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

Title

New York – Sexual Orientation and Gender Identity Law and Documentation of
Discrimination

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MEMORANDUM

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

I. OVERVIEW

Under New York law, sexual orientation discrimination in the workplace is prohibited. Sexual orientation non-discrimination legislation was first introduced in New York in the early 1970s.

As of January 16, 2003, the term “sexual orientation” became a protected status when the governor signed Chapter 2 of the Laws of 2002, referred to as the Sexual Orientation Non-Discrimination Act (“SONDA”). SONDA amended the N.Y.S. Human Rights Law, Civil Rights Law, and the Education Law to include sexual orientation as a protected class.¹ Under SONDA, discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodations, education, credit, and the exercise of civil rights is prohibited.²

During the 1970s and 1980s local municipalities throughout the state began passing their own local ordinances outlawing anti-gay discrimination.³

Documented examples of discrimination on the basis of sexual orientation and gender identity in New York by state and local governments include:

- The Associated Press ran a story on July 16, 2009 of a transgender woman who had been fired from her job as a mailroom clerk with the New York City Department of Parks and Recreation because she had transitioned. The 27-year-old Harlem resident was also made fun of and called vulgar names by co-workers because of her gender change. At the time of press, she had filed a discrimination suit in Manhattan.⁴
- An employee of the New York State courts settled his claim of sexual orientation discrimination in the promotion process. He later challenged the validity of a

¹ See N.Y. EXEC. LAW § 296 (2005); N.Y. CIV. RIGHTS. LAW § 40-C; N.Y. EDUC. LAW § 313.

² N.Y. EXEC. LAW § 296 (2005).

³ The Village of Alfred, N.Y. (population 1,000) passed their own local ordinance outlawing anti-gay discrimination in 1974.

⁴ Associated Press, *Transsexual Sues NYC Parks Department over Firing*, July 16, 2009, available at http://www.silive.com/news/index.ssf/2009/07/transsexual_sues_new_york_city.html (last visited Sept. 8, 2009).

verbal settlement of his case. The court held that the verbal agreement was binding.⁵ Aguiar v. State, 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).

- A lesbian corrections officer employed by the New York State Department of Correctional Services alleged discrimination based both on her gender and sexual orientation. The Division of Human Rights found that her supervisor had engaged in unlawful discrimination and retaliation against her. The woman was subjected to a fellow officer's obscene language and offensive conduct. The co-worker persistently and relentlessly demeaned the woman, scrawled sexually explicit graffiti in her workplace, and filed a baseless internal complaint against her. While the Department promptly processed the co-workers claim against the woman, even though they admitted it was "bogus," they failed to take any steps towards remedying her grievances. Despite her numerous complaints, the Department did not discipline the co-worker and instead retaliated against the woman for complaining. Due to the harassment, the woman suffered from increased stress, sleeping and eating difficulties, nosebleeds, and she was diagnosed with "adjustment disorder with depressive features." A unanimous five-judge panel of the New York Appellate Division affirmed, but reduced her damages from \$850,000 to \$200,000, finding them disproportionate compared to awards based on similar claims.⁶ New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights, 2008 WL 2682073 (July 10, 2008).
- In 2008, two lesbian police officers were subjected to hostile work environments because of their sexual orientation.⁷
- An NYPD police officer brought an action against the City of New York claiming he was discriminated against based on his perceived sexual orientation.⁸ He was denied his application to transfer to the NYPD Office of Community Affairs' Youth Services Section ("YSS") because he was incorrectly perceived to be a child molester because of his perceived sexual orientation, and was retaliated against after filing an internal complaint against a police officer with the NYPD's Office of Equal Employment Opportunity.⁹ The jury's verdict was in favor of plaintiff finding that CITY/NYPD had discriminated against him based upon his "perceived sexual orientation and CITY/NYPD employees retaliated against him for engaging in protected activity resulting in emotional damages."¹⁰ The court determined the jury was "able to assess the long term effects of [defendant's] harmful stereotyping of [plaintiff] and discriminatory denial of [plaintiff's] career opportunity with YSS has had on his mental and emotional state and which was

⁵ Aguiar v. State of N.Y., 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).

⁶ New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights, 2008 WL 2682073 (July 10, 2008).

⁷ 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).

⁸ Sorrenti v. City of N.Y., 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 at *1 (N.Y. Sup. 2007).

⁹ *Id.* at *1.

¹⁰ *Id.* at *7.

compounded by CITY/NYPD employees' ongoing retaliatory acts of 'abuse, intimidation and humiliation'"¹¹ Sorrenti v. City of N.Y., 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 (N.Y. Sup. 2007).

- A railroad ticket agent sued the Long Island Railroad and one of its managers for constitutional and statutory sexual orientation harassment. The court denied the Defendant's summary judgment motion, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans*,¹² and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.¹³ The harassment began in 1996 when the ticket agent's supervisor began making derogatory comments related to his sexual orientation. The ticket agent reported the harassment to his manager, and though the manager decided to send the supervisor to sensitivity training classes, she never followed through. Later, the same supervisor continued to harass him in retaliation, and the ticket agent's complaints about the supervisor's conduct were never addressed. The ticket agent was also referred to by several people in the office as a "fucking faggot" and "a queer." Pugliese v. Long Island R. R. Co., 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).
- In 2005, Plaintiff, a bisexual man, sued the Suffolk County Police Department alleging that he was subjected to harassment based on sexual orientation. A federal jury awarded Plaintiff \$260,000 in damages. Post-verdict, an attorney for the Department indicated that its policies had been under review since the election of Suffolk County Executive Steve Levy, a Democrat whose predecessor had a much less supportive record on lesbian and gay rights. The attorney said that the goal of the "review" was to "avoid any of these lawsuits in the future." She also noted that the jury verdict related solely to workplace harassment, and did not find that Plaintiff was discharged because of his sexual orientation or as retaliation for complaining about the harassment.¹⁴
- On August 23, 2005, an employee of the Department of Correctional Services filed an administrative complaint with the State Division of Human Rights alleging that he had been harassed because of his sexual orientation. The employee was a Head Cook at a state correctional facility where, at the time of filing, he had been employed for seven years. The employee's co-workers began to harass him because of his sexual orientation approximately one year before the complaint was filed. They posted pictures in the Department that had been altered to make it look as though the employee was engaging in sexual intercourse with the inmates. Comments such as, "No more head cooks in the pc unit ha-ha how do you like that fag boy," were written on the employee bathroom walls and co-workers made lewd comments in the presence of other employees and inmates about the employee's sexual activity, including an accusation "that [the

¹¹ *Id.* at *8.

¹² 517 U.S. 620 (1996).

¹³ *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).

¹⁴ Lesbian & Gay L. Notes (Mar. 2005).

- employee] was screwing [a female co-worker] because she was tighter than his boyfriend.” The employee reported the harassment to two supervisors, but no corrective action was taken and the harassment continued. Thereafter, the employee had to take medical leave due to the effects of the harassment.¹⁵ The Division investigated the matter and determined that there was probable cause to support the employee’s charge. The state of New York settled the matter privately with the employee in exchange for discontinuing the proceeding.¹⁶
- On March 5, 2007, the employee described above filed a second complaint with the State Division of Human Rights alleging that he had been retaliated against based on his complaint of August 23, 2005. After the settlement was reached in that matter, he was passed over for overtime and was made to perform tasks outside of his job description, and was unfairly issued notices of discipline on multiple occasions.¹⁷ Again, the Division’s investigation revealed probable cause to support the employee’s charge. Again, the parties entered into a private settlement.¹⁸
 - A former art teacher who brought an action against a school district based on allegations that she was subjected to a hostile work environment because of her sexual orientation.¹⁹ She also alleged the school district retaliated against her for speaking out against such discrimination.²⁰ She alleged a number of incidents involving students harassing her on the basis of her sexual orientation.²¹ One student told her she was “disgusting” another asked her if she was a “dyke.” A third student, when reprimanded by Lovell, called her a racist and a man-hater. The teacher’s complaints to the school administration were not addressed. The teacher also found graffiti in her classroom that read, “Lovell is a stupid dyke.” As a result, she had to request a catastrophic leave after a psychiatric evaluation determined that her condition was of a “mixed anxiety and depressed mood.”²² The court held that the school teacher successfully alleged sexual orientation discrimination, thereby defeating defendant’s summary judgment motion arguing that the principal and other school officials had acted reasonably under the circumstances. The court determined that a jury could find defendant condoned and enabled a “continuous campaign of harassment by some students against [Lovell] on the basis of her sexual orientation.”²³ Further, the court determined that “even if [defendant] did not know in 2001 that he had to protect [Lovell]

¹⁵ Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Aug. 23, 2005).

¹⁶ Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Jan. 28, 2008).

¹⁷ Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Mar. 5, 2007).

¹⁸ Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Jan. 28, 2008).

¹⁹ *Lovell v. Comsewogue Sch. Dist.*, 2005 WL 1398102 at *1 (E.D.N.Y. 2005).

²⁰ *Id.* at *1.

²¹ *Id.* at *1-3.

²² *Id.* at *4.

²³ *Id.* at *9.

against the students' discrimination, he is presumed to have known of his obligation not to engage in such discrimination himself."²⁴ Lovell v. Comsewogue Sch. Dist., 2005 WL 1398102 (E.D.N.Y. 2005).

