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

**Title**

Arizona - Sexual Orientation and Gender Identity Law and Documentation of Discrimination

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## MEMORANDUM

**From:** Williams Institute

**Date:** September 2009

**RE:** **Arizona – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

### I. OVERVIEW

There is no state-wide statute in Arizona that protects its LGBT citizens from employment discrimination in either the public or private sectors. Five municipalities have extended such protection through local ordinances. Those ordinances are inconsistent, however, with regard to inclusion of gender identity protection. In recent years there has been considerable debate in Arizona about the extension of partner benefits to public sector employees, but there is currently no such protection for state government employees. Indicia of hostility and animus toward gay people have surfaced during legislative consideration of these proposals. For example, when State Representative Karen Johnson introduced a bill that would have prohibited state municipalities from offering domestic partnership benefits to their employees, she supported her measure with the statement, “homosexuality is at the lower end of the behavioral spectrum” and linked gay people with diseases, including a set of symptoms she labeled “gay bowel disease.”<sup>1</sup> Her co-sponsor, Barbara Blewster, stated that homosexuality was a “high sign of the downfall of the nation.”<sup>2</sup>

Documented examples of employment discrimination by state and local government employers against LGBT people in Arizona include:

- In 2009, an Arizona crime scene investigator was fired on account of her sexual orientation.<sup>3</sup>
- 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.<sup>4</sup>

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<sup>1</sup> PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 78-79* (2000 ed.)

<sup>2</sup> *Id.*

<sup>3</sup> 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).

<sup>4</sup> 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.<sup>5</sup>
- A lesbian police officer for the City of Phoenix alleged that she was discriminated against on the basis of sex and sexual orientation, and that her right to privacy was improperly invaded when the police department investigated her relationship with another woman employed by the department, ordering her not to speak about the investigation with her partner. The Court of Appeals for the Ninth Circuit affirmed summary judgment in favor of the City. Patches v. City of Phoenix, 68 Fed.Appx. 772, 2003 WL 21206120 (Ariz. 2003).
- 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 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." Kastl v. Maricopa County Community College Dist., F.Supp.2d, 2004 WL 2008954 (D. Ariz. 2004).
- 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 city, but the trial court ruled against him and an Arizona appellate court upheld the decision.<sup>6</sup>

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

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<sup>5</sup> 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).

<sup>6</sup> 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>.

## II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

### A. State-Wide Employment Statutes

None. Currently, the state of Arizona has not enacted laws to protect sexual orientation and gender identity from employment discrimination.<sup>7</sup>

### B. Attempts to Enact State Legislation

#### 1. Proposed Bill to Modify Arizona's Civil Rights Act

In January 2008, Representatives Campel and Prezelski introduced a bill to modify Arizona's Civil Rights Act to prohibit discrimination on the basis of gender identity or expression and sexual orientation.<sup>8</sup> It does not appear that the House voted on the measure. Arguments against the bill by the Center for Arizona Family included (1) "homosexuals are not a true minority group" because they are not economically deprived, politically powerless and do not have immutable, non-behavioral characteristics; (2) "adding sexual orientation, gender identity, and gender expressions as protected classes is contrary to Arizona's at-will employment practices" and will lead to a heterosexual being fired or laid off before a homosexual; (3) "adding sexual orientation as a protected class opens the door for same-sex marriage;" and (4) "the religious exemption is inadequate to protect religious organizations and individual religious beliefs."<sup>9</sup>

A similar bill was introduced in the State Senate but was held in committee.<sup>10</sup> Similar legislation has been unsuccessfully introduced in Arizona for several years.<sup>11</sup>

Bills prohibiting only the State or political subdivisions of the State from discriminating against their employees on the basis of sexual orientation or gender identity have also been unsuccessfully introduced.<sup>12</sup> In addition, in 1994 Arizona State Representative Rusty Bowers introduced a legislative proposal to amend the Arizona constitution to ban municipalities from adopting sexual orientation discrimination

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<sup>7</sup> In 1965, Arizona passed its Civil Rights Act, which barred discrimination on the basis of race, color, religion, sex, age, disability or national origin. (*as amended*) A.R.S. § 41-1401 *et seq.*

<sup>8</sup> *See* 2008 AZ H.B. 2002.

<sup>9</sup> *See* The Center for Arizona Policy, Family Issue Fact Sheet, HB 2002-Employment Nondiscrimination Act (EDNA) (February 2008); The Center for Arizona Policy, Employment Nondiscrimination Act (January 2008).

<sup>10</sup> *See* 2008 AZ S.B. 146.

<sup>11</sup> *See* 2007 AZ H.B. 2580 (sexual orientation and gender identity or expression); 2006 AZ H.B. 2726 (sexual orientation and gender identity or expression); 2005 AZ H.B. 2704 (sexual orientation and gender identity or expression); 2004 AZ H.B. 2415 (sexual orientation and gender identity); 2003 AZ S.B. 1255 (sexual orientation and gender identity); 2002 AZ H.B. 2308 (sexual orientation and gender identity); 2001 AZ S.B. 1225 (sexual orientation and gender identity); 1996 AZ S.B. (sexual orientation); *see also* 1997 AZ H.B. 2431 (proposing a separate section of the Civil Rights Act to address discrimination based on sexual orientation).

<sup>12</sup> *See* 2001 AZ H.B. 2270 (proposed a separate section of the Civil Rights Act, § 41-1466, to address sexual orientation and gender identity); 2001 AZ S.B. 1240 (same).

ordinances; at the same time, the "Traditional Values Coalition of Arizona" circulated petitions to qualify a similar initiative.

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

**1. Executive Orders**

In 2003, by Executive Order, Arizona Governor Janet Napolitano directed that no state agency, board or commission shall discriminate solely on the basis of an individual's sexual orientation.<sup>13</sup> In addition, the Governor directed that acts of sexual harassment or other harassment based upon sexual orientation would be cause for discipline, including dismissal.<sup>14</sup>

On January 20, 2009, Governor Napolitano became Secretary of Homeland Security. Secretary of State Jan Brewer then became Governor. Press reports at the time suggested that Brewer might repeal Governor Napolitano's Order protecting against discrimination on the basis of sexual orientation.<sup>15</sup> As of July 27, 2009, Governor Brewer has taken no action on this matter.

**2. State Government Personnel Regulations**

Since 1986, Arizona Department of Administration Personnel Administration regulations have directed that that a State agency shall not discriminate against an individual in violation of A.R.S. §§ 41-1461 (definitions), 41-1463 (prohibiting discrimination on the basis of race, color, religion, sex, age, disability or national origin), and 41-1464 (prohibiting retaliation and indication of preference, limitation, specification or discrimination based on race, color, religion, sex, age, disability or national origin).<sup>16</sup> Sexual orientation and gender identity are not listed as protected categories.

