

UCLA

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

Title

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

Permalink

<https://escholarship.org/uc/item/42v9z2s5>

Author

Sears, Brad

Publication Date

2009-09-23



MEMORANDUM

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

I. OVERVIEW

On July 2, 2009, Delaware added the term “sexual orientation” to the already-existing list of protected categories; the statute now prohibits discrimination against a person on the basis of sexual orientation in housing, employment, public works contracting, public accommodations, and insurance. It does not include gender identity, although an executive order does. Prior to 2009, the Delaware legislature repeatedly attempted and failed to enact legislation aimed at ending discrimination against gays in employment, public housing, public accommodation, insurance and public contracts. Despite the fact that the Delaware Division of Industrial Affairs had received more than 500 complaints of employment discrimination based on sexual orientation or association with an individual based on sexual orientation by 1999,¹ bills to prevent such discrimination failed each year between 1998 and 2009.

Unsurprisingly, some politicians who opposed this protective legislation have evidenced their animosity towards gays. For example, the Senate Pro Tem, repeatedly sabotaged such legislation by sending the proposed bills to committees where he knew they would fail.² According to one gay rights activist, Representative Charles West told a group of citizens lobbying in support of adding sexual orientation to the state anti-discrimination statute, “I’m not going to vote for it because I don’t like the way you [gay people] recruit children to your lifestyle....It was one thing when you people were quiet, but now that you’re coming forward, wanting your rights, that’s hard to take.”³ Still others have remained in the political arena in part to oppose such legislation. As late as November 2008, for example, Senator Colin R.M.J. Bonini, an incumbent candidate seeking re-election to the Delaware General Assembly, said that one of his reasons for running was to uphold traditional values, telling newspapers: “I believe in traditional values and I am willing to defend those values. I oppose gay marriage, and I oppose granting special rights to individuals based on sexual preference.”⁴

¹ Letter from Karen E. Peterson, Director, State of Delaware Dep’t of Labor, Division of Industrial Affairs (Feb. 8, 1999), *available at* <http://bit.ly/4t9d2L> htm (last visited Sept. 6, 2009).

² *See infra* Section II.A.2.

³ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 133 (2000 ed.) [hereinafter HOSTILE CLIMATE].

⁴ *Candidates Profiles for Delaware State General Assembly*, DOVER POST, Oct. 22, 2008, *available at* <http://bit.ly/4kB5Pu> (last visited Sept. 6, 2009).

Documented examples of discrimination based on sexual orientation by state and local employers include two cases almost 25 years apart, both involving public education, illustrate the continuing nature of the proble:⁵

- In 1977, the University of Delaware refused to renew the contract of an openly gay instructor.⁶ A month after an article was published in the campus newspaper quoting him on gay issues, Richard Aumiller was told that his lectureship contact would not be renewed because “Aumiller had placed himself in a position of advocacy of the homosexual lifestyle for the undergraduate.”⁷ Aumiller sued the University and won. Aumiller v. University of Delaware, 434 F.Supp. 1273 (D. Del. 1977).
- In 2001, a Delaware public high school teacher alleged that the school principal forced her to remove a “Safe Space” rainbow triangle sticker from her classroom door.⁸ Although the school permitted the display of stickers of other clubs and organizations, the school district did not want to appear as an advocate of “Safe Space” associated with gay people.⁹ A similar pattern appears in the private sector.

Beyond the context of employment, but illustrating the problems encountered by LGBT citizens in dealing with public officials, a judge hearing a domestic abuse case involving a lesbian couple told them “get out of here” and “don’t bring it back – the next time you come back, I’ll put somebody in jail.”

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices 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.

⁵ See *infra* Section III.A.1.

⁶ *Aumiller v. University of Delaware*, 434 F.Supp. 1273, 1276 (D. Del. 1977).

⁷ *Id.* at 1285.

⁸ “EMcG,” *Tell Your Story*, TOWARD EQUALITY, <http://bit.ly/zqBIU>.

