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

**Title**

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

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## MEMORANDUM

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

### I. OVERVIEW

Massachusetts state law explicitly protects its citizens from discrimination on the basis of sexual orientation, but not gender identity.

In 1989, the Massachusetts legislature amended its anti-discrimination law to include sexual orientation as a protected class.<sup>1</sup> The bill was originally introduced to the House in 1973, but faced insurmountable opposition in the Legislature for 16 years.<sup>2</sup> Legislators opposed to adding “sexual orientation” as a protected class under the anti-discrimination statute argued that the “homosexual way of life” spreads AIDS,<sup>3</sup> gay people have sex with animals<sup>4</sup> and that homosexuality was illegal based on Massachusetts’ sodomy laws.<sup>5</sup> In 1987, during the Massachusetts Senate floor discussion of the bill, legislators opposing the bill read aloud from a book that depicted gay people as promiscuous individuals, alleging that most were involved in orgies and one-fifth of them had sex with animals.<sup>6</sup>

Once the bill passed the Senate and was signed into law by Governor Michael Dukakis, its opponents vowed to overturn the amendment by referendum.<sup>7</sup> However, then-Attorney General James Shannon issued a formal opinion excluding the amendment from the referendum process.<sup>8</sup>

On July 14, 2009, there was a Massachusetts Judiciary Committee hearing on “An Act Relative to Gender-Based Discrimination and Hate Crimes,” which was introduced in January to the Massachusetts legislature for the second time.<sup>9</sup> If passed, this bill would add “gender identity and expression” to the state’s anti-discrimination and hate crime

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<sup>1</sup> See MASS. GEN. LAWS ch. 151B, § 4.

<sup>2</sup> *Massachusetts Second State to Enact Gay Rights Law*, L.A. TIMES, Nov. 16, 1989, at 21 (hereinafter “L.A. Times article”).

<sup>3</sup> Jane Meredith Adams, *Anger Toward Gays is Out of the Closet with Visibility Comes Abuse*, *Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.

<sup>4</sup> Jane Meredith Adams, *Anger Toward Gays is Out of the Closet with Visibility Comes Abuse*, *Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.

<sup>5</sup> *Senate Votes in Favor of Gay Rights*, BOSTON GLOBE, Oct. 31, 1989, at 22.

<sup>6</sup> Jane Meredith Adams, *Anger Toward Gays is Out of the Closet: With Visibility Comes Abuse*, *Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.

<sup>7</sup> *A Gay Rights Law is Voted in Massachusetts*, N.Y. TIMES, Nov. 1, 1989, at A27.

<sup>8</sup> See *infra* Section II.C.2.

<sup>9</sup> H.B. 1728 (Mass. 2009). Thus far, there has been no further activity on the bill since the July 14, 2009 judiciary committee hearing.

statutes, a classification currently unprotected by Massachusetts state law.<sup>10</sup> At the hearing, there was overwhelming support for the measure, based on the testimony of transgender individuals who expressed concern for their safety, as well as accounts of individuals who lost their jobs as a result of gender transitioning.<sup>11</sup>

The following are documented examples of sexual orientation and gender identity discrimination by state and local governments in Massachusetts:

- In 2009, worker who has worked at a state university for 26 years has been isolated from his fellow workers and he feels that his requests to remedy this have not been addressed because he is gay.<sup>12</sup>
- In 2009, a public school teacher has been suspended four times since 2003, and she feels that the reason is that she is the only out teacher in the district.<sup>13</sup>
- In 2008, a Massachusetts truck driver working for a town experienced harassment because she was a lesbian. People at work displayed pornographic images near her locker. She filed suit against the town for sexual orientation harassment and won a \$2.1 million lawsuit.<sup>14</sup>
- In 2008, a police officer who worked at a state university in Massachusetts for four years reported that during training, his drill instructor would yell, "Are you looking at me, boy? Do you like me? Are you a faggot?" After several of his coworkers became aware that the police officer was a gay man, he received phone calls at home from his coworkers, including one who called him and said, "I need a blow job" and then hung up. He eventually left the university for a job with a city police department.<sup>15</sup>
- In 2008, a married lesbian working for the Massachusetts State Trial Court reported that she was demoted and her pay was cut as a result of her recent marriage to a woman. The employee took time off of work for an illness with a doctor's note, but she was called by her union steward to notify her that she had been suspended and that proceedings were under way to fire her.<sup>16</sup>

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<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (June 13, 2008) (on file with GLAD) [hereinafter GLAD Intake Form (date)].

<sup>15</sup> *Id* at 58-62.

<sup>16</sup> GLAD Intake Form (Jan. 24, 2008).

- In 2008, a mathematics professor at a Massachusetts state university reported that he and his husband, also a mathematics professor, were discriminated against based upon their sexual orientation. Both the professor and his spouse were chosen to serve on a search committee for a new faculty member. They were notified, however, that one of them would need to step down because there was a university policy that family members could not serve together on a search committee. The professor was not able to find any such policy, and believes that he and his husband are being discriminated against based upon their sexual orientation.<sup>17</sup>
- In 2007, a police officer from Massachusetts testified about his experience of discrimination at a U.S. House of Representatives hearing on ENDA. The officer testified that he lost two-and-a-half years of employment fighting to get his job back because he is gay. The officer realized soon after graduating the police academy that because he was gay, his safety as a police officer and his future as a public servant were seriously jeopardized. He worried that if he were killed in the line of duty there would be no one to tell his partner what happened to him and his partner would learn about it on the news. Because Massachusetts has an anti-discrimination law that protects against sexual orientation discrimination he was eventually able to get his job back.<sup>18</sup>
- In 2007, a Massachusetts deputy sheriff, who is gay, experienced two years of harassment by his chief. The chief threatened to suspend him if he continued "to see two guys at one time" because it looked bad for the department. The chief also "outed" him to his coworkers. Due to the harassment he suffered, the deputy sheriff suffered a mild heart attack, and was placed on sick leave. During that time, he was fired for abandonment of post.<sup>19</sup>
- In 2007, a lesbian staff member with the Massachusetts Department of Transitional Assistance applied four times for a promotion and was denied each time, despite having obtained additional training. The employee also received good evaluations and received the Governor's Award for Outstanding Performance. She believed that she was denied advancement due to her sexual orientation. Another employee was, at the time the incident was reported, suing the department for discrimination based upon sexual orientation as well. That employee had already filed paperwork to start the complaint process.<sup>20</sup>
- In 2007, a lesbian staff person working in a Massachusetts town's clerk office was fired after she and her partner filed a birth certificate, listing themselves as the

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<sup>17</sup> GLAD Intake Form (Mar. 10, 2008)

<sup>18</sup> Transcript of Statement by Michael Carney Regarding H.R. 2015 (Employment Non-Discrimination Act of 2007), H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY, Sept. 5, 2007; Transcript of Statement by Mass. Rep. George Miller Regarding Mass. H.B. 13228 H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY, Sept. 5, 2007.

<sup>19</sup> GLAD Intake Form (May 24, 2007).

<sup>20</sup> GLAD Intake Form (Aug. 10, 2007).