- A white Jewish gay male and a former administrative law judge for the State Department of Motor Vehicles brought an action claiming racial, religious and sexual orientation discrimination. The court found he could proceed with his hostile environment claim, mainly based on the anti-Semitic comments that he was subjected to in the workplace repeatedly. Since the N.Y.S. Human Rights Law also prohibited sexual orientation discrimination he was allowed to include anti-gay harassment in his hostile environment claim, as well as racist harassment. He contended that hostile attitudes toward homosexual persons pervaded the office—that the words "fag" or "faggot" were used in his presence at least three times, that he was advised not to be "openly gay," and that another employee made at least three hostile references to his sexual orientation. In addition, he alleged that after he was terminated, he learned that a clerk referred to him as "that faggot judge" in the public area of the office.²⁵ Feingold v. N.Y., 366 F.3d 138 (2d Cir. 2004).
- In 2002, an openly-gay highway employee was suspended from work for three and a half days for wearing a baseball hat embroidered with a symbol of a half-red, half-rainbow-colored ribbon symbolizing the fight against AIDS. The *Rochester Democrat and Chronicle* reported that the employee's foreman had asked the gay man three years earlier not to wear a cap with a rainbow pride flag logo, which the employee said he had agreed not to wear. The suspension was rescinded after the employee's union argued that town rules make no mention of hats whatsoever. The man was reimbursed for lost wages and the suspension was removed from his personnel file. The man also received an apology from the town, a promise of no future retribution, and a monetary settlement to assist with lawyer fees.²⁶
- A police officer employed by the Port Authority of New York alleged that harassment by co-workers due to his perceived homosexuality or failure to conform to "traditional male stereotypes" eventually led superiors to terminate his employment in violation of the Equal Protection Clause. The court denied the Port Authority's summary judgment motion, holding that sexual orientation is a viable basis for an equal protection claim, even if the police officer himself was not a homosexual. Specifically, the officer alleged that his co-workers disseminated "computer-altered pictures" of his face on figures posed in a variety "of homosexual and/or deviant sexual practices" and put them in his locker. In addition, co-workers affixed a pair of women's panties and a condom to his locker. Plaintiff also discovered a "Pee-Wee Herman" doll, representing him, "in a sexually provocative pose." Upon complaining to a superior, the superior joked

²⁴ *Id.* at *10.

²⁵ *Feingold v. State*, 366 F.3d 138, 150 (2d Cir. 2004).

²⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 198-99 (2002 ed).

- about the incidents before an audience of Plaintiff's co-workers.²⁷ Emblen v. Port Auth. of N.Y./N.J., 2002 WL 498634 (S.D.N.Y. 2002).
- A principal at a public school in New York sued the school district and teachers' union upon termination of her employment and denial of her tenure appointment, claiming sexual orientation discrimination and discrimination on the basis of sex under Title VII. She settled her claims with the school district for an undisclosed amount. The court granted summary judgment in favor of the teacher's union holding, in part, that Title VII does not provide protection against discrimination on the basis of sexual orientation.²⁸ Byars v. Jamestown Teachers Assoc., 195 F. Supp. 2d 401 (W.D.N.Y. 2002).
 - A correctional officer for the New York State Department of Correctional Services alleged his fellow employees routinely called him names such as "faggot, pervert, homo, queer, fucking faggot, cock-sucker, fudge-packer, and you gay bastard." They also left sexually explicit photos at the officer's work area, on restroom walls, and in his mailbox. One co-worker grabbed his own nipple, remarking to the officer, "like what you see?" He also alleged that he experienced physical assaults by co-workers and reported incidents to supervisors and the union, who failed to properly address the issue.²⁹ He brought a sex stereotyping claim under 42 U.S.C. § 1985, Title VII, and the N.Y.S. Human Rights Law.³⁰ The court found that the officer failed to assert evidence that he was discriminated against based on his perceived lack of masculinity, and that he was seeking to "bootstrap" a claim of discrimination based on sexual orientation under Title VII (which is not cognizable) to a sexual stereotyping claim (which is cognizable). However, as to his union which ignored his complaints, the court found that it is possible for an employee to state a retaliation claim based on the union's reaction to his complaints, even if Title VII would not cover the underlying discrimination claims."³¹ The court determined that he failed to establish a prima facie case for the 42 U.S.C. § 1985 claim, since homosexuality did not fall under a suspect classification such as race, national origin, or sex.³² Martin v. N.Y. State Dep't of Corr. Servs., 115 F.Supp.2d 307 (N.D.N.Y. 2000). Later in the case, a court granted summary judgment in favor of the defendants. Martin v. New York State Dep't of Corr. Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002).
 - In 2001, after she had been employed as a planner with the City of Buffalo for 14 years, a transgender woman was forced to resign because of hostile workplace treatment that began immediately after she began to transition. By 2001, she had a distinguished career and received a county-wide civic award for her improvement of a Federal program that sought to reduce homelessness among

²⁷ Emblen v. Port Auth. of N.Y./N.J., 2002 WL 498634 (S.D.N.Y. 2002).

²⁸ Byars v. Jamestown Teachers Assoc., 195 F. Supp. 2d 401 (W.D.N.Y. 2002).

²⁹ Martin v. New York State Dep't of Corr. Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002).

³⁰ Martin v. New York State Dep't of Corr. Servs., 115 F.Supp.2d 307 (N.D.N.Y. 2000).

³¹ *Id.* at 315-16..

³² *Id.* at 316.

- people living with HIV/AIDS. In 2001, she informed the Mayor of Buffalo that she would be transitioning from male to female. After she transitioned she was demoted. Though she had an unblemished record when she presented as a man, she received unwarranted criticism and faced workplace hostility immediately after she transitioned. One “casual Friday” she wore a gay pride t-shirt to work. When she refused to change after she was told that the shirt made a co-worker uncomfortable, she was charged with insubordination and harassment. She was required to attend an informal hearing as a result of the charge, where she was told that the charges would be dropped if she agreed not to sue for any past grievances. She refused to sign and the harassment and hostility increased. She was unable to sleep and was diagnosed with depression. Eventually, worn down by stress and mistreatment, she resigned.³³
- A lesbian police officer brought an action against the NYPD alleging claims of employment discrimination, hostile work environment, and retaliation on the basis of her sexual orientation under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and the N.Y.C. Human Rights Law.³⁴ She alleged fellow employees made derogatory comments concerning her sexual orientation.³⁵ The court concluded defendants were motivated by their “invidious and discriminatory animus towards homosexuals,” and that they conspired to discriminate against the plaintiff solely on the basis of her sexual orientation.³⁶ The court also concluded that the defendants permitted the practice of discrimination to continue for a long enough period of time so as to warrant the application of the continuing violation doctrine.³⁷ Salgado v. City of N.Y., 2001 WL 290051 (S.D.N.Y. 2001).
 - An employee of the New York Transit Authority alleged that he had been discriminated against based on his sexual orientation. The court granted Defendants’ summary judgment motion, finding that his suit appeared to be based largely on offensive comments made to him by a co-worker, which the court characterized as isolated and not actionable, and that his claim for sexual orientation discrimination under Title VII was not cognizable because the statute does not prohibit discrimination on that basis.³⁸ Trigg v. New York City Transit Auth., 2001 WL 868336 (E.D.N.Y. July 26, 2001).
 - In 2000, two years after he was hired, an English teacher at a New York public school was forced to resign. During his tenure, he intentionally disclosed his sexual orientation to only a few colleagues, but believed that the school principal knew he was gay. In April 2000, he was called into a meeting with the assistant principal. The assistant principal commended him for his hard work and conscientiousness, but told him that he would not be returning to work the

³³ 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).

³⁴ Salgado v. City of N.Y., 2001 WL 290051, at *1 (S.D.N.Y. 2001).

³⁵ *Id.*

³⁶ *Id.* at *4.

³⁷ *Id.* at *7.

³⁸ Trigg v. New York City Transit Auth., 2001 WL 868336 (E.D.N.Y. July 26, 2001).

- following year because of “classroom management issues.” The assistant principal told the teacher that he would “do [him] a favor” and let him resign. If he did not agree to resign, he was told that he would receive an unfavorable evaluation. His union rep. discouraged him from taking up his grievance. Two days after the meeting, his class room was vandalized and the word “faggot” was written across the chalkboard. Fearing that he would be terminated, he felt he had no option other than to resign.³⁹
- In 2000, a corrections officer with the Nassau County Sheriff’s Department brought equal protection and Section 1983 claims based on anti-gay harassment in the workplace. A federal jury awarded him \$1.5 million, finding the harassment at the county jail so widespread that it constituted a “custom and practice” to discriminate against gay men. He presented evidence demonstrating that he encountered almost daily harassment from his co-workers for almost four years, including being called offensive names and the display of pornographic images depicting him as a pedophile, a transsexual and someone who engaged in bestiality. Plaintiff repeatedly complained to his superiors about the harassment, but they ignored him. Ultimately, a fellow corrections officer attacked him with a chair and injured his knee. The officer left work and later went on disability leave. A doctor certified that he suffered from post-traumatic stress disorder.⁴⁰
 - In 1999, a Saratoga Springs police officer, who alleges he was derided and harassed because he was perceived to be gay, sued the city and several fellow officers for slander and sexual harassment. The officer, an eight-year veteran of the Saratoga Springs force, asserted that he became the target of anti-gay harassment by his colleagues after he was honored for his involvement in a robbery investigation in 1992. According to the officer, harassment consisted of references to him as “queenie,” and to his friends as his “boyfriends.” Other officers allegedly ridiculed him by blowing kisses to him derisively over the police radio, stalking him, and telling members of the community that he was gay. He claims that the harassment irreparably tarnished his reputation in the community and caused him ‘enormous emotional distress.’ He also asserts that a city employee told a youth organization with which he was involved that he was “light in the loafers” and therefore “should not be considered as a chaperone for a camping trip the organization was having.”⁴¹
 - A lesbian police officer sued the NYPD for harassment based on her sexual orientation for over two years. She ultimately settled the case for \$50,000 and was permitted to resign. She alleged that the harassment began after her same-sex marriage ceremony in Central Park to a fellow officer. She claimed that obscene

³⁹ 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).

