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

Title

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

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MEMORANDUM

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

I. OVERVIEW

In 1992, the State of Vermont passed a comprehensive statewide law prohibiting discrimination on the basis of sexual orientation,¹ which is defined as “female or male homosexuality, heterosexuality, or bisexuality.”² Protection with respect to gender identity was added in May 2007.³ Vermont’s Human Rights Law prohibits discrimination on the basis of sexual orientation in areas such as employment, housing, and education.

Since enactment of the 1992 law, there have been several complaints of job discrimination filed by state employees. (*See* Section II.A.4 *infra.*). Documented examples of employment discrimination on the basis of sexual orientation and gender identity in Vermont include the following:

- 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.⁴
- 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.⁵
- 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.⁶

¹GLAD, VERMONT, OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 1 (2009).

² 1 V.S.A. § 143.

³ Public Act 41 (2007-2008) Leg., Reg. Sess. (Vt. 2007). *See also*, 1 V.S.A §144; Senate Bill 51, 2007 Vt. Laws 41 (legislative history).

⁴ 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).

⁵ 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).

⁶ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 12, 2009) (on file with GLAD) [hereinafter GLAD Intake Form (date)].

- In 2002, a transgender officer was told that the police chief was being pressured to run him off the force because he was transgender.⁷ 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.⁸
- 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 filed as a grievance under procedures designed to serve state employees and then been commenced in superior court. Aranoff v. Bryan, 153 Vt. 59 (1989).

In addition, there have been at least two complaints filed alleging that public school officials failed to take steps to prevent harassment of students perceived to be gay. Probable cause to believe that discrimination had occurred was found in one case, and a settlement agreement was entered in the other case. Again, complete records as to other charges of discrimination are not available. (*See* Section III.D.1 *infra*.)

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.

⁷ GLAD Intake Form (Sept. 9, 2002).

⁸ Press Release, GLAD, Vermont Attorney General Issues Landmark Ruling Prohibiting Discrimination of Transgender Employees (Apr. 23, 2004), *available at* <http://bit.ly/1LIrql>.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

Vermont's Human Rights Law, passed April 23, 1992, prohibits discrimination on the basis of sexual orientation⁹ in public employment, public accommodations, private employment, education, housing, credit, insurance and union practices.¹⁰ The anti-discrimination laws themselves do not distinguish between actual and perceived sexual orientation, and there is no case law on this particular issue to date.¹¹ The school harassment law, discussed below in Section III, explicitly provides protection for students and their family members who are gay, lesbian or bisexual, or perceived as such.¹²

In May, 2007, Vermont explicitly prohibited discrimination on the basis of gender identity. The law defines gender identity as "an 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."¹³ Thus, in the case of gender identity discrimination, there is explicit protection both for transgender people and for people who are perceived as transgender.

The nondiscrimination law prohibits any employer, employment agency or labor organization from discriminating against any individual because of his or her sexual orientation or gender identity.¹⁴ This applies to both private and government employers and covers most significant job actions, such as hiring, firing, failure to promote, demotion, excessive discipline, harassment and different treatment of the employee and similarly situated co-workers.¹⁵

In addition, employment agencies may not participate in discrimination by refusing to classify or refer their customers for employment or otherwise discriminate because of sexual orientation or gender identity. Unions may not deny union membership or otherwise discriminate against its members because of sexual orientation or gender identity.¹⁶ The law also forbids these entities from advertising in such a way as to restrict employment or membership because of sexual orientation or gender identity.¹⁷ Discrimination "on the basis of a person's having a positive test result from an HIV-related blood test" is also prohibited.¹⁸

⁹*Supra* note 1, at 1.

¹⁰ 21 V.S.A. § 495; 9 V.S.A. § 4503; 8 V.S.A. § 10403; 8 V.S.A. § 4724; 3 V.S.A. § 963.

¹¹ *Supra* note 1, at 1.

¹² 16 V.S.A. § 11 (2001).

¹³ Pub. Act 41, Leg., Reg. Sess. (Vt. 2007). *See also*, 1 V.S.A §144; Senate Bill 51, 2007 Vt. Laws 41 (legislative history).

¹⁴ 21 V.S.A. § 495 (a)(1).

¹⁵ 21 V.S.A. § 495 (a)(3).

¹⁶ 21 V.S.A. § 495 (a)(4).

¹⁷ 21 V.S.A. § 495 (a)(2).

¹⁸ 21 V.S.A. § 495 (a)(6), (a)(7).