- parents of their child. She was made to feel incompetent and overworked, which resulted in her suffering a breakdown while at work. She was forced to sign a document indicating that she would not sue the town upon her termination.<sup>21</sup>
- In 2007, a public school teacher reported homophobic graffiti and harassment to her supervisor and then was harassed and terminated by the supervisor.<sup>22</sup>
  - In 2006, the Appeals Court of Massachusetts affirmed a trial court decision awarding a Suffolk County corrections officer over \$620,000 in back pay and damages because his department failed to take adequate steps to remedy the harassment against him. The corrections officer had desired to keep his homosexuality private but a co-worker began spreading rumors, and he was thereafter shunned, harassed and subjected to lewd comments from co-workers. The harassment from his co-workers and supervisor included being called “fucking fag,” and having children’s toy blocks spelling “FAG” sent to his home.<sup>23</sup> The superior court concluded that the plaintiff had been “subjected to unwelcome, severe, or pervasive conduct by the Defendant...based on sexual orientation that unreasonably interfered with the condition”<sup>24</sup> of his employment. The court further found that the department knew or had reason to know of the hostile environment but failed to take adequate steps to remedy it. *Salvi v. Suffolk County Sheriff’s Dep’t*, 67 Mass App 596 (Mass. App. Ct. 2006).
  - In 2005, while working at the Massachusetts Department of Social Services, a transgender man experienced discrimination in his workplace. He met with his superiors and a civil rights officer to assist in his transition (from female to male) while at work. Despite discussing a plan for his transition, such as training sessions with fellow employees and name changing procedures, no action has been taken by his workplace. His request to formally change his name has been put on hold, and he was not invited to participate in weekly meetings.<sup>25</sup>
  - In 2005, an English teacher reported that he had been harassed almost on a daily basis by a group of students at the high school where he teaches. The students called him derogatory names, such as “faggot,” left lewd notes, drawings, and pictures on his desk or bulletin board, and signed the teacher up for gay pornographic websites using his school email address. The teacher complained to the principal, who indicated that she would “handle it.” However, after she had not addressed these issues, the teacher then sent a letter to the District Superintendent. Shortly thereafter, the teacher was notified that his position had been changed and that he was being terminated. The Superintendent told the teacher that in exchange for a signed agreement to not continue with any

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<sup>21</sup> GLAD Intake Form (Mar. 20, 2007).

<sup>22</sup> 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).

<sup>23</sup> *Salvi v. Suffolk County Sheriff’s Dep’t*, 67 Mass App 596 (Mass. App. Ct. 2006).

<sup>24</sup> *Id.* at 597.

<sup>25</sup> GLAD Intake Form (Apr. 20, 2005).

harassment complaints, she would offer him three weeks severance pay and allow him to collect unemployment benefits.<sup>26</sup>

- In 2005, a lesbian probation officer in the Suffolk County court system reported that she received a brochure in her work mailbox that touted a seminar discussing “cures for homosexuality” after she announced her marriage to her female partner. She and two other unmarried women in the department were the only employees to receive the brochure. Her union suggested that she contact the Commissioner of Probation. In response to her complaint, the Commissioner asked if she “expected the whole office to be turned upside down in order to find the culprit.” He then suggested that she take up her grievance with someone else.<sup>27</sup>
- In 2005, a Boston police officer, who is a lesbian, overheard and was the target of harassing comments and slurs. After verbally complaining to her supervisors about these comments, no action was taken.<sup>28</sup>
- In 2005, a gay nurse working in a prison as an employee of the Massachusetts Sheriff’s Department reported working in a hostile work environment. His coworkers gave him a Christmas present, which included fishnet stockings and obscene gay sex cards. He was given a bag of peanuts by a coworker and told, “Eat my nuts.” When he complained, he was told that “this was the way prisons work” and that he shouldn’t complain. He filed a complaint with the Massachusetts Commission Against Discrimination.<sup>29</sup>
- In 2005, a Massachusetts deputy sheriff, who is gay, reported being discriminated against after working for more than 13 years in law enforcement. His coworkers began targeting him with “usual locker room homo talk.” He was then excluded from meetings and his responsibilities were slowly taken away until finally, he was transferred to an inferior, nonsupervisory position. He was then terminated. He also reported that one other openly gay person, a lesbian, in the department was also forced out after her sexual orientation was disclosed. He reported that he was in settlement negotiations with the Sheriff Department, but they broke down.<sup>30</sup>
- In 2004, a lesbian teacher working in a Massachusetts public school reported that her contract was not renewed. The other lesbian teacher working at the school also did not have her contract renewed. When approached, the principal said that there were “differences in philosophies” and “overarching differences.” The teacher also claimed that several teachers had tried to start a gay-straight alliance

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<sup>26</sup> GLAD Intake Form (Feb. 12, 2009).

<sup>27</sup> GLAD Intake Form (Aug. 31, 2005).

<sup>28</sup> GLAD Intake Form (Oct. 13, 2005).

<sup>29</sup> GLAD Intake Form (Mar. 21, 2005).

<sup>30</sup> GLAD Intake Form (Oct. 17, 2005).

at the school and had wanted to put up "safe zone" stickers, but they were told by the administration that they could not.<sup>31</sup>

- In 2004, a school psychologist working in a Massachusetts public school reported that despite positive performance reviews, his responsibilities were restricted as a result of his being gay. His office was moved and he no longer has any interactions with students. Administrators at the school told the psychologist that he should not tell students he is gay nor should he say that he is married (to a man). The principal also asked everyone to disclose their sexual orientations during a staff meeting. His union representative did not take any action and advised the psychologist to not take any further steps to address these issues.<sup>32</sup>
- In 2004, a staff member at the Massachusetts Department of Revenue reported being harassed by one of his co-workers because he was openly gay. This co-worker posted and distributed anti-gay news articles and made anti-gay remarks. The gay staff member complained to his supervisor about the harassment, but his supervisor took no steps to stop the harassment.<sup>33</sup>
- In 2003, a gay man, who worked for the Massachusetts Department of Revenue for nineteen years, reported that he had been sexually harassed at work. A supervisor called him "a loser" and a "fucking faggot" behind his back. After telling internal affairs that he did not wish to work in the same space as this particular supervisor, he was asked to move to another location. He filed a formal complaint with internal affairs.<sup>34</sup>
- In 2003, a lesbian direct care worker for the Massachusetts Department of Social Services reported that she was one of seven lesbians fired at the same time. The employee filed a complaint with the Massachusetts Commission Against Discrimination.<sup>35</sup>
- In 2003, one year after a public high school teacher in Medford, Massachusetts was hired the school became aware that he was gay. When his three-year tenure position expired two years later, he was terminated. The only reason given by the Superintendent was that he "shouldn't be known for [his] activities outside the classroom." He brought the situation to the attention of his union, which told him that the "discrimination would be very difficult to prove." Though the school eventually offered him tenure because of support from students and parents, school officials have continued to harass him. He has been in therapy since the incident because of the harassment he endures at work.<sup>36</sup>

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<sup>31</sup> GLAD Intake Form (May 27, 2004).

<sup>32</sup> GLAD Intake Form (Aug. 13, 2004).

<sup>33</sup> GLAD Intake Form (July 28, 2004).

<sup>34</sup> GLAD Intake Form (Apr. 28, 2003).

<sup>35</sup> GLAD Intake Form (Jan. 15, 2003).

<sup>36</sup> Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

- In 2003, a gay teacher working in a Massachusetts public school was forced to resign because of his sexual orientation. He was the target of several anti-gay remarks and vandalism. Someone keyed "Gay Faggot" into the paint of his car. The teacher brought these incidents to the attention of the school administration, which did nothing. The union representing the teacher was also made aware of these incidents but did nothing. Even after leaving his job, the teacher continues to receive harassing phone calls.<sup>37</sup>
- In 2003, a facilities employee in a Massachusetts public school district experienced regular harassment by his coworkers because he is gay. One co-worker called the facilities worker a "faggot." He reported that other co-workers drank on the job and then threatened him physically. One coworker pushed him. This incident was caught on video, but the school district now claims that they cannot locate the tape. He started having panic attacks as a result of the harassment and, at the time the incident was reported, was on leave from work. He filed a complaint with the school district and his union, but neither had taken steps to stop the harassment.<sup>38</sup>
- In 2002, a sixteen veteran of the Massachusetts Highway Department was harassed by his immediate supervisor, his boss, and several co-workers. They asked him several questions, including "Are you gay?," "Do you swing both ways?," and "If a girl strapped on a dildo, would that get you excited?" He was offered a lateral transfer, however the harassment continued. As a result of the harassment, he was diagnosed with high blood pressure. He felt that he could not file a complaint with the union because his steward was one of the harassers.<sup>39</sup>
- In 2000, a lesbian working for a city department for sixteen years was harassed by one of her co-workers. The co-worker treated her differently than her co-workers and made comments including, "You just want to give me a hard time; you want a man; you want the forbidden fruit." She filed a grievance with her department and with the Massachusetts Commission Against Discrimination.<sup>40</sup>
- In 2000, a Boston firefighter was awarded \$50,000 in damages by the Massachusetts Commission Against Discrimination for being harassed in the workplace, including being subjected to profanity and pornography and being taunted that "lesbians are not women."<sup>41</sup> Her co-workers also referred to her as "one way Wanda," referred to her female partner as "Pinky," and placed a picture of two women engaged in sexual relations in her sleeping bag. *Moore v. Boston Fire Dep't*, 22 MDLR 294 (M.D.L.R. 2000).
- A book published in 1996 recorded the following story of discrimination and harassment against a prison kitchen guard who was an employee of the

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<sup>37</sup> GLAD Intake Form (Feb. 6, 2003).