The Arizona State Board of Education and several local government departments and municipalities have adopted non-discrimination policies.

**(a) Education**

Since 2003, Arizona has prohibited teachers and school administrators licensed by the State Board of Education and applicants for licensure from discriminating against or harassing "any pupil or school employee on the basis of race, national origin, religion, sex, including sexual orientation, disability, color or age."<sup>17</sup> Individuals engaging in such unprofessional or immoral conduct may be disciplined by the Board.<sup>18</sup> There is no protection for gender identity.

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<sup>13</sup> Executive Order 2003-22, Confirming Equal Employment Opportunities.

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

<sup>15</sup> See e.g. <http://www.politickeraz.com/tags/jan-brewer?page=4> (predicting rollback of Executive Order 2003-22).

<sup>16</sup> Ariz. Admin. Code § R2-5-104.

<sup>17</sup> Ariz. Admin. Code § R7-2-1308(B).

<sup>18</sup> *Id.* § R7-2-1308(C).

Enforcement against a person certified by the State Board of Education who is accused of engaging in unprofessional or immoral conduct begins when a signed and notarized statement of allegations against the certified individual is submitted to the Board.<sup>19</sup> The Board must conduct an investigation of all statements of allegations.<sup>20</sup> After an investigation, the Board may file a complaint.<sup>21</sup> The certified individual against whom the complaint is filed has fifteen days to respond.<sup>22</sup> Decisions of the Board are final unless an appeal is filed in Arizona Superior Court within thirty days of the date of the decision.<sup>23</sup>

Only seven out of approximately 224 school board policies include provision prohibiting discrimination on the basis of sexual orientation.<sup>24</sup> Of the seven, two schools also include gender identity in their nondiscrimination policy statements.<sup>25</sup>

The seven policy statements typically provide that “[t]he Board is committed to a policy of nondiscrimination in relation to race, color, religion, sexual orientation, age, national origin, and disability. This policy will prevail in all matters concerning staff members, students, the public, educational programs, and services, and individuals with whom the Board does business.”<sup>26</sup> The Superintendent is designated the compliance officer and charged with investigating and documenting complaints that violate the equal opportunity policy.<sup>27</sup> The Superintendent may hold an administrative hearing or recommend that the matter be brought before the board.<sup>28</sup> If the alleged violator is a teacher or administrator, misconduct may result in suspension or dismissal.<sup>29</sup>

The seven school boards also have reciprocal regulations ensuring equal employment opportunity. In general the equal employment policies prohibit discrimination “against an otherwise qualified individual with a disability or any individual by reason of race, color, religion, sexual orientation, age, or national origin.”<sup>30</sup> The policy

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<sup>19</sup> *Id.* § R7-02-1302.

<sup>20</sup> *Id.* § R7-2-1302(H).

<sup>21</sup> *Id.* § R7-2-1303.

<sup>22</sup> *Id.* § R7-2-1304; *see* A.R.S. §§ 15-539 and 15-541 for additional due process requirements.

<sup>23</sup> A.R.S. § 15-543.

<sup>24</sup> An additional two schools located in New Mexico also included sexual orientation in their nondiscrimination policy statements. *See* Hatch Valley Public Schools P.M & A.R. § A-0250 (2005); Tucumcari Public Schools P.M & A.R. § A-0250 (2004).

*See* Amphitheater Sch. Dist. No. 10 Policy Manual and Administrative Regulations (“P.M & A.R.”) § A-0250 (1998); Camp Verde Unified Sch. Dist. No. 28 P.M & A.R. § A-0250 (2007); Catalina Foothills Unified Sch. Dist. No. 16 P.M & A.R. § A-0250 (1997); Flagstaff Unified School District No. 1 Policy Manual § A-0250 (2004); Marana Unified Sch. Dist. No. 6 P.M & A.R. § A-0250 (2005); Pima County Joint Technological Education Dist. No. 11 P.M & A.R. § A-0250 (2008); Sunnyside Unified School Dist. No. 12 P.M & A.R. § A-0250 (2007).

<sup>25</sup> *See* Pima County Joint Technological Education Dist. No. 11 P.M & A.R. § A-0250 (2008); Sunnyside Unified School Dist. No. 12 P.M & A.R. § A-0250 (2007).

<sup>26</sup> *See, e.g.*, Camp Verde Unified Sch. Dist. No. 28 P.M & A.R. § A-0250.

<sup>27</sup> *Id.* § A-0261.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See e.g.*, Camp Verde Unified Sch. Dist. No. 28 P.M & A.R. §G-0200.

also typically states that “[e]fforts will be made in recruitment and employment to ensure equal opportunity in employment for all qualified persons.<sup>31</sup> The Superintendent is the designated compliance officer charged with investigating and documenting complaints and deciding whether to hold an administrative hearing or bring the matter before the School Board.<sup>32</sup>

(b) **Police and Fire Departments**

The Phoenix Police Department “fully endorses and supports the concept of equal business and employment opportunities for all individuals, regardless of race, color, age, sex, religion, national origin, disability, or sexual orientation.”<sup>33</sup> The Police Department Equal Employment Opportunity Policy states that it is illegal to discriminate on the basis of sexual orientation and that all parties will be treated equally without regard to sexual orientation in all employment matters including promotions, transfers, job rotation, training, work assignments, hiring, merit increases, overtime awards, and discipline.<sup>34</sup>

The Phoenix Fire Department Operations Manual (“Manual”) defines discrimination as “any act taken because of race, color, religion, gender, age disability, sexual orientation or national origin by a City employee or group of employees that adversely affects another employee or applicant in any aspect of City employment.”<sup>35</sup> The Manual states that “discrimination will not be tolerated in any aspect of Department employment” and requires supervisors, managers, and executives to take proactive steps to prevent discrimination and to promptly take corrective action wherever discrimination occurs.<sup>36</sup> In accordance with the Phoenix Code, the Manual also states that the Fire Department shall not deny any City service to any person on the basis of a person’s sexual orientation.<sup>37</sup>

The Tempe Fire Department Harassment Policy also prohibits harassment on the basis of sexual preference.<sup>38</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* § G -0211; *see also* Catalina Foothills Unified Sch. Dist. No. 16 P.M & A.R. §§ G-0200-211; Marana Unified Sch. Dist. No. 6 P.M & A.R. §§ G-0200-211; Pima County Joint Technological Education Dist. No. 11 P.M & A.R. §§ G-0200-211; Sunnyside Unified School Dist. No. 12 P.M & A.R. §§ G-0200-211; *compare* Amphitheater Sch. Dist. No. 10 P.M & A.R. § G-0200-211.1 (containing more detailed prohibitions and requiring an affirmative action program to “actively promote the full realization of equal employment opportunity” but not setting forth a complaint procedure.)