⁹ *Id.*

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Delaware added “sexual orientation” to the list of protected categories in its discrimination statute, the Discrimination in Employment Act (“DEA”), on July 2, 2009.¹⁰ The statute now forbids employers, including state and local governments, from discriminating against an employee based on his or her sexual orientation.¹¹ The DEA defines “sexual orientation” as “heterosexuality, homosexuality, and bisexuality.”¹² The DEA does not explicitly prohibit discrimination on the basis of perceived sexual orientation. In fact, DEA states that sexual orientation “*exclusively* means heterosexuality, homosexuality, or bisexuality”¹³ The statute does not prohibit discrimination on the basis of gender identity, but there is a gubernatorial executive order that prohibits the state, as an employer, from discriminating on the basis of gender identity.¹⁴

The DEA applies to employers of four or more employees and exempts religious organizations including those that are “supported, in whole or in part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization’s unrelated taxable income.”¹⁵

1. Scope of Statute

Under the DEA, an aggrieved employee must exhaust administrative remedies before filing a civil action.¹⁶ The administrative complaint must be filed within 120 days of the alleged unlawful practice.¹⁷

Upon a preliminary review of the complaint, the Department of Labor (“the Department”) may dismiss the charge unless it receives additional information that warrants further investigation, refer the case for mediation, or refer the case for investigation.¹⁸ If the Department makes a determination of “no reasonable cause” after an investigation or the case is dismissed before an investigation is conducted, the complainant receives a Right to Sue notice.¹⁹ If the Department makes a determination of “reasonable cause,” the parties are required to appear for conciliation.²⁰ If conciliation

¹⁰ 6 DEL. CODE ANN. § 4501 (2009).

¹¹ *Id.*; § 4502(13).

¹² § 4502(13) (emphasis added).

¹³ *Id.*

¹⁴ See *infra* notes 16, 18 and accompanying text. DO YOU MEAN TO USE INFRA FOR CONTENT THAT CAN BE FOUND TWO SENTENCES LATER?

¹⁵ 19 DEL. CODE ANN. § 710(6).

¹⁶ § 712(c)(1).

¹⁷ *Id.*

¹⁸ § 712(c)(2).

¹⁹ § 712(c)(3).

²⁰ *Id.*

efforts fail, the Department is to issue a Right to Sue notice.²¹ The complainant may file a civil action at any time within 90 days after it receives the Right to Sue notice.²²

2. Enforcement & Remedies

The Department of Labor is not entitled to award damages or injunctive relief, and may only force the employer to engage in reconciliation.²³ If the aggrieved employee files a civil action, the court may award compensatory damages and punitive damages (subject to the same graduated caps imposed on an employee filing a claim under Title VII) as well as injunctive relief and attorneys fees.²⁴

B. Attempts to Enact State Legislation

Though Delaware added “sexual orientation” to the list of protected categories in its discrimination statute in July 2009, there were many failed attempts to add sexual orientation to the statute over the last decade. Proponents in the Delaware State Legislature attempted but failed to enact protective legislation over a number of years.²⁵ The proposed legislation had been identical over the years, with one exception (discussed below). The repeatedly introduced bill would have required the addition of “sexual orientation” to non-discrimination laws already in existence in the areas of employment, housing, public accommodations, insurance and public works contracting.²⁶ The bills defined sexual orientation as “heterosexual, bisexual or homosexual orientation, *whether real or perceived*.”²⁷ The legislation made clear that it did not apply to religious organizations.²⁸ The legislation also made clear that it related only to non-discrimination and was not intended to require additional benefits for same sex domestic partners.²⁹

In 2005, House Bill 36 in the 143rd General Assembly explicitly addressed several opponents’ concerns in the summary of the bill’s purpose (the bill’s text remained unchanged).³⁰ First, the summary clarified the legislative intent to recognize the

²¹ § 712(c)(5).

²² § 714.

²³ § 712(c)(3).

²⁴ § 715.

²⁵ See, e.g., H.B. 99, 141st Gen. Assem., Reg. Sess. (Del. 2001); H.B. 99, 142nd Gen. Ass., Reg. Sess. (Del. 2003); H.B. 36, 143rd Gen. Ass., Reg. Sess. (Del. 2005); S.B. 141, 144th Gen. Ass., Reg. Sess. (Del. 2007).