The anti-discrimination law does not apply to every employer in Vermont – there are exceptions to its application:

(a) **“Bona Fide” Occupational Qualifications**

An employer, agency or labor organization may defend against a discrimination claim by arguing that a “bona fide occupational qualification” of the particular job is that it have someone in it who is non-gay or has a traditional gender identity. There are no general occupational exemptions from the reach of the nondiscrimination law, however, and this defense is very rarely successful.¹⁹

(b) **Religious Institutions, Charities & Educators**

Religious institutions, charitable organizations and educational associations are also exempt from the law.²⁰ Where an employer is operated or supervised by a religious institution, it may preferentially hire members of its own religion, and may take employment actions that it “calculate[s] will ... promote the religious principles for which it is established or maintained.”

2. **Enforcement & Remedies**

The Vermont Human Rights Commission is the entity responsible for hearing unlawful discrimination claims where the claimant has been discriminated against in employment by a state agency, public accommodations, or housing.²¹ The Human Rights Commission is regulated by the “Rules of the Human Rights Commission,” contained in the Code of Vermont Rules.²² These rules delineate the procedural mechanisms by which complaints can be made, and redress can be sought.

Those discriminated against by private employers can either sue directly in the Superior Court of the county where the discrimination occurred, or file a complaint with the Civil Rights Unit of the Office of the Attorney General.²³ This Civil Rights Unit publishes an Employment Discrimination Questionnaire, which is accessible through their website, and allows for individuals who feel they have been discriminated against to seek relief.²⁴

B. **Attempts to Enact State Legislation**

None.

¹⁹ *Supra* note 1, at 3-4.

²⁰ 21 V.S.A. § 495 (e).

²¹ The procedure for filing complaints and seeking relief is clearly set forth at 9 V.S.A. § 4554.

²² CVR 80-250-001 (2009).

²³ *Supra* note 1, at 9-11.

²⁴ Office of the Attorney General, Employment Discrimination Complaint Form, <http://bit.ly/MOpnP> (last visited Sept. 6, 2009).

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

1. Executive Orders

None.

2. State Government Personnel Regulations

None.

3. Attorney General Opinions

The Office of the Attorney General of Vermont publicly posts all Attorney General Opinions since the year 2000 on their website.²⁵ None of these opinions involve employment discrimination with respect to sexual orientation or gender identity.

D. Local Legislation

None.

E. Occupational Licensing Requirements

None.

²⁵ Office of the Attorney General of Vermont, <http://www.atg.state.vt.us> (last visited Sept. 4, 2009).

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

A. Case Law

1. State & Local Government Employees

Aranoff v. Bryan, 153 Vt. 59 (1989).

A judicial law clerk commenced an action in the Vermont Supreme Court, alleging that her supervisors, trial court judges, had attempted to restrain her expression of personal and political beliefs under the authority of Canon 6 (which provides that “a law clerk should refrain from inappropriate political activity”), that she was reprimanded for her LGBT-related activities, and that she was told that one or more violations would result in immediate dismissal.

The law clerk complained specifically that she was “told,” *inter alia*, that she may not write articles for a monthly newspaper serving Vermont’s lesbian and gay population; that she may not remain a secretary of the Vermont Coalition of Lesbians and Gay Men, allegedly because it is a political organization; that she may not serve such organization in a ministerial capacity; that she may not actively disseminate information for the organization; that she may not wear buttons or affix bumper stickers to her car tending to indicate sexual orientation; and that she may not use her residence as a “safe home” for lesbians or gay men needing shelter. She further alleged that she was reprimanded for her activities and told that one more violation would result in immediate dismissal from employment. She was also told to limit her activities at a public march on abortion by not indicating which side of the debate she might be on. She allegedly was told that she could neither disseminate information about, nor testify at a hearing of the Vermont House of Representatives concerning discrimination on the basis of sexual orientation. Petitioner sought a declaration that Canon 6 is “unconstitutional because it is overbroad, vague, and invades the privacy and association rights of law clerks.”

The court denied relief. The court first observed that it was not the appropriate forum because its jurisdiction was principally one of appellate review. Assuming that the judicial law clerk had a stated justiciable claim, the action should have been commenced in the superior court. Regardless, the court considered the merits and dismissed the petition on three grounds. First, the judicial law clerk presented no basis for her assertion that the trial court judges were involved in the disciplinary process. Thus, she stated no claim in law against any named respondent. Second, the matter should have been brought as a grievance under procedures designed to serve state employees. Third, the judicial law clerk’s constitutional claim was premature. A grievance hearing would have given the court a factual record on which to determine whether a judgment on the constitutionality of Canon 6 was essential.