<sup>38</sup> GLAD Intake Form (July 10, 2003).

<sup>39</sup> GLAD Intake Form (Aug. 8, 2002).

<sup>40</sup> GLAD Intake Form (date unknown).

<sup>41</sup> *Moore v. Boston Fire Dep't*, 22 MDLR 294 (2000).



Massachusetts Department of Corrections: An employee began working for the Massachusetts Department of Corrections as a kitchen guard in 1990. His superiors and other officers began to harass him when he arrived to work with a pierced ear. The food service director ordered him to leave the earring at home, despite that it was not against the dress code and other officers wore them, saying, "I don't care what you do in private, being a fag or whatever, but you're going to leave it at home." Other officers made remarks about his taking a personal day to attend "the fag parade" and referred to his vitamins as "homo pills." One officer attached a picture of a woman's body with his face to his timecard. The employee recounts that homophobic banter quickly turned into severe harassment when one officer "was telling the inmates to whip their dicks out at [Leahey]"-- the inmates complied. This practice was common in the kitchen, where inmates would lift their aprons to expose themselves to him when instructed to do so by another officer. When he reported the harassment to the food service director, he was accused of fondling the inmates. During a discussion of the 1992 presidential election, a Lieutenant told him, "Perot doesn't like you fags," and proceeded to then grab his testicles in front of several other officers who all laughed along with the Lieutenant. The Lieutenant continued to grope him inappropriately thereafter. When he reported the Lieutenant's behavior to the superintendent because he began to fear the inmates who no longer respected him, he was told that "this stuff happens all the time" and to "go back to work." Eventually he sought help from the Gay and Lesbian Alliance Against Defamation who confronted the superintendent. Some of the officers were then disciplined; others were not. Following an uninvestigated false accusation of harassment by an inmate after GLAAD's well publicized intervention, the superintendent attempted to transfer him involuntarily to Massachusetts Department of Corrections-Shirley— the facility "known for having a lot of gay people." Leahey refused to "be segregated" and then suffered a nervous breakdown as a result of the harassment.<sup>42</sup>

- A book published in 1994 records the story of a teacher in a Boston area high school who was discriminated against and harassed at work because he is gay. After appearing on the news while at a Boston Pride Parade, the teacher noticed that the students didn't react negatively, but some of his fellow teachers did. On the entrance to the women's restroom, someone wrote his name under the sign. A student told him that another teacher said that he was gay and why would anyone want to be in his class and shouted across the gym "If you take off your pants for [the teacher], he'll give you an A!" The teacher spoke with the principal of the school and said that he would be staying home from work until he could be assured a safe workplace. A hearing was arranged during which the teacher harassing him was represented by the teachers' union, whereas he had to represent himself. The teacher who harassed him was required to write a letter of apology

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<sup>42</sup> ROBIN A. BUHRKE, *A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT* 156-159 (Routledge 1996).

and a negative review was placed in his file. His district also agreed to anti-homophobia training and issued anti-harassment guidelines.<sup>43</sup>

- In 1986, a professor who was a lesbian was hired as an assistant professor at the University of Massachusetts at Lowell. When she was hired, the dean acknowledged her credentials and accomplishments and promised to promote her within one year. But a student began threatening her life, carrying a gun onto the campus and saying the God had "ordained" him to "kill all homosexuals." Soon afterwards, the university notified her that the school no longer needed her courses or her services and that it was terminating her contract. But the university never canceled her courses after it terminated her. Instead, the university hired another professor, who had no background in the course subjects, to teach the same courses.<sup>44</sup>

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

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<sup>43</sup> ARTHUR LIPKIN, ONE TEACHER IN TEN 39-49 (Kevin Jennings ed., 1994).

<sup>44</sup> Human Rights Campaign, HRC PUBLICATION: DOCUMENTED CASES OF JOB DISCRIMINATION BASED ON SEXUAL ORIENTATION (1995).

## II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

### A. State-Wide Employment Statutes

#### 1. Scope of Statute

Chapter 151B of the General Laws of Massachusetts is the state's anti-discrimination statute.<sup>45</sup> In 1989, the legislature amended the law, becoming only the second state in the nation to include sexual orientation as a protected class under an anti-discrimination statute.<sup>46</sup> Under the statute as amended, it is unlawful for an employer, by himself or his agent, to refuse to hire, discharge, or discriminate against an individual on the basis of actual or perceived sexual orientation. "Sexual orientation" is defined as "heterosexuality, homosexuality, or bisexuality."<sup>47</sup> The legislature also included a provision noting that nothing in the act, "shall be construed to provide health insurance or related employee benefits to a 'homosexual spouse.'"<sup>48</sup>

As stated above, Massachusetts has not protected individuals from employment discrimination on the basis of their gender identity or expression. However, many courts and the Massachusetts Commission Against Discrimination ("MCAD"), the state's human rights commission, have ruled that gender identity claims can be brought under the category of sex or disability discrimination.<sup>49</sup>

Certain religious institutions and their charitable and educational associations are exempt from the law.<sup>50</sup> This exemption applies where an employer is operated or supervised by a religious institution and expressly states that an employer may not use his or her religious beliefs as basis for discrimination.<sup>51</sup> Employers with six employees or less are also exempt from the non-discrimination law.<sup>52</sup>

#### 2. Enforcement and Remedies

Any person claiming discrimination on the basis of sexual orientation may file, by himself or his attorney, a complaint with the MCAD.<sup>53</sup> Complaints may be filed with a local non-discrimination agency in addition to the MCAD, or exclusively with that agency if the MCAD allows.<sup>54</sup> These complaints must be made within 300 days of the alleged act of discrimination.<sup>55</sup> After this initial filing, the individual may elect to

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<sup>45</sup> See MASS. GEN. LAWS ch. 151B (1946).

<sup>46</sup> See *id.* at § 4.

<sup>47</sup> MASS. GEN. LAWS ch. 151B, § 3(6).

<sup>48</sup> MASS. GEN. LAWS ch. 151B, § 19 (1989).

<sup>49</sup> See *Millett v. Lutco, Inc.*, 23 MDLR 231 (2001).

<sup>50</sup> MASS. GEN. LAWS ch. 151B, § 1(5).

<sup>51</sup> See *id.*

<sup>52</sup> *Id.*

<sup>53</sup> MASS. GEN. LAWS ch. 151B, § 5.

<sup>54</sup> MASSACHUSETTS: OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 12 (GLAD June 2009), available at <http://bit.ly/WFp2W> (hereinafter "GLAD OVERVIEW").

<sup>55</sup> MASS. GEN. LAWS ch. 151B, § 5.

terminate proceedings before the MCAD and file his or her case in Massachusetts state court instead.<sup>56</sup> After the complaint has been filed with the MCAD, the chairman is required to designate a commissioner to investigate the case.<sup>57</sup> If the commissioner decides that no probable cause exists for the claim, the complainant will be notified in writing of such determination, which may then be appealed within ten days to the MCAD Investigative Commissioner.<sup>58</sup> On appeal, the Investigative Commissioner will hold an informal hearing where the complainant will have an opportunity to explain why he or she believes that the determination was wrong. After the hearing, the Investigative Commissioner may uphold the MCAD's determination, send the case back to MCAD for further investigation, or reverse the MCAD's finding of no probable cause.<sup>59</sup>

Alternatively, if the MCAD commissioner determines that probable cause does exist, then the case will be sent for "conciliation" or settlement proceedings.<sup>60</sup> If negotiations are unsuccessful, then the case may proceed to a hearing, with a format similar to that of a trial. The available remedies for an employment case include reinstatement or upgrading, back pay, restoration in a labor organization and front pay.<sup>61</sup>

## B. Attempts to Enact State Legislation

In November 1989, after a 17 year struggle, Governor Michael Dukakis signed the law banning discrimination based on sexual orientation in employment, housing, credit, and public accommodations.<sup>62</sup> The bill was first introduced in 1973, but was not passed by the House until 1983, at that time, by a 75-71 vote.<sup>63</sup> The House passed the measure again in 1987 and 1989. Over the years, the bill was repeatedly defeated in Senate committees and did not reach the Senate floor for a vote until 1989.<sup>64</sup>

In 1985, the fear of AIDS threatened the bill's success.<sup>65</sup> Legislators were unable to separate the gay rights issue from the concern about AIDS because of the belief that "the gay lifestyle leads to diseases such as AIDS."<sup>66</sup> The debate over gay foster parenting also impacted the House's deliberations, leading it to reject the bill.<sup>67</sup>

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<sup>56</sup> GLAD OVERVIEW, *supra* note 54, at 12.