²⁶ See, e.g., H.B. 99, 141st Gen. Assem., Reg. Sess. (Del. 2001).

²⁷ *Id.* (emphasis added).

²⁸ *Id.* (stating that:

[t]he term ‘employer’ with respect to discriminatory practices based upon sexual orientation does not include religious corporations, associations or societies supported, in whole or in part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization that generate unrelated business taxable income subject to 46 taxation under § 511(a) of the 47 Internal Revenue Code of 1986. *Id.*

²⁹ *Id.* (stating that “[n]othing in this subchapter shall be interpreted to require employers to offer health, welfare, pension or other benefits to persons associated with employers on the basis as such benefits are afforded to the spouses of married employees.”).

³⁰ H.B. 36, 143rd Gen. Ass., Reg. Sess. (Del. 2005).

continued validity of the Delaware Defense of Marriage Act.³¹ Second, the summary clarified that the bill did require employers to establish hiring goals, targets or plans for hiring based on sexual orientation.³² Third, the summary clarified that the bill does not require employers to establish a dress code.³³ Finally, the summary clarified the legislative intent to exclude from the bill's reach employment situations involving minors or the advocacy of sexual orientation.³⁴

Despite these accommodations, these bills and all of their predecessors and successors failed prior to 2009. Over the years, each bill passed the House only to be blocked in the Senate.³⁵

Prior to 2003, it does not appear that these protective bills ever reached a full Senate vote.³⁶ Since 2003, Senator Thurman Adams Jr., the Senate President Pro Tem, has consistently assigned the bill to committees chaired by legislators who he knew opposed it.³⁷ In 2007, he said of the bill, "I hope its reception isn't very good. ... I'm sure there will be some discussion about it. But I don't like it."³⁸ In part because of this animosity, from 2003 through 2009, the legislation failed in the Senate Committees through "desk drawer vetoes" (meaning that the bills have been allowed to expire in committee without reaching the Senate floor for a vote).³⁹ In 2007, under the 144th General Assembly, Senator Adams assigned Senate Bill 141, the only bill of this kind to be initiated in the Senate, to the Senate Insurance and Elections Committee, where for the first time the bill did reach a hearing.⁴⁰ However, the bill appears to have expired at the end of the General Assembly without reaching a full Senate vote.⁴¹

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ In general, once a bill passes the Delaware House, it is sent to the Senate Pro Tem for assignment to a Senate committee. *See* State of Delaware, Legislative Process: How a Bill Becomes Law, *available at* <http://bit.ly/4tGKhb> (last visited Sept. 6, 2009). The committee discusses the bill and votes to send it to the full Senate for debate. *Id.* Once the bill reaches the Senate agenda, the Senate debates and amends the bill, after which it is either passed, defeated or delayed by either postponement or return to committee. *Id.*

³⁶ *See supra* note 28 and accompanying text. But, note that the legislative history prior to 2001 is unavailable on-line.

³⁷ *Antidiscrimination Bill Fails Again in Delaware State Senate*, ADVOCATE, June 22, 2007, *available at* <http://bit.ly/xSfyx>; J.L. Miller & Patrick Jackson, *Sex-Discrimination Bill Again Dies in Committee*, NEWS J., June 21, 2007, at 1A (reporting Senator John C. Still's statement, in reference to Senate President Pro Tem Thurman Adams, Jr., that "[t]his bill has now shown up in three different committees, some of which I haven't served on, and it's never gotten out. I'd say that shows the pro tem knows how to pick committees"); Patrick Jackson, *Gay Rights Bill to Get Committee Hearing*, NEWS J., June 15, 2007, at 1B; J.L. Miller, *Bill to Ban Discrimination Against Gays in Del. in Limbo*, NEWS J., Jan. 3, 2005, at 1A (stating that "[i]n past sessions, House Bill 99 has been assigned to committees chaired by senators who oppose it: Sens. Robert L. Venables Sr. and James T. Vaughn. Each man let the bill die without a vote by the full Senate").