<sup>33</sup> City of Phoenix, EEO & ADA Standards, Statement of commitment for Police Department Employees at [http://phoenix.gov/POLICE/equal\\_op.html](http://phoenix.gov/POLICE/equal_op.html).

<sup>34</sup> Operations Order 3.14(3) (June 2003).

<sup>35</sup> Phoenix Fire Department, Volume 1-Operations Manual, Harassment-Free Environment, MP105.17(A)(III) (defining sexual orientation as heterosexuality, homosexuality, or bisexuality.).

<sup>36</sup> *Id.* at MP 105.17(A)(IV).

<sup>37</sup> *Id.*

<sup>38</sup> Tempe Fire Department Policies and Procedures, Policy Prohibiting Harassment, Including Sexual Harassment 104.12 (2008).

The Sedona Fire District equal employment opportunity policy states that “[t]he District will maintain a policy of nondiscrimination with regard to all personnel and applicants for employment and membership. There shall be no discrimination bias as a result of race, color, religion, sex, sexual orientation, age, national origin, handicap or any basis prohibited by statute.”<sup>39</sup> Sedona does not have a city ordinance addressing equal opportunity.

### 3. Attorney General Opinions

None.

#### D. Local Legislation

##### 1. City of Phoenix

The City of Phoenix (“Phoenix”) bars discrimination on the basis of race, color, religion, sex, national origin or marital status by all employers within the City of Phoenix but does not bar discrimination on the basis of sexual orientation or gender identity.<sup>40</sup> Phoenix also does not include sexual orientation in its ordinances requiring affirmative action efforts by its construction contractors.<sup>41</sup>

The Phoenix Commission on Human Relations, however, is tasked with (1) making periodic surveys of the existence of discrimination in the City of Phoenix because of race, color, religion, national origin, marital status, and sexual orientation in public accommodations and employment and (2) fostering positive inter-group relations and elimination of discrimination based upon race, color, religion, national origin, marital status, and sexual orientation.<sup>42</sup>

In 1991, Phoenix adopted specific regulations barring discrimination by the City on the basis of sexual orientation.<sup>43</sup> Section 18-10.01 of the Phoenix Code provides that Phoenix “shall not refuse to hire any person or to bar or discharge from employment such person, or to discriminate against such person in compensation, conditions or privileges of employment, on the basis of sexual orientation.” The City Manager is charged with adopting administrative regulations to enforce the above rights.<sup>44</sup>

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<sup>39</sup> Sedona Fire District Administrative Procedure #143.

<sup>40</sup> See Code of the City of Phoenix (“Phoenix Code”) §§ 18-1 (declaring “it to be contrary to the policy of the City and unlawful to discriminate against any person because of race, color, religion, sex, national origin, or marital status in places of public accommodation and employment.”), 18-4(A)(2)-(4) (barring discrimination in employment), 18-4(B) (barring discrimination in public accommodations).

<sup>41</sup> See *id.* § 18-12 (“It is the policy of the City of Phoenix that any construction contractor (“contractor”) who anticipates establishing a business relationship with the City of Phoenix for contracts of ten thousand dollars or more adheres to a policy of equal employment opportunity and demonstrates an affirmative effort to recruit, hire and promote regardless of race, color, religion, gender, or national origin, age or disability; and that all contractors uphold this policy with their subcontractors.”); see also *id.* § 18-19 (requiring a similar policy for long-term suppliers of goods and services to the City of Phoenix).

<sup>42</sup> *Id.* § 18-2(A)(5).

<sup>43</sup> See City of Flagstaff Staff Summary Report at 9.

<sup>44</sup> Phoenix Code § 18-10.03. These administrative regulations were not located.



It is also unlawful for employers that are vendors, suppliers or contractors, who do business with Phoenix and employ more than thirty-five persons, to discriminate against any person because of sexual orientation.<sup>45</sup> Specifically, the Phoenix Code prohibits those vendors, suppliers or contractors from (a) failing or refusing to hire or discharging or otherwise discriminating against any individual with respect to compensation, terms, conditions of[r] privileges of employment; (b) limiting, segregating, or classifying employees or applicants for employment in any way that would deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee because of such individual's orientation; (c) coercing, intimidating, threatening or interfering with any person in the exercise of or enjoyment of such rights, or on account of his or her having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of such rights; and (d) discriminating against any individual because of such person's sexual orientation in admission to or employment in any apprenticeship or other training or retraining programs, including on-the-job training programs.<sup>46</sup> "Bona fide religious organizations" are exempt from the prohibitions concerning sexual orientation.<sup>47</sup>

## 2. City of Tucson

The City of Tucson ("Tucson") prohibits discrimination in places of public accommodation, employment, and housing on the basis of, *inter alia*, sexual orientation and gender identity.<sup>48</sup> In addition to prohibiting discrimination on the basis of sexual orientation or gender identity, the Tucson Code provides that such discrimination is a civil infraction with fines ranging from \$300 to \$2,500.<sup>49</sup>

An employer cannot refuse to hire or employ, bar or discharge from employment, or discriminate in compensation or in terms, conditions or privileges of employment on the basis of sexual orientation or gender identity.<sup>50</sup> Tucson also prohibits "any employer or employment agency to print or circulate, or cause to be printed or circulated, any publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly any limitation, specification or discrimination as to race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status or expresses any intent to make any such limitation, specification, or

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<sup>45</sup> Phoenix Code § 18-4(A)(5).

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

<sup>47</sup> *Id.* § 18-4(A)(8).

<sup>48</sup> City of Tucson Code ("Tucson Code") §§ 17-1 ("It is the policy of the city to eliminate prejudice and discrimination due to race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status, in places of public accommodation, in employment, and in housing."), 17-11(b) ("Discriminate or discrimination means to make, directly or indirectly, any distinction with respect to any person or persons based on race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status.").

<sup>49</sup> *Id.* § 17-14.