⁴⁰ Human Rights Campaign, *Documenting Discrimination: A special report from the Human Rights Campaign Featuring Cases of Discrimination Based on Sexual Orientation in America’s Workplaces* (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf>.

⁴¹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 183-84 (1999 ed.).

pictures of women with her face pasted on them were hung in her Bronx precinct house, that other officers refused to ride with her on patrols, and that she was assigned to cleaning duties in the precinct. She also claimed that one co-worker assaulted her and that officers repeatedly taunted her with derogatory names. “When I complained, everyone turned their backs on me,” she said, adding that her commanding officer told her, “No one wants to ride with a dyke.” She maintained that the abuse, which continued for over a year, worsened after it was reported, and that the police department had not taken proper action to address the harassment and unequal treatment.⁴² She was also reassigned to another location. Bryant v. City of N.Y., 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).

- A former Nassau County police officer claimed that his fellow officers and supervisors “embarked on a vicious campaign of harassment against him because of his sexual orientation.” In 1999, a jury awarded him \$380,000. The jury found that members and supervisors committed discriminatory acts demonstrating an ongoing policy or practice of sexual orientation discrimination against him; that such acts were condoned by his supervisors; that in the Nassau County Police Department there was a custom, policy or decision to permit sexual orientation harassment; and that the unwelcome harassment against Plaintiff was severe or pervasive. The court upheld the jury award and denied the dismissal motions to all but one defendant. It was demonstrated in the trial that Plaintiff initially kept his sexual orientation hidden from his colleagues, but it eventually was revealed when an arrestee told officers that he was gay. This began nine years of harassment. Fellow police officers hung pornographic pictures and doctored records on the stationhouse bulletin board, portraying the police officer as a child molester and a sadomasochist. At least 19 of the pictures were produced at trial. They hid his uniform, put rocks in his hubcaps and once placed a nightstick—labeled “P.O. Quinn’s Dildo”—in his squad car. His supervisor admitted to seeing the posted pictures and, according to another sergeant in the precinct, engaged in the harassment by referring to him as “dick smoker.” The precinct Lieutenant admitted at trial that he had seen pictures depicting him unfavorably, but not those presented at trial. He stated, though, that had he seen them, he would not have felt obligated to remove them because he did not view them as offensive.⁴³ Quinn v. Nassau Police Dep’t, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).
- In 1999, two New York police officers filed a lawsuit for sexual harassment and violations of their civil rights. One of the officers, a thirteen-year veteran, had joined East Harlem’s 23rd Precinct in 1989 and was allegedly the target of relentless harassment because he is gay. He asserts that he was the victim of verbal anti-gay harassment and that he was repeatedly forced in to his own locker. In addition, he asserts that on two occasions he was handcuffed and hung from a coat rack in the precinct lunchroom where he was subject to the ridicule of his co-workers and other officers once tried to physically force him to simulate an oral

⁴² Bryant v. City of N.Y., 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).

⁴³ Quinn v. Nassau Police Dep’t, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).

sex act with another officer. The second officer, who is not gay, asserts that he was nonetheless the victim of sexual harassment by other officers simply because he was willing to work with the first officer. According to the second officer, other officers called him “Camacho homo” drew pictures depicting him engaged in sex acts with the first officer on precinct walls, and wrote graffiti on police station walls that read, “Camacho is a butt pirate.”⁴⁴

- A gay physician and former intern at Coney Island Hospital, brought suit alleging sexual orientation discrimination. The court, ruling on cross summary judgment motions ruled that he was entitled to pursue his sexual orientation discrimination against his employer pursuant to New York City's human rights law. He had not disclosed his sexual orientation when he was hired as an intern under a one-year contract. Midway through the contract, he received an offer of employment at another hospital. In seeking permission from his supervisor to terminate his internship early in order to take the other position, he disclosed his sexual orientation and asserted that in the other hospital, he would be able to be more open about being gay. The supervisor's response was allegedly to characterize him as "ungrateful" and deny his request. The physician attributed the various faults in his subsequent performance, to the extent they existed, to depression over having lost the opportunity with the other hospital, and alleges that the change in his evaluations and his treatment by his supervisor all post-dated his revealing his sexual orientation. Within a few months, his performance so deteriorated that he was pressured to quit or be fired and was subsequently terminated in a hospital proceeding.⁴⁵ Sussman v. N.Y.C. Health & Hosps. Corp., 1997 WL 334964 (S.D.N.Y. June 16, 1997).
- A former police officer alleged that he was constructively discharged by the New York City Police Department because he is gay. The harassment included the marking of his locker with graffiti, the placement of garbage cans in front of his locker, and the protest of a fellow officer to his sleeping in the officers' lounge area between shifts, even though such practice was customary. He reported the harassment to his supervisor who did nothing. Following his complaint, he arrived at work to find his locker broken into and a handwritten note left for him which read “Testa Blood Guts” and depicted skull and crossbones. Again, his reports of harassment went unanswered. After disparaging graffiti about Plaintiff was found on the bathroom wall, he was involuntarily transferred to another precinct where the harassment still continued. His new locker was broken and the words “coward” and “fag” were written on it. He eventually told his captain that he did not want to resign, but was under enormous stress and fear due to the harassment. As a result, he was demoted to an unarmed position. In denying the police department's motion to dismiss in part, the court held that there was an issue of fact as to whether the police department maintained a policy of discrimination against homosexuals; noting that, as alleged, Plaintiff's working

⁴⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 179 (1999 ed.).

⁴⁵ Sussman v. N.Y.C. Health & Hosps. Corp., 1997 WL 334964 (S.D.N.Y. June 16, 1997).

conditions, which were imposed on the basis of his sexual orientation, were made so unpleasant as to effectively force Plaintiff to resign.⁴⁶ Tester v. City of N.Y., 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).

- In 1996, the Public Employees Federation, a union representing employees of the State Law Department, filed an unfair practice charge against the Department, asserting that a change in policy, which omitted “sexual orientation” from the executive order governing discrimination law in the Department, violated the Department's duty to bargain over changes in terms of employment. The change was made after Dennis C. Vacco was elected Attorney General of the State of New York in 1994 in a campaign where some of his supporters attacked his opponent, Karen Burstein, because she was a lesbian. Shortly after taking office, Vacco replaced his predecessor's executive order governing discrimination policy. Subsequently several openly lesbian or gay employees of the Department were fired in the course of a purported reorganization of the Department that generally downgraded civil rights enforcement functions.⁴⁷ Two women, a lieutenant and a detective in the New York City Police Department, have filed a \$5 million lawsuit against the city, the Police Department, Police Chief Raymond Abruzzi and Commissioner William Bratton, charging their male coworkers with sexist and homophobic harassment. The officers in their Queens precinct allegedly hung a sign that said ‘NLA’ for ‘No Lesbians Allowed,’ spread rumors that the two women were lovers, referred to the Police Women’s Endowment Association as ‘Lesbians R Us’ and called the lieutenant’s phone ‘the lesbian hotline.’ Both the lieutenant, who commanded the precinct detective squad for nearly two years, and the detective were transferred by Chief Abruzzi after several male officers asked to be transferred because of the women.⁴⁸
- In 1995, Justice Sotomayor, while a judge for the Southern District of New York, denied a motion to dismiss a case where the plaintiff had been fired from his job as a prison kitchen worker because he was gay. Criticizing the defendants’ argument that removing the plaintiff was rationally related to preserving mess hall security, the court stated that a “person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security.” Justice Sotomayor denied Defendants’ motion to dismiss stating that the pro se Plaintiff could use the services of a lawyer “to explore fully the substantial questions raised by this case” and that the Supreme Court’s then-pending decision in *Romer v. Evans*⁴⁹ would provide further guidance on the scope of equal protection rights afforded to lesbians and gay men. The court also rejected Defendants’ qualified immunity defense, stating that the “The constitutional right not to be discriminated against for any reason, including sexual orientation, without a

⁴⁶ *Tester v. City of New York*, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).

⁴⁷ *Public Employees Fed’n v. State of N.Y.*, PERB Case No. U-16702 (1996).

⁴⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 83 (1995 ed.).