<sup>57</sup> MASS. GEN. LAWS ch. 151B, § 5.

<sup>58</sup> GLAD OVERVIEW, *supra* note 54, at 10.

<sup>59</sup> See PRACTICAL GUIDE TO THE COMPLAINT PROCESS AT THE MCAD (M.C.A.D. 2002), <http://bit.ly/1u7L1S> (last visited Sept. 6, 2009).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 11. Complainants are not entitled to punitive damages under the MCAD. *Id.*

<sup>62</sup> LA Times Article, *supra* note 2. The legislative histories of bills that have gone before the Massachusetts legislature are available only through a personal visit to the Massachusetts State House Library.

<sup>63</sup> *A Gay Rights Law is Voted in Massachusetts*, N.Y. TIMES, Nov. 1, 1989, at A27, available at <http://bit.ly/5U874> (hereinafter "*Gay Rights Law*"); Kenneth J. Cooper, *Fear of AIDS Threatens Bill on Gay Rights*, BOSTON GLOBE, Sept. 21, 1985, at 21.

<sup>64</sup> *Senate Votes in Favor of Gay Rights*, BOSTON GLOBE, Oct. 31, 1989, at 22 (hereinafter "*Senate Votes*").

<sup>65</sup> Cooper, *supra* note 63.

<sup>66</sup> Jane Meredith Adams, *Anger Toward Gays is Out of the Closet with Visibility Comes Abuse*, *Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.

<sup>67</sup> Cooper, *supra* note 63.

In 1987, on the Senate floor, legislators opposing the bill read aloud from a book that depicted gay people as promiscuous individuals, alleging that most were involved in orgies and one-fifth of them had sex with animals.<sup>68</sup> In 1989, Representative John Flood opposed the bill stating that he did not think civil rights spring from a private social activity.<sup>69</sup> He further added that he did not believe the gay community had demonstrated that a pattern of discrimination existed against homosexuals.<sup>70</sup> The opposition reasoned that being gay or lesbian is merely a preference, so if an individual feels they are being discriminated against, they can simply choose a different lifestyle.<sup>71</sup> Echoing this sentiment, Senate Minority Leader David Locke characterized the proposed legislation as: “a bill to legalize the homosexual way of life.”<sup>72</sup> Locke further argued that homosexuality violated the sodomy laws of Massachusetts, and that the state should therefore not confer civil rights on gays and lesbians.<sup>73</sup> He also expressed fear that this legislation would set the stage for legalizing same-sex marriage.<sup>74</sup>

The Senate ultimately passed the bill by a margin of 22-13. The bill included a disclaimer that Massachusetts does not endorse homosexuality, and that the law does not recognize homosexual partnerships.<sup>75</sup> After the bill passed, Senator Edward Kirby vowed to fight for repeal by referendum, stating “[t]his is bad for society.”<sup>76</sup>

In 2007, House Bill 1722 was introduced in Massachusetts that would add “gender identity and expression” as a protected ground to the state’s non-discrimination statute, as well as to the existing hate crime law.<sup>77</sup> The bill was sent to the Judiciary Committee which held a hearing on it in March 2008.<sup>78</sup> At the hearing, there was overwhelming support for the measure, based on the testimony of transgender individuals who expressed concern for their safety, as well as accounts of individuals who lost their jobs as a result of gender transitioning.<sup>79</sup> In addition, the parent of a transgender child spoke of the humiliation his son experienced after state employees tactlessly handled the teen’s gender transition.<sup>80</sup> Despite this support, the bill floundered in committees and was never brought to a vote in the 2007-2008 legislative session.<sup>81</sup>

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<sup>68</sup> Jane Meredith Adams, *Anger Toward Gays is Out of the Closet: With Visibility Comes Abuse*, *Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.

<sup>69</sup> Frank Phillips, *Gay Rights Bill Goes Before House Today*, BOSTON GLOBE, Mar. 27, 89, at 49.

<sup>70</sup> *Id.*

<sup>71</sup> Adams, *supra* note 66.

<sup>72</sup> Bruce Mohl, *Parliamentary Maneuvers Delay Gay Rights Bill Action for Second Day*, BOSTON GLOBE, Nov. 11, 1987, at 37.

<sup>73</sup> *Senate Votes*, *supra* note 64.

<sup>74</sup> Mohl, *supra* note 63.

<sup>75</sup> MASS. GEN. LAWS ch. 151B § 19 (1989).

<sup>76</sup> *Gay Rights Law*, *supra* note 59.

<sup>77</sup> See Mass. Transgender Political Coalition, <http://www.masstpc.org> (last visited Sept. 6, 2009).

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> Video Testimony of Kenneth Garber Regarding H.B.1722 (Mar. 4, 2008), <http://bit.ly/Zmlnj> (last visited Sept. 6, 2009).

<sup>81</sup> See Mass. Transgender Political Coalition, *supra* note 77.

In January 2009, the legislation was re-introduced in the House as H.B.1728.<sup>82</sup> H.B.1728 was drafted by Gay & Lesbian Advocates and Defenders (GLAD).<sup>83</sup> The bill defines “gender identity and expression” as a gender-related identity, appearance, expression, or behavior, regardless of the individual’s assigned sex birth.<sup>84</sup> Under H.B.1728, a transgender employee would be ensured non-discriminatory “terms, conditions, or privileges of employment.”<sup>85</sup> Thus, the bill offers broad protection, prohibiting discriminatory hiring and firing practices, as well as discrimination in the extension of employment benefits.<sup>86</sup> The bill would also enable the MCAD to hear complaints alleging discrimination based on “gender identity and expression.”<sup>87</sup> Opponents have dubbed H.B.1728 the “bathroom bill,” contending that it will allow a man to walk into any women’s restroom if he happens to be feeling like a woman at that very moment.<sup>88</sup>

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

#### **1. Executive Orders**

In 1992, Governor William Weld issued Executive Order No. 340 which provided non-discriminatory benefit policies for employees of the state of Massachusetts.<sup>89</sup> This Order allows state employees to register their domestic partners for the purposes of obtaining benefits such as “bereavement” leave.<sup>90</sup> In addition, the order allows state employees to take a sick leave in the event of the serious illness or death of their domestic partner and claim benefits related to this absence.<sup>91</sup>

In January 2007, Governor Deval Patrick issued Executive Order No. 478, which mandated that all programs, activities, and services provided by the state shall be conducted without unlawful discrimination based on race, color, age, gender, ethnicity, sexual orientation, religion, creed, ancestry, national origin, disability, veteran’s status or background.<sup>92</sup> Patrick further specified that the Office of Diversity and Equal Opportunity (“ODEO”) would be responsible for ensuring compliance with the Executive Order.<sup>93</sup>

#### **2. Attorney General Opinions**

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<sup>82</sup> H.B. 1728 (Mass. 2009).

<sup>83</sup> See Amy Contrada, *Part 1: A Radical Comes to Massachusetts*, MASS RESISTANCE, <http://massresistance.org> (last visited Sept. 6, 2009).

<sup>84</sup> H.B. 1728 (Mass. 2009).