<sup>50</sup> *Id.* §§ 17-12(b)-(c).

discrimination.”<sup>51</sup> In general the prohibitions do not apply to religious organizations or to certain housing situations where the lessor also resides in the leased housing.<sup>52</sup>

A person discriminated against on the basis of sexual orientation or gender identity in violation of the Tucson Code must file a verified charge with the Office of Equal Opportunity Programs (“OEOP”) of the City Manager’s office within ninety calendar days of the alleged violation.<sup>53</sup> The OEOP must promptly investigate the charge and notify the person charged. The person charged has twenty days to file a written answer to the charges.<sup>54</sup> The OEOP must issue written findings within 120 calendar days and provide a copy to the parties involved.<sup>55</sup>

If the OEOP issues a finding that there is no reasonable cause to believe the person charged engaged in a discriminatory practice, the aggrieved party may file an appeal with the Tucson Human Relations Commission.<sup>56</sup> If the OEOP finds there is reasonable cause to believe the person charged engaged in a discriminatory practice, OEOP may attempt to eliminate the alleged discriminatory practice by conference, conciliation and persuasion.<sup>57</sup> OEOP may also request the city attorney to file a complaint in city court.<sup>58</sup>

### 3. City of Scottsdale

In December 2007, the City of Scottsdale amended its equal employment opportunity policy articulated in the Scottsdale Revised Code to include sexual orientation and gender identity. “It is the policy of the [City of Scottsdale] to provide employment opportunities to all persons based solely on ability, regardless of race, color, religion, sex, national origin, age, sexual orientation, gender identity or disability.”<sup>59</sup> The policy applies to all human resources related activities.

### 4. City of Tempe

Although the City of Tempe does not have a general ordinance prohibiting discrimination on the basis of sexual orientation, Tempe does have a nondiscrimination policy with respect to city employees. The hiring process for the city states that Tempe will “assure equal employment opportunity to all qualified person[s]” regardless of “race, color, religion, disability, sex, sexual orientation, age, or national origin.”<sup>60</sup>

### 5. City of Flagstaff

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<sup>51</sup> *Id.* § 17-12(d).

<sup>52</sup> *See id.* §§ 17-13(b), (d).

<sup>53</sup> *Id.* § 17-15(a).

<sup>54</sup> *Id.* § 17-15(a)-(b).

<sup>55</sup> *Id.* § 17-15(c).

<sup>56</sup> *Id.* § 17-15(d).

<sup>57</sup> *Id.* § 17-15(e).

<sup>58</sup> *Id.* § 17-15(f).

<sup>59</sup> Scottsdale Rev. Code § 14-2 (2008).

<sup>60</sup> *See* City of Tempe Hiring Process *available at* [http://www.tempe.gov/jobs/hiring\\_process.htm](http://www.tempe.gov/jobs/hiring_process.htm).

The City of Flagstaff also has a nondiscrimination policy to protect city employees from discrimination based on sexual orientation and gender identity.<sup>61</sup> In 2008, the City of Flagstaff considered an ordinance proposed by Equality Arizona that would add sexual orientation and gender identity as a protected class in the City of Flagstaff.<sup>62</sup> The ordinance has not been adopted.

#### E. Occupational Licensing Requirements

Several state licensure requirements still contain clauses referencing a “misdemeanor involving moral turpitude.” Prior to 2001, it was a class 3 misdemeanor to knowingly and without force (1) commit “the infamous crime against nature” with an adult,<sup>63</sup> or (2) commit, “in any unnatural manner, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female adult, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either of such persons.”<sup>64</sup> Thus, prior to 2001, Arizona law effectively permitted discrimination against homosexuals by defining sodomy as a misdemeanor. In 2001, Arizona repealed its laws regarding “crimes against nature” and “lewd and lascivious” conduct and thus removed those acts from the realm of misdemeanors involving moral turpitude.

Several applications for licensure, including licenses provided by the Board of Medical Examiners, the Board of Physician Assistants, the Board of Podiatry Examiners, and the Board of Pharmacy, require disclosure of whether the applicant has ever been convicted of a crime involving moral turpitude:<sup>65</sup>

Board of Chiropractic Examiners: The Board of Chiropractic Examiners may refuse to give an examination or may deny licensure to an applicant if the applicant is under investigation by a regulatory board in Arizona or any other state for an act that constitutes unprofessional conduct.<sup>66</sup> The Board of Chiropractic Examiners may take also disciplinary action for “unprofessional or dishonorable conduct of a character likely to deceive or defraud the public or tending to discredit the profession.”<sup>67</sup> Unprofessional or dishonorable conduct includes committing “a misdemeanor involving moral turpitude.”<sup>68</sup> In addition, the Board will not approve participation of an extern who “is currently under investigation for a licensing violation, or a felony or misdemeanor involving moral turpitude.”<sup>69</sup>

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<sup>61</sup> City of Flagstaff Staff Summary Report at 11.

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

<sup>63</sup> A.R.S. § 13-411 (1995) (repealed 2001).

<sup>64</sup> A.R.S. § 13-1412 (1995) (repealed 2001).

<sup>65</sup> See Ariz. Admin. Code §§ R4-16-201(B)(16) (Board of Medical Examiners); R4-17-203(A) & 204(A) (Board of Physician Assistants); R4-25-301 (Board of Podiatry Examiners); R4-23-301(H)(2)(c), 604(B)(4), 605(B)(1)(e), 606(B)(1)(e), 607(B)(1)(4), 1103(A)(2)(b) (Board of Pharmacy).

<sup>66</sup> A.R.S. § 32-921(C)(3).

<sup>67</sup> A.R.S. § 32-924(5).

<sup>68</sup> Ariz. Admin. Code § R4-7-902(32).

<sup>69</sup> *Id.* § R4-7-1001(C) (addressing the preceptorship training program).

Massage Therapy License: An applicant for a massage therapist license must, among other things, have good moral character and not have, within five years preceding the date of application been convicted of a misdemeanor involving prostitution or solicitation or other similar offense involving moral turpitude that has a reasonable relationship to the practice of massage therapy.<sup>70</sup> Being convicted “of a felony or other offense involving moral turpitude or any conviction for prostitution, solicitation, or similar offense” is also grounds for disciplinary action.<sup>71</sup>

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<sup>70</sup> A.R.S. § 32-4222(A)(4) & (7); *see also* Ariz. Admin. Code § R4-15-101(10) (defining an applicant of good moral character as one who “has not, within five years before the date of application, been convicted of a felony or an offense involving moral turpitude or prostitution, solicitation, or other similar offense”).

<sup>71</sup> A.R.S. § 32-4253(A)(4).

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

#### A. Case Law

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

Patches v. City of Phoenix, 68 Fed.Appx. 772, 2003 WL 21206120 (Ariz. 2003).