⁴⁹ 517 U.S. 620 (1996).

rational basis is an established proposition of law."⁵⁰ Holmes v. Artuz, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

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.

⁵⁰ *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

Under New York law, sexual orientation discrimination in the workplace is prohibited. As of January 16, 2003, “sexual orientation” became a protected status when the governor signed Chapter 2 of the Laws of 2002, referred to as the Sexual Orientation Non-Discrimination Act (“SONDA”). SONDA amended the N.Y.S. Human Rights Law, Civil Rights Law, and the Education Law to include sexual orientation as a protected class.⁵¹ Under SONDA, discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodations, education, credit, and the exercise of civil rights is strictly prohibited.⁵² SONDA defines sexual orientation as “heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived.”⁵³

2. Enforcement and Remedies

Enforcement of SONDA requires the claimant to either file a charge of discrimination with the N.Y.S. Division of Human Rights (“State Division”), or a local human rights agency within one year of the most recent act of discrimination.⁵⁴ Alternatively, a claimant may file a complaint directly in state court within three years of the most recent act of discrimination.⁵⁵ Additionally, all claimants have the option to also file a complaint with the N.Y.S. Attorney General’s Civil Right Bureau.⁵⁶ If the individual chooses to file with the State Division, it will first investigate the charge and can then conduct a hearing before an administrative law judge who can provide relief.⁵⁷

If the claimant successfully proves their sexual orientation discrimination claim, they may be entitled to recover compensatory damages for pain and suffering, lost wages, and benefits.⁵⁸ However, neither punitive damages nor attorneys’ fees are available under SONDA.⁵⁹ In contrast, many municipalities in New York allow for damages not available under state law.⁶⁰ For example, the New York City Human Rights Law allows for both punitive damages and attorneys’ fees in addition to relief under SONDA upon a showing of actual or perceived discrimination.⁶¹

⁵¹ See N.Y. EXEC. LAW § 296 (2005); N.Y. CIV. RIGHTS. LAW § 40-C; N.Y. EDUC. LAW § 313.

⁵² N.Y. EXEC. LAW § 296 (2005).

⁵³ N.Y. EXEC. LAW § 292(27) (2005).

⁵⁴ Office of the Attorney General of New York, Civil Rights Division, *The Sexual Orientation Non-Discrimination Act (“SONDA”)* (2008),

http://www.oag.state.ny.us/bureaus/civil_rights/sonda_brochure.html (last visited Sept. 8, 2009).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ N.Y.C. ADMIN. CODE § 8-107.

B. Attempts to Enact State Legislation

In connection with New York A05710 and S 2406 (2009), legislation that would in relevant part, prohibit discrimination based on gender identity or expression in employment, the legislature makes the following statement regarding legislative intent in §1 of the bill. “The legislature further finds that many residents of this state have encountered prejudice on account of their gender identity or expression, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to live in a gender identity or expression which is different from that traditionally associated with the sex assigned to that person at birth.”⁶²

The bill’s sponsor memo for A05710 states as the “justification” for the legislation that: “The transgender community is still not protected from discrimination under the law. Transgender people whose gender identity, appearance, behavior, or expression differs from their genetic sex at birth face discrimination in housing, employment, public accommodations and many other areas of life, and they are particularly vulnerable to hate crimes.”⁶³

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

1. Executive Orders

Mario M. Cuomo stated the following when issuing the first executive order to forbid employment discrimination on the basis of sexual orientation in New York on November 18, 1983: “As Secretary of State, I was required to issue special regulations to prohibit discrimination against individuals seeking licenses for certain occupations or corporate privileges. Up to that time such licenses were denied on the basis of sexual orientation or even presumed sexual orientation. There is no reason to believe that the discrimination apparent in that part of government was confined there. No one argued then against my change in the State's regulations. No one was heard to say that government had no place in fighting unfair discrimination. In fact, in recognition of this, a personnel directive against discrimination in hiring was issued during the prior administration.”⁶⁴

2. State Government Personnel Regulations

On his first full day in office, New York State's new attorney general, Eliot L. Spitzer, issued an order banning discrimination on the basis of sexual orientation in the New York State Law Department. The first such order in the department was issued by

⁶² A05710, 2009 Assem., Reg Sess. (N.Y. 2009); S. 2406, 2009 Sen., Reg. Sess. (N.Y. 2009).

⁶³ 2009 Legis. Bill Hist. N.Y. A05710, <http://assembly.state.ny.us/leg/?bn=A05710>.

⁶⁴ Mario M. Cuomo, Nov. 18, 1983, Executive Order 28: Establishing a Task Force on Sexual Orientation Discrimination, N.Y. COMP. CODE R. & REGS. tit. 9, § 4.28 (1983).

former Attorney General Robert Abrams, in 1980, but Spitzer's immediate predecessor, Dennis C. Vacco, removed sexual orientation from the department's non-discrimination policy immediately upon assuming office four years ago. Several of the department's openly lesbian and gay attorneys were then discharged as part of a very large internal lay off of career attorneys in the department.⁶⁵

3. Attorney General Opinions

1987 N.Y. Op. Atty. Gen (Inf.) 111, 1987 WL 273443 (N.Y.A.G Jun. 17, 1987).

An assistant from the New York City Corporation Counsel inquired as to whether State Law preempted the enactment of local law prohibiting discrimination against individuals based on their sexual orientation. The Attorney General cited the State Human Rights Law, which prohibited discrimination on the basis of age, race, creed, color, national origin, sex, disability or marital status.⁶⁶ The opinion stated that because there was no prohibition of discrimination on the basis of sexual orientation under State Law, the enactment of local law prohibiting such discrimination “would in effect be prohibiting behavior not expressly covered under State law,” and therefore would be permitted.⁶⁷ Thus, going forward, local municipalities could expand the jurisdiction of their human rights commissions to allow them to consider allegations of discrimination on the basis of sexual orientation.⁶⁸

D. Local Legislation

The following chart contains data compiled for Empire State Pride Agenda prior to the enactment of SONDA.⁶⁹ The information cited therein covers local ordinances up to the year 2001 pertaining to discrimination on the basis of sexual orientation – some of the jurisdictions that also include protection from employment discrimination on the basis of gender identity have been updated in the footnotes to the SONDA table.

Jurisdiction	Law (Year enacted)	Public employment	Private employment
County of Albany	Local Law No. 1 (1996)	Yes	Yes
City of Albany	Ordinance No. 97.112.92 (1992)	Yes	Yes
Village of Alfred	Village Ordinance, Art. II, § 1(1974)	Yes	Yes

⁶⁵ PrideAgenda.org, Press Release: Empire State Pride Agenda Endorses Eliot Spitzer for Governor of New York State (June 25, 2006), <http://www.prideagenda.org/tabid/304/default.aspx?c=186>.

⁶⁶ N.Y. EXEC. LAW § 296.

⁶⁷ N.Y. Op. Atty. Gen (Inf.) 111, 1987 WL 273443 (N.Y.A.G Jun. 17, 1987).at *2.

⁶⁸ *Id.* at *4.

⁶⁹ See MILBANK, TWEED, HADLEY & McCLOY, LLP, LOCAL ANTI-DISCRIMINATION LAWS: AN UNEVEN AND INADEQUATE ALTERNATIVE TO STATEWIDE PROTECTIONS FOR GAY AND LESBIAN NEW YORKERS 6-7 (Jun. 12, 2001) [hereinafter MILBANK, LOCAL ANTI-DISCRIMINATION LAWS].

Jurisdiction	Law (Year enacted)	Public employment	Private employment
Town of Brighton	Town Employment Policy (1992)	Yes	No
City of Buffalo ⁷⁰	City Code § 35-12 (1984)	Yes	No
Town of East Hampton	EEO Policy (1995)	Yes	No
City of Ithaca	Municip. Code Ch. 28-29 (1994)	Yes	Yes
County of Nassau	Local Law No. 38-2000 (2000)	Yes	Yes
City of New York ⁷¹	Admin. Code §§ 8-102.20/8-102.1 (1986)	Yes	Yes
County of Onandaga	1998-B (1998)	Yes	Yes
City of Peekskill ⁷²	City Code Ch. 44	No	No
City of Plattsburgh	Policy Res. (1992)	Yes	No
City of Rochester ⁷³	Ordinance 45; Ch. 63 MUN. CODE (1983)	Yes	Yes
Town of Southampton	Policy Res. (1995)	Yes	No
County of Suffolk ⁷⁴	County Code § 89-1 et seq.	Yes	Yes

⁷⁰ The City of Buffalo also forbids public employers from discriminating on the basis of gender identity. *See* BUFFALO CITY CODE § 35-12 (2002).

⁷¹ New York City’s law explicitly protects transgender employees. *See* N.Y.C. ADMIN. CODE §8-102(23) (2002).

⁷² The authors of the original document write that “The law in . . . Peekskill . . . does not explicitly bar any discriminatory act based on sexual orientation, but merely empowers the Peekskill Commission on Human Relations to ‘foster mutual respect and understanding, . . . inquire into incidents of tension’ and ‘conduct and recommend educational programs’ related to acts of discrimination based on, *inter alia*, sexual orientation.” MILBANK, LOCAL ANTI-DISCRIMINATION LAWS 5-6 n.41 (citing PEEKSKILL, N.Y., CODE § 44-6 (2001)).