³⁸ James Merriweather, *Gay-Rights Advocates Have Fresh Optimism*, DEL. ONLINE, Apr. 22, 2007, *available at* <http://bit.ly/HdsAo> (last visited Sept. 6, 2009).

³⁹ *See supra* note 28 and accompanying text. NOT SURE THIS CORRELATES

⁴⁰ *See* Jackson, *supra* note 28. NOT SURE WHO JACKSON IS. DOUBLE CHECK SUPRA

⁴¹ *See* S.B. 141, 144th Gen. Ass., Reg. Sess. (Del. 2007) (legislative history).

Critics of the bill argued that these protections were unnecessary and overreaching. Some citizens of Delaware argued that LGBT individuals do not need these protections because they are not, in fact, victims of discrimination.⁴² Others, including the 2007 Senate minority leader, argued that the bill would burden small businesses with crushing legal fees.⁴³ Still others claimed that the bill was merely a veiled attack on Delaware's own Defense of Marriage Act or its ban on same-sex marriage.⁴⁴ Public opinion of the bills was also mixed. For example, three downstate legislative candidates who backed House Bill 99 in 2003, Brian J. Bushweller in Dover, Tom Savage in Lewes, and Brian L. Dolan in Milton all lost their election bids in what some comments suggested was a rejection of their position on this bill.⁴⁵ Dolan's support of the measure led to more than 75 of his campaign signs being defaced with "No fags" graffiti."⁴⁶

In addition to introducing a discrimination statute, Senator Margaret Rose Henry, with the support of (then) Governor Minner, also introduced Senate Bill 10 in the 144th General Assembly in 2007. This bill would have required state employers to extend benefits to domestic partners, including same sex domestic partners.⁴⁷ The bill was assigned to the Senate Finance Committee, but this bill also died without a vote at the close of the session.⁴⁸

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

1. **Executive Orders**

In 2009, Governor Markell issued Executive Order Number 8, which prohibits state employers from engaging in discrimination on the basis of gender identity.⁴⁹

In 2000, Governor Thomas Carper approved Executive Order Number 10, which proscribed employment discrimination based on sexual orientation within his own offices.⁵⁰ His successor, Governor Ruth Minner issued three successive Executive Orders prohibiting sexual orientation discrimination against employees of cabinet departments and executive agencies.⁵¹

⁴² See Miller & Jackson, *supra* note 43. THIS IS NOTE 43.

⁴³ See Jackson, *supra* note 26. PLEASE CHECK THIS SUPRA. NOTE 26 DOESN'T REFERENCE JACKSON

⁴⁴ See *id.*

⁴⁵ See J.L. Miller, *Bill to Ban Discrimination Against Gays in Del. in Limbo*, NEWS J., Jan. 3, 2005, at 1A (reporting Senator Adams' statement, "I think in the last election, you saw how the people felt about it The people down here that did not support that bill won by the biggest majority they ever had.").

⁴⁶ Ron Williams, *H.B. 99 Hurt Candidates Yet Does Little*, NEWS J., Nov. 12, 2004, at 14A.

⁴⁷ S.B. 10, 144th Gen. Ass., Reg. Sess. (Del. 2007).

⁴⁸ See *id.* (legislative history).

⁴⁹ Del. Exec. Order No. 8 (2009).

⁵⁰ Young et. al, *Governor Carper Signs Order Protecting Gays from Discrimination*, 6 DEL. EMPL. L. LETTER 2 (Feb. 2001).

⁵¹ Del. Exec. Order No. 10 (2001); Del. Exec. Order No. 81 (2006); Del. Exec. Order No. 86 (2006).