2. Private Employers

None.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

A Vermont Public School

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.²⁶

A Vermont Public School

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.²⁷

Vermont State Department of Corrections

In 2003, a lesbian employee of the Vermont State Department of Corrections reported that a coworker used derogatory language about her and another coworker in regard to their sexual orientation. The employee filed a formal complaint; however there was no investigation.²⁸

Town of Hardwick Police Department

In 2002, a transgender police officer was told that the police chief was being pressured to run him off the force because he was transgender.²⁹ Anthony Barreto-Neto, an experienced and skilled police officer, began working at the Hardwick Municipal Police Department in April 2002. Shortly after he began employment, town officials doing an internet search on Mr. Barreto-Neto found a website that described him as “transsexual.” Based on the information, town officials presumed his inability to do the job. Following the search and dissemination of the information to senior police department personnel, Barreto-Neto 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

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²⁸ GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Feb. 12, 2009) (on file with GLAD) [hereinafter GLAD Intake Form (date)].

²⁹ GLAD Intake Form (Sept. 9, 2002).

probable cause ruling, the Attorney General credited testimony of a former police chief, Gregory Rambo, that a town official directed him to make Barreto-Neto so uncomfortable that he would leave the force. The Town of Hardwick settled the claim.³⁰

³⁰ Press Release, GLAD, Vermont Attorney General Issues Landmark Ruling Prohibiting Discrimination of Transgender Employees (Apr. 23, 2004), *available at* <http://bit.ly/1LIrql>.

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. Sodomy Law

Vermont repealed its sodomy law in 1977.³¹

B. Housing & Public Accommodations Discrimination

In 1992, the State of Vermont passed a comprehensive statewide law prohibiting discrimination on the basis of sexual orientation,³² which is defined as “female or male homosexuality, heterosexuality, or bisexuality.”³³ Protection with respect to gender identity was added in May, 2007.³⁴ Vermont’s Human Rights Law prohibits discrimination on the basis of sexual orientation in areas such as employment, housing, and education.

Tanner v. Clair, HRC Charge No H05-0007.

Tanner, the tenant, filed a charge that Clair, the landlord, discriminated against him on the basis of sexual orientation, among other things. Clair allegedly had said the following things to third parties, based on his sexual orientation: Tanner was a “faggot,” a “pedophile,” a “male prostitute,” and that “he had AIDS.” After some heated confrontations between Tanner and Clair, Clair attempted to evict him. Tanner filed a claim of discrimination with the Human Rights Commission, and the Commission found reasonable grounds to believe that Clair discriminated against Tanner on the basis of sexual orientation.³⁵

C. Hate Crimes

Vermont hate crime law explicitly recognizes and addresses hate crimes based on gender identity and sexual orientation.³⁶

³¹ *Supra* note 1, at 41.

³² GLAD, VERMONT, OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 1 (2009).

³³ 1 V.S.A. § 143.

³⁴ Public Act 41 (2007-2008) Leg., Reg. Sess. (Vt. 2007). *See also*, 1 V.S.A §144; Senate Bill 51, 2007 Vt. Laws 41 (legislative history).

³⁵ Subsequent history for this matter is unavailable.

³⁶ 13 V.S.A. § 1455 (2001).

D. Education

Vermont's Human Rights Law, passed April 23, 1992, covers education.³⁷

Vermont's anti-harassment education law expressly prohibits discrimination and harassment based on sexual orientation. The statute's purpose is to reduce the hostile educational environment for all students.³⁸ It explicitly provides protection for students and their family members who are gay, lesbian or bisexual, or perceived as such.³⁹

Sunflower v. Missiquoi Valley Union High Sch. Dist., Charge No. PA08-0019.

"Sunflower" alleged that the respondents were deliberately indifferent to his repeated complaints to staff that he was being subjected to severe and persistent harassment by other students who were on the hockey team, due to their perception of his sexual orientation. The Pre-Determination Conciliation Agreement, signed by the parties, provided for student programs for training and education in the areas of school climate including issues of bullying and harassment. Furthermore, the staff was to undergo training from the Human Rights Commission, and an investigation was to be conducted.

Peach v. Northfield Elem. Sch., HRC Charge No. PA07-0009.

"Peach" alleged that over the past two years, students at Northfield Elementary had called her son names like "girl," "retard," "queer," "gay," "poser," and "lesbo." There was evidence of repeated harassment, and Peach claimed that the staff had not done enough to intervene. The Human Rights Commission found that there were reasonable grounds to believe that Northfield Elementary discriminated against her son on the basis of sex and sexual orientation.⁴⁰

E. Health Care

A member of a civil union is considered a spouse for all medical treatment decisions and visitation rights.⁴¹ An adult may also designate his or her same-sex partner as having the authority to make medical decisions on his or her behalf.⁴²

F. Gender Identity

The state registrar of Vermont will amend the sex on an individual's birth records only by the decree of the probate court of the district in which the birth occurred.⁴³

³⁷ 21 V.S.A. § 495; 9 V.S.A. § 4503; 8 V.S.A. § 10403; 8 V.S.A. § 4724; 3 V.S.A. § 963 (2003).