⁷³ The City of Rochester forbids both public and private employers from discriminating against transgender employees. *See* ROCHESTER MUN. CODE Ch. 63.

⁷⁴ Section 89-13 of Suffolk County’s Local Law No. 14-2001 governs unlawful discriminatory practices in employment. It states that it is an unlawful discriminatory practice “[f]or an employer to refuse to hire or employ or to bar or to discharge from employment or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment, because of the group identity of any such individual.” Under the law, “group identity” is defined to include both “sexual orientation” and “gender,” and “gender” is in turn defined to include “both the biological and social characteristics of being female or male.” The law also forbids employer retaliation against an employee for filing a discrimination complaint. Suffolk County Local Law 14-2001, §§ 89-13(A)(1), 89-13(A)(5), 89-2(G), 89-2(H). *See also* Suffolk County Resolution No. 802-2001, available at <http://legis.suffolkcountyny.gov/resos2001/i1508-01.htm>.

Jurisdiction	Law (Year enacted)	Public employment	Private employment
City of Syracuse	Loc. Law No. 17-1990 (1990)	Yes	Yes
County of Tompkins	Loc. Law No. 6-1991 (1991)	Yes	Yes
City of Troy⁷⁵	Aff. Action Plan 2-20 (1979)	Yes	No
City of Watertown	City Resolution (1988)	Yes	No
County of Westchester	Loc. Law Intro 17-1999 (1999)	Yes	Yes

In *Under 21 v. City of New York*, the court held that the order from the Mayor of the City of New York, which prohibits discrimination in employment based on sexual orientation, is constitutional and valid in light of due process and equal protection.⁷⁶

E. Occupational Licensing Requirements

There are several state licensing requirements that reference “good moral character” that could include sexual orientation or gender identity. After checking all occupations for which the state issues a license, the occupational boards with such licensing requirements are listed below, which all contain the same reference to “good moral character as determined by [their respective departments].”⁷⁷

1. **Acupuncture** - N.Y. EDUC. LAW § 8214.
2. **Architecture** - N.Y. EDUC. LAW § 7304.
3. **Speech-Language Pathology and Audiology** - N.Y. EDUC. LAW § 8206.
4. **Certified Shorthand Reporting** - N.Y. EDUC. LAW §7504.
5. **Chiropractic** - N.Y. EDUC. LAW § 6554.
6. **Clinical Laboratory Technology Practice Act** - N.Y. EDUC. LAW § 8605.

⁷⁵ Troy’s Policy against discrimination states that “It is the official policy of the City of Troy to comply with all laws, rules and regulations protecting against discrimination. All departments, offices, boards and commissions, officers, employees, representatives and agents of City government shall in the performance of their duties comply with federal, state and local laws, rules, regulations and policies regarding discrimination of any kind related to . . . sexual orientation.” TROY CITY CODE § 2-5 (1998). “Gender Identity” is not included in the list of protected characteristics.

⁷⁶ *Under 21 v. City of New York*, 108 A.D.2d 250 (N.Y. App. Div.1st Dep’t 1985).

⁷⁷ See New York State Educ. Dep’t, Office of the Professions (2009), <http://www.op.nysed.gov>.

7. **Dentistry and Dental Hygiene** - N.Y. EDUC. LAW § 6604.
8. **Professional Engineering and Land Surveying** - N.Y. EDUC. LAW § 7206.
9. **Interior Design** - N.Y. EDUC. LAW § 8305.
10. **Landscape Architecture** - N.Y. EDUC. LAW § 7324.
11. **Massage Therapy** - N.Y. EDUC. LAW § 7804.
12. **Medicine** - N.Y. EDUC. LAW § 6524.
13. **Mental Health Practitioners** - N.Y. EDUC. LAW § 8402.
14. **Midwifery** - N.Y. EDUC. LAW § 6955.
15. **Nursing** - N.Y. EDUC. LAW § 6905.
16. **Occupational Therapy** - N.Y. EDUC. LAW § 7904.
17. **Ophthalmic Dispensing** - N.Y. EDUC. LAW § 7124.
18. **Optometry** - N.Y. EDUC. LAW § 7104.
19. **Pharmacy** - N.Y. EDUC. LAW § 6805.
20. **Physical Therapy and Physical Therapist Assistants** - N.Y. EDUC. LAW § 6734.
21. **Podiatry** - N.Y. EDUC. LAW § 7004.
22. **Psychology** - N.Y. EDUC. LAW § 7603.
23. **Public Accountancy** - N.Y. EDUC. LAW § 7404.
24. **Respiratory Therapy** - N.Y. EDUC. LAW § 8504.
25. **Social Work** - N.Y. EDUC. LAW § 7704.
26. **Speech-Language Pathology and Audiology** - N.Y. EDUC. LAW § 8206.
27. **Veterinary Medicine and Animal Health Technology** - N.Y. EDUC. LAW § 6704.

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

A. Case Law

1. State and Local Government Employees

Aguiar v. State, 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).

Plaintiff, an employee of the New York State courts, challenged the validity of a verbal settlement agreement of his case claiming sexual orientation discrimination in the promotion process. The court held that the verbal agreement was binding. The parties had reached a verbal agreement after a lengthy negotiation session, the notes of which were read into the record in the presence of the judge. The judge decided that this agreement should be binding, despite Aguiar's insistence that the case go forward as a result of the failure to reach a written agreement. The judge found that there had not been any agreement between the parties that a settlement was contingent on reducing the agreement to written terms.⁷⁸

New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights, 2008 WL 2682073 (July 10, 2008).

Plaintiff, a lesbian corrections officer, alleged discrimination based both on her gender and sexual orientation. The woman was subjected to a fellow officer's obscene language and offensive conduct. The co-worker persistently and relentlessly demeaned the woman, scrawled sexually explicit graffiti in her workplace, and filed a baseless internal complaint against her. While the Department promptly processed the co-workers claim against the woman, even though they admitted it was "bogus," they failed to take any steps towards remedying her grievances. Despite her numerous complaints, the Department did not discipline the co-worker and instead retaliated against the woman for complaining. Due to the harassment, the woman suffered from increased stress, sleeping and eating difficulties, nosebleeds, and she was diagnosed with "adjustment disorder with depressive features." Although a unanimous five-judge panel of the New York Appellate Division ruled that the Division of Human Rights did not err in finding unlawful discrimination and retaliation against Plaintiff by her supervisor, the court reduced Plaintiff's damages from \$850,000 to \$200,000, finding that the damages were disproportionate compared to other awards based on similar claims.⁷⁹

Sorrenti v. City of N.Y., 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 (N.Y. Sup. 2007).

Plaintiff, an NYPD police officer, brought an action against the City of New York claiming that defendants discriminated against him based on his perceived sexual

⁷⁸ Aguiar v. State of N.Y., 2008 WL 4386761 (S.D.N.Y. Sept. 25, 2008).

⁷⁹ New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights, 2008 WL 2682073 (July 10, 2008).

orientation.⁸⁰ Plaintiff was denied his application to transfer to the NYPD Office of Community Affairs' Youth Services Section ("YSS") because he was incorrectly thought to be a child molester based on his perceived sexual orientation and was retaliated against after filing an internal complaint against a police officer with the NYPD's Office of Equal Employment Opportunity.⁸¹ The jury's verdict was in favor of Plaintiff, finding that defendant had discriminated against him based upon his "perceived sexual orientation and CITY/NYPD employees retaliated against him for engaging in protected activity resulting in emotional damages."⁸² The court determined the jury was "able to assess the long term effects of [defendant's] harmful stereotyping of [plaintiff] and discriminatory denial of [plaintiff's] career opportunity with YSS has had on his mental and emotional state and which was compounded by CITY/NYPD employees' ongoing retaliatory acts of 'abuse, intimidation and humiliation'"⁸³

Pugliese v. Long Island R. R. Co., 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).

Plaintiff, a railroad ticket agent, sued the Long Island Railroad and one of its managers for constitutional and statutory sexual orientation harassment. The court denied the Defendant's summary judgment motion, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans*, and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.⁸⁴ The harassment began in 1996 when the ticket agent's supervisor began making derogatory comments related to his sexual orientation. The ticket agent reported the harassment to his manager, and though the manager decided to send the supervisor to sensitivity training classes, she never followed through. Later, the same supervisor continued to harass him in retaliation, and the ticket agent's complaints about the supervisor's conduct were never addressed. The ticket agent was also referred to by several people in the office as a "fucking faggot" and "a queer."

Lovell v. Comsewogue Sch. Dist., 2005 WL 1398102 (E.D.N.Y. 2005).

Plaintiff was a former art teacher who brought an action against a school district based on allegations that she was subjected to a hostile work environment because of her sexual orientation.⁸⁵ Plaintiff also alleged the school district retaliated against her for speaking out against such discrimination in violation of 42 U.S.C. § 1983.⁸⁶ Plaintiff alleged incidents involving various students harassing her on the basis of her sexual orientation.⁸⁷ One student told her she was "disgusting" another asked her if she was a "dyke." A third student, when reprimanded by Lovell, called her a racist and a man-hater. The teacher's complaints to the school administration were not addressed. The

⁸⁰ *Sorrenti v. City of N.Y.*, 17 Misc.3d 1102(A), 851 N.Y.S.2d 61, 2007 WL 2772308 at *1 (N.Y. Sup. 2007).

