparing gay and lesbian rights groups to the Ku Klux Klan.³⁴

Delaware

- In 2000, according to one gay rights activist, Representative Charles West of Delaware told a group of citizens lobbying in support of adding sexual orientation to the state anti-discrimination statute, “I’m not going to vote for it because I don’t like the way you [gay people] recruit children to your lifestyle. ... It was one thing when you people were quiet, but now that you’re coming forward, wanting your rights, that’s hard to take.”³⁵
- In 1997, a complaint was filed against a judge in Delaware who dismissed a domestic abuse case involving two lesbians, whom the judge threatened to send to jail because he wanted nothing to do with “funny relationships.” The entire courtroom erupted into laughter after hearing the judge state, “You all have these funny relationships – that’s fine – I have nothing to do with it, but don’t bring it in here for me to try to decide, I don’t know how to handle it. Now take this stuff out of here, I’m dismissing the case, you all control your business another way,

³⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 133 (2000 ed.).

³⁵ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 133 (2000 ed.).

get out of here. It's too much for me. Don't bring it back – the next time you come back, I'll put somebody in jail.”³⁶

Florida

- In 2007, Florida Representative D. Alan Hays has been quoted as saying that he believes gay men and lesbians “need psychological treatment” and on a different occasion stated: “I had a cousin who died of AIDS; he was queer as a three-dollar bill. He had that homosexual lifestyle and deserved what he got.”³⁷
- Susan Stanton worked for the City of Largo as an assistant city manager and city manager for a combined 17 years.³⁸ In early 2007, Stanton informed her superiors that she planned to begin living as a woman in preparation for a sex-change operation. News of Stanton's decision was leaked to the local media, leading the City Commissioners to vote 5-2 to suspend Stanton pending their final vote. During the suspension meeting, one of the Commissioners who voted in favor of the suspension stated: “His brain is the same today as it was last week. He may be even able to be a better city manager. But I sense that he's lost his standing as a leader among the employees of the city.”³⁹ A citizen stated in the meeting: “I don't want that man in office. I don't think we should be paying him \$150,000 a year when he's not been truthful. We have to speak up. Of course, we don't believe in sex changes or lesbianism.”

³⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 48-49 (1997 ed.).

³⁷ Kevin Jennings, *What the Hays? Florida Legislator Proves Need for a Real Safe Schools Bill*, HUFFINGTON POST, Mar. 17, 2007; http://www.dispatch.com/live/content/local_news/stories/2009/09/15/gay_discriminate.html?type=rss&cat=&sid=101 (last accessed September 18, 2009).

³⁸ Jillian Todd Weiss, *The Law Covering Steve (Susan) Stanton, City Manager Dismissed In Largo, Florida*, STANTON LEGAL, <http://bit.ly/186I3m>.

³⁹ Lorri Helfand, *Commission Moves to Fire Stanton*, ST. PETERSBURG TIMES, Feb. 27, 2007.

- The proposal to add sexual orientation protection to the employment anti-discrimination policy at the University of Florida encountered strong opposition. In 1999, during a faculty meeting debate described as “hostile” by the chair of the University of Florida Committee for Gay, Lesbian, and Bisexual Concerns, “some of the speakers associated gay people with pedophiles.”⁴⁰
- In January 1998, the Miami Shores City Council rejected Vice-Mayor Mike Broyle’s proposal to urge Miami-Dade County to add sexual orientation to the county’s Human Rights Ordinance. Councilmember Cesar Sastre, who voted against the measure, compared homosexuality to alcoholism and said, “Why should gay people be treated different than me? What is sexual orientation? Where do we draw the line?” Sastre defended his comments by claiming that he is a recovering alcoholic who wants gay men and lesbians to “recover” from their sexual orientation.⁴¹
- In 1997, a state transportation official responded to a request for a donation to the Florida AIDS Ride by expressing the view that AIDS “was created as a punishment to the gay and lesbian communities across the world.” The official, a planner in the Department of Transportation’s safety office, wrote that she was sorry that “innocent [heterosexual] people have also had to suffer.” But, she

⁴⁰ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 109-110 (1999 ed.).

⁴¹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 116 (1999 ed.).

added, “[A]s far as the gay[s] and lesbians of this world...let them suffer their consequences!” The letter was composed on official state stationery.⁴²

Georgia

- In February, 2009, an openly gay University of Georgia, Athens, professor was accused by two Georgia state representatives of recruiting “young teenage gays” to accompany him on international trips, despite the fact that he is not involved with study abroad programs and teaches graduate level classes. The professor was cleared of any misconduct after an investigation. The state representatives also said they would pressure the University of Georgia, Athens, Georgia State University, and Kennesaw State University to terminate any professors who teach “queer theory” courses. The University of Georgia defended its course offerings and the professors. The legislators also called on three other professors into the State Senate to defend their research on sexuality and the outbreak of HIV and AIDS.⁴³

Idaho

- In a hearing on a bill that would have added sexual orientation to the state’s Human Rights Act in 2009, State Senator Russ Fulcher told the committee: “I’m not interested in giving special rights.”⁴⁴

⁴² PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 52 (1997 ed.).

⁴³ *Pulpit Power: Does the Religious Right Still Control Georgia?*, SOUTHERN VOICE, Mar. 13, 2009; *Georgia Lawmakers Clash Over Queer Theory, Academic Freedom*, SOUTHERN VOICE, Feb. 11, 2009; *Sex Research Puts University of Georgia Professors in Hot Seat*, DIGITAL J., Febr. 23, 2009; *Professor cleared of allegations*, RED & BLACK, Feb. 17, 2009.

⁴⁴ *Idaho LGBT Bill Dies in Committee*, Feb. 25, 2009, <http://rainbowzine.com/news-from-your-state/59-idaho-news/346-idaho-lgnt-bill-dies-in-committee> (last visited Oct. 5, 2009).

Illinois

- In 1999, the Illinois legislature rejected a bill⁴⁵ that would have prohibited employment discrimination based on sexual orientation. State Representative Cal Skinner, who voted against the bill, told a reporter that to pass it “would be enabling an addiction” that kills people by transmitting AIDS.⁴⁶

Indiana

- In 1998, one member of the Indiana state legislature repeatedly tried to prevent adoption by same-sex couples, invoking the myth that they are more likely to molest children.⁴⁷
- In 1997, the East Allen County School Board passed a resolution that stated, “This is a denunciation of activities such as drug use, premarital sex, violence, or gay and lesbian behavior, or the support of such activities.” The board member who raised the issue commented, “I think...this type of behavior in our classroom is contrary to our values in our community and that we should say we don’t approve of that. Homosexuality is contrary to the laws of nature, it’s morally unacceptable to our community, and we should teach our children as much.”⁴⁸

Iowa

- During a debate on a bill to prohibit discrimination on the basis of sexual orientation in 2009, State Senator Nancy Boettger stated, “I think we are opening

⁴⁵ H. 474, 91st Gen. Assemb., Reg. Sess. (Il. 1999).

⁴⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 164 (2000 ed.).

⁴⁷ Steve Sanders, *Hate Speech Can Stir Up Hateful Acts*, BALTIMORE SUN, Oct. 18, 1998 at 1C.

⁴⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 62 (1997 ed.).

the door to some very serious, unintended consequences with this bill... I, for one, do not want a cross-dresser teaching in our public or private schools.”⁴⁹

Kansas

- 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, but failed.⁵⁰ During a hearing on the bill, SB 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 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 opponent argued that homosexuals account for 20 to 33 percent of pedophiles.⁵¹
- In 1995, in *Case v. Unified School District*,⁵² 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, violating the First Amendment and due process rights of students and their parents. In reaching this finding, the court reviewed the reasons that board members gave for removing the book. Olathe school board president Robert Drummond, who voted

⁴⁹ Todd Dorman, *Iowa Senate OKs Gay Rights*, WCF COURIER, Mar. 27, 2007, available at http://www.wcfcourier.com/news/politics/article_eade0789-a2b9-5d26-b994-ae47e62b8888.html.

⁵⁰ Telephone Interview of Kim Horp, Reference Librarian, State Library of Kan. (Jan. 23, 2009) (hereinafter “Telephone Interview”).

⁵¹ 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); SB 169 (Kan. 2009), available at <http://www.kslegislature.org/bills/2010/169.pdf>.

⁵² 908 F. Supp. 864 (D. Kan. 1995).

to remove the book, stated that “homosexuality is a mental disorder similar to schizophrenia or depression” and a “sin.”⁵³ Another board member testified that it is not acceptable to be gay “[b]ecause engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems.”⁵⁴ 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.⁵⁵

Kentucky

- In 2006, State Senator Dick Roeding, speaking about domestic partner benefits at state universities, said, “I find this very repulsive. I don't want to entice any of those people into our state. Those are the wrong kind of people.”⁵⁶
- In 2004, a Kentucky state representative commented that homosexuals could “obviously” change their orientation and did not deserve special civil rights protections.⁵⁷
- On October 5, 1999, the City of Henderson amended its ordinances to prohibit discrimination in employment, housing, and public accommodation on the basis of sexual orientation. The ordinance passed in spite of a strong showing of opponents that appeared at public hearings.⁵⁸ One opponent told city

⁵³ *Id.*

⁵⁴ *Id.* at 871.

⁵⁵ *Id.*

⁵⁶ Brandon Ortiz, *Benefits Expansion at U of L Criticized*, LEXINGTON HERALD-LEADER, July 15, 2006.

⁵⁷ Kevin Eigelbach, *Representative Fischer's (R) Statement Upsets Gays*, KENTUCKY POST, Oct. 25, 2006, available at <http://bit.ly/JVWNA>.

⁵⁸ A thousand people attended two public hearings held in Henderson in September 1999. *Anti-bias Ordinances Fuel Debate*, AP STATE & LOCAL WIRE, Oct. 19, 1999.

commissioners that anyone voting for the ordinance should be thrown into the Ohio River with “a rope tied around your neck with a rock at the other end.”⁵⁹

- Two years later, the ordinance was repealed. Opponents believed that Henderson’s adoption of such an ordinance was a legitimatization of an “immoral lifestyle.”⁶⁰ Defending his vote to repeal the ordinance, Commissioner Robby Mills stated, “I believe this is a moral course of action and this is what the public would have us do.”⁶¹

Louisiana

- The Louisiana Commission on Marriage and Family, recently reorganized by Governor Jindal, has several appointees who have a well-documented history of inflammatory, anti-LGBT rhetoric. For example, one member is Gene Mills, executive director of the conservative Louisiana Family Forum. While heterosexual relationships can result in children, Mills has said, “[Y]ou don’t get the equivalent in a homosexual relationship...you get disease.”⁶²
- In 2008, when allowing an executive order prohibiting employment discrimination on the basis of sexual orientation in state government to lapse,

⁵⁹ *Id.*

⁶⁰ *Fairness Ordinance Expected to Be Repealed in Henderson*, AP STATE & LOCAL WIRE, Nov. 10, 2000.

⁶¹ *Anti-discrimination Repeal May Pass*, LEXINGTON HERALD-LEADER (Kentucky), Feb. 15, 2001, at B3.

⁶² Scott Gold, *Louisiana Judge Throws Out State Ban on Gay and Lesbian Marriages*, L.A.TIMES, Oct. 6, 2004, available at <http://bit.ly/1FEdNI>.

Governor Jindal stated, “The reason for allowing the order to lapse is that I don’t think it is necessary to create additional special categories or special rights.”⁶³

- In 2000, Baton Rouge City Councilmembers Mike Tassin and Jim Benham walked out of a council meeting during which a gay and lesbian group gave a presentation on discrimination. Tassin tried to block the presentation but was overruled by his fellow council members. Tassin said he objected to having the group’s literature placed at his desk, calling the pamphlets “crap.”⁶⁴

Maryland

- In 1999, Rev. Emmett Burns, a state legislator and minister, said of Maryland’s anti-discrimination bill, “I don’t want to improve the chances for someone who is of the gay persuasion to ply their behavior.”⁶⁵
- In 1994, the Montgomery County Council voted 6-1 to repeal a section of the county’s Human Relations Law, known as the Hanna amendment, that allowed employers to refuse a job applicant “on the basis of advocacy of homosexuality or bisexuality” when the job requires “work with minors of the same gender.” The amendment, which was sponsored by County Council President William E. Hanna, Jr., was passed in 1984. Hanna objected to the move to repeal the amendment claiming, “I thought then and I still think [homosexuality] is a perversion.” Hanna stated that he believes there is a direct correlation between

⁶³ *Louisiana Gov. Drops Gay Anti-Discrimination Order*, Aug. 21, 2008, <http://www.365gay.com/news/louisiana-gov-drops-gay-anti-discrimination-order/> (last visited Oct. 5, 2009).

⁶⁴ Allison Kilkenny, *Bobby Jindal Stocks Marriage Commission With Anti-Gay Crusaders*, DAILY NEWS & OPINION, Jan. 6, 2009, <http://allisonkilkenny.wordpress.com/2009/01/06/bobby-jindal-stocks-marriage-commission-with-anti-gay-crusaders>.

⁶⁵ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 200* (2000 ed.).

homosexuality and pedophilia, and justified his vote against the repeal explaining, “I just feel an obligation to protect children.”⁶⁶

Maine

- During discussion of a state law prohibiting sexual orientation discrimination in 1981, one Maine legislator called gay people “creepy crawlers,” and another said of lesbians that if any of them slept with him, they’d never sleep with another woman again.⁶⁷

Massachusetts

- In 1989, the Massachusetts legislature amended its anti-discrimination law to include sexual orientation as a protected class.⁶⁸ The bill was originally introduced to the House in 1973, but faced insurmountable opposition in the Legislature for 16 years.⁶⁹ Legislators opposed to adding sexual orientation as a protected class under the anti-discrimination statute argued that the “homosexual way of life” spreads AIDS,⁷⁰ that gay people have sex with animals⁷¹ and that homosexuality was illegal based on Massachusetts’ sodomy laws.⁷²
- In 1987, during the Massachusetts Senate floor discussion of the bill, legislators opposing the bill read aloud from a book that depicted gay people as promiscuous,

⁶⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 42 (1994 ed.).

⁶⁷ See *Chronology of Maine’s Gay-Rights Legislation*, MAINE SUN. TELEGRAM, Feb. 18, 2001 and Susan Kinzie, *Gay Rights: Evolution of a Debate Once Rarely Discussed Publicly, Subject now out of the Closet*, BANGOR DAILY NEWS, Jan. 3, 1998

⁶⁸ See MASS. GEN. LAWS ch. 151B, § 4.

⁶⁹ *Massachusetts Second State to Enact Gay Rights Law*, L.A. TIMES, Nov. 16, 1989, at 21 (hereinafter “L.A. Times article”).

⁷⁰ Jane Meredith Adams, *Anger Toward Gays is Out of the Closet with Visibility Comes Abuse, Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.

⁷¹ *Id.*

⁷² *Senate Votes in Favor of Gay Rights*, BOSTON GLOBE, Oct. 31, 1989, at 22.

alleging that most were involved in orgies and that one-fifth of them had sex with animals.⁷³

Minnesota

- Opponents of the 1993 amendment that added sexual orientation and gender identity to the Minnesota Human Rights Act (the MHRA) have tried to strike them from the law several times, most recently in 2004.⁷⁴ Former State Representative Arlon Lindner, one of the chief proponents of stripping these provisions from the MHRA, contended that the MHRA as written promoted teaching gay and lesbian sex in school, which in turn would cause HIV transmission.⁷⁵ Therefore, he argued, failing to amend the MHRA put Minnesota at risk of ending up like “the African continent.”⁷⁶ He also questioned whether the LGBT community was targeted by the Nazis during the Holocaust, and went so far as to propose state legislation that would require the state of Minnesota to no longer recognize the LGBT community as victims of the Holocaust. He also suggested that gay guards in the Nazi concentration camps were the real perpetrators of the horrors of the Holocaust.⁷⁷

Mississippi

⁷³ Jane Meredith Adams, *Anger Toward Gays is Out of the Closet with Visibility Comes Abuse*, *Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.

⁷⁴ ACLU, ANNUAL UPDATE OF THE ACLU’S NATIONWIDE WORK ON LGBT RIGHTS AND HIV/AIDS (2004).

⁷⁵ *Committee Leader Lindner Sullies Party, House Name*, DULUTH NEWS TRIBUNE, Mar. 12, 2003. See also, Conrad de Feibre, *Effort to Repeal Rights Protections for Gays Dropped in Senate*, STAR TRIBUNE, Mar. 22, 2003.

⁷⁶ Patricia Lopez & Conrad de Feibre, *House DFL Files Ethics Complaint Against Lindner: Critics Grow in Number*, STAR TRIBUNE, Mar. 12, 2003. John Welsh, *Senator Withdraws Rights Bill*, ST. PAUL PIONEER PRESS, Mar. 22, 2003. See also Conrad de Feibre, *Effort to Repeal Rights Protections for Gays Dropped in Senate*, STAR TRIBUNE, Mar. 22, 2003.

⁷⁷ John Welsh, *Senator Withdraws Rights Bill*, ST. PAUL PIONEER PRESS, Mar. 22, 2003.

- In July 2003, in response to the Supreme Court’s ruling in *Lawrence v. Texas*, Mississippi Gulfport City Councilman Billy Hewes initiated a resolution condemning the Court’s ruling.⁷⁸ He called the ruling “the worst thing to happen since they took prayer out of school,” and proclaimed Gulfport to be a “straight town.”⁷⁹
- In March 2002, in response to a newspaper article on the expansion of rights to gay couples in other states, George County Judge Connie Glen Wilkerson wrote a letter to *The George County Times* stating in part: “[I]n my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.”⁸⁰ The judge later repeated these views in a telephone interview stating: “[H]omosexuality is an ‘illness’ which merited treatment, rather than punishment.”⁸¹

Missouri

- In 1995, Missouri State University President John Keiser wrote that homosexuality is a “biological perversion” and gay or lesbian acts are “intrinsically disordered, contrary to natural law, and cannot be approved.” In 2006, Missouri State University added “sexual orientation” to its list of protected

⁷⁸ Samantha Santa Maria, *I’m Gay...I Carry My Gun*, CLARION-LEDGER, Aug. 13, 2003, at 1E (quoting Jody Renaldo, Executive Director, Equality Mississippi: “Unless [homosexuals] are willing to risk being kicked out of their rented homes or their jobs, [they] have to hide”).

⁷⁹ *Id.*

⁸⁰ See, e.g., *Miss. Comm’n on Jud. Performance v. Wilkerson*, 876 So. 2d 1006, 1008 (Miss. 2004).

⁸¹ *Id.*

classes over the repeated objections of President Keiser and his letter was re-printed in a Missouri paper.⁸²

- In reaction to that addition to Missouri State University's anti-discrimination law, Governor Matt Blunt issued a statement saying the change was "unnecessary and bad."⁸³
- In a case which occurred *after* the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas* declaring sodomy laws to be unconstitutional, the state Department of Social Services relied on a Missouri law criminalizing same-sex sexual conduct as a basis to deny a foster care license to a lesbian couple.⁸⁴ The Director of the Missouri Department of Social Services stated that "but for her sexual orientation, it was agreed by all parties that Applicant and her partner have exceptional qualifications to be foster parents."⁸⁵

Montana

- State Senator Dan McGee of Laurel said during the 2005 state legislative session, "I'll never be able to support bills which try to overturn centuries of moral ideology...Homosexuality is wrong."⁸⁶
- Despite the Montana Supreme Court's ruling striking down the "deviate sexual conduct" law, the law remains part of the Montana Code. When legislation was introduced in the 2001 legislative session to remove it from the Montana

⁸²Inside HigherEd News, *Long-Fought Win for Gay Rights*, September 18, 2006.

⁸³*Id.*

⁸⁴*Johnston v. Mo. Dep't of Social Serv.*, 2005 WL 3465711 (Mo. Cir. 2005).

⁸⁵*Id.*

⁸⁶*AP Alert - Political*, A.P., Apr. 18, 2005.

statutes,⁸⁷ lawmakers successfully opposed the effort, with state Representative Verdell Jackson of Kalispell going so far as to offer that the law “protects me from propositions on the street”⁸⁸ and stated that he had an aversion to being touched by a homosexual.”⁸⁹

- In 1995, the Montana Senate voted 41-8 to pass a sex-offender registry bill that included an amendment requiring anyone convicted of violating Montana’s “deviate sexual conduct” law to register with the police. The bill defined “deviate sexual conduct” to include homosexual sex between consenting adults. Though no one has ever been convicted of violating the law, the amendment was seen as an unnecessary affront to gay men and lesbians. State Senator Al Bishop, a supporter of the anti-gay amendment, reportedly stated that gay sex is “even worse than a violent sexual act.”⁹⁰

Nebraska

- A bill introduced in January 2007, which would have prohibited employers (including the State of Nebraska) from discriminating based on sexual orientation, was debated briefly and then postponed indefinitely. Former State Senator Ernie Chambers, who had introduced the bill, characterized the debate over the bill as

⁸⁷ H.B. 323, 57th Leg. Sess. (Mont. 2001). What appears to be the most recent bill that would have removed the statutory provision also failed to secure passage. See H.B. 294, 58th Leg. Sess. (Mont. 2003).

⁸⁸ *Out in Montana: After a Winter of Fear and Defeat, Advocates Renew Their Fights for Same-Sex Rights*, MISSOULA INDEP., June 7, 2001.

⁸⁹ *Conservatives Back Unconstitutional Law*, Montana Human Rights Network News, Feb. 2001, <http://www.mhrn.org/newsarchive/0201gayrights.html>.

⁹⁰ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 75* (1995 ed.). See, e.g., David W. Dunlap, *Montana Cuts Homosexual Acts from List of Registered Crimes*, N.Y. TIMES, Mar. 24, 1995 (quoting state senator Al Bishop of Billings, who made a statement on the Montana Senate floor that homosexual sex was “even worse than a violent sexual act”).

“unsatisfactory, even silly.”⁹¹ Opponents of the bill questioned whether it would protect pedophiles or transvestites who want to be teachers; said it was not needed, based on their false belief that gay households have higher incomes; and argued that the bill was unnecessary as long as people “keep private what goes on in their bedrooms.”⁹² A state senator opposing the bill said, “I don’t think we should unleash such things on the unsuspecting public....We’re talking here about values. We’re talking here about behavior. We’re talking here about ethics.”⁹³

Nevada

- In 1999, during legislative consideration of AB 311 prohibiting discrimination on the basis of sexual orientation, oral and written testimony entered into the record included (i) arguments that protection should not be granted to persons who engage in deviant sexual conduct,⁹⁴ (ii) an article submitted as evidence that homosexuals were more likely to molest children than others,⁹⁵ (iii) evidence that homosexuals have higher incomes than heterosexuals,⁹⁶ and (iv) testimony that the statute would force employers to hire individuals who may not be “trustworthy” or who are “perhaps infected with the AIDS virus.”⁹⁷ Extensive debate over AB 311 also took place during committee-level hearings in the

⁹¹ JoAnne Young, *Senators Shoot Down Bill To Protect Gays*, LINCOLN J. STAR, May 22, 2007, available at <http://www.journalstar.com/articles/2007/05/23/news/politics/doc46537b7ef3703942207604.txt>.