³⁸ 16 V.S.A. § 11 (2001).

³⁹ 16 V.S.A. § 11 (2001).

⁴⁰ Subsequent history for this matter is unavailable.

⁴¹ 15 V.S.A. § 1204(b); Civil Unions in Vermont are defined in V.S.A. tit. 15 §§ 1201-07.

⁴² 18 V.S.A. § 9701; Advance Directives for Health Care and Disposition of Remains: 18 V.S.A. §§ 9700-20.

⁴³ 18 V.S.A. § 5075.

G. Parenting

Vermont law permits any person, including single LGBT individuals, to petition to adopt.⁴⁴ Same-sex couples who are joined by civil unions may petition to adopt jointly. According to the Vermont Department of Children and Families, “[y]ou can be. . . living with a partner, or joined through a civil union.”⁴⁵ Vermont law also permits a same-sex co-parent to petition to adopt partner’s child.⁴⁶

Titchenal v. Dexter, 166 Vt. 373 (1997).

The dispute arose after the breakup of a relationship between two women who had both participated in raising a child adopted by only one of them.⁴⁷ Plaintiff was the mother who had spent more time with the child throughout the five years of the child’s life, but after the breakup, the defendant was the one who took the child with her. The appellate court rejected Plaintiff’s arguments seeking visitation rights, and found that the superior court had no jurisdiction over this matter.

In re B.L.V.B., 160 Vt. 368 (1993).

After the mother and her same-sex partner had lived together in a committed relationship for several years, the mother became pregnant by artificial insemination and gave birth to two children. The mother and her partner were raising the children together and wanted legal recognition of their status as co-parents. They filed an adoption proceeding, and the social workers that conducted the home study and the psychologist who evaluated the family concluded that the adoptions were in the best interests of the children. The court held that the statutory requirements for a stepparent adoption were satisfied and that the termination of the mother’s rights was not necessary. In so holding, the court found that (1) the language of Vt. Stat. Ann. tit. 15, §§ 431, 448 did not prohibit the adoption of the children by the partner; (2) requiring the termination of the mother’s parental rights under § 448 would reach an absurd result; and (3) that result would be inconsistent with the best interests of the children and the public policy of the state.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 1999 Vermont became the first state to legalize civil unions for same-sex couples.⁴⁸ In 2009, the Vermont legislature extended marriage to same-sex couples.⁴⁹

⁴⁴ 15A V.S.A. § 1-102(a).

⁴⁵ Human Rights Campaign, State Law Listings, Vermont Adoption Law, <http://www.hrc.org/1173.htm> (last visited Sept. 4, 2009).

⁴⁶ 15A V.S.A. § 1-102(b); 15 V.S.A. § 1204(a), (e)(4).

⁴⁷ This was before the Civil Unions Law was in effect. The Civil Unions Law was passed two years after this case, in 1999. *See supra* Section IV.I.1.

⁴⁸ Baker v. State, 170 Vt. 194 (1999) (under the Vermont constitution plaintiffs were not entitled to marriage licenses, but were entitled to the same benefits and protections afforded opposite-sex, married

I. Freedom of Speech

One informal Attorney General Opinion from the year 2000 involves freedom of speech with respect to sexually explicit materials in publications displayed in the State House Cafeteria. The question was to what extent display and distribution of the publication, “Cartoons Out in the Mountains” may be regulated in the State House.⁵⁰ The Attorney General opined that:

“[i]t is constitutionally permissible to prohibit access by minors to displays within the State House of material that depicts intimate sexual activity. Such regulation is likely to be impermissibly overbroad if it also restricts the access of adults to such materials. Any regulation that prohibits or restricts access to material that depicts homosexual activity without prohibiting or restricting access to material depicting similar heterosexual activity is likely to fail because of its tendency to suppress a particular viewpoint.”⁵¹

couples); Noelle Frampton, *For Civil Unions, Justices of the Peace Can Say ‘I Won’t’*, BOSTON GLOBE, July 7, 2008, available at <http://bit.ly/CVzWQ>.

⁴⁹ S. 115, 2009-2010 Leg. Sess. (Vt. 2009).

⁵⁰ Archive of Attorney General Opinions Issued in 2000, http://209.190.248.167/upload/1072727554_INDEX_TO_OPINIONS_ISSUED_IN_2000.pdf (last visited Sept. 3, 2009). Although the actual cartoon is unavailable, the opinion differentiates between homosexual and heterosexual explicit materials, and it can therefore be assumed that the cartoon involved explicit material containing homosexual activity.

⁵¹ *Id.*