2. State Government Personnel Regulations

A few state and local agencies have enacted non-discrimination policies that include sexual orientation. In 2001, in response to Governor Minner's Executive Order Number 10, the Delaware Office of Management and Budget (the "OMB") revised the state Merit System's non-discrimination policy, Merit Rule 2.1, to include sexual orientation.⁵² The Merit System, managed by the OMB, governs state employment and directs the promulgation of Merit Rules governing state employment.⁵³ Therefore, as of 2001, although not mandated by any statute, state government offices have had a non-discrimination policy that includes sexual orientation.⁵⁴

Under the Merit System, employees are encouraged to resolve complaints about discrimination first through informal meetings with their supervisors.⁵⁵ If the complaint still remains unresolved, the employee is then permitted to log a grievance with the Merit Employee Relations Board ("MERB") within 14 calendar days of the grievance matter.⁵⁶ The employee should then meet again with her immediate supervisor, and the supervisor will issue a written reply.⁵⁷ If the employee is still not satisfied, she can file an appeal with the top agency personnel official or representative within 7 calendar days of the supervisor's reply.⁵⁸ The employee then meets with the designated management official who in turn issues another written reply.⁵⁹ If she is still not satisfied, the employee can again appeal to the State Personnel Director within 14 calendar days of that reply.⁶⁰ The employee will then meet with the Director who will issue a binding decision on the agency management within 45 calendar days of the meeting.⁶¹ If the employee is still not satisfied, she has one final appeal to the MERB for a final disposition.⁶² The Director and the MERB have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of the Merit Rules.⁶³ MERB decisions and rulings are available for public inspection, but only in person during business

⁵² DEL. MERIT RULES (2009), available at <http://bit.ly/1Okzvs> I AM NOTICING THESE LINKS YOU USE ARE ALL TO PDFs AS OPPOSED TO WEBSTES. NOT QUITE SURE HOWTO HANDLE THIS BUT IT SEEMS STRANGE. (last visited Sept. 5, 2009) (stating that "2.0 Non-Discrimination 2.1 Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, *sexual orientation*, or other non-merit factors is prohibited." *Id.* (emphasis added)); see Del. Att'y Gen. Op. 03-IB27 (2003) (discussing history of revised Merit Rule 2.1).

⁵³ 29 DEL. CODE ANN. §5914 (2008).

⁵⁴ Robert D. Martz, *Equal Benefits Work in Corporate America*, NEWS J., Jan. 5, 2007, at 9A.

⁵⁵ 19 DEL. ADMIN. CODE 3000 §19.0 (2003) (Grievance Procedure), available at <http://bit.ly/16cLtf>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 29 DEL. CODE ANN. § 5931.

hours.⁶⁴ Because of that limitation, we were unable to review the rulings. There is no private right of action.⁶⁵

Aside from the Merit Rules, other state agencies also have non-discrimination policies that explicitly include sexual orientation as a protected class, including: (i) the Delaware Department of Services for Children, Youth and their Families,⁶⁶ (ii) the Delaware Department of Education⁶⁷ and (iii) the University of Delaware.⁶⁸

3. Attorney General Opinions

None.

D. Local Legislation

A few Delaware cities have implemented legislation protecting gays in various areas, including the employment context.

1. City of Rehoboth Beach

In 2003, the city of Rehoboth Beach, Delaware implemented a law prohibiting private employers from discriminating based on sexual orientation.⁶⁹

2. City of Wilmington

The city of Wilmington, Delaware prohibits discrimination based on sexual orientation in the employment context, in the issuance of business licenses and in the public housing arena.⁷⁰

3. City of Dover

The city of Dover, Delaware prohibits employment discrimination on the basis of sexual orientation in hiring and recruitment.⁷¹

4. County of New Castle

Only one of Delaware's three counties, New Castle County, has an employment policy that includes sexual orientation in its list of protected classifications.⁷²

⁶⁴ RULES GOVERNING PRACTICE AND PROC. BEFORE MERIT EMPL. REL. BD. OF DEL. (2004), *available at* <http://bit.ly/NqyF2> (last visited Sept. 5, 2009).

⁶⁵ 19 DEL. ADMIN. CODE 3000 §19.0 (2003) (Grievance Procedure), *available at* <http://bit.ly/16cLtf>.

⁶⁶ *See* AFFIRMATIVE ACTION/MANAGING DIVERSITY PLAN 7 (Department of Services for Children, Youth and Their Families 2008-09), *available at* <http://bit.ly/d9PtB> (last visited Sept. 6, 2009).