⁹² Martha Stoddard, *Gay Discrimination Ban Again Fails To Become Nebraska Law*, OMAHA WORLD-HERALD, May 23, 2007, available at http://www.omaha.com/index.php?u_page=2798&u_sid=238883.

⁹³ *Id.*

⁹⁴ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

⁹⁵ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

⁹⁶ See Minutes of Nev. Sen. Comm. (May 6, 1999).

⁹⁷ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

Assembly and Senate.⁹⁸ Reflecting the tenor of the hearings on AB 311, during a work session of the Nevada Assembly Committee on Commerce and Labor, Chairman Barbara Buckley noted that “there were strong feelings both of support and concern.” Some of the concerns made in the hearing were “very hateful” in her opinion and she did not think those statements were shared by everyone who opposed the bill.”⁹⁹

New Mexico

- When a bill prohibiting sexual orientation discrimination was introduced in 2001, State Senator Rod Adair described it as “radical legislation” that would force a social value on the people of New Mexico that they do not embrace.¹⁰⁰ To attract support for their position, some members of the Senate conjured scenarios of: “state prisons having to pay for sex-change operations for inmates, bearded transvestites in dresses teaching school children and religious bookstores forced to hire gay clerks.”¹⁰¹ At one point, Senator Tim Jennings attempted to amend the bill to exempt the New Mexico Military Institute, stating that his constituents feared that students could be molested by gay teachers.¹⁰²
- When an earlier version of the bill was introduced in 1999, Representative Daniel Foley argued that it would protect people who are gay because they choose to be

⁹⁸ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999); Minutes of Nev. Assem. Comm. (May 6, 1999). The legislative history does not indicate any significant debate held on the floor of the Assembly or Senate. *Id.*

⁹⁹ See Minutes of Nev. Assem. Comm. (Mar. 22, 1999).

¹⁰⁰ Deborah Baker, *Senate Endorses Gay Rights Legislation*, A.P., Feb. 26, 2003.

¹⁰¹ Steve Terrell, *Gay-Rights Bill Passes Senate*, SANTA FE NEW MEXICAN, Feb. 27, 2003, at A1.

¹⁰² Kate Nelson, *Stop-and-Go Senate Slogs Through Gay Rights Bills*, ALBUQUERQUE TRIB., Feb. 27, 2003, at A7.

– a lifestyle that he said is “wrong.” Foley also insisted that the bill was unnecessary because “gays are among the most prosperous citizens.”¹⁰³

- In the early to mid-1990s, efforts to pass a bill adding sexual orientation and gender identity protection to the state’s anti-discrimination bill were stymied by a number of members of the House, as well as Governor Gary Johnson, who opposed it.¹⁰⁴ One opponent of the legislation in the House, Rep. Jerry Alwin, argued that “[g]ays get fair housing right now if they don’t flaunt their sexual orientation.”¹⁰⁵

North Dakota

- Representative Wes Belter said in opposition to adding protections for LGBT people to North Dakota’s existing anti-discrimination law “...I certainly do not approve of the gay movement, because I do think it really violates what God meant for man.... It does violate what God wanted for this world.”¹⁰⁶

Ohio

- In 2009, during a discussion of a bill to prohibit sexual orientation and gender identity discrimination in the workplace and other arenas, one member of the state legislature said he opposed the bill because LGBT people should “keep your

¹⁰³ Deborah Baker, *House Kills Gay Rights Bill*, A.P., Mar. 8, 1999.

¹⁰⁴ Thom Cole, *Gay-Rights Bill May Be Shelved*, ALBUQUERQUE J., Jan 14, 1995, at D3.

¹⁰⁵ Thom Cole, *Gay-Rights Bill May Be Shelved*, ALBUQUERQUE J., Jan 14, 1995, at D3.

¹⁰⁶ Jessica Green, *North Dakota Lawmakers Deem Sexual Orientation a Choice*, Apr. 6, 2009, available at <http://www.pinknews.co.uk/2009/04/06/north-dakota-lawmakers-deem-sexual-orientation-a-lifestyle-choice/> (last visited Oct. 5, 2009); Janell Cole, *Gay Rights Bill Defeated*, JAMESTOWN SUN, Apr. 4, 2009, available at <http://www.ndhrc.org/wp-publish/wp-content/uploads/2009/05/sb2278-pressroundup.pdf> (last visited Oct. 5, 2009).

immoral beliefs to yourself.” Another member said the anti-discrimination bill was about “forcing acceptance of a lifestyle that many people disagree with.”¹⁰⁷

- In 1982, the Attorney General of Ohio opined that the Department of Youth Services was entitled to dismiss an employee because of his sexual orientation. The opinion was issued in response to a request from the state prompted by its concern that if an employee was known or suspected to be gay, it might result cause “homosexual panic” in the workplace.¹⁰⁸

Oklahoma

- In July of 2008, a State House candidate said on his campaign website: “It seems to me much more rational and normal to legalize polygamous marriage or marriage between first cousins before we even thinking of legalizing marriage between two people of the same sex.”¹⁰⁹
- In March of 2008, Oklahoma State Representative Sally Kern of the Oklahoma Legislature made headlines after an audio clip of her comments berating the gay community was released on YouTube. Aside from claiming that homosexuality is a lifestyle choice unsupported by God, Kern also said the homosexual agenda is

¹⁰⁷ *Gay-rights bill passes Ohio House*, Columbus Ohio Dispatch September 15, 2009, http://www.dispatch.com/live/content/local_news/stories/2009/09/15/gay_discriminate.html?type=rss&cat=&sid=101 (last accessed on September 18, 2009).

¹⁰⁸ Ohio Op. Att’y Gen. 2-213 (1982), 1982 WL 187410 (Ohio A.G.).

¹⁰⁹ Jay K. Ramey Website, <http://www.jayramey.com> (last visited Sept. 6, 2009).

destroying the nation and poses a bigger threat to the U.S. than terrorism or Islam.¹¹⁰

- In 1999, the Oklahoma House of Representatives passed SB 1394, a bill to bar “known homosexuals” from working in schools. The bill had originated in the Senate as a measure prohibiting sex offenders from working in the public school system, and was amended in the House by Representative Bill Graves to include gay men and lesbians as well. Graves claimed that homosexuals were sexual criminals guilty of “consensual sodomy,” which was prohibited by state law. He also said that many homosexuals are pedophiles who use schools as a “breeding ground” to “recruit young people” to become gay or lesbian. Graves told a local newspaper that his goal was to “drive [gays] back into the closet like the way they were.”¹¹¹

Pennsylvania

- When a marriage bill came to a vote in 1997, one representative commented after the hearing, “I just thank God I’m going back to Oakdale, where men are men and women are women, and believe me boys, there’s one hell of a difference.”¹¹²

Rhode Island

- In 1995, Rhode Island’s General Assembly added protection from discrimination based on sexual orientation to the state civil rights law, initially passed in 1949.¹¹³

¹¹⁰ Tim Talley, *Oklahoma Legislator’s Anti-Gay Comments Stir Hostile Reaction*, TULSA WORLD, Mar. 10, 2008, available at <http://bit.ly/1KOAXQ>.

¹¹¹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 190-191 (1999 ed.).

¹¹² PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 97 (1997 ed.).

A proponent of the legislation described the antipathy toward the gay community in the Rhode Island legislature in the mid 1980s: “In the last session you had the extreme of [Senator Robert Motherway] saying that if such a bill passed you could potentially have a rescue worker with gonorrhea of the throat giving you mouth-to-mouth resuscitation, the implication being that we are dirty people and are going to spread disease.”¹¹⁴

- In the debate on the House Floor in 1995, Representative Metts used such phrases as “mankind shall not lie with mankind,” and “immoral sexual behavior is an abomination to God” in stating his opposition to the bill.¹¹⁵
- In the Senate debate in 1995, Senator Graziano argued that the bill would be construed to protect those with a “sexual orientation toward children.”¹¹⁶
- In the 1995 legislative session, Senator Lawrence invoked the state’s sodomy laws as a reason for why discrimination based on sexual orientation should not be prohibited.¹¹⁷

South Carolina

- In 1998, the mayor of Myrtle Beach joined local business and religious leaders in attacking a statewide group and its plans for a gay pride festival. In voting against closing city streets to accommodate the pride festival, he expressed concern that allowing gay men and lesbians to parade through the streets would set a

¹¹³ R.I. GEN. LAWS. § 28-5.1-5.2 (1949).

¹¹⁴ Thomas Morgan, *Gay Alliance Champions the Silent 10%*, PROVIDENCE J., Jul. 24, 1985, at 06

¹¹⁵ Rep. Metts, Floor Statement, Rhode Island House of Representatives, Mar. 29, 1995

¹¹⁶ Senator Graziano, Floor Statement, Rhode Island Senate, Fri. May 19, 1995.

¹¹⁷ Senator Lawrence, Floor Statement, Rhode Island Senate, June 28, 1995.

dangerous precedent and would encourage Black Panthers, white supremacist skinheads and other extremist groups to stage similar marches.¹¹⁸

- In 1997, the Greenville County Council passed a resolution that condemned “homosexuality” as “incompatible” with community standards. The three-hour discussion of the resolution was marked by assertions that gay men and lesbians would go to hell, and that the devil brought gay men and lesbians to Greenville.¹¹⁹
- In 1993, a gay restaurant and bar sought a license for beer and wine sales and consumption.¹²⁰ At a hearing for the license, state Senator Mike Fair testified against granting the license, stating: “homosexuality is a public health problem.”¹²¹ Despite that and other protests, the administrative law judge determined that club could be issued the license.¹²²

South Dakota

- In 2001, the Sioux Empire Gay and Lesbian Coalition (“Coalition”) volunteered to adopt two miles of highway through the state’s Adopt-A-Highway program. The South Dakota Department of Transportation, however, refused their request, based on the fact that the Coalition was an “advocacy” group. At that time, several other advocacy groups already were participants in the program, including College Republicans, the Yankton County Democrats, and the Animal Rights

¹¹⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 130 (1998 ed.).

¹¹⁹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 99 (1997 ed.).

¹²⁰ *The Treehouse Club v. S.C. Dep’t of Revenue*, 2003 WL 24004603, at *1. (S.C. Admin. Law. Judge. Div., 2003).

¹²¹ *Id.* at *2.

¹²² *Id.* at *5.

Advocates of South Dakota. The Coalition then filed a lawsuit alleging violations of its rights to free speech and equal protection. Governor Bill Janklow temporarily allowed the group to post their Adopt-A-Highway sign – but also simultaneously announced he was terminating the program altogether.¹²³

- In 1992, a South Dakota Supreme Court justice wrote a concurring opinion in a case limiting visitation for a lesbian mother, in which he stated: “Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children. After years of treatment, she could then petition for rights of visitation. My point is: she is not fit for visitation at this time. Her conduct is presently harmful to these children. Thus, she should have no visitation. There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan ‘Egyptian Book of the Dead’ bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement.”¹²⁴

Tennessee

- In August 2009, the Metro Council, the legislative body of Nashville and Davidson County, voted 23-16 to pass an ordinance prohibiting sexual orientation

¹²³ Andrew Gumbel, *Adopt-A-Highway Dispute Pits Gay Coalition Against Governor*, INDEPENDENT (U.K.), Aug. 17, 2001, available at <http://www.independent.co.uk/news/world/americas/adoptahighway-dispute-pits-gay-coalition-against-governor-665882.html>; *S. Dakota Gay Group Gets Highway Sign, For A While*, L.A. TIMES, Aug. 18, 2001, at 18, available at <http://articles.latimes.com/2001/aug/18/news/mn-35549>.

¹²⁴ *Chicoine v. Chicoine*, 479 N.W.2d 891 (1992).

discrimination against city workers. One council member who voted against the ordinance, Jim Hodge, made the following remarks during the debate:

As a Christian I cannot endorse a lifestyle that is condemned in both the Old Testament and New...It doesn't make sense to me...I cannot support or endorse a lifestyle that is unhealthy. We as a government make many suggestions and recommendations to folks to live a better lifestyle whether it's menu labeling, whether it's exercising, whether it's recycling, because it's good for the individual or it's good for the community...We ask folks to leave their cigarettes outside...It's not easy to make a lifestyle change but it can be done. When I look at the information on this lifestyle, it's not something that we should endorse. Individuals here are eight times more likely to have to seek professional mental health treatment for all manner of reasons. Those in a committed relationship, four times more likely to have multiple partners. That's not stable. Significantly higher rate of STDs, about 60 percent, and shorter lifespan of 14 years. I would think that we as a government should be encouraging our folks to make better lifestyle choices than this.¹²⁵

- Tennessee asserted five state interests, reflecting anti-gay animus, that were promoted by the Homosexual Practices Act, a law that made it a misdemeanor to engage in consensual sexual penetration with someone of the same gender: (1) discouraging non-procreative sexual activities; (2) discouraging residents from “choosing a lifestyle that is socially stigmatized and leads to higher rates of suicide, depression, and drug and alcohol abuse;” (3) discouraging gay relationships which are “‘short-lived,’ shallow, and initiated for the purpose of

¹²⁵ Posting of Jeff Woods to Pith in the Wind, *Metro Council Votes to Ban Discrimination Against Gay Workers*, <http://blogs.nashvillescene.com/pitw/> (Aug. 18, 2009, 19:58 CST).

sexual gratification; (4) preventing the spread of sexually transmitted diseases; and (5) promoting “the moral values of Tennesseans.”¹²⁶

Texas

- In 2005, Texas Representative Robert Talton introduced a measure to prohibit gay, lesbian and bisexual individuals from being foster parents in Texas. While promoting this bill, which ultimately did not pass, Representative Talton stated, “We do not believe that homosexuals or bisexuals should be raising our children. Some of us believe they would be better off in orphanages than in homosexual or bisexual households because that’s a learned behavior.”¹²⁷
- Another Texas state representative opposed adding sexual orientation to the definition of what constitutes a hate crime on the ground that gay people bring violence upon themselves by their behavior. State Representative Warren Chisum stated that they “put themselves in harm’s way. They go to parks and pick up men, and they don’t know if someone is gay or not.”¹²⁸
- In 1995, three Dallas County Commissioners - Jim Jackson, Kenneth Mayfield and Mike Cantrell - sent a letter to local doctors urging them to support the county’s ban on condom distribution because homosexuality, like prostitution and drug abuse, is unacceptable. Their letter stated that “[w]e don’t want anyone,

¹²⁶ *Campbell v. Sundquist*, 926 S.W.2d 250, 253 n.1 (Court of Appeals of Tennessee, 1996); Sabine Koji, *Campbell v. Sundquist: Tennessee’s Homosexual Practices Act Violates the Right to Privacy*, 28 U. MEM. L. REV 311, 331-32 (1997).

¹²⁷ See Press Release, Lambda Legal, *Proposed Antigay Texas Law is Unconstitutional and Harmful to Children in Foster Care, Lambda Legal Says*, <http://www.lambdalegal.org/news/pr/proposed-antigay-texas-law-is.html> (last visited Sept. 3, 2009).

¹²⁸ See Louisa C. Brinsmade, *Bloody Murders: Gay Rights Lobby’s Quiet Fight for Hate Crimes Bill*, AUSTIN CHRON., Jan. 23, 1997, available at <http://www.austinchronicle.com/gyrobase/Issue/column?oid=oid%3A527262> (last visited, Sept. 3, 2009).

especially anyone in authority, telling our children or future grandchildren that it's an approved or acceptable lifestyle to be a homosexual, a prostitute or a drug user.”¹²⁹

- In 1990, the Texas Attorney General opined that a conviction for “homosexual conduct,” which was classified in the penal code as a Class C misdemeanor, provided an acceptable basis for automatically barring an applicant or dismissing an employee from working in certain facilities within the state Department of Health, even though the penal code stated that a Class C misdemeanor did not impose any legal disability or disadvantage.¹³⁰

Utah

- In 2009, Utah State Senator Chris Buttars claimed that he had “killed” every gay rights bill in the legislature for the last eight years because he believes: “Homosexuality will always be a sexual perversion. And you say that around here now and everybody goes nuts. But I don't care...They're mean. They want to talk about being nice. They're the meanest buggers I have ever seen...It's just like the Muslims. Muslims are good people and their religion is anti-war. But it's been taken over by the radical side...What is [sic] the morals of a gay person? You can't answer that because anything goes.”¹³¹

Virginia

¹²⁹ See John Wright, *Dallas County Overturns Condom Ban*, DALLAS VOICE, Jan. 13, 2009, available at <http://www.dallasvoice.com/instant-tea/2009/01/13/commissioners-court-overturms-condom-ban/>.

¹³⁰ Tex. Op. Att'y Gen. JM-1237 (Oct. 22, 1990), 1990 WL 508355 (Tex. A.G.).

¹³¹ Queerty, *Utah State Senator Chris Buttars on the Gays: "They're the Meanest Buggers I Have Ever Seen*, <http://www.queerty.com/utah-state-senator-chris-buttars-on-the-gays-theyre-the-meanest-buggers-i-have-ever-seen-20090218/> (last accessed on September 18, 2009)

- In debates in the state legislature on unsuccessful bills that would have prohibited discrimination on the basis of sexual orientation in state employment, one Virginia delegate stated in 2006, “[S]exual orientation is a broad term... There are eight different sexual orientations, including pedophilia and bestiality. I think we’d be opening up Pandora’s box and allowing judges to interpret what that means.”¹³²
- Another Virginia delegate stated in 2009 that such protection “may not be in the best interest of our society.”¹³³

Washington

- Opposition in the Washington Senate to the 2006 anti-discrimination bill took a particularly negative tone. Two Washington Senators introduced an amendment, which they later withdrew, to clarify that “sexual orientation” does not include “bestiality, necrophilia, incest, adultery, pedophilia, or sadomasochism.”¹³⁴ One co-sponsor of the amendment used the term “labyrinth of perversion” to describe LGBT people.¹³⁵ Senator Weinstein responded that the amendment was designed to “smear gays and lesbians” by implying that they participate in these types of behavior.¹³⁶
- Senator Benson expressed opposition to the bill on the ground that that “homosexuals don’t need protection” because they have “better education, nicer

¹³² *Virginia Senate to Weigh Gay Workers’ Protections*, WASH. POST, Feb. 6, 2006, at B5.

¹³³ Va. Assembly Access Website, <http://assemblyaccess.wordpress.com> (last visited Sept. 4, 2009).

¹³⁴ Wash. S.H.B. 2661 - Sen. Amend. 20 (2006) (introduced by Sens. Stevens & Hargrove, but later withdrawn).

¹³⁵ Statement of Wash. Sen. Stevens, Wash. Sen. Fl. (Jan. 25, 2006).

¹³⁶ Statement of Wash. Sen. Weinstein, Wash. Sen. Fl., (Jan. 25, 2006).

cars, and nicer homes” than most people.¹³⁷ He also opposed the bill on the ground that it would advance a “political agenda,” and argued that protecting behavior was a big mistake because, “[W]ho knows what other kinds of behavior the rest of society will be forced to tolerate.”¹³⁸

- Senator Oke said that he could not support the bill because it “endorses homosexuality” which he viewed as an “abomination to God.”¹³⁹
- Senator Mulliken expressed concern that homosexuality would be taught in schools, stating that kindergartners would be subjected to the “promotion of a lifestyle not even preferred by those who live it.”¹⁴⁰
- Senator Ed Murray, the bill’s sponsor, tried to encourage support by highlighting derogatory comments made in 2005 by Lou Novak, the former president of the Puget Sound Rental Housing Association. While in the state House office building, Novak remarked, “[L]ooks like it’s anal-sex week” as a group from the Lifelong AIDS Alliance walked by.¹⁴¹
- In 1999, Washington State University officials cancelled a June conference on issues facing gay and lesbian youth because they said they could not “provide a safe and supportive environment” for the attendees. One e-mail announcement for the event that said organizers were hoping for a large turnout was used by

¹³⁷ Statement of Wash. Sen. Benson, Wash. Sen. Financial Inst., Housing & Cons. Protection Comm. Statement (Jan. 24, 2006).

¹³⁸ Statement of Wash. Sen. Benton, Wash. Sen. Financial Inst., Housing & Cons. Protection Comm. (Jan 24, 2006).

¹³⁹ Statement of Wash. Sen. Oke, Wash. Sen. Fl. (Jan 27, 2006).

¹⁴⁰ Statement of Wash. Sen. Mulliken, Wash. Sen. Fl. (Jan 27, 2006).

¹⁴¹ Rebecca Cook, *Official Quits Over Anti-Gay Remarks*, SEATTLE TIMES, Mar. 4, 2005, at B3

conservative state legislators, including Senator Val Stevens, as evidence “that recruitment of children into the lifestyle was central to the homosexual agenda.”

- Representative Marc Boldt asked of the WSU event, “What will the university’s position be if an AIDS-free child goes there, only to return HIV-infected?”
- Senator Harold Hochstatter said he considered it to be WSU’s official promotion of a “lethal lifestyle.”
- Representative Bob Sump chided WSU for “inviting children to the university for a public celebration of immorality,” saying he anticipated the “opportunity next legislative session to trim away” WSU’s budget. Sump also said he planned to use his powers in the State House to defund WSU’s Gay/Lesbian/Bisexual/Alliance because it helped organize the event and was a “recruitment center” for gay youth.¹⁴²

West Virginia

- In 1983, the West Virginia Attorney General issued an opinion¹⁴³ that gay and lesbian teachers could be fired by their districts under a state law that authorized school districts to fire teachers for “immorality.”¹⁴⁴ The Attorney General opined that homosexuality was immoral in West Virginia even though the state had de-

¹⁴² PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 224 (1999 ed.).

¹⁴³ 60 W. Va. Op. Atty. Gen. 46, 1983 WL 180826 (W.Va.A.G.), Office of the Attorney General State of West Virginia, *1 February 24, 1983(Sexual Offenses: *A county board of education may dismiss a teacher who engages in sexually deviant conduct if the teacher's conduct substantially adversely affects his fitness to teach.*)

¹⁴⁴ Chapter 18A, Article 2, Section 8 of the Code of West Virginia of 1931.

criminalized same-sex sexual behavior in 1976. While the Attorney General said homosexuality must be shown to affect the person's fitness to teach, that could be shown if the teacher was "publicly known to be homosexual" as opposed to "private, discreet, homosexuality." He also noted that there were some jobs where "even such publicized sexual deviation" might not interfere with employment in the public sector, such "university drama teacher(s)" and "custodians."



Chapter 15: Analysis of Scope and Enforcement of State Laws and Executive Orders Prohibiting Employment Discrimination Against LGBT People

This chapter compares and analyzes the definitions, scope of coverage, required procedures, remedies, and implementation of ENDA and of each state's anti-discrimination statute that prohibits employment discrimination on the basis of sexual orientation and/or gender identity. The chapter concludes with a discussion of gubernatorial executive orders enunciating a policy against sexual orientation and/or gender identity discrimination in state employment where no such statutory protection exists. Key findings of this section include:

- **ENDA** ENDA prohibits employment discrimination by state and local government employers as well as private employers based on actual or perceived sexual orientation and gender identity.
 - ENDA does not provide a remedy for disparate impact claims and does not require preferential treatment or quotas, the construction of new or additional facilities, that unmarried couples be treated in the same manner as married couples for purposes of employee benefits, or the collection of statistics on actual or perceived sexual orientation or gender identity.