In an unpublished opinion, a unanimous three-judge panel of the U.S. Court of Appeals for the 9th Circuit rejected a discrimination and privacy suit brought by a lesbian police officer against the City of Phoenix, Arizona, and several city employees. The court found no constitutional bar to the police department's investigation of Sharon Patches's relationship with another woman employed by the department, and also rejected her claim of unlawful sex discrimination.

It appears that Patches, who was involved in a relationship with another officer, assigned her partner to a special squad, and the assignment was questioned by other subordinates in the department. This led to a departmental investigation, during which Patches was asked about the nature of her relationship. At the conclusion of the investigation, the department imposed a disciplinary sanction on Patches, which was not specified in the opinion.

Patches sued the City of Phoenix and various department officials in the federal district court, claiming that she had been the victim of sex discrimination in violation of the Civil Rights Act of 1964. She also claimed that her constitutional right to privacy was improperly invaded by the investigation, as well as her right to intimate association, and that her equal protection right to be free of sex and sexual orientation discrimination had also been violated. She also claimed that the department discriminated against her by ordering her not to speak with her partner about the investigation while it was ongoing, even though police officers are normally allowed to discuss such matters with their spouses. The District Court granted the defendants' motion for summary judgment.<sup>72</sup>

Kastl v. Maricopa County Community College Dist., F.Supp.2d, 2004 WL 2008954 (D. Ariz. 2004).

Kastl, a male-to-female transsexual, filed suit against a community college claiming the college had violated Title VII's proscription against discrimination because of sex when it required Kastl 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.

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<sup>72</sup> *Patches v. City of Phoenix*, 68 Fed.Appx. 772, 2003 WL 21206120 (C.A.9, Ariz. 2003) (Not published in Federal Reporter).

Kastl, an adjunct faculty member and student at Estrella Mountain Community College (“EMCC”) alleged that the termination of her employment was the result of unlawful discrimination because of sex, in violation of Title VII. During her employment at EMCC, Kastl had been diagnosed with gender identity disorder. Upon receiving the diagnosis, Kastl began transitioning from male to female and dressed more femininely at work. She legally changed her name and obtained a new driver’s license indicating her sex as female. During this time, Kastl’s employers received objections from employees about Kastl’s use of the female restroom. Consequently, the employer issued a new policy, requiring Kastl and another transsexual employee to use male restrooms until such time as Kastl provided proof that she did not have male genitalia. Kastl offered her new license as proof, but superiors pronounced it “inconclusive and irrelevant.” Kastl refused to abide by the new restroom policy, and EMCC swiftly terminated her employment.

The District Court denied Defendant's motion to dismiss, 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.”

While the defendant argued that its policy segregated people by genitalia—not by sex—the court countered that the defendant mandated the use of the “men’s restroom,” not the “restroom for individuals with male genitalia.” Viewing the evidence in a light most favorable to the Plaintiff, the District Court found that Kastl had successfully stated a claim of sex discrimination against EMCC.<sup>73</sup>

## 2. **Private Employees**

None.

## B. **Administrative Complaints**

None.

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

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<sup>73</sup> *Kastl v. Maricopa County Community College Dist.*, F.Supp.2d, 2004 WL 2008954 (D.A.Z. 2004). The defendant was later granted summary judgment. 2006 WL 2460636, aff’d 325 Fed Appx 492 (9<sup>th</sup> Cir. 2009)

### Municipal Police Department

In 2009, an Arizona crime scene investigator was fired on account of her sexual orientation.<sup>74</sup>

### Arizona Department of Child Support Enforcement

In 2007, 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.<sup>75</sup>

### County Hospital

In 2006, a transgender nurse was fired by an Arizona county hospital on account of her gender identity.<sup>76</sup>

### Mesa Police Department

"R.H." worked as an undercover narcotics officer with the Mesa Police Department. During a tour of duty in Vietnam, he had been awarded the Bronze Star. Since joining the police department, R.H. established a perfect record. In August 1980, R.H. told the police chief that he was gay. The police chief initially assured R.H. that his sexual orientation would not affect his position in the department. Soon after his disclosure, however, R.H. was fired. 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. R.H. filed a lawsuit against the city, but the trial court ruled against him. An Arizona appellate court upheld the decision in 1984.<sup>77</sup>

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<sup>74</sup> 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).

<sup>75</sup> 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).

<sup>76</sup> 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).

<sup>77</sup> 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>.





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

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

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

In 2001, the State of Arizona repealed its long-standing laws addressing “the infamous crime against nature” and “lewd and lascivious acts.” A.R.S. § 13-411 provided that “[a] person who knowingly and without force commits the infamous crime against nature with an adult is guilty of a class 3 misdemeanor.”<sup>78</sup> Prior to 1951, the statute expressly precluded “sodomy, or the crime against nature” with mankind or animal.<sup>79</sup>

State law had also provided that:

A person who knowingly and without force commits, in any unnatural manner, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female adult, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either of such persons, is guilty of a class 3 misdemeanor.<sup>80</sup>

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

The Arizona Civil Rights Act prohibits discrimination in public accommodation or housing on the basis of race, color, religion, sex, familial status or national origin.<sup>81</sup>

In 2008, in connection with legislation barring employment discrimination on the basis of sexual orientation, a bill was introduced into the State Senate that also sought to prohibit discrimination on the basis of sexual orientation or gender identity or expression in public accommodation and in housing.<sup>82</sup> The bill did not make it out of committee.

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<sup>78</sup> A.R.S. § 13-411 (1995) (repealed 2001).

<sup>79</sup> See *State v. Potts*, 254 P.2d 1023, 1024 (Ariz. 1953) (“sodomy” and “infamous crime against nature” meant the same thing at common law and were used interchangeably to refer to carnal copulation of human beings in an other than natural manner, that is, against nature and per anum).

<sup>80</sup> A.R.S. § 13-1412 (1995) (repealed 2001).

<sup>81</sup> See A.R.S. §§ 41-1442 (discrimination in places of public accommodation); 41-1491.14 (discrimination in sale or rental of a dwelling); see also A.R.S. §§ 41-1491.15 (publication of sales or rentals); 41-1491.16 (inspection of dwelling); 41-1491.17 (entry into neighborhood); 41-1491.20 (residential real estate related transactions); 41-1491.21 (brokerage services).

<sup>82</sup> See Ariz. S.B. 1416 (2008).

