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

Title

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

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MEMORANDUM

From: Williams Institute

Date: September 2009

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

I. OVERVIEW

There is no state law in Alabama prohibiting any form of employment discrimination. Rather, Alabama defers to federal law for providing its citizens with protections against discrimination based upon age, race, religion, sex, national origin, and disabilities. Only a few unsuccessful attempts have been made to enact legislation to prohibit sexual orientation discrimination, and none to prohibit discrimination on the basis of gender identity or expression. Neither the state nor any locality in Alabama prohibits sexual orientation or gender identity discrimination.

Documented examples of employment discrimination by state and local government employers on the basis of sexual orientation and gender identity Alabama include:

- 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. Downing v. Board of Trustees of the Univ. of Alabama, 321 F.3d 1017 (11th Cir. 2003).
- 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. State Pers. Dep't v. Mays, 624 So.2d 194 (Ala. Civ. App. 1993).
- In 2007, a city communication technician reported that she had experienced workplace harassment based on her gender identity when a new supervisor was hired.¹
- In 2002, a closeted gay teacher in an Alabama school district reported that he was discharged because of his sexual orientation, after two successful years of teaching in the district. A United State District Court judge allowed his claim to

¹ 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).

proceed under a “John Doe” filing to protect him in from further discrimination in his new job teaching at a public school in Alabama.²

Moreover, Alabama has several state laws and polices that would greatly discourage LGBT applicants from even applying for state or local employment. For example, Alabama criminalized same-sex sexual conduct³ until the United States Supreme Court struck down such laws in 2003.⁴ 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.” 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.”⁵

Comments by public officials reflect widespread hostility toward LGBT persons in Alabama. 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.⁶ 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.⁷ In early December 2008, a federal judge denied the mayor’s motion to dismiss the lawsuit.⁸

In 1998, during a December television broadcast, the chairman of Alabama Gov. Fob James’s re-election campaign and longtime Montgomery, Alabama mayor, Emory Folmar, used a disparaging term for gay people. Complaints from the local Parents, Families and Friends of Lesbians and Gays (PFLAG) chapter and Gay and Lesbian Alliance of Alabama found Mayor Folmar unrepentant. ‘I used the word ‘queer’ and I’ll use it again. I’m not going to call them gay. I don’t approve of their lifestyle one bit,’ Folmar reported to the *Montgomery Advisor*. The mayor’s remarks came during his response to a caller to “Good Morning, Montgomery” about being harassed outside a downtown nightclub. Folmar also recalled ‘I said something to the effect ‘If you didn’t all hang out together, there wouldn’t be a problem.’⁹

² Lesbian & Gay L. Notes (June 2002), available at <http://www.qrd.org/qrd/usa/legal/Igln/2002/06.02>.

³ ALA. CODE §13A-6-63 (2001); §13A-6-64 (2001).

⁴ Human Rights Campaign, State Law Listing, Alabama Sodomy Law, www.hrc.org/laws_and_elections/state/713.htm (last visited Sept. 3, 2009).

⁵ ALA. CODE §16-40A-2(C)(8) (2008).

⁶ *Central Alabama Pride, Inc. v. Langford*. No. 2:2008cv01533 (N.D. Ala. filed Aug 27, 2008).

⁷ See *id.* and Plaintiff’s Complaint associated therewith.

⁸ James Hipps, *Federal Judge Denies Mayor’s Request*, GAYAGENDA, Dec. 15, 2008, <http://www.gayagenda.com/tag/central-pride-alabama>.

⁹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 110 (1998 ed.)

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.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Alabama has not enacted laws to protect sexual orientation and gender identity from employment discrimination.¹⁰

B. Attempts to Enact State Legislation

None.

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

1. Executive Orders

None.

2. State Government Personnel Regulations

Alabama state employees are hired through an application process run by the State Personnel Department. The Personnel Department's legal notice provides that all applications are accepted and appointments made "on an equal opportunity, merit basis, without regard to sex, race, age, religion, disability, color, or national origin."¹¹

3. Attorney General Opinions

None.

D. Local Legislation

None.