- ENDA requires state employees to exhaust all administrative remedies before bringing an action in court and that complaints be filed within 180 days of the alleged unlawful employment practice.
- The remedies for state employees under ENDA include equitable relief, compensatory damages subject to graduated caps, and attorney's fees, but not punitive damages.
- **State Statutes.** Twenty-nine states do not have anti-discrimination statutes that prohibit sexual orientation discrimination and 38 do not have statutes that explicitly prohibit gender identity discrimination. Of the states that do have anti-discrimination statutes that prohibit discrimination on these bases:
 - Three do not prohibit discrimination on the basis of perceived sexual orientation;
 - Five either do not provide for compensatory damages or subject such damages to caps that are lower than ENDA's;
 - Four do not provide for attorney's fee's, and another five only provide for them if the employee files a court action as opposed to an administrative action; and
 - In 2008 and 2009, when asked to provide statistical data about complaints by state employees, statutorily designated enforcement agencies in only 13 of these states were able to do so and only six were able to provide redacted copies of such complaints--often citing a lack

of resources and staff, or contrary to explicit requirements of the state's anti-discrimination statute.

- **Executive Orders.** In 10 other states that do not offer statutory protection for sexual orientation or gender identity, gubernatorial executive orders prohibit discrimination on either or both bases against state employees. However, these orders provide little enforcement opportunities and lack permanency:
 - Most notably, none of these orders provide for a private right of action;
 - Only six confer any power to actually investigate complaints; and
 - Executive orders in Kentucky, Louisiana, Iowa, Ohio, and Virginia have been in flux during the last 15.

A. ENDA

1. Summary

The Employment Non-Discrimination Act of 2009 (“ENDA”) prohibits employment discrimination on the basis of actual and perceived sexual orientation and gender identity. ENDA applies to private and public sector employees with certain exceptions and limitations. The remedies provided for in ENDA generally track those available to an aggrieved employee who files a claim under Title VII of the Civil Rights Act of 1964. Public and private sector employees may recover economic damages under ENDA. Non-equitable relief for all employees is subject to graduated caps, and employees of a State or the United States¹ cannot recover punitive damages. Equitable relief is available to all public and private sector employees.

2. Definitions

ENDA prohibits discrimination on the basis of actual and perceived sexual orientation and gender identity.² “Sexual orientation” is defined in the Act as “heterosexuality, homosexuality, and bisexuality.”³ “Gender identity” is defined as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”⁴

3. Scope of Coverage

ENDA applies to public and private sector employers.⁵ ENDA does not apply to any employer with fewer than 15 employees or to any bona fide private membership club

¹ When the United States is mentioned herein as an employer, it does not include the Armed Forces, to which ENDA does not apply. “Armed Forces” means the Army, Navy, Air Force, Marine Corps, and Coast Guard. Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 7(a) (2009).

² Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 4(a) (2009).

³ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 3(a)(9) (2009).

⁴ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 3(a)(6) (2009).

⁵ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. §§ 3(a)(4), 11 (2009).

that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.⁶ ENDA contains a broad religious organization exemption which excludes from coverage any organization that is allowed to restrict employment based on religion under Title VII of the Civil Rights Act of 1964.⁷ Organizations exempted from Title VII include any “religious corporation, association, educational institution, or society.”⁸ A school, college, university, or other educational institution or institution of higher learning is exempt under this provision if it is “in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, of if the curriculum of such school, college, university, or other educational institution or institution of higher learning is directed toward the propagation of a particular religion.”⁹

4. Required Procedures

Under ENDA, an employee must exhaust administrative remedies before bringing an action in court.¹⁰ The employee must file the complaint within 180 days of the alleged unlawful employment practice, unless the employee initially institutes proceedings with a State or local agency with authority to grant or seek relief from such practice, in which case the complaint must be filed within 300 days.¹¹ For purposes of this report, it will be assumed that the 180-day statute of limitations applies to a complaint filed under ENDA.

5. Remedies

⁶ *Id.*

⁷ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 6 (2009).

⁸ Title VII of the Civil Rights Act of 1964 § 702(a), 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

⁹ Title VII of the Civil Rights Act of 1964 § 703(e), 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

¹⁰ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10 (2009).

¹¹ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009); Title VII of the Civil Rights Act of 1964 § 706, 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* The Civil Rights Act of 1991, 42 U.S.C. § 1981a.

ENDA authorizes economic and non-economic damages¹² to the same extent as Title VII.¹³ All employees may recover compensatory damages subject to graduated caps.¹⁴ Compensatory damages available to an employee bringing a Title VII action, and therefore under ENDA, do not include back pay, interest on back pay, or front pay.¹⁵ Thus, the compensatory damage caps apply to only non-pecuniary and future pecuniary losses.¹⁶ All employees are entitled to the same equitable relief, including injunctive relief, reinstatement or hiring with or without back pay, and any other equitable relief the court deems appropriate.¹⁷ ENDA also authorizes the award of attorney's fees to the prevailing party, except where the prevailing party is the Equal Employment Opportunity Commission or the United States.¹⁸

Under Title VII and ENDA, private sector employee plaintiffs may qualify for punitive damages, but state and federal employees may not recover punitive damages in a suit against a State or the United States as employer.¹⁹ An employee of a State or the United States may recover compensatory damages up to the caps specified in section 102 of the Civil Rights Act of 1991.²⁰ For employees who are not employed by the United States or a State, the caps apply to the combined punitive and compensatory damages that

¹² Economic damages include back pay, interest on back pay, and front pay. Non-economic damages include punitive damages, future pecuniary losses, and non-pecuniary losses. EEOC Decision No. N-915.002 (July 14, 1992).

¹³ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009).

¹⁴ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009); Title VII of the Civil Rights Act of 1964 § 706, 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

¹⁵ Civil Rights Act of 1991 § 102(b), 42 U.S.C. § 1981a.

¹⁶ *Id.*

¹⁷ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009).

¹⁸ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 12 (2009).

¹⁹ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 11(d)(1) (2009); Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a.

²⁰ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 11(d)(2) (2009).

may be recovered.²¹ Thus, an employee from either the public or private sector cannot be awarded compensatory damages greater than the caps delineated in section 102 of the Civil Rights Act of 1991.

6. Implementation

The Equal Employment Opportunity Commission's administration and enforcement powers under ENDA are identical to its powers under Title VII.²² Its major powers and duties include the authority to investigate complaints and initiate litigation, the responsibility to monitor and report compliance by all employers, and oversight of activities of the federal government in its capacity as an employer.

Regarding employees who are not employed by the Federal government, when a complaint is filed with the EEOC, the agency initiates an investigation.²³ In investigating a charge, the EEOC may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred.²⁴ The EEOC can seek to settle a charge or select the charge for mediation at any stage of the investigation if the complainant and the employer express an interest in doing so.²⁵ The EEOC may dismiss a charge at any point and issue the charging party a Right to Sue if, in the agency's best judgment, further investigation would not establish a violation of the law.²⁶

²¹ Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(a)(6)(A) (2009); Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a.

²² Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10 (2009).

²³ http://www.eeoc.gov/charge/overview_charge_processing.html.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

If the evidence obtained in the investigation does not establish that discrimination occurred, the charge is dismissed and the charging party is issued a Right to Sue.²⁷ If the evidence obtained in the investigation establishes that discrimination has occurred, the EEOC will attempt conciliation with the employer to develop a remedy for the discrimination.²⁸ If the case is successfully conciliated, mediated, or settled, neither the EEOC or the charging party may file a complaint in court against the employer unless the agreement is not honored.²⁹ If the case cannot be conciliated, mediated, or settled, the EEOC will decide whether to bring suit in federal court on behalf of the complainant or to issue a Right to Sue so that the complainant may bring suit on his or her own behalf.³⁰ From fiscal year 1999 through fiscal year 2008, the EEOC resolved 657,013 charges of discrimination under Title VII.³¹ During the ten-year period, the EEOC administratively recovered approximately \$1.6 billion for aggrieved employees.³² In the same ten-year period, the EEOC reports that it filed 4256 “merits” lawsuits on behalf of employee complainants.³³ “Merits” lawsuits include direct suits and interventions alleging violations of the substantive provisions of the statutes enforced by the Commission and suits to enforce administrative settlements.³⁴ Of the 4256, 3246 were Title VII claims.³⁵ Through these lawsuits, the EEOC recovered \$784.4 million for aggrieved employees who had filed an administrative complaint under Title VII.³⁶

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ <http://www.eeoc.gov/stats/vii.html>.

³² *Id.*

³³ <http://www.eeoc.gov/stats/litigation.html>.

³⁴ http://www.eeoc.gov/abouteeoc/plan/par/2008/managements_discussion.html#litigation.

³⁵ <http://www.eeoc.gov/stats/litigation.html>.

³⁶ This figure is in addition to the \$1.6 billion recovered administratively; *id.*

The EEOC also publishes annual Performance and Accountability reports, a limited number of Commission appellate and amicus briefs filed in U.S. Courts of Appeals, Federal sector appellate decisions issued by the EEOC, statistical reports on charges filed and dispositions, and other reports and documents pertinent to administrative accountability.³⁷

Regarding federal employees, the EEOC must review and evaluate all agency equal employment opportunity programs and is responsible for obtaining and publishing agency progress reports.³⁸ The EEOC must establish programs to train principal operating officials of each agency in Title VII compliance.³⁹ The EEOC is ultimately responsible for handling administrative complaints alleging a violation of Title VII brought by federal employees.⁴⁰ A federal employee alleging discrimination must first file a complaint with his or her agency employer.⁴¹ If the complaint cannot be resolved within the agency, the employee may file a complaint with the EEOC.⁴² The EEOC may award compensatory damages and equitable relief pursuant to a decision of an administrative judge following a hearing.⁴³

³⁷ <http://www.eeoc.gov>.

³⁸ Title VII of the Civil Rights Act of 1964 § 717(b), 42 U.S.C. §§ 2000e *et seq.* (1964), amended by The Civil Rights Act of 1991, 42 U.S.C. § 1981a.

³⁹ *Id.*

⁴⁰ <http://www.eeoc.gov/facts/fs-fed.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

B. State Statutes Overall

1. Summary

Although 21 states have enacted anti-discrimination statutes that include sexual orientation, including 12 states that also cover gender identity discrimination, there are many discrepancies between these state laws and ENDA. Of the 21 state statutory schemes, three do not prohibit discrimination based on *perceived* sexual orientation, and nine do not prohibit discrimination based on gender identity. Though equitable relief is available in every state, compensatory damages are unavailable or are capped lower than under ENDA in five states. Punitive damages are not available at all in seven states and only available in an eighth state depending on the jurisdiction in which the case is filed. Attorney's fees are unavailable in five states, and in five more are only available if the employee files suit in court.

Similarities also exist. All the state statutes apply to public and private sector employers, and all have an exemption for religious organizations. No state exempts any employers of 15 or more employees and many states have a lower threshold for compliance. In 13 states, employees must exhaust their administrative remedies before filing suit in court.

2. Definitions

Twenty-one states prohibit discrimination on the basis of actual sexual orientation.⁴⁴ Eighteen of the 21 also prohibit discrimination on the basis of perceived

⁴⁴ California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

sexual orientation.⁴⁵ All but six of the 21 states that prohibit discrimination on the basis of sexual orientation offer some legal protection for persons discriminated against on the basis of gender identity.⁴⁶ In the 15 states offering gender identity protection, 12 do so by explicit statutory protection. In the other three states, lower courts or administrative agencies have ruled that individuals discriminated against on the basis of gender identity can state a claim under the state anti-discrimination statute for sex discrimination.⁴⁷

3. Scope of Coverage

All state statutes that prohibit sexual orientation discrimination apply to public and private sector employers. Every state that prohibits discrimination based on sexual orientation includes an exemption for religious organizations. Seventeen state anti-discrimination statutes prohibiting sexual orientation discrimination apply to employers with fewer than 15 employees.⁴⁸ In eight of these states, the statute applies to all employers regardless of size.⁴⁹ The anti-discrimination statutes of the remaining four states apply to only employers with 15 or more employees.⁵⁰ Thirteen states⁵¹ exclude people in domestic service from their definitions of covered employees. Eleven states⁵²

⁴⁵ All of the above mentioned states except Delaware, Vermont, and Washington explicitly prohibit discrimination based on perceived sexual orientation.

⁴⁶ Delaware, Hawaii, Maryland, Nevada, New Hampshire, and Wisconsin offer no protection from discrimination on the basis of gender identity.

⁴⁷ Connecticut (*see* CT Commission on Human Rights and Opportunities: Declaratory Ruling on Behalf of John/Jane Doe, 2000), Massachusetts (*see* *Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412 (Mass. Super. 2002); *Jette v. Honey Farms Mini Market*, 2001 Mass. Comm. Discrim. LEXIS 50 (Mass. Comm'n Against Discrimination 2001)), New York (*see* *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996); *Buffong v. Castle on the Hudson*, 2005 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. 2005)).

⁴⁸ California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

⁴⁹ Colorado (no restriction), Hawaii (no restriction), Maine (no restriction), Minnesota (no restriction), New Jersey (no restriction), Wisconsin (no restriction), Oregon (one or more), and Vermont (one or more).

⁵⁰ New Mexico, Illinois, Maryland, and Nevada.

⁵¹ California, Colorado, Connecticut, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, and Washington.

⁵² California, Connecticut, Maine, Massachusetts, Minnesota, New Hampshire, New York, Oregon, Rhode Island, Washington, and Wisconsin.

exclude those employed by a close family member from their definitions of covered employees.⁵³

4. Required Procedures

Employees in thirteen states with statutes that prohibit discrimination on the basis of sexual orientation must exhaust their administrative remedies before they are permitted to file a complaint in court.⁵⁴ In Connecticut a private sector employee is required to exhaust administrative remedies while a public sector employee may bring a claim directly in court without first exhausting administrative remedies. In Wisconsin, the administrative agency must render a final decision in the case before an employee is permitted to go to court. Employees in the remaining six of the 21 states prohibiting sexual orientation discrimination in employment may file directly in court.⁵⁵

Nine states provide an administrative filing window of more than 180 days after the alleged unlawful practice.⁵⁶ Eleven states require that an administrative complaint is filed either within 180 days or the nearly equivalent period of six months of the alleged unlawful practice.⁵⁷ Delaware is the only state with a statute of limitations on administrative filings of less than 180 days, requiring that the complaint be filed within 120 days of the alleged unlawful practice.

5. Remedies

⁵³ Though ENDA's coverage is not similarly expressly limited, the fact that ENDA applies to employers of only 15 or more employees and only to those employers whose industry "affects commerce" likely excludes employees who are domestic service workers and family employees .

⁵⁴ California, Colorado, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, and Rhode Island.

⁵⁵ Minnesota, New Jersey, New York, Oregon, Vermont, and Washington.

⁵⁶ California (300 days), Massachusetts (300 days), Minnesota (one year), New Mexico (300 days), New York (one year), Oregon (one year), Rhode Island (one year), Vermont (unspecified, but according to Attorney General's Office, one year), and Wisconsin (300 days).

⁵⁷ Colorado (six months), Connecticut (180 days), Hawaii (180 days), Illinois (180 days), Iowa (180 days), Maine (six months), Maryland (six months), Nevada (180 days), New Hampshire (180 days), New Jersey (180 days), and Washington (six months).

Compensatory damages are not available under the anti-discrimination laws of two states.⁵⁸ In four other states,⁵⁹ compensatory damages are available, but only if the aggrieved employee files a complaint in court. Similarly, in Vermont, compensatory damages are available to state employees, but they are only available to an employee of an entity other than the state if he or she files a complaint in court. Wisconsin permits an employee to file a civil action to recover compensatory damages only after the administrative agency has rendered a final decision in the case, and does not permit local government employees to recover compensatory damages under any circumstances. Of the states that do provide for compensatory damages through either an administrative proceeding or a civil action, three of them impose caps that would be less favorable than ENDA's caps in certain circumstances.⁶⁰

Punitive damages are not available under the anti-discrimination laws of eight states⁶¹ and are sometimes unavailable in Connecticut, where there is a split of authority on whether or not a court can award punitive damages under the statute.⁶² Further, in eight states⁶³ that do provide for punitive damages, plus Connecticut, they are only available if a complainant files in court and not if he or she proceeds through the administrative process. In Wisconsin, punitive damages are available only to an employee who files a complaint in court after having obtained a final decision from the

⁵⁸ Colorado and Nevada.

⁵⁹ Massachusetts, Maine, Wisconsin, and Connecticut. See *Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 113 (D. Conn. 2000) (though compensatory damages are not explicitly authorized by Connecticut's Fair Employment Practices Act, a court may award them because they fall within "such legal and equitable relief the court deems appropriate").

⁶⁰ California, Minnesota, and Washington.

⁶¹ California, Colorado, Illinois, Iowa, Nevada, New Mexico, New York, and Washington.

⁶² *Shaw v. Greenwich Anesthesiology Associates, P.C.*, 200 F. Supp. 2d 110, 117 (D. Conn. 2002) (where statute authorizes "such legal and equitable relief which the court deems appropriate," some courts have found that punitive damages are available and other courts have found that they are not available due to the absence of express statutory language).

⁶³ Maryland, Connecticut, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, New Hampshire, and Wisconsin.

enforcing agency and are not available to employees of a local government. In Minnesota, although available through either civil action or administrative proceeding, they are capped at \$8,500 (significantly lower than ENDA's caps).⁶⁴

Attorney's fees are not available in five states.⁶⁵ Further, in five states that do provide for attorney's fees, they are only recoverable if the employee elects to file a complaint in court.⁶⁶ Similarly, in Vermont, although an employee of the state can recover attorney's fees through either the administrative process or in court, any other employee must bring his or her case in court to recoup attorney's fees.

6. Implementation

Each state has designated a state agency to receive and investigate administrative complaints of employment discrimination. In four states prohibiting employment discrimination on the basis of sexual orientation or gender identity, the anti-discrimination statute does not permit the administrative agency to take any action on its own initiative to eliminate discrimination.⁶⁷ In a fifth state, the agency is not vested with the power to issue a complaint or to file lawsuit, but may litigate on behalf of a plaintiff who so requests.⁶⁸ Agencies in the other eighteen states may, by statute, issue an administrative complaint, file a lawsuit, or do both, on behalf of the agency itself or on behalf of an aggrieved employee.

As for reporting and compliance, research conducted by the Williams Institute suggests that many state agencies lack the capacity to provide information of the same

⁶⁴ ENDA's caps, which apply to the sum of compensatory damages for future pecuniary and non-pecuniary losses and punitive damages, are as follows: up to 100 employees: \$50,000; 101-200 employees: \$100,000; 201-500 employees: \$200,000; 500+ employees: \$300,000.

⁶⁵ Colorado, Maryland, Nevada, New Hampshire, and New York.

⁶⁶ California, Connecticut, Oregon, and Washington, and Wisconsin.

⁶⁷ Colorado, Iowa, Nevada, and New Hampshire.

⁶⁸ Massachusetts.

quantity or quality as that made public by the EEOC. Pursuant to requests for information made by the Williams Institute to state agencies responsible for implementing anti-discrimination statutes, only 13 states could break down statistical data on employment discrimination complaints filed on the basis of sexual orientation or gender identity into those filed against public sector and those filed against private sector employers. Seven of the remaining eight states with statutory protection for sexual orientation and/or gender identity in employment refused to provide data based on a confidentiality provision in the statute or failed to respond to written and phone requests altogether. The eighth state, Delaware, was not approached for data because protection went into effect in July 2009 and thus a data collection period of at least one year had not yet elapsed at the time of this report.

Of the 13 states that provided statistical data, five provided copies of the actual complaints filed or a record of the case dispositions. Additionally, Rhode Island provided copies of the actual complaints filed for cases which had been closed at the time of the request, but was unable to tabulate data on filings. See Chapter 11 “Administrative Complaints on the Basis of Sexual Orientation and Gender Identity.”

C. State Statutes by State

1. California

i. Summary

California's Fair Employment and Housing Act ("FEHA") reaches a class of small employers that would not be covered by ENDA. ENDA offers more generous monetary remedies than the FEHA for aggrieved employees under certain circumstances.

ii. Definitions

ENDA and the FEHA both define "sexual orientation" as "heterosexuality, homosexuality, and bisexuality" and extend protections to employees based on perceived sexuality.⁶⁹ California's FEHA, as amended January 1, 2004, includes "a person's gender" within its definition of "sex" to protect employees who do not conform to their "assigned gender" and requires covered employers to allow employees "to appear or dress consistently with the employee's gender identity."⁷⁰ ENDA also prohibits employment discrimination based on gender identity and includes an equally broad definition of the term.

iii. Scope of Coverage

FEHA applies to state and local government employers and private employers.⁷¹ FEHA applies to employers of five or more persons, while ENDA only applies to employers of fifteen or more people.⁷² FEHA and ENDA completely exempt qualifying religious organizations from coverage. The FEHA exception applies to "any religious association or corporation not organized for private profit," which may construed more

⁶⁹ CAL. GOV. CODE 12926(m), (q) (2003).

⁷⁰ CAL. GOV. CODE §§ 12926(p), 12949.

⁷¹ CAL. GOV. CODE § 12926(d).

⁷² *Id.*

broadly by courts than ENDA's definition, which does not reference profit-making activities.⁷³ FEHA also exempts "any individual employed by his or her parents, spouse, or child" and individuals "employed under a special license in a non-profit sheltered workshop or rehabilitation facility" under the definition of employee.⁷⁴ ENDA's definition of "employee," borrowed from Title VII, does not expressly contain a similar limitation.⁷⁵

vi. Required Procedures

Under both FEHA and ENDA, an employee must exhaust administrative remedies before bringing an action in court.⁷⁶ Subject to a few narrow exceptions, an aggrieved employee must file his or her complaint under FEHA within one year of the unlawful practice.⁷⁷ ENDA's statute of limitations is shorter, requiring that the employee file the claim within 180 days of the unlawful practice.

v. Remedies

ENDA and FEHA authorize some similar relief, including back pay, compensatory damages, equitable relief, and attorney's fees (except that under FEHA, attorney's fees are not authorized in an action against a public agency or a public official, acting in an official capacity).⁷⁸ However, in addition, ENDA authorizes punitive damages (subject to a cap and not available in a suit against the United States or a State), while this remedy is available only for an aggrieved California employee who seeks redress in court on a tort theory.⁷⁹

⁷³ *Id.*

⁷⁴ CAL. GOV. CODE § 12926(e).

⁷⁵ *See* 42 U.S.C. § 2000e(f).

⁷⁶ CAL. GOV. CODE § 12960(b).

⁷⁷ CAL GOV. CODE § 12960(d).

⁷⁸ 42 U.S.C. §§ 2000e *et seq.*; Cal. Gov. Code § 12970.

⁷⁹ 42 U.S.C. §§ 2000e *et seq.*; *Rojo v. Klinger*, 53 Cal. 3d 65, 80-81 (Cal. 1990).