The City of Phoenix prohibits discrimination on the basis of race, color, religion, sex, national origin, or marital status, but not sexual orientation or gender identity, in places of public accommodation and in employment.<sup>83</sup> As noted above, the Phoenix Commission on Human Relations conducts periodic surveys of the existence of discrimination in the City of Phoenix because of sexual orientation in public accommodations and employment and fosters positive inter-group relations and elimination of discrimination based upon sexual orientation.<sup>84</sup>

The city of Tucson prohibits discrimination in places of public accommodation and in housing on the basis of, among other things, sexual orientation and gender identity.<sup>85</sup> In addition to prohibiting discrimination on the basis of sexual orientation or gender identity, the Tucson Code provides that such discrimination is a civil infraction with fines ranging from \$300 to \$2,500.<sup>86</sup>

Tucson prohibits the owner, operator, lessee, manager, agent or employee of any place of accommodation from discriminating against any person or directly or indirectly displaying, circulating, publicizing or mailing any advertisement, notice or communication which states or implies that any facility or service shall be refused or restricted on the basis of sexual orientation or gender identity or that any person would be unwelcome, objectionable, unacceptable, undesirable or not solicited because of their sexual orientation or gender identity.<sup>87</sup>

Tucson prohibits discrimination on the basis of sexual orientation or gender identity in the sale and rental of housing within the City Limits.<sup>88</sup> The prohibitions concern offers or negotiations for the sale or rental of a dwelling, advertisement, representations regarding availability of a dwelling or the make-up of a neighborhood, real estate loan terms, and membership or participation in listing services or real estate business organizations.<sup>89</sup> Certain single family dwellings, religious organizations, and private clubs are exempt.<sup>90</sup>

### C. HIV/AIDS Discrimination

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<sup>83</sup> PHOENIX CODE §§ 18-1 (articulating city policy), 18-4(A)(2)-(4) (barring discrimination in employment), and 18-4(B) (barring discrimination in public accommodation).

<sup>84</sup> *Id.* § 18-2(A)(5).

<sup>85</sup> *See* TUCSON CODE §§ 17-1 (“It is the policy of the city to eliminate prejudice and discrimination due to race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status, in places of public accommodation, in employment, and in housing.”) and 17-11(b) (“Discriminate or discrimination means to make, directly or indirectly, any distinction with respect to any person or persons based on race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status.”)

<sup>86</sup> *Id.* § 17-14.

<sup>87</sup> *Id.* § 17-12(a).

<sup>88</sup> *Id.* § 17-51(a).

<sup>89</sup> *Id.* § 17-52.

<sup>90</sup> *Id.* §§ 17-51(b), 17-53.

Arizona law regarding acquired immune deficiency syndrome (“AIDS”) prohibits any instruction which promotes or portrays homosexuality in a positive life style.<sup>91</sup>

#### D. Hate Crimes

Since 1991, the Arizona Highway Department has been obligated to collect information concerning criminal offenses that manifest evidence of prejudice based on race, color, religion, national origin, sexual orientation, gender or disability.<sup>92</sup> In 2008, bills were introduced in the State House and Senate to require tracking of hate crimes based on gender identity or expression.<sup>93</sup> Both bills died when the legislature adjourned June 27, 2008.<sup>94</sup>

#### E. Education

As noted above, teachers and school administrators licensed by the State Board of Education are prohibited from discriminating against or harassing “any pupil or school employee on the basis of race, national origin, religion, sex, including sexual orientation, disability, color or age.”<sup>95</sup>

In addition, seven Arizona School Boards have nondiscrimination or equal opportunity clauses that prohibit discrimination on the basis of sexual orientation or gender identity. These same school boards have equal education policies which prohibit discrimination in educational opportunities. The policies typically provide that “[t]he right of a student to participate fully in classroom instruction shall not be abridged or impaired because of race, gender (including sexual harassment . . . ), sexual orientation, national origin, religion, creed, age disability or any other reason not related to the student’s individual capabilities.”<sup>96</sup> The Superintendent is charged with investigating and documenting complaints and determining whether to hold an administrative hearing or bring the matter before the board.<sup>97</sup>

Arizona law prohibits charter schools from limiting admission based on “ethnicity, national origin, gender, income level, disabling condition, proficiency in the English language or athletic ability.”<sup>98</sup> Admission discrimination based on gender identity or sexual orientation, however, is not prohibited.<sup>99</sup>

Arizona law protects the rights of students to form gay and lesbian and transgender affinity groups, as well as the right to form clubs opposed to homosexuality:

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<sup>91</sup> A.R.S. § 15-0716 (2009).

<sup>92</sup> A.R.S. § 41-1750(A)(3).

<sup>93</sup> See 2008 Ariz. S.B. 1483; 2008 AZ H.B. 2752.

<sup>94</sup> Human Rights Campaign, EQUALITY FROM STATE TO STATE: A REVIEW OF THE STATE LEGISLATION IN 2008 AFFECTING THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITY AND A LOOK AHEAD TO 2009 36 (2008), [http://www.hrc.org/documents/HRC\\_States\\_Report\\_08.pdf](http://www.hrc.org/documents/HRC_States_Report_08.pdf).

<sup>95</sup> ARIZ. ADMIN. CODE § R7-2-1308(B); see Part. I(J)(1) *supra*.

<sup>96</sup> See, e.g. CATALINA FOOTHILLS UNIF. SCH. DIST. NO. 16 POLICY MANUAL § J-0150.

<sup>97</sup> *Id.* § J-0161.

<sup>98</sup> A.R.S. § 15-184(B).

<sup>99</sup> See *id.*

“It is unlawful for any public school that offers instruction in grades seven and eight to deny equal access to pupils, to deny a fair opportunity to pupils or to discriminate against pupils who wish to conduct a meeting within a limited open forum on the basis of religious content, political content, philosophical content or other content of speech at these meetings.”<sup>100</sup>

Arizona regulations governing the content of materials teaching sex education do not accommodate homosexuality or gender identity concerns. Rather, the regulations include language that could be construed to prohibit recognition of homosexuality as acceptable behavior. For example, Arizona regulations provide that sex education materials and instruction shall, among other things, “recognize local community standards and sensitivities [and] shall not include the teaching of abnormal, deviant, or unusual sexual acts and practices.”<sup>101</sup> Any materials discussing sexual intercourse must, among other things, “promote honor and respect for monogamous heterosexual marriage.”<sup>102</sup>

In connection with instruction regarding AIDS, state law reflects a blatant bias against homosexuality. Arizona prohibits a district from including within the AIDS curriculum any instruction which (1) promotes a homosexual life-style; (2) portrays homosexuality as a positive alternative life-style; or (3) suggests that some methods of sex are safe methods of homosexual sex.<sup>103</sup> In 2008, bills were introduced in the State House and Senate to remove these prohibitions, but the measures were unsuccessful.<sup>104</sup>

In 1999, a bill was introduced into a committee at the House of Representatives that would have required a school district to deny the use of school monies, resources, property, and employees to any student organization that (1) encouraged criminal or delinquent conduct; (2) promotes sexual activity of any kind; (3) promotes conduct that contradicts certain abstinence requirements; or (4) promotes a specific sexual orientation.<sup>105</sup> However, the language of the bill was stricken completely in committee and the bill was revised to deal with “spirituous liquor and motor vehicle travel.”<sup>106</sup>

In 2003, a bill was introduced that would have granted “all persons regardless of gender, transgender, ethnic group identification, race, national origin, religion, color, mental or physical disability or sexual orientation” equal rights and opportunities in the

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<sup>100</sup> A.R.S. § 15-720.