⁸¹ *Id.*

⁸² *Id.* at *7.

⁸³ *Id.* at *8.

⁸⁴ *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).

⁸⁵ *Lovell v. Comsewogue Sch. Dist.*, 2005 WL 1398102 at *1 (E.D.N.Y. 2005).

⁸⁶ *Id.*

⁸⁷ *Id.* at *1-3.

teacher also found graffiti in her classroom that read, “Lovell is a stupid dyke.” Subsequently, plaintiff had to request for a catastrophic leave after a psychiatric evaluation determined plaintiff’s condition was of a “mixed anxiety and depressed mood.”⁸⁸ Plaintiff’s claims were predicated on three grounds: (1) plaintiff was treated differently compared to other teachers on account of her sexual orientation; (2) plaintiff was subjected to a hostile work environment because there was no investigation that resulted from her complaints to the school district; and (3) plaintiff was retaliated against by delay of a request to extend her catastrophic leave, which caused a reduction in plaintiff’s pay and pension benefits.⁸⁹

Equal Protection Clause: The court referred to the equal protection clause of the 14th amendment to determine whether or not plaintiff’s situation was similar to others who were harassed by students and whether defendant’s handling of the situation was sufficiently different relative to other situations.⁹⁰ After review, the court determined these were all issues for a rational jury to resolve.⁹¹

Hostile Work Environment: The court referred to *Dawson v. County of Westchester*⁹² to determine whether defendant created a hostile work environment for plaintiff.⁹³ The court stated the “ultimate determination of whether an environment is hostile or abusive must be made ‘looking at all the circumstances,’ which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance—no single factor is required or dispositive.”⁹⁴ Consequently, the court determined there was a possibility that a rational jury might find defendant condoned and enabled a “continuous campaign of harassment by some students against [plaintiff] on the basis of her sexual orientation,” and therefore defendant’s motion for summary judgment on that ground was denied.⁹⁵

Qualified Immunity: The court analyzed whether the doctrine of qualified immunity applied to the school official and whether the official may be found to be personally liable for failing to protect plaintiff from workplace discrimination on the basis of her sexual orientation.⁹⁶ The court determined that “even if [defendant] did not know in 2001 that he had to protect [plaintiff] against the students’ discrimination, he is presumed to have known of his obligation not to engage in such discrimination himself.”⁹⁷

Feingold v. N.Y., 366 F.3d 138 (2d Cir. 2004).

⁸⁸ *Id.* at *4 (E.D.N.Y. 2005).

⁸⁹ *Id.* at *5.

⁹⁰ *Id.* at *8 (E.D.N.Y. 2005).

⁹¹ *Id.*

⁹² 373 F.3d 265, 273 (2d Cir. 2004)

⁹³ *Lovell*, 2005 WL 1398102, at *9.

⁹⁴ *Id.* at *9 (E.D.N.Y. 2005). (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993)).

⁹⁵ *Lovell*, 2005 WL 1398102, at *9.

⁹⁶ *Id.* at *10.

⁹⁷ *Id.*

Plaintiff was a white Jewish gay male and a former administrative law judge for the State Department of Motor Vehicles who brought an action claiming racial, religious and gender discrimination in violation of 42 U.S.C. § 1983 and the N.Y.S. Human Rights Law.⁹⁸

The court dismissed the § 1983 claim as being barred by the 11th amendment due to the fact that the defendant was a state agency.⁹⁹ However, the court found plaintiff “offered sufficient evidence to permit a fact-finder to conclude that he suffered from a hostile work environment predicated on religious animosity, and that such hostility may have been exacerbated by race-based animus.”¹⁰⁰ The court also concluded plaintiff offered sufficient evidence to support his hostile environment and retaliation claims under the N.Y.S. Human Rights Law.¹⁰¹

Emblen v. Port Auth. of N.Y./N.J., 2002 WL 498634 (S.D.N.Y. 2002).

Plaintiff, a police officer employed by the Port Authority of New York, alleged that harassment by co-workers due to his perceived homosexuality or failure to conform to “traditional male stereotypes” eventually led superiors to terminate his employment in violation of the Equal Protection Clause. The court denied Defendants’ summary judgment motion, holding that sexual orientation is a viable basis for an equal protection claim, even if Plaintiff himself was not a homosexual. The court also found that pursuant claims, filed under 42 U.S.C. §1983, were only cognizable against officers who engaged in the pranks, and not their supervisors or government-agency employer. Specifically, Plaintiff alleged that his co-workers disseminated “computer-altered pictures” of Plaintiff’s face on figures posed in a variety “of homosexual and/or deviant sexual practices.” Such pictures were inserted into Plaintiff’s locker, and ten to fifteen were found in an unoccupied locker. In addition, co-workers affixed a pair of women’s panties and a condom to his locker. Plaintiff also discovered a “Pee-Wee Herman” doll, representing him, “in a sexually provocative pose.” Upon complaining to a superior, the superior joked about the incidents before an audience of Plaintiff’s co-workers.¹⁰²

Byars v. Jamestown Teachers Assoc., 195 F. Supp. 2d 401 (W.D.N.Y. 2002).

Plaintiff, a principal at a public school in New York, sued the school district and teachers’ union upon termination of her employment and denial of her tenure appointment, claiming sexual orientation discrimination and discrimination on the basis of sex under Title VII. While Plaintiff settled her claims with the school district for an undisclosed amount, the court granted summary judgment in favor of the teacher’s union. As to the sexual orientation discrimination claim, the court held that Title VII does not provide protection against discrimination on the basis of sexual orientation. As for the sex discrimination claim, the court found that Plaintiff failed to raise a genuine issue of

⁹⁸ *Feingold v. State*, 366 F.3d 138, 143 (2d Cir. 2004).

⁹⁹ *Id.* at 149.

¹⁰⁰ *Id.* at 150.

¹⁰¹ *Id.* at 159.

¹⁰² *Emblen v. Port Auth. of N.Y./N.J.*, 2002 WL 498634 (S.D.N.Y. 2002).

material fact as to whether the union had caused or attempted to cause the district to discriminate against Plaintiff.¹⁰³

Martin v. New York State Dep't of Corr. Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002).

Plaintiff was a homosexual correctional officer who brought an action claiming sexual discrimination (based on sexual stereotyping), retaliation, conspiracy to discriminate, and breach of duty of fair representation under 42 U.S.C. § 1985, Title VII, and the N.Y.S. Human Rights Law. The court granted summary judgment in favor of the State, but allowed Plaintiff's retaliation claims against the union to proceed. As to the State, the court found that Plaintiff failed to advance evidence that he was discriminated against based on his perceived lack of masculinity, and that he was seeking to "bootstrap" a claim of discrimination based on sexual orientation under Title VII (which is not cognizable) to a sexual stereotyping claim (which is cognizable). As for the union, the court found that it is possible for an employee to state a retaliation claim based on the union's reaction to his complaints, even if Title VII would not cover his underlying discrimination claims. Plaintiff claimed that his co-workers routinely harassed him, calling him "pervert," "fucking faggot," "cock-sucker," "fudge-packer," and "you gay bastard." They also left sexually explicit photos at Plaintiff's work area, on restroom walls, and in his mailbox. One co-worker grabbed his own nipple, remarking to Plaintiff, "like what you see?" Plaintiff also alleged that he experienced physical assaults by co-workers and reported incidents to supervisors and the union, who failed to properly address the issue.¹⁰⁴

Salgado v. City of N.Y., 2001 WL 290051 (S.D.N.Y. 2001).

Plaintiff was a lesbian police officer who brought an action against the NYPD alleging claims of employment discrimination, hostile work environment, and retaliation on the basis of her sexual orientation under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and the N.Y.C. Human Rights Law.¹⁰⁵ Plaintiff also alleged fellow employees made derogatory comments concerning her sexual orientation.¹⁰⁶

The court concluded defendants were motivated by their "invidious and discriminatory animus towards homosexuals," and that they conspired to discriminate against plaintiff solely on the basis of her sexual orientation.¹⁰⁷ The court concluded that the defendants permitted the practice of discrimination to continue for a long enough period of time so as to warrant the application of the continuing violation doctrine.¹⁰⁸ However, the court determined plaintiff had failed to state a claim for conspiracy under

¹⁰³ *Byars v. Jamestown Teachers Assoc.*, 195 F. Supp. 2d 401 (W.D.N.Y. 2002).

¹⁰⁴ *Martin v. New York State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002).

¹⁰⁵ *Salgado v. City of N.Y.*, 2001 WL 290051, at *1 (S.D.N.Y. 2001).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *4.

¹⁰⁸ *Id.* at *7.

42 U.S.C. § 1983 and §1985 due to the fact that plaintiff had only alleged individual prejudice by the defendants rather than additional abusive behavior.¹⁰⁹

Trigg v. New York City Transit Auth., 2001 WL 868336 (E.D.N.Y. July 26, 2001).