The amount of compensatory damages for non-pecuniary losses available under FEHA and ENDA are subject to different caps, which, in some circumstances, would allow for a Californian proceeding under FEHA to recover more than under ENDA and vice-versa. Under the FEHA, the administrative agency is required to cap non-pecuniary damages at \$150,000, without regard to the size of the employer.⁸⁰ In contrast, ENDA provides four separate caps on the total award for future pecuniary and non-pecuniary damages based on the employer's size: for employers of up to 100 employees, a cap of \$50,000; for employers of 101-200 employees, a cap of \$100,000; for employers of 201-500 employees, a cap of \$200,000; and for employers of more than 500 employees, a cap of \$300,000.⁸¹ Thus, ENDA potentially provides greater relief for employees of larger entities who would be subject to the \$100,000 cap under FEHA. However, California employees of employers who fall into the first two brackets could potentially recover more by pursuing a cause of action under FEHA as opposed to ENDA. It should be noted that ENDA's caps apply to the sum of compensatory (for future pecuniary and non-pecuniary losses) and punitive damages awarded.

vi. Implementation

The Department of Fair Employment and Housing ("the Department") has the power to receive, investigate, and conciliate complaints alleging that an unlawful practice has taken place.⁸² The Department may issue accusations and may itself prosecute those accusations in hearings before the Fair Employment and Housing Commission.⁸³ If an accusation is served on an employer by the Department that includes a prayer either for

⁸⁰ CAL. GOV. CODE § 12970.

⁸¹ 42 U.S.C. §§ 2000e *et seq.*

⁸² CAL. GOV. CODE § 12930(f).

⁸³ CAL. GOV. CODE § 12930(h).

damages for emotional injuries and/or for administrative fines, the employer may chose to transfer the proceedings to a court rather than proceed administratively.⁸⁴ In this situation, DFEH must file itself, or through the Attorney General, a civil action in its own name on behalf of the employee.⁸⁵ The Department may seek judicial enforcement where a respondent has not complied with an order of the Fair Employment and Housing Commission or with an agreement entered into by the parties.⁸⁶

The Department provided the number of employment discrimination complaints filed against the state and private sector employers from 2000 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.⁸⁷ The Department was unable to provide statistics for those employment discrimination complaints filed on the basis of gender identity because the Department codes them as sex discrimination and was unwilling to comb through the sex discrimination cases to extract those based on gender identity.⁸⁸

The Department reported a total of 5254 complaints filed on the basis of sexual orientation against the state and private sector employers from 2000 through 2007. In 2000, 16 complaints were filed against the state and 440 were filed against private sector employers. In 2001, 22 complaints were filed against the state and 616 were filed against private sector employers. In 2002, 23 complaints were filed against the state and 574 were filed against private sector employers. In 2003, 27 were filed against the state and 646 were filed against private sector employers. In 2004, 24 were filed against the state

⁸⁴ CAL. GOV. CODE § 12965(c)(1).

⁸⁵ CAL. GOV. CODE § 12965(c)(2).

⁸⁶ CAL. GOV. CODE § 12964.

⁸⁷ E-mail from Karen Gilbert, Research Analyst, Department of Fair Employment & Housing, to Christy Mallory, the Williams Institute (Sept. 18, 2008, 15:22:52 PST) (on file with the Williams Institute).

⁸⁸ *Id.*

and 615 were filed against private sector employers. In 2005, 22 were filed against the state and 692 were filed against private sector employers. In 2006, 26 were filed against the state and 696 were filed against private sector employers. In 2007, 23 were filed against the state and 792 were filed against private sector employers.

Additionally, the Department provided copies of 42 case files for proceedings instituted against the state. Twenty-six cases were administratively closed because the complainant requested an immediate Right to Sue. Two cases were administratively closed on other grounds. No probable cause was found in 14 cases. Twenty-nine of the 72 cases against the state were withheld by the agency for unknown reasons.

2. Colorado

i. Summary

ENDA offers remedies to aggrieved employees—including damages and attorney’s fees—that are unavailable through Colorado’s administrative procedure. Colorado’s anti-discrimination law affords protection to employees of small employers that would be excluded under ENDA.

ii. Definitions

ENDA and Colorado’s anti-discrimination statute prohibit discrimination on the basis of sexual orientation, including actual or perceived “heterosexuality, homosexuality, or bisexuality.”⁸⁹ Both ENDA and Colorado’s anti-discrimination statute also prohibit discrimination based on gender identity. The definition of “sexual orientation” in Colorado’s anti-discrimination provisions affords protection for employees based on the “person’s transgendered status” while ENDA protects gender identity separately from sexual orientation, defining “gender identity” as “the gender-

⁸⁹ COLO. REV. STAT. § 24-34-401(7.5) (2008).

related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.”⁹⁰

iii. Scope of Coverage

Colorado’s anti-discrimination provisions apply to state and local government employers and private employers.⁹¹ In contrast to ENDA, which applies only to employers of 15 or more employees, Colorado’s anti-discrimination provisions do not restrict application to any employers based on size.⁹² Furthermore, Colorado’s religious exemption could be interpreted more narrowly than ENDA’s, because it expressly subjects those “religious organizations or associations supported in whole or in part by money raised by taxation or public borrowing” to coverage, but exempts any other “religious organization or association.”⁹³ Colorado’s anti-discrimination statute does not extend to employees who are in domestic service while ENDA does not explicitly exempt such employees.⁹⁴

iv. Required Procedures

Under both ENDA and Colorado’s anti-discrimination laws, employees must exhaust their administrative remedies before bringing an action in court.⁹⁵ An aggrieved employee must file an administrative complaint under Colorado’s anti-discrimination provisions within six months of the alleged unlawful practice.⁹⁶ This is approximately the same filing period an employee is given under ENDA (180 days).

v. Remedies

⁹⁰ COLO. REV. STAT. § 24-34-401(7.5).

⁹¹ COLO. REV. STAT. § 24-34-401(3).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ COLO. REV. STAT. § 24-34-401(2).

⁹⁵ COLO. REV. STAT. § 24-34-306(1); *Brooke v. Restaurant Svcs.*, 906 P.2d 66, 70 (Colo. 1995).

⁹⁶ COLO. REV. STAT. § 24-34-403.

By statute, successful complainants in an administrative hearing under Colorado law are limited to various forms of equitable relief, including back pay—the statute does not provide for attorney’s fees or compensatory or punitive damages.⁹⁷ Though subject to caps, successful complainants proceeding under ENDA are entitled to compensatory and punitive damages (though not in suits against a State or the United States) in addition to the same equitable relief and injunctive relief through an administrative hearing in Colorado.

vi. Implementation

The Colorado Civil Rights Commission (“the Commission”) has the power to receive, investigate, and hold hearings upon charges alleging unfair or discriminatory practices.⁹⁸ The Commission may, on its own initiative, seek judicial enforcement where a party has not complied with the terms of a final order.⁹⁹

The Commission was unable to provide the number of complaints or any copies of actual complaints filed on the basis of sexual orientation or gender identity because, as of the date requested, the statute was enacted too recently to have compiled and maintained the data in a way that would have made tabulation and release feasible. The statute does, however, require that decisions rendered be kept in a central file available for public inspection during regular business hours.¹⁰⁰

3. Connecticut

i. Summary

⁹⁷ COLO. REV. STAT. §§ 24-34-405; 24-34-306; 24-50-125.5.

⁹⁸ COLO. REV. STAT. § 24-34-305(1)(b), (d)(I).

⁹⁹ COLO. REV. STAT. § 24-34-307(1).

¹⁰⁰ COLO. REV. STAT. § 24-34-306(12).

The Connecticut Fair Employment Practices Act (“CFEPA”) covers small employers that would be excluded under ENDA, and allows State employees to bring an action directly in court. However, the remedies available through Connecticut’s administrative process are much more limited than those available through an administrative hearing under ENDA. In addition, ENDA prohibits discrimination based on gender identity in addition to sexual orientation.

ii. Definitions

The CFEPA definition of “sexual orientation” is almost identical to the ENDA definition, prohibiting discrimination based on either an employee’s “sexual preference for heterosexuality, homosexuality or bisexuality” or an employee’s perceived sexual orientation—in the words of the CFEPA, “being identified with such preference.”¹⁰¹ CFEPA also explicitly protects individuals who have a “history of such preference,” while ENDA does not include such language, perhaps extending coverage under the CFEPA to individuals that would be excluded under ENDA.¹⁰² ENDA explicitly prohibits discrimination based on gender identity, while CFEPA does not. However the Connecticut Human Rights Commission has ruled that transgender individuals may pursue anti-discrimination claims under the category of sex discrimination in CFEPA.¹⁰³

iii. Scope of Coverage

CFEPA applies to state and local government employers and private employers.¹⁰⁴ CFEPA’s definition of employer is broader than the ENDA definition, while its religious organization exemption may be narrower, thus affording protection to

¹⁰¹ COLO. REV. STAT. § 46a-81a.

¹⁰² CONN. GEN. STAT. § 46a-81a (2007 & Supp. 2008).

¹⁰³ *CHRO Declaratory Ruling on behalf on John/Jane Doe* (2000).

¹⁰⁴ CONN. GEN. STAT. § 46a-51(10).

more employees than ENDA. CFEPA covers employers of three or more employees, while ENDA only covers employers of 15 or more employees.¹⁰⁵ CFEPA's definition of "religious organization" is arguably as broad as ENDA's, encompassing any "religious corporation, entity, association, educational institution or society," but the CFEPA exemption is limited to religious organizations "with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association."¹⁰⁶ Though it is unclear from CFEPA what work is considered to be "connected with the carrying on...of [the religious organization's] activities," there is a possibility that this definition does not cover every employee of every religious organization. Also, CFEPA excludes from its definition of "employee" "any individual employed by such individual's parents, spouse, or child, or in the domestic service of any person."¹⁰⁷ ENDA does not contain this exclusion.

iv. Required Procedures

ENDA requires all employees to exhaust their administrative remedies, and CFEPA requires employees of an employer other than the State to exhaust administrative remedies, before bringing a civil suit.¹⁰⁸ CFEPA does not appear to require Connecticut's state employees to exhaust their administrative remedies before bringing a civil action.¹⁰⁹ CFEPA and ENDA both require that an employee who chooses to file or

¹⁰⁵ *Id.*

¹⁰⁶ CONN. GEN. STAT. § 46a-81p.

¹⁰⁷ CONN. GEN. STAT. § 46a-51(9).

¹⁰⁸ *See* CONN. GEN. STAT. §§ 46a-99, 46a-82.

¹⁰⁹ *See id.*

must file an administrative complaint do so within 180 days of the alleged unlawful practice.¹¹⁰

v. Remedies

Under CFEPA, successful complainants proceeding through an administrative hearing are limited to certain forms of equitable relief and back pay.¹¹¹ Employees who elect to bring an action in court based on an employer's violation of CFEPA are by statute entitled to "such legal an equitable relief which the court deems appropriate" and "attorney's fees and costs."¹¹² A federal district court found that this language is broad enough to encompass compensatory damages.¹¹³ While no state courts have rejected this decision, there is a split of authority in Connecticut courts on whether or not punitive damages are authorized by the same language.¹¹⁴ Under ENDA, an employee may recover compensatory damages (subject to cap), punitive damages (subject to cap and not available in suit against the United States or a State), and attorney's fees and costs, in addition to the equitable relief and back pay.

vi. Implementation

The Connecticut Commission on Human Rights and Opportunities ("the Commission") has the power to receive, initiate, investigate and mediate discriminatory practice complaints.¹¹⁵ The Commission itself may issue a complaint if it has reason to believe that any person has been engaged or is engaging in a discriminatory practice.¹¹⁶ Further, if either party elects a civil action in lieu of a civil hearing after a reasonable

¹¹⁰ CONN. GEN. STAT. § 46a-82(e).

¹¹¹ CONN. GEN. STAT. § 46a-86(a), (b).

¹¹² CONN. GEN. STAT. § 46a-104.

¹¹³ See *Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 113 (D. Conn. 2000).

¹¹⁴ *Shaw v. Greenwich Anesthesiology Associates, P.C.*, 200 F. Supp. 2d 110, 117 (D. Conn. 2002).

¹¹⁵ CONN. GEN. STAT. § 46a-54(8).

¹¹⁶ CONN. GEN. STAT. § 46a-82(a).

cause determination has been made, the Commission or the Attorney General shall commence an action on behalf of the employee.¹¹⁷ The Commission may bring an action in court to enforce a final order where a party has not complied with its terms.¹¹⁸

The Commission provided the number of employment discrimination complaints filed from 1999 through 2007 pursuant to a request from the Williams Institute.¹¹⁹ The Commission was able to break down the total number of complaints into those filed by State employees and all other employees, but was unable to break down the number by year filed. The Department reported a total of 507 employment discrimination complaints filed on the basis of sexual orientation from 1999 through 2007; 44 of those complaints were filed by state employees. The Commission was unresponsive to a request for copies of the actual complaints or a record of the case dispositions.

4. Delaware

i. Summary

Delaware's Discrimination in Employment Act ("DEA"), amended in July 2009 to include sexual orientation, offers protection to employees of small employers that would be unprotected under ENDA and authorizes more remedies than ENDA in certain circumstances. However, the scope of "sexual orientation" in DEA is more limited than that of ENDA and, unlike ENDA, does not prohibit employment discrimination on the basis of gender identity.

ii. Definitions

¹¹⁷ *Id.*

¹¹⁸ CONN. GEN. STAT. § 46a-95(a).

¹¹⁹ E-mail from Constance Sakyi, Connecticut Commission on Human Rights and Opportunities, to Christy Mallory, the Williams Institute (Sept. 16, 2008, 07:13:45 PST) (on file with the Williams Institute).

ENDA and DEA prohibit discrimination based on “sexual orientation” defined in both as “heterosexuality, homosexuality, or bisexuality.”¹²⁰ However, DEA does not explicitly prohibit discrimination on the basis of perceived sexual orientation, while ENDA does. In fact, DEA states that sexual orientation “*exclusively* means heterosexuality, homosexuality, or bisexuality.”¹²¹ ENDA, unlike DEA, also prohibits discrimination based on gender identity.

iii. Scope of Coverage

DEA applies to state and local government employers and private employers.¹²² DEA applies to employers of four or more employees while ENDA applies only to employers of 15 or more employees.¹²³ DEA and ENDA both provide broad religious organization exemptions, with Delaware exempting “religious corporations, associations or societies whether supported, in whole or in part, by government appropriations, except where the duties of employment or employment opportunity pertain solely to activities of the organization that generate unrelated business taxable income subject to taxation under § 511(a) of the Internal Revenue Code of 1986.”¹²⁴ DEA also exempts any employee employed in agriculture or in the domestic service of any person or employed by his or her parents, spouse, or child; these exemptions are not explicitly contained in ENDA.¹²⁵

iv. Required Procedures

Under both ENDA and DEA, aggrieved employees must exhaust administrative remedies before filing a civil action.¹²⁶ An employee must file an administrative

¹²⁰ DEL. CODE ANN. tit. 19 § 710 *et seq.* (2009).

¹²¹ DEL. CODE ANN. tit. 19 § 710(18) (emphasis added).

¹²² DEL. CODE ANN. tit. 19 § 710(6).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ DEL. CODE ANN. tit. 19 § 710(5).

¹²⁶ DEL. CODE ANN. tit. 19 § 712(c)(1).

complaint under DEA within 120 days of the alleged unlawful practice; ENDA's statute of limitations for filing an administrative complaint is 180 days.¹²⁷

v. Remedies

Under DEA, the administrative agency is not entitled to award damages or injunctive relief and may only force the employer to engage in conciliation.¹²⁸ An aggrieved employee who files a civil action under the Delaware statute is entitled to the same relief available under ENDA, including compensatory and punitive damages, injunctive relief, and attorney's fees.¹²⁹ Compensatory and punitive damages available under ENDA and DEA are subject to the caps and other limitations imposed by Title VII.

vi. Implementation

The Delaware Department of Labor ("the Department") has the power to receive, investigate, and conciliate complaints of unlawful employment practices.¹³⁰ The Department is also vested with the power to commence civil actions in a superior court for violations of the anti-discrimination provisions.¹³¹ Additionally, any time the Attorney General has reasonable cause to believe that a violation of the anti-discrimination law has occurred, it too may, on its own initiative, file an action in the Delaware Court of Chancery against the offending entity.¹³²

The DEA amendment extending protection for sexual orientation in employment was passed on July 2, 2009.¹³³ Because passage was so recent, data on complaints filed were not collected. It appears likely that the Department would not have released copies

¹²⁷ *Id.*

¹²⁸ DEL. CODE ANN. tit. 19 § 712(c)(3).

¹²⁹ DEL. CODE ANN. tit. 19 § 715.

¹³⁰ DEL. CODE ANN. tit. 19 § 712.

¹³¹ DEL. CODE ANN. tit. 19 § 712(a)(3).

¹³² DEL. CODE ANN. tit. 19 § 713(a).

¹³³ S.B. 122, 145th Gen. Assem., Reg. Sess. (Del. 2009) (enacted).

of the actual complaints because the statute requires that the Department not make public the charge of discrimination except to parties, counsel, or witnesses.¹³⁴

5. Hawaii

i. Summary

Hawaii's Employment Practices Act ("HEPA") and ENDA are similar in remedies and in scope, except that HEPA applies to small employers that would not be subject to ENDA, and Hawaii's religious exemption may be construed more narrowly than ENDA's exemption. However, ENDA protects employees who would not be covered under HEPA because it prohibits discrimination based on gender identity in addition to sexual orientation, while HEPA does not.

ii. Definitions

Both ENDA and HEPA define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality."¹³⁵ ENDA prohibits discrimination based on gender identity as well as an employee's perceived sexual orientation, while HEPA does not.

iii. Scope of Coverage

HEPA applies to state and local government employers and private employers.¹³⁶ HEPA applies to employers regardless of the number of employees, while ENDA applies only to employers of fifteen or more employees.¹³⁷ The religious exemption contained in HEPA is arguably more restrictive than that contained in ENDA. While ENDA's definition of religious organization is broad and does not differentiate with respect to the nature of the work an employee does for the organization, Hawaii's exemption does not

¹³⁴ DEL. CODE ANN. tit. 19 § 712(c)(4).

¹³⁵ HAW. REV. STAT. § 378-1 (1991).

¹³⁶ *Id.*

¹³⁷ *Id.*

prohibit “any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised, or controlled by or in connection with a religious organization, from...making a selection calculated to promote the religious principles for which the organization is established or maintained.”¹³⁸ Though it is not clear which employment selections are “calculated to promote the religious principles” of an organization, it is possible that not every employee of the religious organization would fall into this definition. Also, HEPA excludes “services by an individual employed as a domestic in the home of any person” from its definition of “employment.”¹³⁹ ENDA does not explicitly contain a similar exclusion.

iv. Required Procedures

Under both ENDA and HEPA, aggrieved employees are required to exhaust their administrative remedies before filing a civil action.¹⁴⁰ HEPA and ENDA both require that an administrative complaint be filed within 180 days of the alleged unlawful practice.¹⁴¹

v. Remedies

ENDA and HEPA authorize almost identical remedies—including back pay, compensatory damages, punitive damages (but not for employees of the State or United States under ENDA), attorney’s fees, and equitable relief.¹⁴² However, HEPA has no statutory cap on compensatory damages or punitive damages, while ENDA imposes the

¹³⁸ HAW. REV. STAT. § 378-3(5).

¹³⁹ HAW. REV. STAT. § 378-1.

¹⁴⁰ HAW. REV. STAT. § 378-4.

¹⁴¹ HAW. REV. STAT. § 368-11.

¹⁴² HAW. REV. STAT. §§ 378-5; 368-178.

same caps as Title VII for these damages, and the administrative agency and the court may award identical remedies under HEPA.¹⁴³

vi. Implementation

The Civil Rights Commission (“the Commission”) has the power to receive, investigate, and conciliate complaints alleging an unlawful discriminatory practice.¹⁴⁴ The Commission is also empowered to hold hearings to resolve employment discrimination charges and may commence a civil action in a circuit court to seek relief on behalf of a complainant or to enforce any commission order, conciliation agreement, or predetermination settlement.¹⁴⁵ Additionally, the Commission may intervene in a civil action brought by a complainant who had been issued a Right to Sue by the Commission if the case is of general importance.¹⁴⁶

The Commission would not release to the Williams Institute any data on complaints filed, citing the confidentiality provision in HEPA.¹⁴⁷

6. Illinois

i. Summary

The Illinois Human Rights Act (“IHRA”) provides fewer remedies than ENDA, but provides protection for some public sector employees who would not be covered by ENDA and has an arguably narrower religious exemption.

ii. Definitions

Both ENDA and IHRA prohibit discrimination based on actual and perceived “sexual orientation” defined as “heterosexuality, homosexuality, or bisexuality.”¹⁴⁸ Both

¹⁴³ *Id.*

¹⁴⁴ HAW. REV. STAT. § 368-3(1).

¹⁴⁵ HAW. REV. STAT. § 368-3(2),(3).

¹⁴⁶ HAW. REV. STAT. § 368-12.

¹⁴⁷ HAW. REV. STAT. § 368-4.

also protect employees from discrimination based on gender identity.¹⁴⁹ IHRA covers “gender related identity, whether or not traditionally associated with the person’s designated sex at birth,” while ENDA defines “gender identity” as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”¹⁵⁰

iii. Scope of Coverage

IHRA applies to state and local government employers and private employers.¹⁵¹ IHRA only applies to private sector employers that employ 15 or more people, which is the same employer size requirement imposed by ENDA.¹⁵² However, while the 15-employee restriction applies to both public and private employers under ENDA, there is no employee minimum for application of the IHRA in the public sector.¹⁵³ The religious organization exemption under IHRA allows religious employers to limit hiring to individuals of a particular religion “to perform work connected with the carrying on by [a religious organization].”¹⁵⁴ This limitation is similar to that contained in Title VII.¹⁵⁵ Though the effect of the importation of Title VII language into ENDA is unclear, it was likely intended that only the definition of “religious organization” from Title VII carry over into ENDA. Thus, if ENDA excludes any qualifying religious employer from ENDA but IHRA really only allows discrimination based on religious faith, the IHRA is much narrower than ENDA. Furthermore, as discussed in the Connecticut statute analysis above, it is unclear what type of work performed in a religious institution would

¹⁴⁸ 775 ILCS 5/1-102(O-1) (2007).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 775 ILCS 5/1-101(B)(1)(a).

¹⁵² *Id.*

¹⁵³ 775 ILCS 5/1-101(B)(1)(c).

¹⁵⁴ 775 ILCS 5/2-101(B)(2).

¹⁵⁵ 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2).

not be considered to be “connected with the carrying on,” and whether this language might act to exempt religious organizations as far as employing people in some positions, but not others. This would make ILCS’s statute even narrower than if only the “particular religion” clause were included. IHRA also excludes from its definition of “employee” 1.) domestic servants in private homes; 2.) elected public officials or members of their immediate personal staffs; 3.) principal administrative officers of the State or any political subdivision, municipal corporation or other governmental unit or agency; 4.) a person in a vocational rehabilitation facility certified under federal law who has been designated as an evaluatee, trainee, or work activity client.¹⁵⁶ ENDA also provides a similar exclusion for elected public officials, etc., but not expressly for domestic servants.

iv. Required Procedures

Under both IHRA and ENDA, aggrieved employees must exhaust their administrative remedies before filing a civil action.¹⁵⁷ Both IHRA and ENDA require that an administrative complaint be filed within 180 days of the alleged unfair practice.¹⁵⁸

v. Remedies

ENDA and IHRA provide similar remedies including back pay, actual damages, attorney’s fees, and equitable relief.¹⁵⁹ IHRA, however, does not cap any damages while ENDA caps compensatory damages for future pecuniary and non-pecuniary losses at amounts that depend on the size of the employer. While ENDA provides for punitive damages (subject to caps and not available in suits against the United States or a State),

¹⁵⁶ 775 ILCS 5/2-101(A).