<sup>101</sup> ARIZ. ADMIN. CODE § R7-2-303(A)(3)(a).

<sup>102</sup> ARIZ. ADMIN. CODE § R7-2-303(A)(3)(b)(v).

<sup>103</sup> A.R.S. § 15-716 (1991).

<sup>104</sup> See 2008 Ariz. H.B. 2708; 2008 AZ S.B. 1342.

<sup>105</sup> 1999 Ariz. H.B. 2051.

<sup>106</sup> Amendments to H.B. 2051 (Feb. 19, 2009); see also *Perspective*, TUCSON OBSERVER, Feb. 24, 1999, at 4, available at <http://bit.ly/FOWhe> (noting bill that would ban gay and lesbian support clubs from public school campuses would be “guttled”).

education institutions of the State of Arizona.<sup>107</sup> The bill would have prohibited educational institutions that received State financial assistance or that enroll students who receive state financial aid from discriminating against the same class of people.<sup>108</sup> The bill died in committee.

#### F. Health Care

Residents of a health care institution licensed by the Department of Health Services have the right “[t]o be free from discrimination in regard to race, color, national origin, sex, sexual orientation, and religion and to be assured the same civil and human rights accorded to other individuals.”<sup>109</sup> Regulations barring discrimination by nursing care institution administrators, however, do not mention sexual orientation.<sup>110</sup>

A client of a behavioral health service agency that is licensed by the Department of Health Services has the right to “not be discriminated against based on race, national origin, religion, gender, sexual orientation, age disability, marital status, diagnosis, or source of payment.”<sup>111</sup> Further, opioid treatment must be provided regardless of race, ethnicity, gender, age or sexual orientation.<sup>112</sup>

Counselors licensed by the Board of Behavioral Health Examiners who obtained degrees by non-accredited programs must take one three-semester credit hour course addressing, among other things, “attitudes and behaviors based on factors such as age, race, religious preference, physical disability, sexual orientation, ethnicity and culture, family patterns, gender, socioeconomic status and intellectual ability.”<sup>113</sup> Required courses for accredited programs do not specifically include instruction regarding sexual orientation or gender identity. Instead, required content refers to studies to provide a broad understanding of “the physical, psychological, social and moral development of individuals throughout the lifespan, including normal and abnormal behavior” or “social norms, changes, and trends, human roles, and alternative lifestyles.”<sup>114</sup>

#### G. Parenting

In 2008, a bill was introduced into the House of Representatives that would have set forth the rights of children in foster care. Included in the enumerated rights was the right of a child in foster care to be free from unfair treatment because of the child’s sex,

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<sup>107</sup> See 2003 Ariz. H.B. 2453.

<sup>108</sup> *Id.*

<sup>109</sup> ARIZ. ADMIN. CODE § R9-10-710(D)(22).

<sup>110</sup> See *id.* at §§ R4-33-208(B)(6) & 407(B)(6) (barring discrimination against a patient or employee on the basis of race, sex, age, religion, disability, or national origin).

<sup>111</sup> *Id.* at § R9-20-203(C)(2); see also *id.* at §§ R9-20-701 (C) (providing similar rights to clients of agencies that treat individuals determined to be sexually violent); R9-20-1202 (providing similar rights to clients of agencies that assist with crisis situations or enhance independent living skills).

<sup>112</sup> *Id.* at § R9-20-1010.

<sup>113</sup> *Id.* at § R4-6-501(K)(1)(g)(i).

<sup>114</sup> See *id.* at §§ R4-6-501(C)(2)(a), (e).

gender identity, sexual orientation, race, ethnicity, religion, national origin, disability, medical status.<sup>115</sup> The bill was held in committee.

## H. Recognition of Same-Sex Couples

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

Arizona prohibits same-sex marriage by a state constitutional provision and by statute.<sup>116</sup> However, several local jurisdictions have enacted domestic partnership registries.

#### (a) City of Phoenix – Domestic Partnership Registry

On December 17, 2008 the Phoenix City Council and mayor unanimously voted to enact a domestic partnership registry for city residents. The sole right granted to domestic partners under the ordinance is partner visitation rights in all health care facilities operating within the City of Phoenix, unless no visitors are allowed, or the patient expresses a desire that visitation be restricted. The ordinance goes into effect February 9, 2009. Domestic partnership is not limited to gay or lesbian individuals.<sup>117</sup>

#### (b) City of Tucson – Domestic Partnership Registry

Tucson's Domestic Partner Registry Ordinance was the first domestic partner registry law in the State of Arizona and has been in effect since December 1, 2003. Couples sign a statement affirming that they (1) are not related by blood closer than would bar marriage in the State of Arizona; (2) are not married to another person in a marriage expressly recognized by the State of Arizona or in any domestic partnership and/or civil union with another person; (3) are both 18 years of age or older; (4) are both competent to enter into a contract; (5) both declare that they are each other's sole domestic partner; and (6) both currently share a primary residence, are in a relationship of mutual support and that they intend to remain in such for the indefinite future.<sup>118</sup>

Domestic partnership registration provides partner visitation rights in a health care facility, as long as the patient consents and extends use of and access to city facilities to a registered domestic partner as if that partner were a spouse.<sup>119</sup>

#### (c) City of Mesa – Domestic Partnership Registry

Mesa Councilman Dennis Kavanaugh has asked the city attorney to draft an ordinance that would create a domestic partner registry for unmarried couples for the sole

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<sup>115</sup> Ariz. H.B. 2775 (Summary, at 1).

<sup>116</sup> Ariz. Const. Art. XXX (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”), *available at* <http://bit.ly/DumQA>; A.R.S. § 25-101; (“Marriage between persons of the same sex is void and prohibited.”)