<sup>85</sup> H.B. 1728 (Mass. 2009).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Groups Spar Over Massachusetts Transgender “Bathroom Bill,”* FOX NEWS, Apr. 8, 2009, <http://bit.ly/1DqJe> (last visited Sept. 6, 2009).

<sup>89</sup> Mass. Exec. Order 340 (1992).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Mass. Exec. Order 478 (2007) (rescinding prior Exec. Order No. 452 (2003) (Gov. Romney).

<sup>93</sup> *Id.*

In 1989, Attorney General James Shannon issued a formal opinion declaring that the inclusion of sexual orientation as a protected ground in Massachusetts' anti-discrimination statute could not be put to a referendum.<sup>94</sup> Prior to Shannon's opinion, a referendum petition had been filed with the Secretary of State calling for the repeal of the sexual orientation bill, signed by ten voters.<sup>95</sup> Ultimately, Shannon concluded that, under the Massachusetts Constitution, the sexual orientation bill could not be put to referendum because the Constitution contained an exclusion for religious institutions.<sup>96</sup> Article 48 of the Amendments to the Massachusetts Constitution states that "no law that relates to religion, religious practices, or religious institutions...shall be the subject of a referendum petition."<sup>97</sup>

Prior to the opinion issued in 1989, Shannon had issued an order, in 1987, prohibiting discrimination by the Attorney General's office based on sexual orientation or a diagnosis of AIDS or AIDS-related conditions.<sup>98</sup>

### 3. Local Legislation

Boston, Cambridge, Northampton and Amherst all have non-discrimination ordinances that include sexual orientation and preference as a protected ground, as well as gender identity and expression.<sup>99</sup> The Boston ordinance, similar to the state statute, exempts religious institutions from complying with the non-discrimination law.

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<sup>94</sup> 1990 MASS. ATT'Y GEN. ANN. REP. 12.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> MASS. CONST. AMENDMENTS art. 48, The Referendum, Pt. III, § 2.

<sup>98</sup> See Lesbian, Gay, Bisexual & Transgender Political Alliance of Mass. Records (1982-1997), <http://www.lib.neu.edu/archives/collect/findaids/m91findbioghist.htm> (last visited Sept. 6, 2009).

<sup>99</sup> See BOSTON MUN. CODE § 12-9.3 (gender identity or expression added in 2002); CAMBRIDGE MUN. CODE § 2.76.160 (gender definition expanded to include identity or expression in 1997); Northampton MUN. CODE § 22-104 (gender identity or expression added in 2005); Amherst Town Bylaws Art. 16 (1999) (gender identity or expression added in 2009 by Article 11).

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

#### A. Case Law

##### 1. State & Local Government Employees

Salvi v. Suffolk County Sheriff's Dep't, 67 Mass App 596 (Mass. App. Ct. 2006).

Salvi was a corrections officer at the Suffolk County sheriff's department who was subjected to severe sexual orientation harassment. A jury awarded him \$93,600 in back pay, \$380,000 in front pay, \$50,000 for emotional distress and \$100,000 in punitive damages.<sup>100</sup> The superior court's decision was affirmed by the Appeals Court of Massachusetts.<sup>101</sup>

Salvi had desired to keep his homosexuality private but a co-worker began spreading rumors, and the plaintiff was thereafter shunned, harassed and subjected to lewd comments from co-workers. As a result, Salvi gained weight, became mentally distraught and attempted suicide. The plaintiff further alleged that his co-workers and commanding officer referred to him as a "fucking fag," and sent children's toy blocks spelling "FAG" to his home. The superior court concluded that the plaintiff had been "subjected to unwelcome, severe, or pervasive conduct by the Defendant...based on sexual orientation that unreasonably interfered with the condition"<sup>102</sup> of his employment. The court further found that the department knew or had reason to know of the hostile environment but failed to take adequate steps to remedy it.

##### 2. Private Employees

Lie v. Sky Publ'g Corp., 15 Mass. L. Rptr. 412 (Mass. Super. Ct. 2002)

In *Lie*,<sup>103</sup> the Massachusetts Superior Court held that a male-to-female transgender employee who refused to dress like a man while working as an editorial assistant at a private company was discriminated against on the basis of sex and disability under the state's anti-discrimination statute. The MCAD emphasized that it "cannot be gainsaid that transsexuals have a classically stigmatizing condition that sometimes elicits reactions based solely on prejudices, stereotypes, or unfounded fear."<sup>104</sup>

Millett v. Lutco, Inc., 23 MDLR 231 (2001).

Millett, a male-to-female transgender, filed a complaint with the MCAD contending that Lutco, Inc., a private employer, had discriminated against her because of her sex and sexual orientation. Specifically, Millett alleged that, despite her satisfactory job performance, she was issued written warnings by her superior for insubordination and

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<sup>100</sup> *Id.* at 598.

<sup>101</sup> *Id.*

<sup>102</sup> *Salvi v. Suffolk County Sheriff's Dep't*, 67 Mass. App. Ct. 596, 597 (Mass. App. Ct. 2006).

<sup>103</sup> *Lie v. Sky Publ'g Corp.*, 15 Mass. L. Rptr. 412 (Mass. Super. Ct. 2002).

<sup>104</sup> *Id.*



threatened with termination of employment after complaining about her superior's harassing behavior towards her. The MCAD held that though "transsexuality" is not protected under the "sexual orientation" category, it is included under the sex discrimination category. The MCAD reasoned that Millett was "subjected to harassment because of the kind of man she was -- one who wanted to be woman."<sup>105</sup> Since "sex discrimination is the result of stereotypes of women and men, mandating conformity with society's expectations of each sex; discriminating against transsexual people is, often times, because the individual is well outside these expectations."<sup>106</sup> The court further noted that the "transgendered person literally embodies a plethora of sexual stereotypes that are contrary to her birth sex."<sup>107</sup>

## B. Administrative Complaints

Moore v. Boston Fire Dep't, 22 MDLR 294 (M.D.L.R. 2000).

In *Moore*,<sup>108</sup> a Boston firefighter was subjected to severe sexual orientation harassment. Accordingly, the Massachusetts Commission Against Discrimination awarded Moore \$50,000 in compensatory damages.<sup>109</sup>

Moore filed a complaint with the MCAD charging the Boston Fire Department with unlawful discrimination in violation of the anti-discrimination statute partly on the basis of sexual orientation. Moore alleged that she was harassed during her work as a firefighter, subjected to unequal terms and conditions of employment and targeted with profanities because she is a lesbian. Specifically, Moore claimed that co-workers referred to her as "one way Wanda" and also referred to her female partner as "Pinky." One co-worker even exclaimed "lesbians are not women." Moore also alleged that co-workers placed a picture of two women engaged in sexual relations in her sleeping bag. The MCAD found that Moore had produced sufficient evidence to state a claim of a hostile work environment, as it was reasonable to infer from the record that she was targeted because of her sexual orientation.

## C. Other Documented Examples of Discrimination

Massachusetts Department of Corrections

James M. Leahey, a gay man, began working for the Massachusetts Department of Corrections as a kitchen guard in 1990. Leahey's superiors and other officers began to harass Leahey when he arrived to work with a pierced ear. The food service director ordered him to leave the earring at home, despite that it was not against the dress code and other officers wore them, saying to Leahey, "I don't care what you do in private, being a fag or whatever, but you're going to leave it at home." Other officers made remarks about Leahey taking a personal day to attend "the fag parade" and referred to his

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<sup>105</sup> *Millett v. Lutco, Inc.*, 23 MDLR 231 at 9 (2001).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Moore v. Boston Fire Dep't*, 22 MDLR 294 (M.D.L.R. 2000).