¹⁵⁷ 775 ILCS 5/7A-102(A), (A-1).

¹⁵⁸ 775 ILCS 5/7A-102(A-1).

¹⁵⁹ 775 ILCS 5/8A-104.

IHRA authorizes “any other action necessary to make the Complainant whole” but does not explicitly provide for punitive damages.¹⁶⁰ IHRA is silent as to remedies available to an employee bringing a civil suit under the Act and, because the IHRA was recently amended (on January 1, 2008) to permit an employee to bring a civil action for violation of the Act, there is currently no case law identifying remedies available through civil action.

vi. Implementation

The Department of Human Rights (“the Department”) has the power to issue, receive, investigate, conciliate, settle and dismiss charges filed under IHRA.¹⁶¹ The Department may also file complaints with the Illinois Human Rights Commission (“the Commission”) for IHRA violations on its own initiative.¹⁶² The Department may seek judicial intervention to enforce orders of the Commission.¹⁶³

The Department responded to requests from the Williams Institute for complaint data by reporting that it does not create or maintain the sort of information requested.¹⁶⁴ The Department was also unwilling to provide copies of the actual complaints filed.

7. Iowa

i. Summary

The Iowa Civil Rights Act (“ICRA”) protects employees of small employers that would be unprotected under ENDA and offers much, but not all, of the same relief offered by ENDA through both administrative and civil actions.

¹⁶⁰ 775 ILCS 5/7A-104.

¹⁶¹ 775 ILCS 5/7-101(B).

¹⁶² 775 ILCS 5/7-101(D).

¹⁶³ 775 ILCS 5/7-101(E).

¹⁶⁴ Letter from Donyelle L. Gray, Deputy General Counsel, Illinois Human Rights Commission, to Christy Mallory, the Williams Institute (Oct. 30, 2008) (on file with the Williams Institute).

ii. Definitions

ICRA and ENDA define “sexual orientation” as “heterosexuality, homosexuality, or bisexuality” and protect employees from discrimination based on actual or perceived sexual orientation.¹⁶⁵ ICRA and ENDA also prohibit discrimination based on gender identity.¹⁶⁶ ICRA definition of “gender identity,” the “gender-related identity of a person, regardless of the person’s assigned sex at birth,” may be narrower in practice than ENDA’s definition, which explicitly covers “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual’s designated sex at birth.”¹⁶⁷

iii. Scope of Coverage

ICRA applies to state and local government employers and private employers.¹⁶⁸ ICRA, which applies to all employers of four or more employees, reaches small employers that would not have to comply with ENDA which only applies when an employer has fifteen or more employees.¹⁶⁹ Further, while ICRA exempts “any bona fide religious institution or its educational facility, association, corporation, or society,” the exemption is limited to employment decisions based on “religion, sexual orientation, or gender identity when such qualifications are related to a religious purpose.”¹⁷⁰ Without language in ENDA to carve out an exemption only where the employment is related to a “religious purpose,” the exemption in ENDA would likely render employees unprotected who would be protected under ICRA. ICRA also excludes “individuals who work within

¹⁶⁵ IOWA CODE § 216.2(14) (2008).

¹⁶⁶ IOWA CODE § 216.2(10).

¹⁶⁷ *Id.*

¹⁶⁸ IOWA CODE § 216.2(6).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

the home of the employer if the employer or members of the employer's family reside therein during such employment or individuals who render personal service to the person of the employer or members of the employer's family" from the definition of "employee."¹⁷¹ ENDA does not expressly contain a similar exclusion.

iv. Required Procedures

Under both ENDA and ICRA, aggrieved employees must exhaust administrative remedies before filing a civil action.¹⁷² Both ICRA and ENDA require that an administrative complaint be filed within 180 days of the alleged unfair practice.¹⁷³

v. Remedies

Employees are entitled to almost identical relief under ICRA and ENDA.¹⁷⁴ Under ICRA, damages available through an administrative hearing or a civil action include actual damages (not subject to cap), costs and attorney's fees, and equitable relief. Under ENDA, punitive damages are available in addition to all of the relief authorized by ICRA (but not in a suit against the United States or a State), though the sum of compensatory damages and punitive damages is subject to a cap.¹⁷⁵ ICRA also allows a respondent to collect attorney's fees and costs through a civil action if the complainant's action was frivolous.¹⁷⁶

vi. Implementation

The Iowa Civil Rights Commission ("the Commission") has the power to receive, investigate, mediate, and determine the merits of complaints alleging discriminatory

¹⁷¹ *Id.*

¹⁷² IOWA CODE § 216.15(8).

¹⁷³ IOWA CODE § 216.15(12).

¹⁷⁴ IOWA CODE §§ 216.15(8), 216.16(5).

¹⁷⁵ *Id.*

¹⁷⁶ IOWA CODE § 216.16(5).

practices.¹⁷⁷ The Commission may also attempt to eliminate discrimination by conciliation or may hold a hearing to resolve the complaint.¹⁷⁸ The Commission may obtain an order of the court for enforcement if the respondent has not complied with the Commission order.¹⁷⁹

The Commission provided the number of employment discrimination complaints filed between July 1, 2007 and June 30, 2008 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.¹⁸⁰ The Commission did not respond to requests for copies of the actual complaints filed or for dispositions of the cases.

The Commission reported that 22 cases had been filed with the Commission on the basis of sexual orientation or gender identity discrimination in employment from July 1, 2007 through June 30, 2008. Of the six cases filed on the basis of gender identity, four were against private employers, one was against state or local government, and one was against a public school. Of the 16 cases filed on the basis of sexual orientation, 14 were against private employers, one was against state or local government, and one was classified as “other; miscellaneous personal services.”

8. Maine

i. Summary

¹⁷⁷ IOWA CODE § 216.5(2).

¹⁷⁸ IOWA CODE § 216.5(3).

¹⁷⁹ IOWA CODE § 216.17(2).

¹⁸⁰ E-mail from Crystal Schrader, Iowa Civil Rights Commission to Ralph Rosenberg, Iowa Civil Rights Commission, forwarded to Christy Mallory, the Williams Institute (Sept. 12, 2008, 13:59:01 PST) (on file with the Williams Institute).

The Maine Human Rights Act (“MHRA”) offers protection to employees of small employers that would be excluded from protection under ENDA and provides for the same array of remedies available under ENDA.

ii. Definitions

Like ENDA, MHRA includes within its definition of “sexual orientation” “heterosexuality, homosexuality, or bisexuality” and protects employees from discrimination based on either actual or perceived sexual orientation.¹⁸¹ Both ENDA and MHRA prohibit discrimination based on “gender identity.” ENDA separately defines gender identity as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual’s designated sex at birth,” while MHRA includes “gender identity or expression” in its definition of “sexual orientation.”¹⁸² There is a current Citizen Initiative to remove sexual orientation from protection under the MHRA through the Maine Human Rights Referendum (2009).¹⁸³ The measure will appear on the 2010 ballot.¹⁸⁴

iii. Scope of Coverage

MHRA applies to state and local government employers and private employers.¹⁸⁵ MHRA does not restrict its application based on the size of the employer, unlike ENDA, which applies to only employers of 15 or more employees.¹⁸⁶ While perhaps not textually as broad as ENDA’s blanket religious exemption, but likely as broad in practice, the MHRA religious exemption allows “any religious or fraternal corporation or

¹⁸¹ ME. REV. STAT. ANN. tit. 5 § 4553(9-C) (2007).

¹⁸² *Id.*

¹⁸³ <http://www.maine.gov/sos/cec/elec/pets02/pets02-1.htm>.

¹⁸⁴ *Id.*

¹⁸⁵ ME. REV. STAT. ANN. tit. 5 § 4553(4).

¹⁸⁶ ME. REV. STAT. ANN. tit. 5 § 4553(4).

association, not organized for private profit and in fact not conducted for private profit” to restrict employment to “members of the same religion, sect, or fraternity” and also to “require that all applicants and employees conform to the religious tenets of that organization.”¹⁸⁷ MHRA excludes from its definition of “employee” an “individual employed by that individual’s parents, spouse, or child.”¹⁸⁸ ENDA does not expressly include a similar limitation.

iv. Required Procedures

Under both MHRA and ENDA, aggrieved employees are required to exhaust their administrative remedies before filing a civil action.¹⁸⁹ In contrast to the administrative procedure in many states, employees in Maine are not offered the option of proceeding through an administrative hearing to seek relief, but may either obtain a Right to Sue from the administrative agency, or if a conciliation attempt fails, may be awarded relief through court in a civil action brought by the administrative agency on the employee’s behalf.¹⁹⁰ The MHRA requires an aggrieved employee to file an administrative complaint within six months of the unlawful practice; approximately the same as ENDA’s 180-day statute of limitations.¹⁹¹

v. Remedies

The remedies available through a civil action under the MHRA are the same as those offered by ENDA including actual damages, punitive damages (though not available in suits against the State or United States under ENDA), attorney’s fees and

¹⁸⁷ *Id.*

¹⁸⁸ ME. REV. STAT. ANN. tit. 5 § 4553(3).

¹⁸⁹ ME. REV. STAT. ANN. tit. 5 §§ 4611, 4622.

¹⁹⁰ ME. REV. STAT. ANN. tit. 5 § 4613(2).

¹⁹¹ ME. REV. STAT. ANN. tit. 5 § 4611.

costs, and equitable relief.¹⁹² Like ENDA, MHRA caps the sum amount available for compensatory future pecuniary and non-pecuniary losses and punitive damages.¹⁹³ The MHRA caps are as follows: for employers of 14-100 employees, a cap of \$50,000; for employers of 101-200 employees, a cap of \$100,000; for employers of 201-500 employees, a cap of \$300,000; and for employers of more than 500 employees, a cap of \$500,000.¹⁹⁴ It is unclear under the MHRA whether employees of employers of fewer than 14 people are entitled to recover compensatory and/or punitive damages.¹⁹⁵

vi. Implementation

The Maine Human Rights Commission (“the Commission”) has the power to investigate all forms of invidious discrimination, attempt to eliminate discriminatory practices by conciliation, and to hold hearings to resolve complaints of employment discrimination.¹⁹⁶ Additionally, if conciliation is unsuccessful, the Commission may file a civil action in the superior court on behalf of the complainant.¹⁹⁷

The Commission provided the number of employment discrimination complaints filed in 2006 and 2007 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.¹⁹⁸ The MHRA did not provide copies of the actual complaints or a record of the dispositions of the cases.

Because the Commission coded all sexual orientation and gender identity complaints as “sexual orientation” complaints, the numbers reported represent all such complaints filed. In 2006, two complaints were filed against the State, three complaints

¹⁹² ME. REV. STAT. ANN. tit. 5 § 4613(2).

¹⁹³ ME. REV. STAT. ANN. tit. 5 § 4613(2)(b).

¹⁹⁴ *Id.*

¹⁹⁵ *See id.*

¹⁹⁶ ME. REV. STAT. ANN. tit. 5 §§ 4566, 4612.

¹⁹⁷ ME. REV. STAT. ANN. tit. 5 § 4612(4)(A).

¹⁹⁸ Letter from Charil Mairs, Case Controller, Maine Human Rights Commission, to Christy Mallory, the Williams Institute (Oct. 15, 2008) (on file with the Williams Institute).

were filed against public sector employers other than the State, and 10 complaints were filed against private sector employers. In 2007, two complaints were filed against the State, three complaints were filed against public sector employers other than the State, and 13 complaints were filed against private sector employers.

9. Maryland

i. Summary

Maryland's anti-discrimination law is similar to ENDA in its definition of "sexual orientation" and its employer size limitation. However, unlike under ENDA, it does not provide for attorney's fees to a successful claimant. In addition, the state law does not protect against gender identity discrimination. Maryland's religious organization exemption might be more narrowly construed than ENDA's.

ii. Definitions

Maryland's anti-discrimination law defines "sexual orientation" as "the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality."¹⁹⁹ While ENDA describes sexual orientation similarly, it also expressly prohibits discrimination based on perceived sexual orientation, which the Maryland statute does not (though it is possible that perceived sexual orientation is covered by "identification"). ENDA also prohibits discrimination based on gender identity while Maryland's statute does not.

iii. Scope of Coverage

Maryland's anti-discrimination provisions apply to state and local government employers and private employers.²⁰⁰ Both ENDA and Maryland's statute apply only to

¹⁹⁹ MD. ANN. CODE art. 49B § 15(j) (2008).

²⁰⁰ MD. ANN. CODE art. 49B § 15(b).

employers of 15 or more employees.²⁰¹ Maryland’s religious organization exemption, which is likely narrower than ENDA’s, covers any “religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work with the carrying on by such [organization].”²⁰² ENDA’s religious exemption applies to religious institutions rather than particular activities. Further, ENDA and Maryland’s statute also both exempt any tax-exempt “bona fide private membership club” from coverage.²⁰³

iv. Required Procedure

Under both ENDA and Maryland’s anti-discrimination statute, an aggrieved employee must first exhaust administrative remedies before filing a civil action.²⁰⁴ The statute of limitations for filing an administrative complaint under Maryland’s anti-discrimination statute and ENDA is approximately the same, six months and 180 days, respectively.²⁰⁵

v. Remedies

The remedies available under Maryland’s statute are similar to those available under ENDA, except that attorney’s fees are not available under the Maryland statute. Through an administrative hearing under Maryland’s statute, a successful complainant may be awarded back pay, compensatory damages, and equitable relief.²⁰⁶ Compensatory damages for future pecuniary losses and non-pecuniary losses are subject to the same caps as imposed by ENDA.²⁰⁷ In a civil action under Maryland’s statute, a

²⁰¹ *Id.*

²⁰² MD. ANN. CODE art. 49B § 18(2).

²⁰³ MD. ANN. CODE art. 49B § 15(b), (e).

²⁰⁴ MD. ANN. CODE art. 49B § 9A(a).

²⁰⁵ *Id.*

²⁰⁶ MD. ANN. CODE art. 49B § 11.

²⁰⁷ *Id.*

successful employee is entitled to punitive damages in addition to the relief available through an administrative hearing, however, as under ENDA, the same caps as stated above apply to the sum of punitive damages and compensatory damages for future pecuniary and non-pecuniary losses.²⁰⁸ Maryland's statute, like ENDA, also provides for attorneys fees and costs.²⁰⁹

vi. Implementation

The Maryland Human Relations Commission ("the Commission") has the power to receive and investigate claims of discriminatory practices and may endeavor to eliminate discrimination through conciliation.²¹⁰ Whenever the Commission has received reliable information from any individual or individuals that any person has been engaged in any discriminatory practice it may, on its own motion, issue a complaint.²¹¹ If conciliation fails, the Commission has the power to require the respondent to answer the charges at a hearing.²¹² Further, if conciliation fails, the complainant, the respondent, or the Commission itself may elect to have the claims asserted in the complaint determined in a civil action.²¹³ If a respondent refuses to comply with an order of the Commission, the Commission may institute litigation to seek judicial enforcement of the order.²¹⁴

The Commission advised the Williams Institute to send a written request for information about discrimination complaints to the Executive Director of the Maryland

²⁰⁸ *Id.*

²⁰⁹ MD. ANN. CODE art. 49B § 11D.

²¹⁰ MD. ANN. CODE art. 49B §§ 9A, 10, 11A.

²¹¹ MD. ANN. CODE art. 49B §§ 9A(b), 10(a).

²¹² MD. ANN. CODE art. 49B § 11(a).

²¹³ MD. ANN. CODE art. 49B § 11A(a)(1), (b).

²¹⁴ MD. ANN. CODE art. 49B § 12(a).

Commission on Human Rights, Mr. Henry B. Ford.²¹⁵ The information was not provided in response to the written request.

10. Massachusetts

i. Summary

Massachusetts's Fair Employment Practices Law ("FEPL") offers protection to employees of small employers that would not be protected under ENDA and offers similar, but possibly less extensive, relief to ENDA. ENDA explicitly prohibits discrimination based on gender identity, while FEPL does not.

ii. Definitions

Both ENDA and FEPL prohibit discrimination based on actual or perceived "sexual orientation" defined in both acts as "heterosexuality, homosexuality, or bisexuality."²¹⁶ FEPL does not explicitly prohibit discrimination based on gender identity, although courts in Massachusetts have held that transgender individuals can pursue a claim for sex or disability discrimination in violation of FEPL.²¹⁷ ENDA explicitly protects against gender identity discrimination.

iii. Scope of Coverage

FEPL applies to state and local government employers and private employers.²¹⁸ FEPL applies to employers of six or more employees, while ENDA only covers employers of 15 or more employees.²¹⁹ Further, ENDA's blanket religious organization exemption is likely broader than that contained in FEPL, which exempts "religious

²¹⁵ Letter from Christy Mallory, the Williams Institute, to Henry B. Ford, Executive Director, Maryland Commission on Human Rights (Oct. 14, 2009) (copy on file with the Williams Institute).

²¹⁶ MASS. GEN. LAWS ch. 151B, § 3(6) (2008).

²¹⁷ *Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412 (Mass. Super. 2002); *Doe v. Yuntis*, 15 Mass. L. Rptr. 278 (Mass. Super. 2001); *Jette v. Honey Farms Mini Market*, 2001 Mass. Comm. Discrim. LEXIS 50 (Mass. Comm'n Against Discrimination 2001).

²¹⁸ MASS. GEN. LAWS ch. 151B, § 1(5).

²¹⁹ *Id.*

organizations,” defined as “any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated or controlled in connection with a religious organization, and which limits membership, enrollment, admission or participation to members of that religion,” so long as the employment action is “calculated by such organization to promote the religious principles for which it is established or maintained.”²²⁰ FEPL, unlike ENDA, explicitly excludes from its definition of “employee” “any individual employed by his parents, spouse or child or in the domestic service of any person.”²²¹ Like ENDA, FEPL does not cover “a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit.”²²²

iv. Required Procedures

Under both ENDA and FEPL an aggrieved employee must exhaust administrative remedies before filing a civil action.²²³ FEPL requires that an aggrieved employee file an administrative complaint within 300 days of the alleged unlawful practice; ENDA’s statute of limitations is shorter at 180 days.²²⁴

v. Remedies

Damages authorized under FEPL are similar to those available under ENDA. Remedies available through an administrative hearing under the FEPL are limited to back pay, attorney’s fees and costs, and equitable relief.²²⁵ The court, however, may award actual damages or punitive-like damages in addition to the relief available through the

²²⁰ *Id.*

²²¹ MASS. GEN. LAWS ch. 151B, § 1(6).

²²² MASS. GEN. LAWS ch. 151B, § 1(5).

²²³ MASS. GEN. LAWS ch. 151B, § 5.

²²⁴ *Id.*

²²⁵ *Id.*

administrative agency.²²⁶ While ENDA provides for future pecuniary and non-pecuniary damages and punitive damages (though not available in suits against the United States or a State) subject to caps depending on employer size, under FELP the court can award the amount of actual damages or “up to three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the anti-discrimination provisions” (ENDA’s standard for punitive damages is malice or reckless indifference).²²⁷ In addition to such damages, the court may award the relief available through the administrative agency.²²⁸

vi. Implementation

The Massachusetts Commission Against Discrimination (“the Commission”) has the power to receive, investigate, and pass upon complaints of unlawful practices in violation of FEPL.²²⁹ If, after a finding of probable cause, either the complainant or respondent elects to have the matter determined in court rather than by administrative hearing, the Commission is to notify the Attorney General who shall then commence the action on behalf of the complainant.²³⁰ If the case is instead handled administratively, the Commission has the power to seek conciliation, and if it fails, to hold hearing.²³¹ The Commission may, on its own initiative, obtain a court order for enforcement where there has not been compliance with an order of the Commission.²³²

²²⁶ MASS. GEN. LAWS ch. 151B, § 9.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ MASS. GEN. LAWS ch. 151B, § 3(6).

²³⁰ MASS. GEN. LAWS ch. 151B, § 5.

²³¹ *Id.*

²³² MASS. GEN. LAWS ch. 151B, § 6.

The Commission did not respond to the Williams Institute's written request for data pertaining to employment discrimination complaints filed on the basis of sexual orientation.²³³

11. Minnesota

i. Summary

The Minnesota Human Rights Act (“MHRA”) protects employees that would be unprotected by ENDA based on its employer size restriction, but does not cover employees of youth organizations that may be covered under ENDA. Similar damages are available under MHRA and ENDA, although the caps imposed by MHRA are more restrictive than those imposed by ENDA.

ii. Definitions

MHRA defines “sexual orientation” as “having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.”²³⁴ This definition is likely intended to extend protection for gender identity.²³⁵ ENDA also prohibits discrimination on the basis of gender identity defining “gender identity” as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual’s designated sex at birth.”

iii. Scope of Coverage

²³³ Letter from Christy Mallory, the Williams Institute, to Keith Healy, the Massachusetts Commission Against Discrimination (Mar. 26, 2009) (copy on file with the Williams Institute).

²³⁴ MINN. STAT. § 363A.03 subd. 44 (2008).

²³⁵ *Id.*

MHRA applies to state and local government employers and private employers.²³⁶ MHRA applies to all employers regardless of number of employees, while ENDA applies only to employers of 15 or more employees.²³⁷ MHRA's religious organization exemption, which applies to any "religious or fraternal corporation, association, or society", is likely more restrictive than ENDA's blanket exemption because it only applies "when religion or sexual orientation shall be a BFOQ for employment."²³⁸ While ENDA, along with several states, excludes "bona fide private membership clubs" from the definition of employer, MHRA expressly exempts "any non-public service organization whose primary function is providing occasional services to minors, such as youth sports organizations, scouting organizations, boys' or girls' clubs, programs providing friends, counselors, or role models for minors, youth theater, dance, music or artistic organizations, agricultural organizations for minors, including 4-H clubs, and other youth organizations, with respect to qualifications of employees or volunteers based on sexual orientation."²³⁹ MHRA, but not ENDA, further excludes from its definition of "employee" "any individual employed by the individual's parent, grandparent, spouse, child, or grandchild or any individual in the domestic service of any person."²⁴⁰

iv. Required Procedures

Unlike ENDA, MHRA does not require an aggrieved employee to exhaust administrative remedies before bringing a civil action; an employee may file a complaint directly in court.²⁴¹ The MHRA requires that a civil action be commenced or an

²³⁶ MINN. STAT. § 363A.03A subd. 16.