<sup>117</sup> ORD. AND RES. 26, <http://bit.ly/6Vf8n> (last visited Sept. 3, 2009).

<sup>118</sup> Tucson, Domestic Partnership Registration Instructions, <http://bit.ly/ONNaL> (last visited Sept. 5, 2009); TUCSON CODE § 17-72.

<sup>119</sup> TUCSON CODE § 17-76.

purpose of providing visitation rights for people who are in unmarried-partner relationships.<sup>120</sup>

## 2. Benefits

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 “They can afford it,” referring to the myth that all gay men and lesbians have high incomes. Defending her attempt to exclude gays from state benefits, she claimed that “Homosexuality is the lower end of the behavioral spectrum.” Johnson linked gays to diseases such as AIDS, gonorrhea, anal carcinoma and something she called “gay bowel disease.” 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.”<sup>121</sup>

In April 2008, the State granted domestic partnership benefits to state employees, present and retired, by amending its benefits regulations.<sup>122</sup>

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

In *Whitmire v. Arizona*,<sup>123</sup> a homosexual partner of state prisoner brought action against the Arizona Department of Corrections (DOC), alleging that DOC regulations prohibiting same-sex kissing and hugging among non-family members during prison visits violated equal protection clause. The plaintiff appealed from the District Court’s dismissal of the case.<sup>124</sup>

The Ninth Circuit Court of Appeals held that the dismissal on the pleadings was not warranted because the DOC presented no corroborating evidence of a rational connection between the regulation and the correctional safety interest being asserted. To determine whether or not a statute or regulation violates equal protection rights, the issue is whether there is a valid, rational connection between the prison regulation and the asserted, legitimate governmental interest. The DOC asserted the interest of protecting prisoners against being labeled as homosexuals. The Court of Appeals remanded the case

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<sup>120</sup> Gary Nelson, *Councilman Seeks Mesa Partnership Registry*, ARIZ. REPUB., Jun. 6, 2009, at B1, available at <http://bit.ly/UIVqP>.

<sup>121</sup> PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 78-79 (2000 ed.).

<sup>122</sup> *Arizona Extends Domestic Partner Benefits to State Employees*, TUSCAN OBS., Apr. 1, 2008, available at <http://bit.ly/VAeKb>; see also ARIZ. ADMIN. CODE §§ R2-5-101, R2-5-416-419, R2-5-421-422; see also Ariz. Dep’t of Admin., Benefits Div., *Domestic Partner Enrollment Forms and Instructions*, <http://bit.ly/12dJNX> (last visited Sept. 5, 2009) (listing criteria to qualify for benefits).

<sup>123</sup> 298 F.3d 1134 (Ariz. 2002).

<sup>124</sup> *Id.*

stating that there was no common sense connection between the regulation and the DOC's asserted safety interest for prisoners who were open about their homosexuality.

### 1. Insurance

Under Arizona law, an insurer shall not cancel or nonrenew a motor vehicle insurance policy because of the named insured's location of residence, age, race, color, religion, sex, sexual orientation, marital status, national origin, ancestry or driving record.<sup>125</sup>

### 2. Arizona Judicial Code of Conduct

The Arizona Code of Judicial Conduct (“the Code”) prohibits a judge from holding “membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.”<sup>126</sup> Although the Canon does not mention sexual orientation or gender identity, general provisions within the Canon directing a judge to avoid impropriety and the appearance of impropriety may apply.<sup>127</sup>

The Code mandates that a judge perform judicial duties without bias or prejudice.<sup>128</sup> Specifically, the Code states that:

“[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials, or others subject to the judge's direction and control to do so.”<sup>129</sup>

In proceedings before judges, attorneys must adhere to the same standards.<sup>130</sup>

### 3. Legal Profession

The Arizona State Bar Association has suggested a revision to the Oath of Admission to include language that a lawyer “will not permit considerations of gender, race, religion, age, nationality, sexual orientation, disability or social standing to influence my duty of care.” Opponents of the change have argued that the language's vagueness violates due process and free speech guarantees and that its application infringes First Amendment rights by compelling conduct and expression in conflict with

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<sup>125</sup> A.R.S. § 20-1632.01 (2001).

<sup>126</sup> ARIZ. CODE OF JUD. CONDUCT, Canon 2.

<sup>127</sup> See, e.g., *id.* at Canon 2(B) (“A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment”).

<sup>128</sup> *Id.* at Canon 3(B)(5).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at Canon 3(B)(6).



an attorney's philosophical or religious beliefs as well as his other professional responsibilities.<sup>131</sup>

#### 4. **Prison Regulations**

In 2002, Arizona Department of Correction Regulations permitted kissing and embracing at the beginning and end of each visit but prohibited "same-sex kissing, embracing (with the exception of relatives or immediate family), or petting."<sup>132</sup>

Current orders or procedures by the Department of Corrections no longer contain the restrictions barring same-sex interaction.<sup>133</sup> Yet visitation rules on the Department of Corrections website still contain language barring same-sex kissing.<sup>134</sup>

#### 5. **Homeland Security**

In 2007, the Arizona Senate considered a bill to create a homeland security committee and a homeland security force. The bill as originally introduced prohibited members of the homeland security force from discussing their sexual orientation with the media as a topic of an interview.<sup>135</sup> This language was removed by amendment by the Committee of the Whole.<sup>136</sup>

#### 6. **Franchise Act**

In 2000, a proposed bill to regulate business franchises would have prohibited a person from discriminating among prospective franchises on the basis of race, color, sexual orientation, gender, religion, disability, national origin or age.<sup>137</sup> The bill was held in committee.

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<sup>131</sup> See Letter to Edward F. Novak, Arizona State Bar President, from Members of the Arizona Bar (Dec. 12, 2008), <http://bit.ly/E8nvz> (last visited Sept. 5, 2009).

<sup>132</sup> See *Whitmire v. Ariz.*, 298 F.3d 1134, 1135 (9th Cir. 2002).

<sup>133</sup> Ariz. Dep't of Corr. Order 911 (Inmate Visitation).

<sup>134</sup> See Ariz. Dep't of Corr. Phoenix Visitation Rules, <http://bit.ly/9JK7R> (last visited Sept. 5, 2009) (barring same sex kissing or embracing (with the exception of relatives or immediate family members)).

<sup>135</sup> Ariz. S.B. 1132 Sec. 1(E) (2007).

<sup>136</sup> *Id.* at Final Amended Fact Sheet, 4.

<sup>137</sup> Ariz. H.B. 2195 §§ 44-7003(A)4, 44-7004(A)(2) (2000).