1. City of Birmingham

In May, 2007, the city of Birmingham, Alabama passed a "non binding anti-discrimination resolution that [includes] sexual orientation."¹² City Council member Valerie Abbot initially proposed this resolution in March, 2007, but the resolution failed

¹⁰ Lawyers.com Employment Law in Alabama, <http://www.http://research.lawyers.com/Alabama/Employment-Law-in-Alabama.html> (last visited Sept. 3, 2009).

¹¹ Alabama State Personnel Dep't Website Legal Notice, <http://www.personnel.state.al.us/Content.aspx?Pg=27> (last visited Sept. 3, 2009).

¹² Lyon, Cody, *Despite Rocky History, Birmingham GLBT Community Making Progress*, EDGE, Jan. 5, 2008.

by a vote of 3-4 with one abstention.¹³ Notably, it was reported that one City Council member, Roderick Royal, objected to the resolution because he felt it placed sexual orientation on the same level as civil rights.¹⁴ There was a tremendous outcry following this initial failure, and only a few months later the resolution passed unanimously.¹⁵ The resolution provides, in part, as follows: “[T]he Mayor and Council herein condemn individual and collective acts of racism, bigotry, harassment, or discrimination directed toward any resident or visitor because of age, ancestry, creed, color, gender, income, mental or physical disability, national origin, race, religion, sexual orientation or gender identity, and will support just and prompt resolution to such incidents.”¹⁶

D. Occupational Licensing Requirements

Many of Alabama’s licensing regulations have “good moral character” requirements, including licenses for dentists, chiropractors, therapists, geologists, and people in the alcohol industry.¹⁷ No specific cases applying these standards to limit LGBT people from receiving licenses were found.

¹³ Equality California Get Informed Resolution, <http://www.equalityalabama.org/informed/resolution.html> (last visited Sept. 3, 2009).

¹⁴ *See Id.*

¹⁵ *Inclusion Resolution Passes Unanimously*, BIRMINGHAM TERMINAL, <http://bhamterminal.com/blog/2007/05/15/inclusion-resolution-passes-unanimously/> (last visited Sept. 3, 2009).

¹⁶ Equality California, *The Latest on Birmingham’s Inclusion Resolution*, <http://www.equalityalabama.org/informed/resolution.html> (last visited Sept. 3, 2009).

¹⁷ *See, e.g.*, Ala. Admin. Code R. 20-X-8-.06 (Alcohol Manuf., Importer, and Wholesaler); Ala. Admin. Code R. 190-X-2-.03 (Chiropractor); Ala. Admin. Code R. 270-X-2-.03 (Dentistry); Ala. Admin. Code R. 364-X-2-.01 (Geologists); Ala. Admin. Code R. 660-5-25-.05 (Day Care); Ala. Admin. Code R. 536-X-2-.02 (Fam. & Marriage Therapists/Counselor).

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

A. Case Law

1. State & Local Government Employees

State Pers. Dep't v. Mays, 624 So.2d 194 (Ala. Civ. App. 1993).

*State Personnel Department v. Mays*¹⁸ involved a receptionist, Timothy Mays, with the Bureau of Tourism and Travel who was fired on the grounds that he made “uninvited homosexual advances toward another state employee” while on state premises and that he defaced state property by writing graffiti on the restroom walls. Mays initially appealed his dismissal to the State Personnel Board (as used in this section, the “Board”), which appointed a hearing officer to conduct an evidentiary hearing.¹⁹ The Hearing Officer found that there was insufficient evidence that the incidents occurred as charged and recommended that Mays be reinstated with back pay. After reviewing the Hearing Officer’s findings and hearing oral argument from both parties’ counsel, the Board rejected the Hearing Officer’s determination and upheld the dismissal.²⁰ According to the Board, the Hearing Officer “had ignored evidence corroborating the account of the incident given by the alleged victim of the alleged unwanted sexual advance.”²¹ Mays then appealed the Board’s decision to the Circuit Court of Montgomery County, which reversed the Board’s decision, holding that the rejection of the Hearing Officer’s findings was “unreasonable, arbitrary and capricious.”²²

The alleged victim claimed to have been working at a state welcome center, where Mays was also employed, on the night of January 17, 1991, when Mays came to the center while he was off duty. Mays denied the accusations and denied even being at the welcome center on the night of the alleged incident. There were no witnesses present during the incident but “a multitude of character testimony to the effect that the conduct of which Mays was accused was completely contrary to his character.”²³ The second charge against Mays involved the claim of another coworker who alleged that Mays had written sexually explicit graffiti written on a toilet paper dispenser. Mays denied this allegation. There was also testimony that Mays and the coworker did not get along and that this coworker and the alleged victim of the homosexual advances had once played a sexually oriented practical joke together upon Mays.²⁴

¹⁸ 624 So.2d 194 (Ala. Civ. App. 1993).