²³⁷ *Id.*

²³⁸ MINN. STAT. § 363A.20 subd. 2.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ MINN. STAT. § 363A.33 subd. 1.

administrative complaint filed within one year of the alleged unlawful practice.²⁴² Under ENDA, the aggrieved employee must file an administrative complaint within 180 days of the alleged unlawful practice.

v. Remedies

Remedies available under MHRA are similar to the remedies available under ENDA, but the caps on monetary damages under MHRA are much more restrictive than under ENDA. A successful complainant in an administrative hearing under the MHRA is entitled to back pay, compensatory damages, damages for mental anguish and suffering, punitive damages, attorney's fees, and equitable relief.²⁴³ However, compensatory damages awarded cannot exceed three times the amount of actual damages sustained and punitive damages are capped at \$8,500.²⁴⁴ Under ENDA, an employee may not recover punitive damages in a suit against a State or the United States. The MHRA allows punitive damages to be assessed against a political subdivision, although however, no member of a governing body may be held personally liable for punitive damages.²⁴⁵ A successful plaintiff in a civil action under MHRA is entitled to the same relief that is available through the administrative agency.²⁴⁶

vi. Implementation

The Department of Human Rights ("the Department") has the power to issue complaints, receive and investigate charges alleging unfair discriminatory practices, and determine whether or not probable cause exists for a hearing.²⁴⁷ The Department may

²⁴² MINN. STAT. § 363A.28 subd. 3.

²⁴³ MINN. STAT. § 363A.25 subds. 4, 5.

²⁴⁴ *Id.*

²⁴⁵ MINN. STAT. § 363A.29 subd. 4(b).

²⁴⁶ MINN. STAT. § 363A.33 subd. 6.

²⁴⁷ MINN. STAT. § 363A.06 subd. 8.

attempt by means of conciliation to eliminate unfair discriminatory practices and, if conciliation fails, may attempt to resolve the complaint through an administrative hearing.²⁴⁸ The Department, on its own initiative, may bring a civil action seeking redress for an unfair discriminatory practice in a district court.²⁴⁹ Further, when a respondent fails or refuses to comply with a final decision of the Department, the commissioner may obtain judicial enforcement of the order.²⁵⁰

The Department provided data on employment discrimination complaints filed from 1999 through 2007 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.²⁵¹ Because both sexual orientation complaints and gender identity complaints are coded by the Department as “sexual orientation,” the numbers reported encompass complaints on both bases.

The Department reported a total of 244 complaints on the basis of sexual orientation or gender identity from 1999 – 2007. In 1999, two complaints were filed against the State, two were filed against public sector employers other than the State, and 28 were filed against private sector employers. In 2000, one complaint was filed against the State, four were filed against public sector employers other than the State, and 19 were filed against private sector employers. In 2001, no complaints were filed against the State, two were filed against public sector employers other than the State, and 29 were filed against private sector employers. In 2002, one complaint was filed against the State, three were filed against public sector employers other than the State, and 29 were filed against private sector employers. In 2003, three complaints were filed against the State,

²⁴⁸ MINN. STAT. §§ 363A.06 subd. 10, 363A.29 subd.1.

²⁴⁹ MINN. STAT. § 363A.33 subd. 1.

²⁵⁰ MINN. STAT. § 363A.30 subd. 3.

²⁵¹ E-mail from Jeff Holman, Minnesota Department of Human Rights, to Christy Mallory, the Williams Institute (Oct. 30, 2008 12:31:17 PST) (on file with the Williams Institute).

five were filed against public sector employers other than the State, and 19 were filed against private sector employers. In 2005, no complaints were filed against the State, four were filed against public sector employers other than the State, and 23 were filed against private sector employers. In 2006, no complaints were filed against the State or other public sector employer and 27 were filed against private sector employers. In 2007, one complaint was filed against the State, one was filed against a public sector employer other than the State, and 19 were filed against private sector employers.

Despite the fact that the statute makes public those portions of closed cases that do not contain identifying data on a person other than the complainant or respondent, the Department did not respond to requests for the actual complaints or a record of the dispositions of those cases.²⁵²

12. Nevada

i. Summary

Nevada's anti-discrimination statute is more limited in scope and remedies than ENDA. It lacks gender identity protection, and provides far more limited remedies than ENDA. However, Nevada has a more limited religious exemption. Nevada's restricted administrative procedure differs from most states and that required by ENDA.

ii. Definitions

Both ENDA and Nevada's anti-employment discrimination statutes prohibit discrimination based on actual and perceived sexual orientation, and both define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality."²⁵³ ENDA also prohibits

²⁵² MINN. STAT. § 363A.35 subd. 3.

²⁵³ NEV. REV. STAT. § 613.310(6) (2008).

discrimination based on gender identity, while Nevada’s anti-discrimination statute does not.

iii. Scope of Coverage

Nevada’s anti-discrimination statutes apply to state and local government employers and private employers.²⁵⁴ Both ENDA and the Nevada statutes apply only to employers of 15 or more employees, and both exclude from the definition of “employer” “any tax-exempt bona fide private membership clubs.”²⁵⁵ Nevada’s statute exempts “any religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of religious activities.”²⁵⁶ This exemption, which appears to allow only discrimination based on certain religious beliefs, is narrower than ENDA’s blanket exemption for religious organizations.

iv. Required Procedure

Under ENDA and Nevada’s anti-discrimination statutes, an aggrieved employee must exhaust administrative remedies.²⁵⁷ Unlike many states and ENDA, which allow a complainant to elect to proceed through the administrative body or to seek a Right to Sue (subject to certain procedural restrictions) in order to file a complaint in court, complainants in Nevada must proceed through the administrative process and can only seek judicial review through appeal of a final order issued by the administrative agency.²⁵⁸ Both ENDA and Nevada’s anti-discrimination statutes require that an

²⁵⁴ NEV. REV. STAT. § 613.310(2).

²⁵⁵ NEV. REV. STAT. §§ 613.310(2), 613.320(1)(c).

²⁵⁶ NEV. REV. STAT. § 613.320(1)(b).

²⁵⁷ NEV. REV. STAT. § 613.405.

²⁵⁸ NEV. REV. STAT. §§ 613.405, 223.170(2), 613.420.

aggrieved employee subject to the administrative filing requirement file a complaint within 180 days of the alleged unlawful practice.²⁵⁹

v. Remedies

The relief available under Nevada’s statutes is much more limited than that available under ENDA, including only “restoration of rights including, but not limited to, rehiring, back pay, annual leave time, sick leave time or pay, other fringe benefits or seniority, with interest.”²⁶⁰ If a complainant seeks judicial review of a final order of the administrative agency, the court may “restor[e] rights to which complainant is entitled,” which presumably authorizes no more relief than that available through the administrative agency.²⁶¹

vi. Implementation

The Nevada Equal Rights Commission (“the Commission”) has the power to accept complaints of and investigate practices of discrimination and may conduct hearings and mediations with regard thereto.²⁶² If the respondent fails to comply with a final order of the Commission, the Commission may obtain judicial enforcement of the order on its own initiative.²⁶³

The Commission provided the number of employment discrimination complaints filed from 1999 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.²⁶⁴ The Commission was unable to break down public sector complaints into those filed against the State and those filed against other public sector

²⁵⁹ NEV. REV. STAT. § 613.430.

²⁶⁰ NEV. REV. STAT. § 233.170(3)(b).

²⁶¹ NEV. REV. STAT. § 613.420.

²⁶² NEV. REV. STAT. §§ 233.150(1)(b), (c); 233.157.

²⁶³ NEV. REV. STAT. § 233.170(4).

²⁶⁴ E-mail from Maureen Cole, Deputy Administrator, Nevada Equal Rights Commission, to Christy Mallory, the Williams Institute (Oct. 8, 2008 11:42:44) (on file with the Williams Institute).

employers. The Commission was unable to release copies of the actual complaints filed or a record of the case dispositions because the Commission's records are not public until and unless a case goes to public hearing or to state or federal court. The Nevada Equal Rights Commission Deputy Administrator in contact with the Williams Institute reported that she was not aware of any sexual orientation cases that had gone to a public hearing; the Commission does not track cases that are subsequently filed in state or federal court.²⁶⁵

The Commission reported a total of 267 employment discrimination complaints filed from 1999 through 2007 on the basis of sexual orientation. In 1999, the year protection for sexual orientation was added to the anti-discrimination statutes, no complaints were filed. In 2000, two complaints were filed against public sector employers and 15 complaints were filed against private sector employers. In 2001, four complaints were filed against public sector employers and 40 complaints were filed against private sector employers. In 2002, three complaints were filed against public sector employers and 36 complaints were filed against private sector employers. In 2003, three complaints were filed against public sector employers and 43 complaints were filed against private sector employers. In 2004, three complaints were filed against public sector employers and 39 complaints were filed against private sector employers. In 2005, three complaints were filed against public sector employers and 23 complaints were filed against private sector employers. In 2005, three complaints were filed against public sector employers and 23 complaints were filed against private sector employers. In 2006, three complaints were filed against public sector employers and 19 complaints were filed

²⁶⁵ E-mail from Maureen Cole, Deputy Administrator, Nevada Equal Rights Commission, to Christy Mallory, the Williams Institute (Oct. 8, 2008 12:44:08) (on file with the Williams Institute).

against private sector employers. In 2007, five complaints were filed against public sector employers and 25 complaints were filed against private sector employers.

13. New Hampshire

i. Summary

Though New Hampshire's anti-discrimination statutes defines key terms similarly to ENDA, it covers smaller employers. However, the remedies available under New Hampshire statutes are more limited than those available under ENDA, and ENDA expressly prohibits discrimination based on gender identity while New Hampshire's statutes do not.

ii. Definitions

New Hampshire's anti-discriminations statutes and ENDA define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality," and both prohibit discrimination on the basis of either actual or perceived sexual orientation.²⁶⁶ ENDA also expressly prohibits discrimination based on gender identity, while New Hampshire's anti-discrimination statutes do not.

iii. Scope of Coverage

New Hampshire's anti-discrimination statutes apply to state and local government employers and private employers.²⁶⁷ New Hampshire's anti-discrimination statutes apply to employers of six or more employees, while ENDA applies to employers of 15 or more employees.²⁶⁸ New Hampshire's statutes, like ENDA, provide a broad religious organization exemption, excluding "any fraternal or religious association or corporation, if such association or corporation is not organized for private profit," and, also like

²⁶⁶ N.H. REV. STAT. Ann. § 354-A:2(XIV-c) (2008).

²⁶⁷ N.H. REV. STAT. Ann. § 354-A:2(VII).

²⁶⁸ N.H. REV. STAT. Ann. § 354-A:2(VII).

ENDA, exempt “any exclusively social club if such club is not organized for private profit.”²⁶⁹ New Hampshire’s statutes also do not cover “any individual employed by a parent, spouse or child, or any individual in the domestic service of any person.”²⁷⁰

iv. Required Procedures

Under both New Hampshire’s anti-discrimination statutes and ENDA, an aggrieved employee must exhaust administrative remedies before filing in court.²⁷¹ Under both New Hampshire’s anti-discrimination statutes and ENDA, an aggrieved employee must file an administrative complaint within 180 days of the unlawful practice.²⁷²

v. Remedies

If a complainant is successful at an administrative hearing under New Hampshire’s statute, the agency may award back pay, compensatory damages, and equitable relief.²⁷³ If the complainant instead proceeds through a civil action, the court may award the same relief available through the administrative agency, except that, in lieu of an administrative fine, the court may award enhanced compensatory damages to the plaintiff if the “defendant’s conduct was taken with willful or reckless disregard for the plaintiff’s rights” (basically the same as ENDA’s punitive damages standard).²⁷⁴

vi. Implementation

The State Commission for Human Rights (“the Commission”) has the power to receive, investigate, and pass upon complaints alleging discriminatory employment

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ N.H. REV. STAT. ANN. §§ 354-A:21(I)(a), 354-A:21-a(I).

²⁷² N.H. REV. STAT. ANN. §354-A:21(III).

²⁷³ N.H. REV. STAT. ANN. § 354-A:21(d).

²⁷⁴ N.H. REV. STAT. ANN. § 354-A:21-a(I).

practices.²⁷⁵ The Commission may attempt conciliation and hold hearings to resolve claims.²⁷⁶ The Commission may, by its own initiative, obtain a judicial order for enforcement where a party has not complied with an order of the Commission.²⁷⁷

The Commission did not respond to requests made by the Williams Institute for data on filed employment discrimination complaints.

14. New Jersey

i. Summary

New Jersey’s Law Against Discrimination (“LAD”) is broader in scope than ENDA and many other state laws. Further, LAD offers remedies which could, in certain circumstances, exceed those available under ENDA.

ii. Definitions

LAD’s definition of “sexual orientation” is similar to that of ENDA, but may cover employees who would be excluded under ENDA. LAD includes within its definition of sexual orientation “affectional” orientation and prohibits discrimination based not only on actual or perceived “heterosexuality, homosexuality, or bisexuality” (like ENDA) but also explicitly on “having a history of [heterosexuality, homosexuality, or bisexuality]” and on one’s domestic partnership status.²⁷⁸ Both ENDA and LAD expressly prohibit discrimination based on “gender identity,” defined in ENDA as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual’s designated sex at birth” and in

²⁷⁵ N.H. REV. STAT. Ann. § 354-A:5(VI).

²⁷⁶ N.H. REV. STAT. Ann. § 354-A:5(VII), (VIII).

²⁷⁷ N.H. REV. STAT. Ann. § 354-A:22(I).

²⁷⁸ N.J. STAT. § 10:5-5(hh) (2008).

LAD as “having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person’s assigned sex at birth.”²⁷⁹

iii. Scope of Coverage

LAD applies to state and local government employers and private employers.²⁸⁰ LAD, unlike ENDA, which applies only to employers of 15 or more employees, has no applicability restriction based on employer size.²⁸¹ Additionally, LAD’s religious organization exemption is narrower than ENDA’s. LAD exempts “any religious association or organization utilizing religious affiliation in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee” whereas ENDA provides a blanket exemption for “religious organizations.”²⁸² LAD also excludes “any individual employed in the domestic service of any person” from its definition of “employee.”²⁸³

iv. Required Procedure

Unlike under ENDA and most other state statutes, LAD does not require an aggrieved employee to exhaust administrative remedies before filing a civil action.²⁸⁴ LAD and ENDA both require that an employee who chooses to or must file an administrative complaint, do so within 180 days of the alleged unlawful practice.²⁸⁵

v. Remedies

²⁷⁹ N.J. STAT. § 10:5-5(rr).

²⁸⁰ N.J. STAT. § 10:5-12(11)(a).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ N.J. STAT. § 10:5-13.

²⁸⁵ N.J. STAT. § 10:5-18.

A complainant who files a claim with the administrative agency and proceeds through an administrative hearing under LAD may be awarded back pay, equitable relief, attorney's fees and costs, and damages for emotional distress to the same extent they are available in common law tort actions.²⁸⁶ A complainant who files a complaint in court may be awarded all common law tort remedies (which presumably include punitive damages, which also can be available under ENDA) in addition to all remedies which are available through the administrative agency.²⁸⁷

vi. Implementation

The Division of Civil Rights ("the Division") has the power to conduct investigations, receive complaints and conduct hearings thereon for unlawful discriminatory practices.²⁸⁸ The Commissioner of Labor and the Attorney General are both vested with the power to make and file a complaint when it believes a discriminatory practice has taken place.²⁸⁹ If an order of the Division has not been complied with, the Attorney General or the director of the Division may seek judicial enforcement of the order on its own initiative.²⁹⁰

The Division provided data on employment discrimination complaints filed from 1999 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.²⁹¹ The request for data was made in September 2008 and at that point there were no data for complaints of employment discrimination based on gender

²⁸⁶ N.J. STAT. §§ 10:5-17(16), 10:5-27.1(6).

²⁸⁷ N.J. STAT. § 10:5-13.

²⁸⁸ N.J. STAT. § 10:5-8(h).

²⁸⁹ N.J. STAT. § 10:5-13.

²⁹⁰ N.J. STAT. §§ 10:5-14.1, 10:5-19.

²⁹¹ E-mail from Ralph Menendez, New Jersey Division on Civil Rights, to Christy Mallory, the Williams Institute (Sept. 16, 2008 6:56:53 PST) (on file with the Williams Institute).

identity. The Division did not respond to a request for the actual complaints or a record of the dispositions of the cases filed.

The Division reported a total of 109 employment discrimination complaints filed on the basis of sexual orientation from 1999 through 2007. In 1999, two complaints were filed against the State, none were filed against public sector employers other than the State, and eight were filed against private sector employers. In 2000, no complaints were filed against the State, one was filed against a public sector employer other than the State, and four were filed against private sector employers. In 2001, no complaints were filed against the State, one was filed against a public sector employer other than the State, and 15 were filed against private sector employers. In 2002, no complaints were filed against the State, two were filed against public sector employers other than the State, and 12 were filed against private sector employers. In 2003, one complaint was filed against the State, none were filed against public sector employers other than the State, and five were filed against private sector employers. In 2004, no complaints were filed against the State, one¹ was filed against a public sector employer other than the State, and 14 were filed against private sector employers. In 2005, two complaints were filed against the State, two were filed against public sector employers other than the State, and 13 were filed against private sector employers. In 2006, two complaints were filed against the State, three were filed against public sector employers other than the State, and 12 were filed against private sector employers. In 2007, no complaints were filed against the State, one complaint was filed against a public sector employer other than the State, and eight were filed against private sector employers.

15. New Mexico

i. Summary

The New Mexico Human Rights Act (“NMHRA”) has less relief than that available under ENDA. NMHRA is similar in scope to ENDA except that its religious organization may be narrower.

ii. Definitions

NMHRA and ENDA both define “sexual orientation” as “heterosexuality, homosexuality, or bisexuality” and both prohibit discrimination based on actual or perceived sexual orientation.²⁹² Both ENDA and NMNRA also explicitly prohibit discrimination based on “gender identity,” defined in ENDA as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual’s designated sex at birth” and in NMHRA as “a person’s self-perception, or perception of that person by another, of the person’s identity as a male or female based upon the person’s appearance, behavior or physical characteristics that are in accord with or opposed to the person’s physical anatomy, chromosomal sex or sex at birth.”²⁹³

iii. Scope of Coverage

NMHRA applies to state and local government employers and private employers.²⁹⁴ NMHRA and ENDA apply to only employers of 15 or more employees.²⁹⁵ NMRHA contains a narrower religious organization exemption than does ENDA, which applies to religious institutions rather than particular activities. NMRHA exempts from coverage “any religious or denominational institution or organization that is operated,

²⁹² N.M. STAT. § 28-1-2(P) (2008).

²⁹³ N.M. STAT. § 28-1-2(Q).

²⁹⁴ N.M. STAT. § 28-1-7(A).

²⁹⁵ *Id.*

supervised or controlled by or that is operated in connection with a religious or denominational organization from imposing discriminatory employment practices that are based on sexual orientation or gender identity.” . However, the provisions of NMHRA regarding sexual orientation and gender identity do apply to “for profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 511(a) of the Internal Revenue Code of 1986” and “nonprofit activities of a religious or denominational institution or religious organization subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986”.²⁹⁶

iv. Required Procedures

Under both ENDA and NMHRA, aggrieved employees must exhaust administrative remedies before filing a civil action.²⁹⁷ Under NMHRA, an aggrieved employee must file an administrative complaint within 300 days of the alleged unlawful practice.²⁹⁸ Under ENDA, the employee has 180 days to file an administrative complaint.

v. Remedies

Relief available through an administrative hearing under NMHRA includes actual damages, reasonable attorney’s fees, and “such affirmative action as the Commission deems necessary.”²⁹⁹ NMHRA provides for recovery of only actual damages and attorney’s fees for a successful plaintiff in a civil action.³⁰⁰ Though there is no cap on actual damages, NMHRA, unlike ENDA (in a suit against an employer other than a State

²⁹⁶ N.M. STAT. § 28-1-9(C).

²⁹⁷ N.M. STAT. § 28-1-10(A).

²⁹⁸ *Id.*

²⁹⁹ N.M. STAT. § 28-1-11(E).

³⁰⁰ N.M. STAT. §§ 28-1-13; 28-1-10(J).

or the United States), does not allow a successful complainant to recover punitive damages.³⁰¹

vi. Implementation

The Human Rights Division (“the Division”) has the power to receive and investigate complaints of alleged unlawful discriminatory practice.³⁰² The Division may seek to eliminate discrimination through conciliation or, by way of the Human Rights Commission (“the Commission”), seek to eliminate discrimination through an administrative hearing.³⁰³ A member of the Commission who has reason to believe that discrimination has occurred may file a complaint with the Division on his or her own initiative.³⁰⁴ If a respondent has failed to comply with an order of the Commission, the Attorney General or District Attorney may seek judicial enforcement of the order.³⁰⁵

The Division provided the number of employment discrimination complaints filed from 2003 through 2007 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.³⁰⁶ Data on gender identity specifically, however, is not available for years prior to 2006 because the cases were coded as sexual orientation until that point.

The Division reported a total of 179 employment discrimination complaints filed from 2003 through 2007 on the basis of sexual orientation and gender identity. As mentioned, gender identity became its own category for coding purposes in 2006. In 2006 and 2007 there were two gender identity complaints filed (one in each year) and

³⁰¹ *Id.*

³⁰² N.M. STAT. § 28-1-4(B)(1).

³⁰³ N.M. STAT. § 28-1-4(B)(2), (A)(2).

³⁰⁴ N.M. STAT. § 28-1-10(A).

³⁰⁵ N.M. STAT. § 28-1-12.

³⁰⁶ E-mail from Patricia Wolf, New Mexico Human Rights Division, to Christy Mallory, the Williams Institute (Oct. 20, 2008 10:13:01 PST) (on file with the Williams Institute).

both were against private sector employers. Of the 177 sexual orientation complaints filed from 2003 through 2007, the breakdown is as follows: in 2003, one complaint was against the State, three were against public sector employers other than the State, and 13 were against private sector employers. In 2004, three complaints were against the State, four were against public sector employers other than the State, and 32 were against private sector employers. In 2005, four complaints were against the State, four were against public sector employers other than the State, and 24 were against private sector employers. In 2006, five complaints were against the State, three were against public sector employers other than the State, and 37 were against private sector employers. In 2007, one complaint was against the State, three were against public sector employers other than the State, and 40 were against private sector employers.

Additionally, the Division provided copies of 13 case files for proceedings instituted against the state from 2003 through 2007. The fourteenth complaint could not be released because the case had not been closed at the time of the request. Three cases ended in settlement. In one case there was a finding of probable cause, but there is no record of remedies awarded. No probable cause was found in eight cases. One case was dismissed with a Right to Sue.

16. New York

i. Summary

New York's Sexual Orientation Non-Discrimination Act ("SONDA") covers employees of small employers that would be covered under ENDA, but, unlike ENDA, does not provide for punitive damages or attorneys fees, and does not expressly prohibit discrimination on the basis of gender identity.

ii. Definitions

SONDA, like ENDA, prohibits discrimination on the basis of either actual or perceived sexual orientation, which includes “heterosexuality, homosexuality, or bisexuality.” SONDA also includes within its definition of “sexual orientation” “asexuality,” which is not included in the ENDA definition or in any other state anti-discrimination statute.³⁰⁷ Though SONDA does not explicitly prohibit discrimination based on gender identity, New York courts have held that transgendered individuals can pursue discrimination claims under the category of sex discrimination.³⁰⁸ ENDA expressly prohibits discrimination based on gender identity.

iii. Scope of Coverage

SONDA applies to state and local government employers and private employers.³⁰⁹ SONDA, which applies to employers of four or more employees, covers more employers than ENDA, which only applies to employers of 15 or more employees.³¹⁰ SONDA’s religious organization exemption for “any religious or denominational institution or organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization” may be interpreted more narrowly than ENDA’s exemption.³¹¹ While ENDA provides a blanket exemption for any organization that fits into the definition of religious organization, SONDA excuses religious organizations when “limiting employment...to or giving preference to persons of the same religion or denomination or

³⁰⁷ N.Y. EXEC. LAW § 292(27) (2008).