<sup>109</sup> *Id.*

vitamins as "homo pills." One officer attached a picture of a woman's body with Leahey's face to his timecard. Leahey recounts that homophobic banter quickly turned into severe harassment when one officer "was telling the inmates to whip their dicks out at [Leahey]"-- the inmates complied. This practice was common in the kitchen, where inmates would lift their aprons to expose themselves to Leahey when instructed to do so by another officer. When Leahey reported the harassment to the food service director, he was accused of fondling the inmates. During a discussion of the 1992 presidential election, a Lieutenant told Leahey, "Perot doesn't like you fags," and proceeded to then grab his testicles in front of several other officers who all laughed along with the Lieutenant. The Lieutenant continued to grope Leahey inappropriately thereafter. When Leahey reported the Lieutenant's behavior to the Superintendent because he began to fear the inmates who no longer respected him, he was told that "this stuff happens all the time" and to "go back to work." Eventually Leahey sought help from the Gay and Lesbian Alliance Against Defamation who confronted the Superintendent. Some of the officers were then disciplined; others were not. Following an uninvestigated false accusation of harassment by an inmate after GLAAD's well publicized intervention, the Superintendent attempted to transfer Leahey involuntarily to Massachusetts Department of Corrections-Shirley— the facility "known for having a lot of gay people." Leahey refused to "be segregated" and then suffered a nervous breakdown as a result of the harassment.<sup>110</sup>

#### Massachusetts Department of Transitional Assistance

In 2007, a lesbian staff member with the Massachusetts Department of Transitional Assistance applied four times for a promotion and was denied each time, despite having obtained additional training. The employee also received good evaluations and received the Governor's Award for Outstanding Performance. She believed that she was denied advancement due to her sexual orientation. Another employee was, at the time the incident was reported, suing the department for discrimination based upon sexual orientation as well. The employee had filed paperwork to start the complaint process.<sup>111</sup>

#### Massachusetts Department of Social Services

In 2005, while working at the Massachusetts Department of Social Services, a transgender man experienced discrimination in his workplace. He met with his superiors and a civil rights officer to assist in his transition (from female to male) while at work. Despite discussing a plan for his transition, such as training sessions with fellow employees and name changing procedures, no action has been taken by his workplace. His request to formally change his name has been put on hold, and he was not invited to participate in weekly meetings.<sup>112</sup>

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<sup>110</sup> ROBIN A. BUHRKE, *A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT* 156-159 (Routledge 1996).

<sup>111</sup> GLAD Intake Form (Aug. 10, 2007).

<sup>112</sup> GLAD Intake Form (Apr. 20, 2005).

In 2003, a lesbian direct care worker for the Massachusetts Department of Social Services reported that she was one of seven lesbians fired at the same time. The employee filed a complaint with the Massachusetts Commission Against Discrimination.<sup>113</sup>

#### Massachusetts Department of Revenue

In 2004, an openly gay staff member at the Massachusetts Department of Revenue was harassed by one of his co-workers. This co-worker posted and distributed anti-gay news articles and made anti-gay remarks. The gay staff member complained to his supervisor about the harassment, but his supervisor took no steps to stop the harassment.<sup>114</sup>

In 2003, a gay man, who worked for the Massachusetts Department of Revenue for nineteen years, reported that he had been sexually harassed at work. A supervisor called him "a loser" and a "fucking faggot" behind his back. After telling internal affairs that he did not wish to work in the same space as this particular supervisor, he was asked to move to another location. He filed a formal complaint with internal affairs.<sup>115</sup>

#### Massachusetts Highway Department

In 2002, a sixteen year veteran of the Massachusetts Highway Department was harassed by his immediate supervisor, his boss, and several coworkers. They asked him several questions, including "Are you gay?," "Do you swing both ways?," and "If a girl strapped on a dildo, would that get you excited?" He was offered a lateral transfer, however the harassment continued. As a result of the harassment, he was diagnosed with high blood pressure. He felt that he could not file a complaint with the union because his steward was one of the harassers.<sup>116</sup>

#### Massachusetts State Universities

In 2009, worker who has worked at a state university for 26 years has been isolated from his fellow workers and he feels that his requests to remedy this have not been addressed because he is gay.<sup>117</sup>

In 2008, a mathematics professor at a Massachusetts state university reported that he and his husband, also a mathematics professor, were discriminated against based upon their sexual orientation. Both the professor and his spouse were chosen to serve on a search committee for a new faculty member. They were notified, however, that one of them would need to step down because there was a university policy that family members

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<sup>113</sup> GLAD Intake Form (Jan. 15, 2003).

<sup>114</sup> GLAD Intake Form (July 28, 2004).

<sup>115</sup> GLAD Intake Form (Apr. 28, 2003).

<sup>116</sup> GLAD Intake Form (Aug. 8, 2002).

<sup>117</sup> 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).

could not serve together on a search committee. The caller was not able to find any such policy, and he believes that he and his husband are being discriminated against based upon their sexual orientation.<sup>118</sup>

“B,” a gay man who asked that his real name not be used, worked as a police officer at a university in Massachusetts for four years. During training, his drill instructor would yell, "Are you looking at me, boy? Do you like me? Are you a faggot?" After several of his coworkers became aware that B was a gay man, he received phone calls at home from his coworkers, including one who called him and said, "I need a blow job" and then hung up. B then left the university for a job with a city police department.<sup>119</sup>

#### Cambridge Rindge & Latin High School

Arthur Lipkin, a gay man, worked as a teacher at a Boston area high school. After appearing on the news while at a Boston Pride Parade, Lipkin noticed that the students didn't react negatively, but some of his fellow teachers did. On the entrance to the women's restroom, someone wrote under the sign, "And Lipkin." A student told Lipkin that another teacher said "you're gay and why would I want to be in your class?" The same teacher shouted across the gym "If you take off your pants for Lipkin, he'll give you an A!" Lipkin spoke with the principal of the school and said that he would be staying home from work until he could be assured a safe workplace. A hearing was arranged during which the teacher in question was represented by the teachers' union, where as Lipkin had to represent himself. The teacher was required to write a letter of apology and a negative review was placed in his file. Lipkin's district also agreed to anti-homophobia training and issued anti-harassment guidelines.<sup>120</sup>

#### Massachusetts Public Schools

In 2009, a public school teacher has been suspended four times since 2003, and she feels that the reason is that she is the only out teacher in the district.<sup>121</sup>

In 2007, a public school teacher reported homophobic graffiti and harassment to her supervisor and then was harassed and terminated by the supervisor.<sup>122</sup>

In 2005, an openly gay English teacher reported that he had been harassed almost on a daily basis by a group of students at the high school where he teaches. The students called him derogatory names, such as "faggot," left lewd notes, drawings, and pictures on his desk or bulletin board, and signed the teacher up for gay pornographic websites using his school email address. The teacher complained to the principal, who indicated that she

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<sup>118</sup> GLAD Intake Form (Mar. 10, 2008).

<sup>119</sup> *Id* at 58-62.

<sup>120</sup> ARTHUR LIPKIN, ONE TEACHER IN TEN 39-49 (Kevin Jennings ed., 1994).

<sup>121</sup> 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).

<sup>122</sup> 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).

would "handle it." However, after she had not addressed these issues, the teacher then sent a letter to the District Superintendent. Shortly thereafter, the teacher was notified that his position had been changed and that he was being terminated. The Superintendent told the teacher that in exchange for a signed agreement to not continue with any harassment complaints, she would offer him three weeks severance pay and allow him to collect unemployment benefits.<sup>123</sup>

In 2004, a lesbian teacher working in a Massachusetts public school reported that her contract was not renewed. The other lesbian teacher working at the school also did not have her contract renewed. When approached, the principal said that there were "differences in philosophies" and "overarching differences." The teacher also claimed that several teachers had tried to start a gay-straight alliance at the school and had wanted to put up "safe zone" stickers, but they were told by the administration that they could not.<sup>124</sup>

Also in 2004, gay school psychologist working in a Massachusetts public school reported that despite positive performance reviews, his responsibilities were restricted as a result of his being gay. His office was moved and he no longer has any interactions with students. Administrators at the school told the psychologist that he should not tell students he is gay nor should he say that he is married (to a man). The principal also asked everyone to disclose their sexual orientations during a staff meeting. His union representative did not take any action and advised the psychologist to not take any further steps to address these issues.<sup>125</sup>

In 2003, one year after a public high school teacher in Medford, Massachusetts was hired the school became aware that he was gay. When his three-year tenure position expired two years later, he was terminated. The only reason given by the Superintendent was that he "shouldn't be known for [his] activities outside the classroom." He brought the situation to the attention of his union, which told him that the "discrimination would be very difficult to prove." Though the school eventually offered him tenure because of support from students and parents, school officials have continued to harass him. He has been in therapy since the incident because of the harassment he endures at work.<sup>126</sup>

In 2003, a gay teacher working in a Massachusetts public school was forced to resign because of his sexual orientation. He was the target of several anti-gay remarks and vandalism. Someone keyed "Gay Faggot" into the paint of his car. The teacher brought these incidents to the attention of the school administration, which did nothing. The union representing the teacher was also made aware of these incidents but did nothing. Even after leaving his job, the teacher continues to receive harassing phone calls.<sup>127</sup>

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<sup>123</sup> GLAD Intake Form (Feb. 12, 2009).