¹⁹ *Id.* at 196.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

In rejecting the decision of the Hearing Officer, “the Board determined that the Hearing Officer ‘ignore[d] contemporaneous circumstances corroborating [the alleged victim’s] account of the incident.’”²⁵ The Appeals court, however, disagreed with the Board and held that the Hearing Officer took these circumstances into consideration and, consequently, the Board had no reasonable justification for reversing the credibility determination made by the Hearing Officer.²⁶

Downing v. Board of Trustees of the Univ. of Alabama, 321 F.3d 1017 (11th Cir. 2003).

James D. Downing, a former employee in the campus police department of the University of Alabama at Birmingham sought equitable relief and damages against the University's Board of Trustees under Title VII, on the grounds that his immediate supervisor in the department, the Deputy Chief of Police, sexually harassed him in the workplace and that, when he complained of the harassment, the Chief of Police not only failed to take corrective action, but fired him. The Board of Trustees, claiming sovereign immunity under the Eleventh Amendment, moved to dismiss Downing's Title VII claim.

The Court of Appeal for the Eleventh Circuit held that because Title VII's ban on same-sex hostile environment sexual harassment is co-extensive with the ban on sex discrimination found in the Equal Protection Clause of the 14th Amendment, 11th Amendment sovereign immunity will not shield a state university from a Title VII same-sex harassment claim brought by a male employee. Relying on *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) in its equal protection analysis, the Court also found no difference between same-sex and opposite-sex harassment as a practical and theoretical matter, so long as the victim was selected for harassment because of his sex, and, inasmuch as opposite-sex harassment in a public sector workplace has been found to violate the Equal Protection Clause, there would be no reason to treat same-sex harassment any differently. The court rejected the University's motion to dismiss, affirming the district court.²⁷

B. Administrative Complaints

Alabama does not have any employment discrimination laws, but rather defers to federal law for adjudication of claims of discrimination based upon age, race, religion, sex, national origin, and disabilities. These issues are handled by the Equal Employment Opportunity Commission, whose office is in Birmingham.²⁸ If an individual believes that he or she has been discriminated against in a manner prohibited by the Workforce

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Downing v. Board of Trustees of the Univ. of Alabama*, 321 F.3d 1017 (11th Cir. 2003).

²⁸ Ala. Labor Website, Job Termination Laws, http://www.alalabor.state.al.us/job_termination_laws.htm (last visited Sept. 3, 2009).

Investment Act or 29 CFR Part 37, he or she may file a complaint with the Alabama Department of Industrial Relations or the Civil Rights Center.²⁹

²⁹ Alabama Department of Industrial Relations Human Resources FAQ,
http://dir.alabama.gov/contacts/Human_Resources.aspx (last visited Sept. 3, 2009).

C. Other Documented Examples of Discrimination

City Government Department

In 2007, a city communication technician reported that she had experienced workplace harassment based on her gender identity when a new supervisor was hired. In addition, her new supervisor assigned her to work with co-workers who did not want to work with her because she is transgender, and gave her unfavorable work assignments where the work was more difficult than required of other employees.³⁰

Alabama Public School

In 2002, a closeted gay teacher filed a civil rights suit against an Alabama school district, claiming he was discharged because of his sexual orientation, seeking reinstatement and unspecified monetary damages. Intending to remain closeted, the teacher petitioned for permission to proceed as a John Doe plaintiff, which was granted by U.S. District Judge Inge Johnson. At the time of filing, he was teaching in another school district. He alleged that he was told by some school officials that his discharge was solely for being gay, after two successful years of teaching in the district.³¹

³⁰ 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).

³¹ Lesbian & Gay L. Notes (June 2002), *available at* <http://www.qrd.org/qrd/usa/legal/lgln/2002/06.02>.