³⁰⁸ *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996); *Buffong v. Castle on the Hudson*, 2005 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. 2005).

³⁰⁹ N.Y. EXEC. LAW § 292(5).

³¹⁰ *Id.*

³¹¹ N.Y. EXEC. LAW § 296(11).

from taking action as is calculated by such organization to promote the religious principles for which it is established or maintained.”³¹² SONDA excludes from its definition of employee “any individual employed by his or her parents, spouse or child, or any individual in the domestic service of any person.”³¹³ ENDA does not contain these exclusions.

iv. Required Procedures

Under ENDA, an aggrieved employee must exhaust administrative remedies before bringing a civil action, but under SONDA the employee may elect either to file a complaint with the Commission or to file a complaint directly in court.³¹⁴ Under SONDA, an aggrieved employee who chooses to file an administrative complaint must do so within one year of the alleged unlawful practice.³¹⁵ Under ENDA, an aggrieved employee must file an administrative complaint within 180 days of the alleged unlawful practice.

v. Remedies

SONDA provides for the same relief whether the employee proceeds through an administrative hearing or instead chooses to file a complaint in court, , including compensatory damages, back pay, and other equitable relief.³¹⁶ SONDA, unlike ENDA, does not cap compensatory damages, but it also does not authorize punitive damages.³¹⁷ Under SONDA, unlike ENDA, attorney’s fees are not available in cases of employment discrimination.³¹⁸

³¹² *Id.*

³¹³ N.Y. EXEC. LAW § 292(6).

³¹⁴ N.Y. EXEC. LAW § 297.

³¹⁵ N.Y. EXEC. LAW § 297(5).

³¹⁶ N.Y. EXEC. LAW §§ 297(4)(c), (9).

³¹⁷ *Id.*

³¹⁸ *See* N.Y. Exec. Law § 297(10).

vi. Implementation

The Division of Human Rights (“the Division”) has the power to receive, investigate, and pass upon complaints alleging violations of this article and may, upon its own motion, file complaints alleging violations of SONDA.³¹⁹ The Division has the power to hold hearings and attempt to conciliate charges of discrimination.³²⁰ The Division may take appropriate action to ensure compliance with any order issued.³²¹

The Division provided the number of employment discrimination complaints filed from 2003 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.³²²

The Division reported a total of 794 employment discrimination complaints filed from 2003 through 2007 on the basis of sexual orientation. In 2003, two complaints were filed against the State, 16 complaints were filed against public sector employers other than the State, and 100 were filed against private sector employers. In 2004, five complaints were filed against the State, 19 were filed against public sector employers other than the State, and 139 were filed against private sector employers. In 2005, five complaints were filed against the State, 16 were filed against public sector employers other than the State, and 131 were filed against private sector employers. In 2006, two complaints were filed against the State, 24 were filed against public sector employers other than the State, and 133 were filed against private sector employers. In 2007, 10

³¹⁹ N.Y. EXEC. LAW § 295(6).

³²⁰ N.Y. EXEC. LAW §§ 295(7), 297(3).

³²¹ N.Y. EXEC. LAW § 297(7).

³²² Email from Richard Brill, New York State Division of Human Rights, to Christy Mallory, the Williams Institute (Sept. 18, 2008 8:25:38 PST) (on file with the Williams Institute).

complaints were filed against the State and 192 were filed against private sector employers.³²³

Additionally, the Division provided copies of 15 case files for proceedings instituted against the State from 2004 through 2007. Two cases ended in settlement. No probable cause was found in 12 cases. One case was withdrawn by the complainant. The other nine cases filed against the State on record between 2003 and 2007 could not be released because the State no longer retained the files or the cases had not been closed at the time of the request.³²⁴

17. Oregon

i. Summary

The Oregon Equality Act (“OEA”) offers protection to employees of small employers not covered by ENDA, and, if the employee chooses to file the case in court under OEA (rather than proceeding through an administrative hearing), the employee can recover the same types of relief available under ENDA. In addition, because OEA imposes no caps on damages, the employee may be able to recover a greater amount of monetary damages than under ENDA.

ii. Definitions

OEA and ENDA both prohibit discrimination on the basis of sexual orientation, and both define “sexual orientation” as “heterosexuality, homosexuality, and bisexuality.”³²⁵ OEA’s definition of “sexual orientation” includes gender identity, extending to employees “regardless of whether the individual’s gender identity,

³²³ The number of complaints filed against public sector employers other than the state in 2007 was unavailable at the time the request was made.

³²⁴ Letter from Richard Brill, New York State Division of Human Rights, to Christy Mallory, the Williams Institute (Apr. 3, 2009) (on file with the Williams Institute).

³²⁵ OR. REV. STAT. § 174.100(6) (2005).

appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.”³²⁶ ENDA also prohibits discrimination based on “gender identity,” defined as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth.”

iii. Scope of Coverage

OEA applies to state and local government employers and private employers.³²⁷ Unlike ENDA, which only applies to employers of 15 or more employees, OEA does not restrict application based on the size of the employer.³²⁸ OEA's religious organization exemption, which applies to “any bona fide church or other religious institution,” is not likely to be interpreted as broadly as ENDA's exemption for religious institutions. Rather than exempt religious institutions altogether, OEA allows religious institutions to “take any employment action based on a bona fide religious belief about sexual orientation: : “(a) In employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors, and support staff; (b) In employment positions in a non-profit religious school, non-profit religious camp, non-profit religious day care center, non-profit religious thrift store, non-profit religious bookstore, non-profit religious radio station, or non-profit religious shelter; or (c) In other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the

³²⁶ *Id.*

³²⁷ OR. REV. STAT. § 169A.001(4).

³²⁸ *Id.*

church or institution.”³²⁹ OEA’s definition of employee does not include “any individual employed by the individual’s parents, spouse, or child or in the domestic service of any person.”³³⁰ ENDA does not explicitly exclude these types of employees from coverage.

iv. Required Procedures

Unlike under ENDA, where an aggrieved employee must exhaust administrative remedies before filing in court, under OEA, an employee may file a complaint directly in court.³³¹ Under OEA, an aggrieved employee choosing to file an administrative complaint must do so within one year of the alleged unlawful practice.³³² The filing period for an administrative complaint under ENDA is 180 days.

v. Remedies

Under OEA, a successful complainant in an administrative hearing is limited to recovery of actual damages and equitable relief, but a successful plaintiff in a civil action can be awarded the same remedies available under ENDA, including compensatory damages, punitive damages (not available under ENDA in a suit against a State or the United States), and attorney’s fees.³³³ Unlike ENDA, however, OEA has no caps on damages.³³⁴

vi. Implementation

The Bureau of Labor and Industries (“the Bureau”) has the power to receive complaints and conduct investigations where a violation of OEA is alleged.³³⁵ If the Attorney General or the Commissioner of the Bureau has reason to believe that an

³²⁹ OR. REV. STAT. § 659A.006(5).

³³⁰ OR. REV. STAT. § 659A.001(3).

³³¹ OR. REV. STAT. § 659A.820.

³³² OR. REV. STAT. §§ 659A.820(1), 659A.875(1).

³³³ OR. REV. STAT. §§ 659A.850, 659A.885(1), (3)(a), (7).

³³⁴ *Id.*

³³⁵ OR. REV. STAT. §§ 659A.820(1), 659A.830(1).

unlawful practice was committed in violation of OEA, he or she may file a complaint with the Bureau.³³⁶ The Bureau may attempt to resolve the matter through conciliation and, if conciliation is unsuccessful, may hold a hearing on the matter.³³⁷ If the Attorney General or the Commissioner has filed the complaint, he or she may elect to have the matter heard in circuit court.³³⁸

The Bureau provided the number of employment discrimination complaints filed on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.³³⁹ Though statutory protection for sexual orientation and gender identity did not go into effect in Oregon until January 1, 2008, the Bureau received 15 complaints in 2007. One of the 15 complaints was filed against the State, one was filed against a public sector employer other than the State, and the other 13 were filed against private sector employers.

Additionally, the Bureau provided copies of the case files for the proceedings instituted against the State and local government (Lane County). Both cases were withdrawn when Right to Sues were issued by the Bureau.

18. Rhode Island

i. Summary

Rhode Island's anti-discrimination statutes protect more employees than are protected under ENDA, and offer the same range of relief as ENDA (so long as an employee files in court). In addition, because Rhode Island's statute does not cap

³³⁶ OR. REV. STAT. § 659A.825(1).

³³⁷ OR. REV. STAT. § 659A.845(1).

³³⁸ OR. REV. STAT. § 659A.870(4)(c).

³³⁹ Letter from Leticia Ellis, Oregon Civil Rights Division, to Christy Mallory, the Williams Institute (Feb. 17, 2009) (on file with the Williams Institute).

damages, a suit under Rhode Island law may result in a larger recovery for a prevailing employee.

ii. Definitions

Both ENDA and Rhode Island’s statutes prohibit discrimination based on actual or perceived sexual orientation, which both define as “heterosexuality, homosexuality, or bisexuality.”³⁴⁰ Rhode Island’s statutes and ENDA also both prohibit discrimination based on “gender identity,” which is defined in ENDA as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual’s designated sex at birth” and in Rhode Island’s statutes as “a person’s actual or perceived gender, as well as a person’s gender identity, gender-related self-image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related image, or gender-related expression is different from that traditionally associated with the person’s sex at birth.”³⁴¹

iii. Scope of Coverage

Rhode Island’s anti-discrimination provisions apply to state and local government employers and private employers.³⁴² While ENDA applies to only employers of 15 or more employees, Rhode Island’s statutes apply to employers of four or more employees.³⁴³ Rhode Island’s religious organization exemption covers “any religious corporation, association, educational institution, or society,” but limits an organization’s ability to discriminate “to the employment of individuals of its religion to perform the

³⁴⁰ R.I. GEN. LAWS § 28-5-6(15) (2008).

³⁴¹ R.I. GEN. LAWS § 28-5-6(10).

³⁴² R.I. GEN. LAWS § 28-5-6(7).

³⁴³ *Id.*

work connected with the carrying on of its activities.”³⁴⁴ ENDA's religious exemption is broader, exempting religious institutions without the restriction based on religious activities. Rhode Island's statute excludes from its definition of employee “any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.” ENDA does not cover these kinds of employees.³⁴⁵

iv. Required Procedures

Under both ENDA and Rhode Island's anti-discrimination statutes, an aggrieved employee must exhaust administrative remedies before filing a complaint in court.³⁴⁶ Under Rhode Island's anti-discrimination statutes, an aggrieved employee must file an administrative complaint within one year of the alleged unlawful practice.³⁴⁷ Under ENDA, the employee must file within 180 days of the alleged unlawful practice.

v. Remedies

If an employee elects to file with the administrative agency and seek relief through an administrative hearing under Rhode Island's statute, the agency may award back pay, compensatory damages, attorney's fees, equitable relief, and “other appropriate affirmative action.”³⁴⁸ In addition to those remedies, a court may award punitive damages to a successful plaintiff, thus making available the same range of relief that is available under ENDA (though punitive damages are unavailable in suits against a State or the United States under ENDA).³⁴⁹ However, unlike ENDA, Rhode Island's statute does not cap damages.³⁵⁰

³⁴⁴ R.I. GEN. LAWS § 28-5-6(7).

³⁴⁵ R.I. GEN. LAWS § 28-5-6(6).

³⁴⁶ R.I. GEN. LAWS § 28-5-17.

³⁴⁷ R.I. GEN. LAWS § 28-5-17(a).

³⁴⁸ R.I. GEN. LAWS § 28-5-24(a).

³⁴⁹ R.I. GEN. LAWS § 28-5-29.1.

³⁵⁰ *Id.*

vi. Implementation

The Rhode Island Commission for Human Rights (“the Commission”) has the power to receive, investigate, and pass upon charges of unlawful employment practices.³⁵¹ The Commission may attempt to resolve complaints of discrimination through conciliation or a hearing.³⁵² The Commission, on its own initiative, may make a charge of unlawful discriminatory practice.³⁵³ The Commission may obtain judicial enforcement of any final order where the respondent has not complied.³⁵⁴

The Commission provided copies of actual complaints filed on the basis of sexual orientation or gender identity filed against public sector employers pursuant to a request from the Williams Institute. All seven complaints provided were filed on the basis of sexual orientation. One complaint was filed in 1997, one was filed in 1999, one was filed in 2000, two were filed in 2004, and two were filed in 2006. The complaints provided had been so heavily redacted that was impossible to discern whether they were filed against the State or local governments. The dispositions of the cases were not provided. Further, the Commission did not provide the number of complaints filed against private employers and the number filed against the State and other public sector employers, by year.

19. Vermont

i. Summary

The Vermont Fair Employment Practices Act (“VFEPa”) applies to all employers without regard to the number of employees, while ENDA applies only to employers of 15

³⁵¹ R.I. GEN. LAWS § 28-5-13(6).

³⁵² R.I. GEN. LAWS §§ 28-5-13(7), 28-5-17.

³⁵³ R.I. GEN. LAWS § 28-5-17(a).

³⁵⁴ R.I. GEN. LAWS § 28-5-28.

or more employees. Depending on whether the employee seeks administrative remedies or files directly in court, VFEPA offers the same range of remedies available under ENDA, but without the caps on monetary damages mandated by ENDA.

ii. Definitions

VFEPA and ENDA both prohibit discrimination based on “sexual orientation,” which is defined in both as “heterosexuality, homosexuality, or bisexuality.”³⁵⁵ In contrast to ENDA, VFEPA does not explicitly prohibit discrimination based on perceived sexual orientation. VFEPA and ENDA both prohibit discrimination based on “gender identity” (including perceived gender identity), which ENDA defines as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual’s designated sex at birth” and which VFEPA defines as “any individual’s actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual’s gender or gender-identity, regardless of the individual’s assigned sex at birth.”³⁵⁶

iii. Scope of Coverage

VFEPA applies to state and local government employers and private employers.³⁵⁷ ENDA applies only to employer of 15 or more employees, and VFEPA applies to all otherwise non-exempt employers, regardless of size.³⁵⁸ VFEPA’s religious organization exemption seems textually narrower than ENDA’s, although it may be equally broad in practice. VFEPA’s exemption does not prohibit “any religious or denominational institution or organization, or any organization operated for charitable

³⁵⁵ 1 VT. STAT. ANN. § 143 (2008).

³⁵⁶ 1 VT. STAT. ANN. § 144.

³⁵⁷ 21 VT. STAT. ANN. § 495d(1).

³⁵⁸ *Id.*

purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained.”³⁵⁹ ENDA's religious exemption applies to religious institutions without regard to religious principles or activities.

iv. Required Procedures

Unlike under ENDA, an aggrieved employee need not exhaust administrative remedies before filing a civil action pursuant to VFEPA.³⁶⁰ VFEPA has unique enforcement mechanisms which involve two separate agencies handling complaints, depending on whether a complaint is against a state agency or any other employer, and authorize different remedies against state agencies and other employers when a complainant elects to proceed through the administrative process. If an employee of a state agency files an administrative complaint pursuant to VFEPA, the Vermont Human Rights Commission (“the Commission”) maintains jurisdiction and can ultimately seek relief in court on the complainant’s behalf.³⁶¹ If an employee of any employer that is not a state agency files an administrative complaint pursuant to VFEPA, the Attorney General’s Office has jurisdiction and, like the Commission, can ultimately seek relief in court on the complainant’s behalf.³⁶²

VFEPA does not state a limitations period in which claims of employment discrimination must be filed if the employee chooses to proceed through the

³⁵⁹ 21 VT. STAT. ANN. § 495(e).

³⁶⁰ 21 VT. STAT. ANN. § 495b(b).

³⁶¹ 9 VT. STAT. ANN. § 4552(b).

³⁶² 9 VT. STAT. ANN. § 4552(c).

administrative agency. However, the Legal Action Center was told by Ira Hammerslough from the Vermont Attorney General's Office on April 3, 2008 that "the Attorney General's Office has a policy of not accepting claims that exceed a year since the most recent alleged discriminatory act, unless the claim is very compelling."³⁶³ The statute of limitations for filing an administrative claim under ENDA is 180 days.

v. Remedies

Under VFEPA, an employee of any state agency may recover, under the jurisdiction of the Commission, compensatory damages, punitive damages, attorney's fees and costs, equitable relief, and "other appropriate relief."³⁶⁴ An employee of any employer that is not a state agency may recover, under the jurisdiction of the Attorney General's Office, back pay and other equitable relief, but not other compensatory or punitive damages.³⁶⁵ If an aggrieved employee chooses to file an action directly in court (apparently whether a state agency or other employer), the court is authorized to award back pay, compensatory damages, punitive damages, attorney's fees and costs, equitable relief, and "other appropriate relief."³⁶⁶ These are the same remedies that are available under ENDA (though punitive damages are not available in a suit against a State or the United States under ENDA). However, unlike ENDA, VFEPA does not impose caps on monetary damages.³⁶⁷

vi. Implementation

³⁶³ http://www.lac.org/doc_library/lac/KYR-trainings/VT_KYR.pdf.

³⁶⁴ 9 VT. STAT. ANN. § 4553(a)(6)(A).

³⁶⁵ 21 VT. STAT. ANN. § 495b(a); 9 VT. STAT. ANN. § 2458.

³⁶⁶ 21 VT. STAT. ANN. § 495b.

³⁶⁷ *Id.*

The Commission has the power to investigate and enforce complaints of unlawful employment discrimination where the party complained against is a state agency.³⁶⁸ An employee of the Commission may file a complaint with the Commission on behalf of an aggrieved employee.³⁶⁹ The Commission may engage parties in conciliation, hold hearings, and, on its own initiative, file civil actions on behalf of complainants.³⁷⁰ The Commission may seek judicial enforcement of conciliation agreements.³⁷¹

The Attorney General's Office has the power to investigate and enforce complaints of unlawful employment discrimination where the party complained against is an employer other than the state.³⁷² If the Attorney General's Office has reason to believe that an unlawful employment practice has taken place, it may pursue a civil investigation.³⁷³ The Attorney General's Office may bring, on its own initiative, a civil action on behalf of a complainant seeking permanent relief.³⁷⁴

The Commission provided the number of employment discrimination complaints filed against the state from 1999 through 2007 on the basis of sexual orientation, and the Attorney General's Office provided the number of employment discrimination complaints filed from 2002 through 2007 against local government employers on the basis of sexual orientation, pursuant to requests from the Williams Institute. Between July 1, 2007 (when statutory protection was extended to cover gender identity) and December 31, 2007, no employment discrimination complaints based on gender identity had been received by either office. Of the seven employment discrimination complaints

³⁶⁸ 9 VT. STAT. ANN. § 4552(a).

³⁶⁹ 9 VT. STAT. ANN. § 4554(b).

³⁷⁰ 9 VT. STAT. ANN. § 4553(a).

³⁷¹ 9 VT. STAT. ANN. § 4553(a)(6)(A).

³⁷² 9 VT. STAT. ANN. § 4552(c).

³⁷³ 9 VT. STAT. ANN. §§ 2460, 21 VT. STAT. ANN. § 495b(a).

³⁷⁴ 9 VT. STAT. ANN. §§ 2458, 21 VT. STAT. ANN. § 495b(a).

filed against the State based on sexual orientation, one was filed in 2002, two in 2003, two in 2004, and two in 2006. Of the three employment discrimination complaints filed against local government on the basis of sexual orientation, one was filed in 2006 and two were filed in 2007.

The Commission is required by statute to keep confidential all complaints and investigative files.³⁷⁵ The Commission refused to release copies of actual complaints filed against the State as employer pursuant to this section when a request was made for the information by the Williams Institute. Likewise, the Attorney General refused to release copies of actual complaints filed against employers other than the State.

20. Washington

i. Summary

The Washington State Law Against Discrimination (“WSLAD”) applies to employers of eight or more employees, while ENDA applies to employers of 15 or more employees. If a complainant seeks redress through civil action, it offers the same remedies as ENDA does. However, WSLAD offers fewer remedies than ENDA if the complainant chooses to proceed through an administrative hearing.

ii. Definitions

WSLAD and ENDA both prohibit discrimination based on sexual orientation, which includes under both “heterosexuality, homosexuality, or bisexuality.”³⁷⁶ WSLAD, unlike ENDA, does not explicitly prohibit discrimination based on perceived sexual orientation. Both ENDA and WSLAD prohibit discrimination based on “gender identity,” defined in ENDA as “the gender-related identity, appearance, or mannerisms or

³⁷⁵ 9 VT. STAT. ANN. § 4555(a).

³⁷⁶ WASH. REV. CODE § 49.60.040(15) (2008).

other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth," and defined in WSLAD as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."³⁷⁷

iii. Scope of Coverage

WSLAD applies to state and local government employers and private employers.³⁷⁸ WSLAD applies to employers of eight or more employees, while ENDA applies only to employer of 15 or more employees.³⁷⁹ Like ENDA, WSLAD contains a blanket religious organization exemption under which the WSLAD exempts "any religious or sectarian organization not organized for private profit."³⁸⁰ WSLAD also excludes from its definition of "employee" "any individual employed by his or her parents, spouse, or child, or in the domestic service of any person."³⁸¹ ENDA does not exclude this type of employee.

iv. Required Procedures

In contrast to ENDA, an aggrieved employee in Washington is not required to exhaust administrative remedies before bringing a civil action under WSLAD, and may file a complaint directly in court.³⁸² Under WSLAD, an aggrieved employee who chooses to file an administrative complaint must do within six months of the alleged

³⁷⁷ *Id.*

³⁷⁸ WASH. REV. CODE § 49.60.040(3).

³⁷⁹ *Id.*

³⁸⁰ WASH. REV. CODE § 49.60.040(3).

³⁸¹ WASH. REV. CODE § 49.60.040(4).

³⁸² WASH. REV. CODE § 49.60.030(2).

unlawful practice.³⁸³ This period is approximately the same as ENDA’s requirement of 180 days.

v. Remedies

A successful complainant in an administrative action under WSLAD is entitled to back pay, equitable relief, and “other action that could be ordered by a court.”³⁸⁴ Although this language suggests that the full range of relief offered by ENDA would also be available through an administrative action under WSLAD, WSLAD caps damages for “humiliation and mental suffering” at \$20,000, which is lower than the cap for the smallest employer bracket under ENDA.³⁸⁵ Though WSLAD explicitly provides for attorney’s fees in a civil action, is silent as to whether they can be awarded through an administrative hearing. Such fees may be included within “action that could be awarded by a court.” If an employee instead elects to proceed through filing a civil action under WSLAD, the court may award actual damages, attorney’s fees, equitable remedies, and “any other appropriate remedy authorized by the statute or United States Civil Rights Act of 1964.”³⁸⁶ However, the Supreme Court of Washington has held that punitive damages are unavailable under WSLAD absent express authorization.³⁸⁷

vi. Implementation

The Washington State Human Rights Commission (“the Commission”) has the power to receive, investigate, and pass upon complaints alleging discriminatory employment practices.³⁸⁸ The Commission may engage parties to a complaint in

³⁸³ WASH. REV. CODE § 49.60.230(2).