⁶⁷ *See* Del. Dep't of Empl., *available at* <http://www.doe.k12.de.us/job/default.shtml> (last visited Sept. 5, 2009).

⁶⁸ ANNUAL REPORT 6 (Univ. of Del. 2006), *available at* <http://bit.ly/1vQJkY>.

⁶⁹ N. Peter Lareau, 1 LABOR AND EMPLOYMENT LAW § 127.12 (2008).

⁷⁰ WILMINGTON CODE §35-111, §5-31, §35-77 (2008), *available at* <http://bit.ly/34OY6y>.

⁷¹ *See* DOVER EMPLOYEE HANDBOOK, at13-14 (J2004), *available at* <http://bit.ly/uYsD0>.

E. Occupational Licensing Requirements

The application for teacher licensure in the State of Delaware states that a teacher must not have engaged in any immoral acts.⁷³ It is unknown whether this requirement has ever been used in a discriminatory manner against LGBT persons.

⁷² See New Castle County Govn't. Application (2007), available at <http://bit.ly/V5YBM> (last visited Sept. 6, 2009); see also Kent County Non-Discrimination Notices, available at <http://bit.ly/CFvzC> (last visited Sept. 6, 2009) (omitting sexual orientation); Sussex County Council Employ. Application, available at <http://bit.ly/17uh4Y> (last visited Sept. 6, 2009).

⁷³ 14 DEL. ADMIN. CODE § 1510 (2009), available at <http://bit.ly/2s11Cq>.

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

A. Case Law

1. State & Local Government Employees

Aumiller v. University of Delaware, 434 F.Supp. 1273 (D. Del. 1977).

Richard Aumiller was a non-tenured “Lecturer” at the University of Delaware during the 1974-75 and 1975-76 academic terms.⁷⁴ He brought a civil rights action under 42 U.S.C. section 1983 against the University of Delaware, the Board of Trustees of the University, and a number of University officials and administrators.⁷⁵ Aumiller, a gay man and a member of an organization at the University called *The Gay Community*, alleged that the defendants violated his First Amendment rights of free expression and association by refusing to renew his contract for the 1976-77 academic term based on his statements on the subject of homosexuality appearing in three newspaper articles.⁷⁶

The first newspaper article quoted two statements by Aumiller and excerpted a portion of a letter written by Aumiller in his capacity as faculty advisor to the Gay Community. A month after the first article was published, Aumiller was rehired for the 1975-76 academic term. In the second and third articles published in October and November, 1975, Aumiller was quoted regarding a variety of issues related to the Gay Community.

A month after the last article was published, the president of the university told others that he would not sign a contract for Aumiller for the 1976-77 term if one were presented to him because “Aumiller had placed himself in a position of advocacy of the homosexual lifestyle for the undergraduate.”⁷⁷ The president also said that the issue was not Aumiller’s job performance, but rather that he had placed himself in a position of advocating “a homosexual lifestyle for the undergraduate and that he had used his position as a faculty member to expound this particular point of view and that this was not appropriate for him to do so.”⁷⁸ Aumiller was later told that his contract would not be renewed for the following academic year.⁷⁹

Aumiller filed a three-part grievance to the University of Delaware and sought to have his contract reinstated.⁸⁰ It was appealed all the way up to the University’s President, who made the final decision.⁸¹ The University’s President denied the three

⁷⁴ *Aumiller v. University of Delaware*, 434 F.Supp. 1273, 1277 (D. Del. 1977)

⁷⁵ *Id.*

⁷⁶ *Id.* at 1278.

⁷⁷ *Id.* at 1285.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1286.