Plaintiff brought an action alleging sexual orientation discrimination. The court granted Defendants' summary judgment motion, finding that Plaintiff's suit appeared to be based largely on offensive comments to him by a co-worker, which the court characterized as isolated and not actionable under either a respondeat superior or co-employee theory, and that Plaintiff's claim for sexual orientation discrimination under Title VII was not cognizable because the statute does not prohibit discrimination on that basis.¹¹⁰

Bryant v. City of N.Y., 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).

Plaintiff, a lesbian police officer, sued the City of New York and its Police Department for discrimination based on her sexual orientation. Plaintiff ultimately settled the case for \$50,000 and was permitted to resign. Plaintiff alleged that the harassment began after her same-sex marriage ceremony in Central Park to a fellow officer. Bryant claims that obscene pictures of women with her face pasted on them were hung in her Bronx precinct house, that other officers refused to ride with her on patrols, and that she was assigned to cleaning duties in the precinct. She also claimed that one co-worker assaulted her and that officers repeatedly taunted her with derogatory names. "When I complained, everyone turned their backs on me," she said, adding that her commanding officer told her, "No one wants to ride with a dyke." Bryant maintained that the abuse, which continued for over a year, worsened after it was reported, and that the police department had not taken proper action to address the harassment and unequal treatment.¹¹¹

Martin v. N.Y. State Dep't of Corr. Serv., 115 F.Supp.2d 307 (N.D.N.Y. 2000).

Plaintiff was a homosexual correctional officer who brought an action claiming sexual discrimination, retaliation, conspiracy to discriminate, and breach of duty of fair representation under 42 U.S.C. § 1985, Title VII, and the N.Y.S. Human Rights Law.¹¹² Plaintiff alleged fellow employees routinely called him names such as "faggot, pervert, homo, and queer," and defendant failed to act on plaintiff's complaints of a pattern of abusive treatment.¹¹³

The court first addressed plaintiff's Title VII and N.Y.S. Human Rights Law claims, which plaintiff attempted to bring under evidence of sexual stereotyping.¹¹⁴

¹⁰⁹ *Id.* at *9.

¹¹⁰ *Trigg v. New York City Transit Auth.*, 2001 WL 868336 (E.D.N.Y. July 26, 2001).

¹¹¹ *Bryant v. City of N.Y.*, 2000 WL 1523284 (S.D.N.Y. Oct. 11, 2000).

¹¹² *Martin v. N.Y. State Dep't of Corr. Serv.*, 115 F.Supp.2d 307, 310 (N.D.N.Y. 2000).

¹¹³ *Id.* at 311.

¹¹⁴ *Id.* at 312.

Plaintiff's claim of sexual stereotyping was based on plaintiff's assertion that he did not meet certain stereotypes associated with his gender.¹¹⁵ The court concluded that based on that allegation alone, plaintiff failed to satisfy the burden of proof of gender discrimination.¹¹⁶ However, the court found plaintiff established a prima facie case of retaliation based on plaintiff's belief that he was being discriminated against on the basis of his sexual orientation.¹¹⁷ Finally, the court determined plaintiff failed to establish a prima facie case for the 42 U.S.C. § 1985 claim, since homosexuality did not fall under a quasi-suspect classification such as race, national origin, or sex.¹¹⁸

Quinn v. Nassau Police Dep't, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).

Plaintiff, a homosexual man and former Nassau County police officer, claimed that his fellow officers and supervisors “embarked on a vicious campaign of harassment against him because of his sexual orientation.” The jury returned a special verdict in favor of Plaintiff, awarding \$380,000. Among the jury's findings were that members and supervisors committed discriminatory acts demonstrating an ongoing policy or practice of sexual orientation discrimination against Quinn; that such acts were condoned by the supervisors; that in the Nassau County Police Department there was a custom, policy or decision to permit sexual orientation harassment; and that the unwelcome harassment against Plaintiff was severe or pervasive. The court upheld the jury award and denied the dismissal motions to all but one defendant. It was demonstrated at trial that Plaintiff initially kept his sexual orientation hidden from his colleagues, but it eventually was revealed when officers arrested an assistant district attorney for engaging in homosexual sex in public, and the attorney told the officers that Plaintiff was gay. This began a nine-year campaign of ridicule, abuse, and harassment. Fellow police officers hung pornographic pictures and doctored records on the stationhouse bulletin board, portraying Plaintiff as a child molester and a sadomasochist. At least 19 of the pictures were produced at trial. They hid his uniform, put rocks in his hubcaps and once placed a nightstick—labeled “P.O. Quinn's Dildo”—in his squad car. Defendant supervisor admitted to seeing the posted pictures and, according to another sergeant in the precinct, engaged in the harassment by referring to Plaintiff as “dick smoker.” The precinct Lieutenant admitted at trial that he had seen pictures depicting Quinn unfavorably, but not those presented at trial. He stated, though, that had he seen them, he would not have felt obligated to remove them because he did not view them as offensive. Plaintiff complained to the Precinct Commander and wrote a letter to the Police Commissioner, complaining of the unfair treatment and harassment. The complaints to his supervisors were ignored.¹¹⁹

Sussman v. NYC Health & Hospitals Corp, 1997 WL 334964 (S.D.N.Y. June 16, 1997).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 313.

¹¹⁷ *Id.* at 315-16.

¹¹⁸ *Id.* at 316.

¹¹⁹ *Quinn v. Nassau Police Dep't*, 75 F. Supp. 2d 74 (E.D.N.Y. 1999).

Plaintiff, a gay physician and former intern at Coney Island Hospital, brought suit alleging sexual orientation discrimination. The court, ruling on cross summary judgment motions ruled that Plaintiff was entitled to pursue various claims against his former employer, including sexual orientation discrimination pursuant to New York City's Human Rights Law. Plaintiff had not disclosed his sexual orientation when he was hired as an intern under a one-year contract. Midway through the contract, Plaintiff received an offer of employment at another hospital. In seeking permission from his supervisor to terminate his internship early in order to take the other position, Plaintiff disclosed his sexual orientation and asserted that in the other hospital, he would be able to be more open about being gay. The supervisor's response was allegedly to characterize Plaintiff as "ungrateful." Ultimately, the supervisor denied Plaintiff's request. Plaintiff attributes the various faults in his subsequent performance, to the extent they existed, to depression over having lost the opportunity with the other hospital, and alleges that the change in his evaluations and his treatment by his supervisor all post-dated his revealing his sexual orientation. Within a few months, Plaintiff's performance so deteriorated that he was pressured to quit or be fired and was subsequently terminated in a hospital proceeding.¹²⁰

Tester v. City of New York, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).

Plaintiff, a former police officer who alleges that he was constructively discharged by the New York City Police Department because he is gay, brought several claims alleging sexual orientation discrimination. The court denied in part and granted in part Defendants' motion to dismiss, holding that there was an issue of fact as to whether the police department maintained a policy of discrimination against homosexuals, and noting that, as alleged, Plaintiff's working conditions, which were imposed on the basis of his sexual orientation, were made so unpleasant as to effectively force Plaintiff to resign. During the early months of Plaintiff's first assignment, the harassment included the marking of his locker with graffiti, the placement of a floor fan and garbage cans in front of his locker, and the protest of a fellow officer to Plaintiff's sleeping in the officers' lounge area between shifts, even though such practice was customary. Plaintiff reported the harassment and unfair treatment to his supervisor after other officers accused him of failing to act while on duty. His supervisor was deliberately indifferent to his concerns and took no investigative or remedial action to correct the situation. Following his report to the supervisor, the discrimination intensified. He arrived to work to find the lock on his locker broken, his personal property damaged, and his paperwork strewn about. A handwritten note was placed on top of the broken locker, which read "Testa Blood Guts" and depicted skull and crossbones. Again, his reports of discrimination went unanswered. After disparaging graffiti about Plaintiff was found on the bathroom wall, he was involuntarily transferred to another precinct where the harassment continued. His new locker was broken and the words "coward" and "fag" were written on it. He eventually told his Captain that he did not want to resign, but was under enormous stress and fear due to the harassment. He was relegated to an unarmed, disfavored position.¹²¹

¹²⁰ *Sussman v. N.Y.C. Health & Hosps. Corp.*, 1997 WL 334964 (S.D.N.Y. June 16, 1997).

¹²¹ *Tester v. City of N.Y.*, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997).

Holmes v. Artuz, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

Plaintiff, a prisoner filed a Section 1983 action, claiming he was removed from his prison food service job solely because he was a homosexual. Then District Court Judge Sotomayor denied Defendants' motion to dismiss with leave to amend in six months in order to give the court's pro bono office time to locate a lawyer for the Plaintiff. The court felt the pro se Plaintiff could use the services of a lawyer "to explore fully the substantial questions raised by this case." The court also wanted to await the U.S. Supreme Court's decision in *Romer v. Evans*¹²² for further guidance on the scope of equal protection rights afforded to lesbians and gay men. Criticizing the Defendants' argument that removing the Plaintiff from that job was rationally related to the legitimate state interest of preserving mess hall security, the court stated that a "person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security." Defendant would have to prove that "real threats" to security existed and that an exclusionary policy was a rational response to those threats. The court also rejected Defendants' qualified immunity defense, noting that qualified immunity shields government officials only if their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. "The constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law."¹²³

In re Kimball, 301 N.E.2d 436 (N.Y. 1973).