³⁸⁴ WASH. REV. CODE § 49.60.250(5).

³⁸⁵ *Id.*

³⁸⁶ WASH. REV. CODE § 49.60.030(2).

³⁸⁷ *Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589 (Wash. 1996).

³⁸⁸ WASH. REV. CODE § 48.60.120(4).

conciliation and may hold hearings.³⁸⁹ The Commission, on its own initiative, may issue a complaint if it has reason to believe that any person has been or is engaging in an unfair practice.³⁹⁰ The Commission may seek judicial enforcement where a respondent has not complied with a final order of the Commission.³⁹¹

The Commission provided the number of employment discrimination complaints filed in 2006 and 2007 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.³⁹²

The Commission reported a total of 32 employment discrimination complaints filed in 2006 and 2007 on the basis of sexual orientation or gender identity. In 2006, one complaint was filed against the State, two were filed against employers other than the State, and 10 were filed against private sector employers. In 2007, two were filed against the State, two were filed against public sector employers other than the State, and 25 were filed against private sector employers.

Additionally, the Commission provided copies of eleven complaints filed against the State or local governments from 2006 through 2008. This number includes the seven complaints filed against the State and local governments in 2006 and 2007 as well as four complaints filed in 2008. The dispositions of the cases were not released.

21. Wisconsin

i. Summary

³⁸⁹ WASH. REV. CODE §§ 49.60.140, 49.60.240.

³⁹⁰ WASH. REV. CODE § 49.60.230(1)(b).

³⁹¹ WASH. REV. CODE § 49.60.260(4).

³⁹² E-mail from Les Smith, Washington State Human Rights Commission, to Christy Mallory, the Williams Institute (Sept. 15, 2008 14:49:43 PST) (on file with the Williams Institute).

Wisconsin's Fair Employment Law ("FEL") applies to all employers without regard to the number of employees, while ENDA only applies to employers of 15 or more employees. FEL does not offer nearly the same range of remedies as ENDA.

ii. Definitions

ENDA and FEL both prohibit discrimination based on actual or perceived sexual orientation.³⁹³ Both include within the definition of "sexual orientation" "heterosexuality, homosexuality, bisexuality."³⁹⁴ FEL, but not ENDA, prohibits discrimination against an employee for "having a history of a preference for heterosexuality, homosexuality, or bisexuality."³⁹⁵ This definitional difference may have little effect in practice. ENDA also prohibits discrimination based on gender identity, while FEL does not expressly do so.

iii. Scope of Coverage

FEL applies to state and local government employers and private employers.³⁹⁶ Unlike ENDA, which only applies to employers of 15 or more employees, FEL does not restrict application based on employer size.³⁹⁷ Like ENDA, which does not apply to "bona fide private membership clubs," FEL exempts any "social club or fraternal society" -- but FEL's exemption applies only "if the particular job is advertised only within the membership."³⁹⁸ FEL does not contain a blanket "religious organization" exemption like ENDA, but does exempt "any religious association not organized for private profit or an organization or corporation which is primarily owned or controlled by

³⁹³ WIS. STAT. § 111.32(13m) (2007).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ WIS. STAT. § 111.32(6)(a).

³⁹⁷ *Id.*

³⁹⁸ WIS. STAT. § 111.32(6)(b).

such a religious association to give preference to an applicant or employee who adheres to the religious association's creed, if the job description demonstrates that the position is clearly related to the religious teachings and beliefs of the religious association" or for the same to give preference to "a member of the same or similar religious denomination."³⁹⁹ FEL also, unlike ENDA, excludes from its definition of "employee" "any individual employed by his or her parents, spouse or child."⁴⁰⁰

iv. Required Procedure

Under ENDA an aggrieved employee can exhaust administrative remedies and then file a civil action. By contrast, under FEL, the state agency has sole jurisdiction over all claims brought under the act and there is no opportunity for a complainant to obtain a Right to Sue and proceed in court. Only an administrative final order can be judicially reviewed and, in that situation, additional remedies can be awarded by the circuit court.⁴⁰¹ Under FEL, an aggrieved employee must file an administrative complaint within 300 days of the alleged unlawful practice.⁴⁰² Under ENDA, an aggrieved employee must file an administrative complaint within 180 days of the alleged unlawful practice.

v. Remedies

FEL offers limited administrative remedies and only allows an employee to bring a civil action after proceeding through the entire administrative process through to a final order. Under FEL, a successful complainant in an administrative hearing is entitled to

³⁹⁹ WIS. STAT. § 111.337(2)(a), (am).

⁴⁰⁰ WIS. STAT. § 111.32(5).

⁴⁰¹ WIS. STAT. §§ 111.39, 111.395, 11.397.

⁴⁰² WIS. STAT. § 111.39(1).

back pay and either reinstatement or compensation in lieu of reinstatement.⁴⁰³ The statute also states that the agency may take “such action as will effectuate the purposes of this chapter,” but the meaning of that phrase is unclear and not further explained in the statute.⁴⁰⁴ Only after a final administrative decision has been issued may an aggrieved employee bring an action in circuit court to seek additional remedies.⁴⁰⁵ In a civil suit filed after an administrative decision is rendered, the employee can seek compensatory damages, punitive damages, and attorney’s fees and costs.⁴⁰⁶ FEL imposes the same graduated caps on the sum of non-pecuniary and future pecuniary damages and punitive damages as ENDA.⁴⁰⁷ An aggrieved employee of a local unit may not bring suit to seek remedies unavailable through an administrative hearing.⁴⁰⁸

vi. Implementation

The Department of Workforce Development (“the Department”) has the power to receive and investigate complaints charging discrimination.⁴⁰⁹ The Department may engage the parties to a complaint in conciliation and may hold hearings.⁴¹⁰ After an employee has proceeded through the full administrative process and a final decision has been rendered by the agency, the Department may file in circuit court on the employee’s behalf to seek additional remedies.⁴¹¹ Judicial enforcement may be sought to enforce a

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ WIS. STAT. § 111.397(1)(a).

⁴⁰⁶ *Id.*

⁴⁰⁷ WIS. STAT. § 111.397(2)(a).

⁴⁰⁸ “Local unit” is defined as a “a political subdivision of the state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision of special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing.” Wis. Stat. §§ 111.397(a), 19.42(7u).

⁴⁰⁹ WIS. STAT. § 111.39(1).

⁴¹⁰ WIS. STAT. § 111.39(4)(b).

⁴¹¹ WIS. STAT. § 111.397(1).

final order of the Department; in which case the Department of Justice will represent the Department.⁴¹²

The Department provided the number of employment discrimination complaints filed from 2002 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.⁴¹³

The Department reported a total of 395 employment discrimination complaints filed from 2002 through 2007 on the basis of sexual orientation. In 2002, one complaint was filed against the State, two were filed against public sector employers other than the State, and 79 were filed against private sector employers. In 2003, five complaints were filed against the State, six were filed against public sector employers other than the State, and 59 were filed against private sector employers other than the State. In 2004, one complaint was filed against the State, two were filed against public sector employers other than the State, and 71 were filed against private sector employers. In 2005, two were filed against the State, three were filed against public sector employers other than the State, and 54 were filed against private sector employers. In 2006, three complaints were filed against the State, two were filed against public sector employers other than the State, and 46 were filed against private sector employers. In 2007, two complaints were filed against the State, two were filed against public sector employers other than the State, and 54 were filed against private sector employers.

Additionally, the Department provided copies of 12 case files for proceedings instituted against the State. Two cases ended in settlement. Probable cause was found in one case. No probable cause was found in six cases. Two cases were withdrawn and one

⁴¹² WIS. STAT. § 111.395.

⁴¹³ Facsimile from LeAnna Ware, Wisconsin Department of Workforce Development, to Christy Mallory, the Williams Institute (Sept. 11, 2008 15:39 PST) (on file with the Williams Institute).

was dismissed for lack of jurisdiction. Case files for the other two proceedings against the State from 2002 through 2007 were not released because the cases had not been closed at the time of the request.

D. State Executive Orders That Prohibit Sexual Orientation and Gender Identity Discrimination

In 10 states that do not statutorily prohibit employment discrimination based on sexual orientation or gender identity, gubernatorial executive orders prohibit discrimination on either or both bases against state employees. Analysis of gubernatorial executive orders and their enactment histories reveals that executive order protection is unstable, often temporary, and generally unenforceable:

- None of these 10 executive orders in states without anti-discrimination statutes prohibiting sexual orientation and gender identity discrimination provides for a private right of action;
- Only two impose administrative enforcement schemes, and only one of them allows a complainant to file with the state agency responsible for enforcing other equal opportunity regulations;
- Only six confer any power to actually investigate complaints - -and none of those has provisions ensuring the confidentiality of the complainant; and
- Executive orders can be, and have been, revoked or allowed to expire on their own terms with no effort to reinstate the policies. Orders in Kentucky, Louisiana, Iowa, Ohio, and Virginia have been in flux during the last 15.

i. Protected Categories

Gubernatorial executive orders in 9 states ban employment discrimination on the basis of sexual orientation in state employment.⁴¹⁴ Of those 9 states, six also prohibit discrimination on the basis of gender identity in state employment.⁴¹⁵ One state, Delaware, prohibits sexual orientation discrimination by statute, and prohibits gender identity discrimination against state government employees by executive order.⁴¹⁶ All states but two leave the categories undefined, in contrast to the anti-discrimination statutes of states offering such protection.⁴¹⁷

ii. Accountability Mechanisms

None of the 10 gubernatorial executive orders prohibiting employment discrimination on the basis of sexual orientation and/or gender identity provides for a private right of action. For example, Delaware's executive order explicitly states that it is not intended to and shall not create independent causes of action for or on behalf of persons who allege a lack of compliance.⁴¹⁸ Additionally, in early 2009, a Virginia court, hearing an appeal from an adverse administrative ruling,⁴¹⁹ held that Virginia's then-

⁴¹⁴ Alaska (Alaska Admin. Order No. 195 (Mar. 5, 2002)), Arizona (Ariz. Exec. Order 2003-22 (June 21, 2003)); Indiana (Ind. State Govt. Emp. Pol. Stmt. (Aug. 17, 2004)), Kansas (Kan. Exec. Order 07-24 (Aug. 31, 2007)), Kentucky (Ky. Exec. Order 2008-473 (June 2, 2008)), Michigan (Mich. Exec. Dir. No. 2007-24 (Nov. 21, 2007)), Montana (Mont. Non-Discrim. EEO 41-2008 (Nov. 14, 2008)), Ohio (Ohio Exec. Order 2007-10S (May 17, 2007)), Pennsylvania (Exec. Order 2003-10 (July 28, 2003)).

⁴¹⁵ Indiana, Kansas, Kentucky, Michigan, Ohio, and Pennsylvania.

⁴¹⁶ Del. Exec. Order No. 8 (Aug. 11, 2009).

⁴¹⁷ Michigan's executive order defines gender identity or expression as "the perception by an individual or another person of the gender identity, appearance, behavior, or expression of the individual whether or not that gender identity, appearance, behavior, or expression traditionally associated with the sex assigned to the individual at birth" and Ohio's executive order defines sexual orientation and gender identity, respectively, as "a person's actual or perceived homosexuality; bisexuality; or heterosexuality, by orientation or practice, by and between adults who have the ability to consent" and "the gender a person associates with him or herself, regardless of the gender others might attribute to that person."

⁴¹⁸ Del. Exec. Order No. 8 (Aug. 11, 2009).

⁴¹⁹ Though the Office of Equal Opportunity ultimately determined that there was insufficient evidence to prove that Moore would not have been terminated but for his sexual orientation, it did find that there was "sufficient evidence to support that there was improper consideration of [his] sexual orientation." Va.

existing executive order banning sexual orientation discrimination in state employment “did not provide subject matter jurisdiction to the court nor create a cause of action.”⁴²⁰

Without a statutory prohibition on sexual orientation discrimination in employment, the aggrieved Virginia state employee had no effective form of redress.

Only Ohio’s executive order allows an aggrieved employee to file a formal administrative complaint with the state’s commission responsible for enforcing equal opportunity regulations. Delaware’s executive order provides that an employee may file a complaint with the State Equal Employment Opportunity/Affirmative Action Program Administrator, who can attempt to reach a resolution. However, unlike claims that fall under Title VII, the ADA, the ADEA, the VEVRAA, or Delaware’s anti-discrimination statutes, a complaint of gender identity discrimination will not be referred to the Office of Anti-Discrimination for investigation.⁴²¹ The executive orders of five states do not explicitly confer the power to investigate informal complaints to a department or the department head responsible for implementation of the policy.⁴²² Of the executive orders instituting an investigation procedure for informal complaints, none ensures confidentiality of the complaint. Two executive orders have not placed the authority to implement the policy in a single department or department head.⁴²³ Scholars have argued

Dept. of Hum. Res. Mgmt. O.E.E.S, Priv. Ltr. Rul. 0107-038 (Jan. 7, 2009); Final Order, *Moore v. Virginia Museum of Natural History*, No. 690CL09000035-00 (Va. Cir, June 15, 2009).

⁴²⁰ Fin. Ord. 1.

⁴²¹ Del. Exec. Order No. 8 (Aug. 11, 2009).

⁴²² Executive orders in Arizona, Indiana, Kansas, Kentucky, and Michigan do not explicitly grant the power to investigate. Ariz. Exec. Order 2003-22 (June 21, 2003), Ind. State Govt. Emp. Pol. Stmt. (Aug. 17, 2004), Kan. Exec. Order 07-24 (Aug. 31, 2007), Ky. Exec. Order 2008-473 (June 2, 2008), Mich. Exec. Directive No. 2007-24 (Nov. 21, 2007). However, though Arizona, Kansas, and Montana do not explicitly confer investigatory power, it may well be impliedly granted to heads or EEO officers of each state department (Ariz. Exec. Order 2003-22 (June 21, 2003), Kan. Exec. Order 07-24 (Aug. 31, 2007), Mont. Non-Discrim. EEO 41-2008 (Nov. 14, 2008).

⁴²³ Arizona and Kansas. Ariz. Executive Order 2003-22 (June 21, 2003), Kan. Executive Order 07-24 (Aug. 31, 2007).

that failure to delegate oversight to one position or agency hinders effective implementation.⁴²⁴

Nine of the executive orders do not require the implementing department or accountable state agencies to furnish a discrimination report to the governor in order to monitor their efforts. Only the executive order of Delaware requires that the Governor receive a yearly report on the status of implementation.⁴²⁵

iii. Instability of Executive Orders

In several states, including those with anti-discrimination statutes and those without, gubernatorial executive orders addressing sexual orientation and/or gender identity discrimination in employment have been revoked or have expired by their own terms, rendering once-protected state employees vulnerable to discrimination. Executive order protection for sexual orientation and/or gender identity in Kentucky, Louisiana, Iowa, and Ohio has been in flux during the last 15 years, and the constitutionality of Virginia's order is currently in dispute.

a. Kentucky

Former Kentucky Governor Paul Patton signed an executive order on May 28, 2003, prohibiting discrimination against gay and transgender state employees. On Diversity Day in 2006, Former Governor Patton's order was rescinded by then Governor Ernie Fletcher, who removed language from the Kentucky Affirmative Action Plan that specifically prohibited discrimination on the basis of sexual orientation and gender identity. Defending his action, Governor Fletcher's administration relied on the

⁴²⁴ See Roddrick A. Colvin, *Improving State Policies Prohibiting Public Employment Discrimination Based on Sexual Orientation*, 20 REVIEW OF PUBLIC PERSONNEL ADMINISTRATION 5, 12 (2000) (implementing agency must have jurisdiction over other governmental entities in order to ensure effective implementation of the policy).

⁴²⁵ Del. Exec. Order No. 8 (Aug. 11, 2009).

questionable arguments that removing sexual orientation and gender identity categories as protected classes would further increase the number of women and blacks working in state government and that the previous affirmative action plan had left the state open to potential lawsuits since it would force state government to provide separate bathrooms and other facilities for transsexuals.⁴²⁶

In June 2008, Kentucky Governor Steve Beshear reinstated a ban prohibiting discrimination on the basis of sexual orientation or gender identity. The executive order barred state officials from making hiring or firing decisions based on sexual orientation or gender identity. In a statement describing the motivations behind the reinstatement, Governor Beshear said, “Experience, qualifications, talent and performance are what matter.”⁴²⁷

b. Louisiana

In 1992, former Louisiana Governor Edwin Edwards became the first Southern governor to issue an executive order protecting lesbian, gay, bisexual and transgendered persons from discrimination in state governmental services, employment and contracts.⁴²⁸ This executive order expired in August of 1996 and was not renewed when the next governor, Mike Foster, took office.

On December 6, 2004, the then-Governor of Louisiana, Kathleen Blanco, issued a similar executive order barring state agencies from discriminating against employees because of their race, religion, gender, sexual orientation, national origin, political

⁴²⁶ Joe Biesk, *Gay Rights Supporters Criticize Ky. Governor on Affirmative Action*, AP STATE & LOCAL WIRE, Apr. 11, 2006.

⁴²⁷ The Equality Party, *Kentucky Governor Bans Discrimination for Sexual Orientation/Gender Identity*, June 3, 2008, available at <http://equalityparty.blogspot.com/2008/06/kentucky-governor-bans-discrimination.html> (last visited Dec. 4, 2008).

⁴²⁸ La. Executive Order No. EWE 92-7.

affiliation or disability.⁴²⁹ Governor Blanco’s successor, Governor Jindal, did not renew the executive order, and it therefore expired in August 2008.⁴³⁰ Explaining his rationale for letting the executive order expire, Governor Jindal said that it was “not necessary to create additional special categories or special rights” because these forms of discrimination are prohibited under existing state and federal laws.⁴³¹

c. Ohio

Current Ohio Governor Ted Strickland issued an executive order prohibiting discrimination in public employment based on sexual orientation and/or gender identity in May 2007.⁴³² The order itself states that it will expire on Governor Strickland’s last day as Governor of Ohio;⁴³³ his current term expires in 2010.⁴³⁴

d. Iowa

On September 14, 1999, then Governor Tom Vilsack signed Executive Order No. 7, which explicitly prohibited the discrimination of people on the basis of their sexual orientation or gender identity in state employment.⁴³⁵ Immediately after the Executive Order was issued, a group of law-makers began a campaign to have the order rescinded. Senate Majority Leader Stewart Iverson said, “Iowa should be on the cutting edge of

⁴²⁹ La. Executive Order No. KBB 2004-54.

⁴³⁰ Chris Johnson, “A step backwards for equality in Louisiana,” August 21, 2008, *available at* <http://www.hrcbackstory.org/2008/08/a-step-backwards-for-equality-in-louisiana/> (explaining that Gov. Jindal’s position is not correct as Louisiana remains one of thirty states that does not prohibit discrimination based on sexual orientation and one of thirty eight states that does not prohibit discrimination based on gender identity).

⁴³¹ *Id.*

⁴³² OH Exec. Order No. 2007-10S (2007), *available at* <http://www.wright.edu/admin/affirm/ExecutiveOrder2007-105.html> (last visited Feb. 1, 2009).

⁴³³ *Id.* unless rescinded before then.

⁴³⁴ The Governor of Ohio serves a four-year term. Governor Strickland was elected in 2006.

<http://www.ohiohistorycentral.org/entry.php?rec=2127>;
<http://www.governor.ohio.gov/AboutUs/AboutTed/tabid/55/Default.aspx>.

⁴³⁵ *See* Lambda Legal Iowa, <http://www.lambdalegal.org/our-work/states/iowa.html> (last visited Sept. 4, 2009).

educating our children, not the cutting edge of extending civil rights to transsexuals.”⁴³⁶ He dismissed the need for employment protections, saying, “I have friends who are homosexual, but they do their job and that isn’t the issue. When you talk about gender identity and transsexuals, that is unbelievable...how far do you go in setting up special classes of people?”⁴³⁷ Approximately one year after its issuance, Gov. Vilsack was forced to rescind the Executive Order after a state judge ruled that it constituted unconstitutional law-making in light of the fact that Iowa’s ICRA did not at that time prohibit discrimination based on a person’s sexual orientation or gender identity.

e. Virginia

In Virginia, Governor Tim Kaine and his predecessor Mark Warner issued and subsequently affirmed executive order protection for sexual orientation in state employment.⁴³⁸ However, on February 24, 2006, shortly after Governor Kaine affirmed the inclusion of sexual orientation as a protected class in the executive order, Robert McDonnell, Attorney General of Virginia, released an official Opinion opining that Executive Order 1 was unconstitutional insofar as it established a policy against sexual orientation discrimination in state employment.⁴³⁹

In February 2009, Attorney General McDonnell resigned his position to run for governor and garnered 59% of the vote in his gubernatorial race.⁴⁴⁰ He was sworn into office on January 16, 2010.⁴⁴¹ In February 2010, Governor McDonnell issued a new Executive Order, consistent with his position on sexual orientation discrimination as

⁴³⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 184-185 (2000 ed.).

⁴³⁷ *Id.*

⁴³⁸ Va. Exec. Order No.1 (2006).

⁴³⁹ Va. Atty Gen. Op. No. 05-094 (2006).

⁴⁴⁰ Va. Office of the Governor, Governor Robert F. McDonnell- Bio., <http://www.governor.virginia.gov/TheAdministration/mcdonnell-bio.cfm> (last visited Mar. 11, 2010).

⁴⁴¹ *Id.*

Attorney General, stripping former executive order protections by omitting sexual orientation as a protected classification.⁴⁴² Attorney General Ken Cuccinelli, who took over the Attorney General's office following McDonnell's resignation, issued a letter in March 2010 telling public colleges that they could not enact policies prohibiting employment discrimination based on sexual orientation, and asking that all current policies to that effect be rescinded.⁴⁴³ Following a period of public unrest caused by Cuccinelli's letter, Governor McDonnell issued a Directive to state agencies barring them from discriminating on the basis of sexual orientation.⁴⁴⁴

McDonnell's unique positioning on the issue is a result of believing that he would violate the separation of powers doctrine by issuing an executive order "changing" the Virginia Human Rights Act.⁴⁴⁵ A gubernatorial Directive, the governor's office maintains, only applies to the executive branch and therefore does not pose the same constitutional problem as a further reaching executive order.⁴⁴⁶

⁴⁴² Va. Exec. Order 6 (2010); Samair Luther, Human Rights Campaign, *Virginia: State Employees Lose Protections from Anti-LGBT Discrimination*, Feb. 16, 2010, <http://www.hrcbackstory.org/2010/02/virginia-state-employees-lose-protections-from-anti-lgbt-discrimination/> (last visited Mar. 11, 2010).

⁴⁴³ Larry O'Dell, *Virginia Governor Counters State Attorney General's Advice on Gay People*, Mar. 11, 2010, <http://miamiherald.typepad.com/gaysouthflorida/2010/03/virginia-governor-counters-state-attorney-generals-advice-on-gay-people.html>.

⁴⁴⁴ *Id.*; Va. Exec. Dir. 1 (2010).

⁴⁴⁵ O'Dell, *supra* note 442.

⁴⁴⁶ *Id.*



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