<sup>124</sup> GLAD Intake Form (May 27, 2004).

<sup>125</sup> GLAD Intake Form (Aug. 13, 2004).

<sup>126</sup> Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

<sup>127</sup> GLAD Intake Form (Feb. 6, 2003).

Also in 2003, a gay facilities employee in a Massachusetts public school district experienced regular harassment by his co-workers. He reported that his coworkers drank on the job and then threatened him physically. One co-worker pushed him. This incident was caught on video, but the school district now claims that they can't locate the tape. Another co-worker called the facilities worker a "faggot." He started having panic attacks as a result of the harassment and, at the time the incident was reported, was on leave from work. He filed a complaint with the school district and his union, but neither had taken steps to stop the harassment.<sup>128</sup>

#### City Government Departments

In 2008, a Massachusetts truck driver, working for a town, experienced harassment based upon her being a lesbian. People at work displayed pornographic images near her locker. She filed suit against the town for sexual orientation harassment and won a \$2.1 million lawsuit.<sup>129</sup>

In 2000, a lesbian working for a city department for sixteen years was harassed by one of her co-workers. The co-worker treated her differently than her co-workers and made comments, including, "You just want to give me a hard time; you want a man; you want the forbidden fruit." She filed grievances with her union and with the Massachusetts Commission Against Discrimination.<sup>130</sup>

#### Town Clerk's Office

In 2007, a lesbian staff person working in a Massachusetts town's clerk office was fired after she and her partner filed a birth certificate, listing themselves as the parents of their child. She was made to feel incompetent and overworked, which resulted in her suffering a breakdown while at work. She was forced to sign a document indicating that she would not sue the town upon her termination.<sup>131</sup>

#### Massachusetts State Trial Court

In 2008, a married lesbian working for the Massachusetts State Trial Court reported that she was demoted and her pay was cut as a result of her recent marriage to a woman. The employee took time off of work for an illness with a doctor's note, but she was called by her union steward to notify her that she had been suspended and that proceedings were under way to fire her.<sup>132</sup>

#### Suffolk County Court System

In 2005, a lesbian probation officer in the Suffolk County court system reported that she received a brochure in her work mailbox that touted a seminar discussing "cures

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<sup>128</sup> GLAD Intake Form (July 10, 2003).

<sup>129</sup> GLAD Intake Form (June 13, 2008)

<sup>130</sup> GLAD Intake Form (date unknown).

<sup>131</sup> GLAD Intake Form (Mar. 20, 2007).

<sup>132</sup> GLAD Intake Form (Jan. 24, 2008).

for homosexuality” after she announced her marriage to her female partner. She and two unmarried women in the department were the only employees to receive the brochure. Her union suggested that she contact the Commissioner of Probation. In response to her complaint, the Commissioner asked if she “expected the whole office to be turned upside down in order to find the culprit.” He then suggested that she take up her grievance with someone else.<sup>133</sup>

#### Boston Police Department

In 2005, a Boston police officer, who is a lesbian, overheard and was the target of harassing comments and slurs. After verbally complaining to her supervisors about these comments, no action was taken.<sup>134</sup>

#### County Sheriff’s Departments

In 2007, a Massachusetts deputy sheriff, who is gay, experienced two years of harassment by his chief. The chief threatened to suspend him if continued "to see two guys at one time" because it looked bad for the department. The chief also “outed” him to his coworkers. Due to the harassment he suffered, the deputy sheriff suffered a mild heart attack, and was placed on sick leave. During that time, he was fired for abandonment of post.<sup>135</sup>

In 2005, a gay nurse working for a Massachusetts Sheriff Department worked in a hostile work environment. His co-workers gave him a Christmas present, which included fishnet stockings and obscene gay sex cards. He was given a bag of peanuts by a coworker and told to "Eat my nuts." When he complained, he was told that "this was the way prisons work" and that he shouldn't complain. He filed a complaint with the Massachusetts Commission Against Discrimination.<sup>136</sup>

Also in 2005, a Massachusetts deputy sheriff, who is gay, worked for more than 13 years in law enforcement. His co-workers began targeting him with "usual locker room homo talk." He was then excluded from meetings and his responsibilities were slowly taken away until finally, he was transferred to an inferior, nonsupervisory position. He was then terminated. He also reported that one other openly gay person, a lesbian, in the department was also forced out after her sexual orientation was disclosed. He reported that he was in settlement negotiations with the Sheriff’s Department, but they broke down.<sup>137</sup>

#### Municipal Police Department

Michael Carney realized soon after graduating the police academy, because he was gay, his safety as a police officer and his future as a public servant was seriously

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<sup>133</sup> GLAD Intake Form (Aug. 31, 2005).

<sup>134</sup> GLAD Intake Form (Oct. 13, 2005).

<sup>135</sup> GLAD Intake Form (May 24, 2007).

<sup>136</sup> GLAD Intake Form (Mar. 21, 2005).

<sup>137</sup> GLAD Intake Form (Oct. 17, 2005).

jeopardized. He worried that if he were killed in the line of duty there would be no one to tell his partner what happened to him and his partner would learn about it on the news.

Mr. Carney was a good cop, but he lost two-and-a-half years of employment fighting to get his job back because he is gay. Because Massachusetts has an antidiscrimination law that protects against sexual orientation discrimination he was eventually able to get his job, back but if he lived in a state without such protections or if he were a federal employee living in Massachusetts, he would not have been able to get his job back.<sup>138</sup>

#### University of Massachusetts, Lowell

Karen Harbeck began teaching as an assistant professor at the University of Massachusetts at Lowell in 1986. When she was hired, the dean acknowledged her credentials and accomplishments and promised to promote her within one year. But a student began threatening Harbeck's life, carrying a gun onto the campus and saying the God had "ordained" him to "kill all homosexuals." Soon afterwards, the university notified Harbeck that the school no longer needed her courses or her services and that it was terminating her contract. But the university never canceled Harbeck's courses. Instead, the school hired another professor, who had no background in the course subjects, to teach the same courses.<sup>139</sup>

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<sup>138</sup>Transcript of Statement by Michael Carney Regarding H.R. 2015 (Employment Non-Discrimination Act of 2007), H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY, Sept. 5, 2007; Transcript of Statement by Mass. Rep. George Miller Regarding Mass. H.B. 13228 H. Ed. & Labor Comm., Subcomm. on Health, Employ., Labor & Pensions Hearing, MASS. CONG. QUARTERLY, Sept. 5, 2007.

<sup>139</sup> Human Rights Campaign, HRC PUBLICATION: DOCUMENTED CASES OF JOB DISCRIMINATION BASED ON SEXUAL ORIENTATION (1995).



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

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

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

In 2002, the Massachusetts Supreme Judicial Court struck down both of Massachusetts' sodomy laws as unconstitutional.<sup>140</sup>

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

The Massachusetts anti-discrimination law prohibits discrimination based on sexual orientation in housing, public accommodations and the granting of credit.<sup>141</sup> Owner-occupied buildings with two or fewer units are exempt from the ban on discrimination in housing.<sup>142</sup>

In Boston, the local anti-discrimination ordinance prohibits discrimination on the basis of sexual orientation and gender identity or expression in labor organizations, credit transactions, bonding, insurance, education, and public accommodations and services.<sup>143</sup> The Boston Fair Housing Commission works to prevent the denial of equal access to, and discrimination in, housing where denial or discrimination is based on sexual preference or gender identity or expression.<sup>144</sup>

The City Discrimination Policy in Cambridge protects against discrimination on the basis of sexual orientation and gender identity in housing and real estate, education, credit, bonding, insurance and public accommodations.<sup>145</sup>

Amherst's Human Rights Policy makes it the policy of the town that no person, public or private, shall be denied any rights guaranteed by law on the basis of sexual preference, gender identity or expression.<sup>146</sup> In addition, the Housing Partnership/Fair Housing Committee in Amherst actively promotes access to housing for all persons regardless of sexual orientation.<sup>147</sup>

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<sup>140</sup> *GLAD v. Attorney General*, 436 Mass. 132 (2002) (striking down MASS. GEN. LAWS ch. 272, §§ 34, 35).