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

Alabama's sodomy law was invalidated by the U.S. Supreme Court on June 26, 2003, as a result of the decision in *Lawrence v. Texas*.³² Previously, Alabama's sodomy law applied to both heterosexual and same-sex partners.³³ Homosexual conduct was also criminalized under the sexual misconduct law.³⁴ Under the sexual misconduct law, a person was punishable for engaging in "deviate sexual intercourse with another person."³⁵

The Alabama sodomy law has been used to deny rights in other situations, as discussed in Parts IV.E and IV.H, *infra*.³⁶

B. Housing & Public Accommodations Discrimination

The Alabama Fair Housing Law provides that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or rental of, or otherwise to make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin."³⁷ No materially different housing regulations were found.³⁸

C. Hate Crimes

Alabama House Bill 829 would have amended the hate crime law by adding "sexual orientation" as a category. It passed the House by a 46-44 vote and passed a Senate committee, but died when legislature adjourned on May 19, 2008.³⁹

³² Human Rights Campaign, State Law Listings: Alabama Sodomy Law, http://www.hrc.org/laws_and_elections/state/713.htm (last visited Sept. 3, 2009).

³³ ALA. CODE §13A-6-63 (2001); §13A-6-64 (2001).

³⁴ Human Rights Campaign, *supra* note 32.

³⁵ ALA. CODE § 13A-6-65(a)(3) (2001).

³⁶ *See id.*

³⁷ ALA. CODE §24-8-4(1) (2008).

³⁸ Municipalities reviewed include Montgomery, Huntsville, Mobile, Gulf Shores, Auburn and Birmingham.

³⁹ Human Rights Campaign, Alabama HB 829, http://www.hrc.org/your_community/10715.htm (last visited Sept. 3, 2009).

D. Education

In the 1996 case of *Gay, Lesbian, Bisexual Alliance v. Sessions*, an Alabama college attempted to use the sodomy law to deny funding to a gay, lesbian, bisexual and transgender student group at a state college. The court held that the law violated the First Amendment.⁴⁰

Section 16-1-28 of the Alabama Code provides that no public funds or public facilities are to be used to promote lifestyle or activities prohibited by sodomy and sexual misconduct laws. Despite this prohibition, the statute provides that it does not apply to any organization or group whose activities are limited solely to the political advocacy of a change in the sodomy and sexual misconduct laws of Alabama. This statute was deemed to be unconstitutional, as violating the constitutional guarantee of free speech in *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F.Supp. 1548 (M.D.Ala. 1996), affirmed 110 F.3d 1543.

Section 16-40A-2 of the Alabama Code provides that, “[a]n emphasis, in a factual manner and from a public health perspective, 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,”⁴¹ is one element that should be included in course materials and instruction pertaining to sexual education or sexually transmitted diseases.

The Teen Suicide and Violence Protection Act would have required local school system to adopt a policy prohibiting harassment motivated by “any characteristic,” including sexual orientation, or motivated by an association with an individual who falls into a protected category.⁴² On February 14, 2008, house Bill 90 passed the House by a 95-0 vote and passed a Senate committee, but died when the legislature adjourned on May 19, 2008.⁴³

E. Parenting

In the 2002 Alabama Supreme Court case *Ex parte H.H.*, the Alabama sodomy law was used to deny a lesbian mother custody of her children, despite the prior holding that the father abused the children.⁴⁴

⁴⁰ *Gay, Lesbian, Bisexual Alliance v. Sessions*, 917 F.Supp. 1548 (M.D.Ala. 1996), affirmed 110 F.3d 1543.

⁴¹ ALA. CODE §16-40A-2(C)(8) (2008)

⁴² Human Rights Campaign, Alabama HB 90/SB 109, http://www.hrc.org/your_community/9377.htm (last visited Sept. 3, 2009).

⁴³ *Id.*

⁴⁴ *Ex parte H.H.*, 830 So. 2d 21 (Ala. 2002).

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Alabama has both a state law and a constitutional amendment prohibiting marriage between same-sex couples and the recognition of married same-sex couples from other states or jurisdictions.⁴⁵ The state has no domestic partnership or civil union law extending the rights and obligations of marriage to same-sex couples.

⁴⁵ ALA. CODE § 30-1-19 and ALA. CONST. AMEND 774 (2006).