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

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Testimony on H.R. 3017, The Employment Non-Discrimination Act of 2009

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**(“ENDA”)**

**R. Bradley Sears**

**September 23, 2009**

**U.S. House of Representatives, Committee on Education and Labor**

Good morning, Chairman Miller and members of the committee. I am the Executive Director of the Williams Institute, a national research center on sexual orientation and gender identity law and public policy at UCLA School of Law.

Today I am here to speak to you about H.R. 3017, the Employment Non-Discrimination Act of 2009, which will prohibit employment discrimination on the basis of sexual orientation and gender identity. Specifically, I am here to address the question of whether there is a widespread pattern of unconstitutional employment discrimination on the basis of sexual orientation and gender identity by state governments. This finding will support Congress in exercising its powers under section 5 of the 14th amendment to provide a private right of action for damages to state government employees who have suffered discrimination.

My testimony is based on a study conducted over the last twelve months by the Williams Institute. My principal co-investigators have been Georgetown Law Center Professor Nan Hunter and Williams Institute Law Fellow Christy Mallory. We have been assisted by eight law firms and a number of scholars from different disciplines in creating a report documenting discrimination for each of the fifty states and a series of papers summarizing our findings. The full text of the completed study will be posted on the Williams Institute web site <http://www.law.ucla.edu/williamsinstitute/home.html>.

Based on this research, we conclude that there has been a widespread and persistent pattern of unconstitutional discrimination by state governments. Although additional types of evidence support our findings and are discussed in the report, I am going to focus on four key sources today.

First, we reviewed surveys of LGBT people about their experiences of discrimination. We identified over eighty surveys in which either all or some of the respondents were public sector employees. All of these surveys found that significant percentages of LGBT public employees reported being fired, denied jobs, denied promotions, or harassed in the workplace. For example, one in five LGB public sector employees in the 2008 General Social Survey reported being discriminated against on the basis of their sexual orientation, and a survey this year of over 640 transgender employees (in both public and private sectors) found that 70% reported experiencing workplace discrimination on the basis of gender identity. Another 2009 survey of more than 1,900 LGBT employees of state university systems nationwide found that more than 13% had experienced discriminatory treatment or harassment *during the past year alone*.

When we compare this set of studies to prior reviews that the Williams Institute has conducted of employment discrimination surveys, we find no difference between the patterns of employment discrimination against LGBT people in the public sector and in the private sector, and no difference in the patterns of such discrimination against LGBT workers in state versus local government agencies.

Second, we collected data about complaints from state and local administrative agencies charged with enforcing prohibitions against sexual orientation and gender identity discrimination. Although we requested data from twenty state and 203 local

agencies, many did not respond, even after repeated requests. The agencies that did respond provided us with 430 administrative complaints of sexual orientation and gender identity discrimination by state and local employers between 1999 and 2007. Although not all states could provide us with data distinguishing between state and local government defendants, at least 265 of these were filed by employees of state government agencies.

Additional evidence suggests that many of these complaints of discrimination are well-founded. Five states provided us information about the dispositions of the claims made by state employees. For four of these states, the combined rate of positive administrative outcomes for the complaints, such as findings of probable cause of discrimination or settlements, averaged 30%. For the fifth state, California, 61% of complainants sought an immediate right to sue letter, which often indicates they have already found counsel to take their cases to court. A review of the dispositions of complaints made to local enforcement agencies found a similar rate of favorable outcomes.

Third, we reviewed studies surveying the differences in wages between LGB employees and their heterosexual counterparts. If, after controlling for factors significant for determining wages such as education, a wage gap exists between people who have different personal characteristics, such as sexual orientation, economists typically conclude that the most likely reason for the wage gap is discrimination. More than twelve studies have shown a significant wage gap, ranging from 10% to 32%, for gay men when compared to heterosexual men. Two recent studies have found similar wage gaps when looking just at public employees. Together, the studies find that gay men,

lesbians, and bisexuals who are government employees earn 8% to 29% less than their heterosexual counterparts. Men in same-sex couples who are state employees earn 8% to 10% less than their married heterosexual counterparts. These studies, too, suggest that sexual orientation discrimination in state government is similar to that in the private sector and other public employment.