<sup>141</sup> MASS. GEN. LAWS ch. 151B, § 4(6).

<sup>142</sup> *Id.*

<sup>143</sup> See BOSTON MUN. CODE §§ 12-9.4, 12-9.5, 12-9.6, 12-9.7.

<sup>144</sup> See BOSTON MUN. CODE § 10-3.3.

<sup>145</sup> See CAMBRIDGE MUN. CODE § 2.76.

<sup>146</sup> See Amherst Town Bylaws Art.16 (1999) (gender identity or expression added in 2009 by Article 11).

<sup>147</sup> See Amherst Town Website, <http://www.amherst.gov> (last visited Sept. 5, 2009).

Executive Order No. 341 provides for non-discriminatory visitation privileges when dealing with inmates, patients, and residents of state facilities.<sup>148</sup> The Order specifies that visitation privileges will be extended to persons who have a “relationship of mutual support” with the inmate, patient, or resident.<sup>149</sup> This phrase may be interpreted to mean “a relationship between two individuals, each unmarried and competent to contract, characterized by mutual caring and emotional support; an agreement to share basic living expenses; a sharing of living quarters and an intent to do so indefinitely; a mutual assumption of responsibility for each other’s welfare; and a mutual expectation that the relationship is exclusive and will endure over time.”<sup>150</sup> Thus, same-sex couples have the same visitation privileges as heterosexual couples.

### C. HIV/AIDS Discrimination

In Massachusetts, it is illegal to discriminate against people who have, or are perceived as having, HIV or AIDS, in employment, housing and public accommodations.<sup>151</sup> Moreover, Massachusetts law prevents an employer from requiring any employee to take an HIV test.<sup>152</sup>

### D. Hate Crimes

The Massachusetts “Hate Crimes Penalties Act” penalizes anyone who “commits an assault or a battery upon a person or damages the real or personal property of a person with the intent to intimidate such person because of their race, color, religion, national origin, sexual orientation, or disability.”<sup>153</sup> If H.B. 1728 passes, gender identity or expression will be added as a protected class.<sup>154</sup>

### E. Education

Under Massachusetts law, no person shall be excluded from or discriminated against in admission to a public school of any town on account of sexual orientation.<sup>155</sup>

Doe v. Yunits, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

In *Doe*,<sup>156</sup> a fifteen-year-old male-to-female transgender student at South Junior High School in Brockton, Massachusetts, brought an action requesting the court to prohibit the school from excluding him on account of her female gender identity. Plaintiff had been diagnosed with gender identity disorder and sought to attend the school

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<sup>148</sup> Mass. Executive Order 340 (Gov. Patrick).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> MASS. GEN. LAWS ch. 151B.

<sup>152</sup> MASS. GEN. LAWS ch. 111, § 70F.

<sup>153</sup> MASS. GEN. LAWS ch. 265, § 39.

<sup>154</sup> H.B. 1728 (Mass. 2009).

<sup>155</sup> MASS. GEN. LAWS ch. 76, § 5.

<sup>156</sup> *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

wearing clothes and fashion consistent with her gender identity. School officials informed the plaintiff that she could not enroll in school if she wore girls' clothes or accessories. During the 1999-2000 school year plaintiff stopped attending school, citing the hostile environment created by the principal. Because of the absences, she was forced to repeat eighth grade. Plaintiff had also been suspended several times for using the ladies' restroom.

The Court held that the plaintiffs' conduct was protected expressive speech pursuant to Article XVI of the Massachusetts Declaration of Rights. Furthermore, the court reasoned that the plaintiff's ability to dress consistent with her gender identity was important to her health and "not merely a personal preference but a necessary symbol of her identity."<sup>157</sup>

#### F. Health Care

Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002).

In *Kosilek*,<sup>158</sup> an inmate, serving life without the possibility of parole for murdering his wife, brought an action against correction officials seeking to require medical treatment for his gender identity disorder, pursuant to the Eighth Amendment right to adequate medical care. The disorder had caused the plaintiff severe mental anguish, leading him to attempt suicide twice, as well as an attempt to castrate himself. Since being incarcerated in 1990, he had sought, but not received, any form of treatment.

The court held that at a minimum, the Eighth Amendment requires that "psychotherapy, with, or under the direction of, a professional with training and experience concerning individuals with severe gender identity disorder"<sup>159</sup> be performed.

O'Donnabhain v. Comm'r, No. 006402-06 (Ma. Tax Ct.).

This case, which arose in Massachusetts, is currently pending before the United States Tax Court. The issue is whether an individual who was born anatomically male and has been diagnosed with gender identity disorder can deduct sex reassignment surgery costs as necessary medical expenses under 26 U.S.C. § 213 of the tax code. The IRS has argued that the surgery is merely cosmetic, as it is directed at improving the patient's appearance, not promoting the proper functioning of the body or preventing or treating illness or disease. The position taken by the IRS has sparked outrage from some experts who specialize in gender identity disorder. Marshall Forstein, an associate professor of psychiatry at Harvard Medical School, exclaimed, for example, that the IRS is "practicing medicine without a license." O'Donnabhain has countered that the treatments are directed at curing and mitigating her disorder, and are therefore "medically necessary."

#### G. Gender Identity

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<sup>157</sup> *Id.* at 3.

<sup>158</sup> *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002).

<sup>159</sup> *Id.*

The Department of Motor Vehicles (“DMV”) has added a check off box to their license renewal forms in which individuals may indicate if their sex has changed. The DMV cautions, however, that individuals may be required to show further documentation, without indicating what such a showing would entail.<sup>160</sup>

## H. Parenting

The Appeals Court of Massachusetts was one of the first state courts to find that sexual orientation should not be a factor in custody hearings unless it is demonstrated to be harmful to the child.<sup>161</sup>

Same-sex individuals and couples in Massachusetts may also adopt children and become foster parents.<sup>162</sup> This was not always the case. In 1985, then-Governor Michael Dukakis enacted a state policy that categorically banned lesbians and gay men from becoming foster parents.<sup>163</sup>

## I. Recognition of Same-Sex Couples

In November of 2003, the Massachusetts Supreme Judicial Court ruled that same-sex couples have the right to marry in Massachusetts.<sup>164</sup> A proposed constitutional amendment to define marriage as a union between a man and a woman was defeated most recently in 2007, after numerous attempts to ban same-sex marriage by opponents.<sup>165</sup> In July 2008, the Massachusetts legislature repealed a 1913 law, which was used to deny marriage licenses to same-sex couples from other states unless they had an intent to reside in Massachusetts.<sup>166</sup> Now same-sex couples from other states may get married in Massachusetts. However, this does not mean that their home state must recognize the marriage.

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<sup>160</sup> See Mass. Registry of Motor Vehicles License/ID Update Application, <http://www.mass.gov/rmv> (last visited Sept. 6, 2009).

<sup>161</sup> Philip S. Gutis, *Homosexual Parents Winning Some Custody Cases*, N.Y. TIMES, Jan. 21, 1987, at C1.

<sup>162</sup> MASS. GEN. LAWS ch. 210, § 1.

<sup>163</sup> Kenneth J. Cooper, *Foster-Care Resolution is Voted in Senate*, BOSTON GLOBE, June 4, 1985, at 17.

<sup>164</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>165</sup> Frank Phillips, *Legislators Vote to Defeat Same-Sex Marriage Ban*, BOSTON GLOBE, June 14, 2007.

<sup>166</sup> Remarks by Mass. Gov. Deval Patrick Regarding Repeal of Mass. Stat. 1913 and Signing of MassHealth (July 31, 2008).