⁸¹ *Id.* at 1287.

grievances, explaining that he believed that Aumiller improperly used his position at the University to promote a homosexual lifestyle.⁸²

Aumiller prevailed on his First Amendment claim.⁸³ The court held that although homosexuality is controversial and emotional topic, and that Aumiller's position likely represents a minority view, its unpopularity "can not justify the limitation of Aumiller's First Amendment rights by the University of Delaware."⁸⁴ Thus, the decision not to renew Aumiller's contract contravened the primary purpose of the First Amendment and violated Aumiller's right of freedom of expression.⁸⁵ The court awarded Aumiller with the following remedies: (1) reinstatement for the 1976-77 academic term (because the term was at its end, Aumiller received his salary for the year); (2) that all reference to this incident in Aumiller's employment records be expunged, (3) \$10,000 in compensatory damages for the emotional distress, embarrassment and humiliation Aumiller suffered as a result of defendants' actions, and (4) \$5,000 in punitive damages.⁸⁶

2. Private Employers

None.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

None.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1301.

⁸⁵ *Id.* at 1301-02.

⁸⁶ *Id.* at 1312-1313.

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

Until 1972, Delaware had a sodomy statute that criminalized consensual sexual acts between same sex persons.⁸⁷ The police used this statute vigorously to arrest and harass same sex couples.⁸⁸ In 1972, the legislature redefined sodomy to exclude consensual sexual acts between same sex persons.⁸⁹ In 1987, House Representative B. Bradford Barnes attempted to reinstate the sodomy law, but his fellow House members rebuffed this proposal.⁹⁰

B. Housing & Public Accommodations Discrimination

In 1997, a complaint was filed against a judge who dismissed a domestic abuse case involving two lesbians, whom the judge threatened to send to jail because he wanted nothing to do with “funny relationships.” The entire courtroom erupted into laughter after hearing the judge state, “You all have these funny relationships – that’s fine – I have nothing to do with it, but don’t bring it in here for me to try to decide, I don’t know how to handle it. Now take this stuff out of here, I’m dismissing the case, you all control your business another way, get out of here. It’s too much for me. Don’t bring it back – the next time you come back, I’ll put somebody in jail.”⁹¹

The City of Wilmington prohibits discrimination based on sexual orientation not only in employment, but also in the issuance of business licenses and public housing.⁹²

C. HIV/AIDS Discrimination

Miller v. Spicer, 822 F. Supp. 158 (D. Del. 1993).

In *Miller v. Spicer*,⁹³ an emergency room physician at a private hospital refused to treat a critically injured patient because of the patient’s perceived homosexuality and HIV status. The doctor specifically instructed the nurse to label plaintiff’s chart with the words “known admitted homosexual,” despite the fact that plaintiff had never revealed

⁸⁷ George Painter, THE SENSIBILITIES OF OUR FOREFATHERS: THE HISTORY OF SODOMY LAWS IN THE UNITED STATES: DELAWARE (1991), available at <http://bit.ly/Uho7f>.

⁸⁸ *Id.* at 5.

⁸⁹ *Id.* at 6.

⁹⁰ *Id.* at 7.

⁹¹ HOSTILE CLIMATE, *supra* note 3 at 48-49 (1997 ed.).

⁹² WILMINGTON CODE § 35-111, § 5-31, § 35-77 (2008), available at <http://bit.ly/34OY6y>.

⁹³ *Miller v. Spicer*, 822 F. Supp. 158 (D. Del. 1993).

his sexual orientation to the hospital.⁹⁴ The doctor also falsely claimed that he did not perform the type of procedure plaintiff needed and consequently transferred plaintiff to a hospital in Washington D.C. that he believed “[took] care of gay people.”⁹⁵ As a result of the doctor’s refusal to treat him, the patient suffered a permanent disability. Plaintiff brought suit against the doctor and the hospital claiming discrimination based on his perceived HIV status, intentional infliction of emotional distress and breach of contract.⁹⁶

On defendants’ motion for summary judgment, the court held that a genuine issue of material fact existed as to whether the hospital discriminated against plaintiff because of his perceived HIV status. The court noted that the fact that the doctor lied about his ability to perform plaintiff’s procedure and labeled the plaintiff a “known admitted homosexual,” a highly unusual practice, supported an inference that hospital employees knew plaintiff was being transferred for discriminatory reasons.⁹⁷ The court also held that a genuine issue of material fact existed as to whether the doctor and the hospital acted so outrageously as to give rise to a claim for intentional infliction of emotional distress.⁹⁸ With respect to the doctor, the court noted that a jury could find outrageous:

(i) the manner in which Dr. Spicer refused to render medical treatment; (ii) the fact that he refused to treat plaintiff, not for some legitimate medical reason, but for unacceptable discriminatory reasons; (iii) the fact that he formulated his discriminatory treatment plan primarily on the basis of subjective information such as derogatory comments made by [hospital] staff members that the patient was homosexual and his leap to the conclusion that [plaintiff] might therefore be infected with the AIDS virus; and (iv) the fact that Spicer knew his refusal to treat the plaintiff could cause serious permanent injury.⁹⁹

With respect to the hospital, the court held that a jury could have found the staff’s labeling of plaintiff as a homosexual outrageous, and that the staff’s failure to follow procedures for the transfer of patients evidenced a discriminatory purpose.¹⁰⁰ The court dismissed all other claims, and no other subsequent appellate history is available online.

D. Hate Crimes

The Delaware Hate Crime Bill criminalizes hate crimes committed because of the victim’s sexual orientation, but the statute does not cover gender identity.¹⁰¹

⁹⁴ *Id.* at 161.

⁹⁵ *Id.*

⁹⁶ *Id.* at 160.

⁹⁷ *Id.* at 164.

⁹⁸ *Id.* at 169-171.

⁹⁹ *Id.* at 170.

¹⁰⁰ *Id.*

¹⁰¹ 11 DEL. CODE ANN. §1304 (a)(2) (2008).

The City of Wilmington also criminalizes bias crimes that were committed on the basis of sexual orientation.¹⁰²

E. Parenting

Delaware provides several protections for same sex parents. For example, Delaware recognizes second-parent adoptions by same sex partners.¹⁰³ Delaware also recognizes the parental rights of a same sex parent with no biological or adoptive relationship to the child of an ex-partner.¹⁰⁴

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 1996, the Delaware Constitution was amended to prohibit marriage between same-sex couples.¹⁰⁵ Moreover, Delaware does not recognize marriages of same sex couples performed outside of the State.¹⁰⁶ Delaware courts, however, have permitted same-sex partners to legally change their surnames.¹⁰⁷

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

New Castle Parade Permits

The City of New Castle, Delaware expressly prevents the City Administrator from denying applications for parades or public assemblies based on sexual orientation.¹⁰⁸

[a]ny person who commits, or attempts to commit, any crime as defined by the laws of this State, and who intentionally: ... selects the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry, shall be guilty of a hate crime. For purposes of this section, the term 'sexual orientation' means heterosexuality, bisexuality, or homosexuality. *Id.*) WHAT'S GOING ON HERE? WAS THIS SUPPOSED TO BE INTRODUCED BY THE CITATION IN FN 102.

¹⁰² WILMINGTON CODE §35-1 (2008).

¹⁰³ *See, e.g., In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001).

¹⁰⁴ *See, e.g., L.M.S. v. C.M.G.*, 2006 Del. Fam. Ct. Lexis 298 (Del. Fam. Ct. 2006) (recognizing *de facto* parental rights for a child that plaintiff and defendant, her ex-partner, jointly decided to adopt, even though only defendant's name appeared on the adoption papers); *Chambers v. Chambers*, 2002 Del. Fam. Ct. Lexis 39 (Del. Fam. Ct. 2002) (recognizing *de facto* parental rights in child who plaintiff and ex-partner jointly decided to conceive through in-vitro fertilization, despite defendant's lack of biological relation to child); *S.A.S. v. E.M.S.*, 2004 Del. Fam. Ct. Lexis 188 (Del. Fam. Ct. 2004).

¹⁰⁵ 13 DEL. CODE ANN. § 101 (2008) (otherwise known as the "Delaware Defense of Marriage Act").

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g., In re Marley*, 1996 Del. Super. Lexis 192 (Del. Super. Ct. 1996) (overturning lower court's decision to deny name change because court should not undertake a pseudo-marriage ceremony).

¹⁰⁸ New Castle Code § 171-8 (2008), available at <http://bit.ly/g9QHt>.