Fourth, we compiled a set of documented examples of discrimination based on sexual orientation and gender identity that further supports a finding of a widespread and continuing pattern of unconstitutional discrimination by state and local governments. We collected examples from court opinions, administrative complaints, academic journals, books, newspapers, and community-based organizations. We placed time limits on the study in order to test whether such discrimination is persistent. In total, we have compiled more than 380 specific examples of workplace discrimination, almost all occurring within the last 20 years.

This record demonstrates that discrimination is widespread in terms of quantity, geography, and occupations. The quantity compares favorably to that of past records of public employment discrimination supporting civil rights legislation. Geographically, the examples reach into every state except North Dakota, which has a smaller population. The LGBT employees discriminated against work for every branch of state government: legislatures, judiciaries, and the executive branch. The examples include public employees who help people find jobs, housing, and health care; teachers and professors; state troopers and prison guards; judges, bus drivers and tax collectors; and those who work for museums and for the DMV.

In many of these cases, courts have found violations of rights to equal protection, free expression, and privacy, as well as the impermissible use of sex stereotypes. There are also cases where plaintiffs lose, because judges rule that, in the absence a law like ENDA, state and federal law do not provide a remedy.

What is missing in all of these cases is *any rational reason* for the adverse employment action, whether or not the law provides a remedy. In none of these cases do employers assert that sexual orientation or gender identity impacts an employee's performance in the workplace. To the contrary, among the examples of public servants who have been discriminated against are a gay faculty member at Louisiana State University who had received a Distinguished Service Award; a transgender sheriff in Oregon who had received a commendation for delivering a baby on the side of a highway, and a lesbian social worker in Mississippi who was told she was one of the best employees at her center helping mentally disabled children.

The irrationality of the discrimination is also vividly indicated by the harassment that many of these workers have been subjected to. With my apologies, here is a very limited sense of what they are called in the workplace: an officer at a state correctional facility in New York, "pervert" and "homo;" a lab technician at a state hospital in Washington, a "dyke;" an employee of New Mexico's Juvenile Justice System, a "queer." The language that you can read in the report gets worse from there. What is also striking about these examples of workplace harassment is the degree to which the words are accompanied with physical violence. A gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was

slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her that said God wanted her to die. When employees complain about this kind of harassment, they are often told that it is of their own making, and no action is taken.

These 380-plus documented examples should in no way be taken as a complete record of discrimination against LGBT people by state and local governments. Based on our research, and on other scholarship, we have concluded that these examples represent just a fraction of the actual discrimination. First, our record does not even completely capture all of the documented instances. For example, of the twenty state enforcement agencies we contacted, only six made available redacted complaints for us to review. Second, several academic studies have shown that state and local administrative agencies often lack the resources, knowledge and willingness to consider sexual orientation and gender identity discrimination complaints. Similarly, legal scholars have noted that courts and judges have often been unreceptive to LGBT plaintiffs and reluctant to write published opinions about them, reducing the number of court opinions and administrative complaints that we would expect to find. Third, many cases settle before an administrative complaint or court case is filed. Unless the parties want the settlement to be public, and the settlement is for a large amount, it is likely to go unreported in the media or academic journals. Fourth, LGBT employees are often reluctant to pursue claims for fear of retaliation or of outing themselves further in their workplace. For example, in a study published this month by the Transgender Law Center, only 15% of those who reported that they had experienced some form of discrimination had filed a complaint. Finally, and perhaps most important, numerous studies have documented that

as many one-third of LGBT people are not out in the workplace. They try to avoid discrimination by hiding who they are.

In our study, we also considered other forms of evidence of employment discrimination besides these, including similar findings reached by courts and legal scholars; findings of such discrimination by government officials and commissions; the long history of state laws, policies, and practices explicitly discriminating against LGBT employees, and more recent statements showing animus against LGBT people by state and local government officials.

Based on this research as well as the research I have just discussed, we conclude that:

1) there is a widespread and persistent pattern of unconstitutional discrimination against LGBT state government employees, as well as against local government employees;

2) there is no meaningful difference in the pattern and scope of employment discrimination against LGBT people by state governments compared to what is found in the private sector or in federal or local government; and

3) that the list of documented examples that we have compiled far under-represents the actual prevalence of employment discrimination against LGBT people by state and local governments.

Thank you.