Plaintiff, a lawyer who had previously been licensed in Florida and then had his license revoked based on his sodomy conviction under the Florida sodomy law, brought suit against the New York State Bar for denying his bar application on the basis that his homosexuality per se made him unfit. The court held that a bar applicant may not be rejected as "unfit" or "lacking in character" because of homosexuality per se, and ordered the State Bar to reconsider the application, thereby overruling the trial court.¹²⁴

Brass v. Hoberman, 295 F. Supp. 358 (S.D.N.Y. 1968).

Plaintiffs, two gay caseworkers that applied for jobs with the New York City Department of Social Services, filed a motion seeking a preliminary injunction to restrain the city from declaring them ineligible for civil service employment based on their sexual orientation. Though the court declined to issue a preliminary injunction, it ordered a trial on the merits. The Plaintiffs were found "not qualified" for the positions on the basis of the City's policy excluding LGBT persons from city employment. Plaintiff Brass was denied employment by the Department following a mandatory medical exam by a psychiatrist who found Brass unfit for the position "because of a history of homosexuality." The City Personnel Director wrote to Brass, in response to Brass's inquiry after he was not selected for the position, "[i]t is our policy to disqualify homosexuals for employment as Case Workers, Hospital Care Investigators, and Children's Counselors." Plaintiff Teper had a similar experience with the Department.

¹²² 517 U.S. 620 (1996).

¹²³ *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

¹²⁴ *In re Kimball*, 301 N.E.2d 436 (N.Y. 1973).

The Department argued that the policy was not unconstitutional when restricted to a few selected positions because, with respect to such positions, it had a reasonable basis in denying employment to homosexuals based on recognized and accepted medical and psychiatric opinions regarding homosexuality.¹²⁵

2. Private Employers

Murray v. Visiting Nurse Servs. of N.Y., 528 F.Supp.2d 257 (S.D.N.Y. 2007).

Plaintiff, a heterosexual male employed at a nursing center, brought an action against his former employer alleging sexual orientation discrimination in violation of the N.Y.C. and N.Y.S. Human Rights Laws and Title VII.¹²⁶ Plaintiff specifically alleged that male coworkers made comments to other male employees stating “you’re a bitch,” “he’s on the rag today,” “when are you going to come out of the closet,” and “are you ladies going to the parade?”¹²⁷ Additionally, plaintiff alleged that another coworker drew a picture of a penis beneath President George W. Bush’s mouth from a newspaper clipping that headlined “President Bans Gay Marriage.”¹²⁸

The court dismissed plaintiff’s claims relating to his sexual orientation under Title VII since it was “well-settled in [the Second Circuit] and in all other to have reached the question that...Title VII does not prohibit harassment or discrimination because of sexual orientation.”¹²⁹ Because the court had dismissed plaintiff’s federal claims, the court also decided to use its discretion and declined to assert federal jurisdiction over the remaining state claims relating to the alleged violations of the N.Y.C. and N.Y.S Human Rights Laws.¹³⁰

Lederer v. BP Prods. N. Am., 2006 WL 3486787 (S.D.N.Y. 2006).

Plaintiff was a former employee of BP Products North America who brought an action alleging he was subjected to a hostile work environment in violation of the ADA, Title VII, and the N.Y.S. and N.Y.C. Human Rights Laws.¹³¹ Plaintiff alleged fellow employees made various derogatory comments to him regarding his sexual orientation.¹³² Plaintiff did not reveal his sexual orientation to anyone. However, plaintiff claimed his supervisor understood him to be gay.¹³³

The court denied defendant’s motion for summary judgment on plaintiff’s ADA claim based on evidence in the records from which a reasonable factfinder might have concluded an ADA violation existed.¹³⁴ The court dismissed plaintiff’s Title VII claim

¹²⁵ *Brass v. Hoberman*, 295 F. Supp. 358 (S.D.N.Y. 1968).

¹²⁶ *Murray v. Visiting Nurse Servs. of N.Y.*, 528 F.Supp.2d 257, 260 (S.D.N.Y. 2007).

¹²⁷ *Id.* at 261.

¹²⁸ *Id.*

¹²⁹ *Id.* at 266 (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)).

¹³⁰ *Murray*, 528 F.Supp.2d at 257.

¹³¹ *Lederer v. BP Prods. N. Am.*, 2006 WL 3486787 at *1 (S.D.N.Y. 2006).

¹³² *Id.*

¹³³ *Id.* at *2.

¹³⁴ *Id.* at *7.

on the basis that Title VII did not cover sexual orientation discrimination.¹³⁵ With regard to the state and city claims, defendants attempted to argue they were not in violation of the Human Rights Law because they lacked knowledge of plaintiff's sexual orientation as a homosexual male.¹³⁶ The court stated "it [would] seem inconsistent with the purpose of the civil right laws to allow such an employer to escape liability merely because its employees made abusive comments only when they believed that member of the protected class were out of earshot."¹³⁷ Accordingly, the court denied defendant's motion for summary judgment on the state and city claims.¹³⁸

Dawson v. Bumble & Bumble, 398 F.3d 211 (2d. Cir. 2005).

Plaintiff was a former hair stylist employed at defendant's hair salon.¹³⁹ Plaintiff alleged discrimination on the basis of her sexual orientation as a lesbian that was in violation of federal, state, and municipal law.¹⁴⁰ There was a sharp disagreement between her and defendant as to the quality of plaintiff's work as a hair assistant and a participant in defendant's hair training program.¹⁴¹ Further, plaintiff alleged that her failure to advance through the training program was a result of "discriminatory animus."¹⁴² Plaintiff claimed "she was subject to a hostile work environment in that she was constantly harassed about her appearance, that she did not conform to the image of women, and that she should act in a manner less like a man a more like a women."¹⁴³ Plaintiff also alleged a Title VII violation, arguing that she was faced with adverse employment actions as a result of defendant's animus toward plaintiff's "exhibition of behavior considered to be stereotypically inappropriate for a female."¹⁴⁴

The court addressed plaintiff's stereotyping argument and referred to other court decisions, which stated "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'"¹⁴⁵ The court went on further and stated "district courts in [the Second Circuit] have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes."¹⁴⁶ Ultimately, the court determined plaintiff's record contained insufficient allegations to show plaintiff was subjected to any adverse employment consequences as a result of her sexual orientation.¹⁴⁷

Logan v. Salvation Army, 10 Misc.3d 756, 809 N.Y.S.2d 846 (N.Y. Sup. 2005).

¹³⁵ *Id.* at *8.

¹³⁶ *Id.* at *9.

¹³⁷ *Id.* at *9.

¹³⁸ *Id.* at *10.

¹³⁹ *Dawson v. Bumble & Bumble*, 398 F.3d 211, 213 (2d. Cir. 2005).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 214.

¹⁴² *Id.*

¹⁴³ *Id.* at 215.

¹⁴⁴ *Id.* at 218.

¹⁴⁵ *Id.* (citing *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).

¹⁴⁶ *Dawson*, 398 F.3d, at 219.

¹⁴⁷ *Id.* at 225.

Plaintiff was a gay Jewish male employed as a senior caseworker for the World Trade Center Disaster Relief project who filed a complaint based on religious and sexual orientation discrimination.¹⁴⁸ Plaintiff alleged that his supervisor stated: “I wonder how the officer would feel if they knew they had a Jewish fag working for them.”¹⁴⁹ After this statement, Plaintiff reported the harassing behavior to HR, but the harassment continued thereafter.¹⁵⁰ After meeting with HR again, Plaintiff was reprimanded and soon thereafter was terminated.¹⁵¹ After Plaintiff’s termination, the supervisor made a comment to her colleagues about the Plaintiff stating she hoped he “did not play the gay card.”¹⁵² After Plaintiff commenced suit, defendant sought dismissal.

The court determined Plaintiff pled sufficiently based on his first two causes of action that the defendant discriminated against him due to his sexual orientation pursuant to N.Y.S and N.Y.C. Human Rights Laws.¹⁵³

Viruet v. Citizen Advice Bureau, 2002 WL 1880731 (S.D.N.Y. 2002).

Plaintiff was a homosexual male employee who brought an action against his former employer alleging defamation, sexual orientation discrimination, and retaliation claims under the N.Y.C. Human Rights Law and Title VII.¹⁵⁴ Plaintiff also alleged that due to his sexual orientation he was refused a pay raise and a promotion, asked to perform duties outside his job description, harassed, and ultimately terminated.¹⁵⁵ Further, Plaintiff alleged several instances of verbal harassment based on his homosexuality by both fellow employees and clients that came into the workplace.¹⁵⁶

The court determined that Plaintiff did not meet minimal requirements to bring a Title VII claim because “as a homosexual male [plaintiff] is not a member of a Title VII protected class. ‘The law is well-settled in [the Second Circuit] and in all others to have reached the question that...Title VII does not prohibit harassment or discrimination because of sexual orientation.’”¹⁵⁷ The court also decided plaintiff had not submitted any evidence supporting a hostile work environment or disparate treatment based on his sexual orientation to warrant a claim under the N.Y.C. Human Rights Law.¹⁵⁸ Finally, the court determined defendant could not be held liable for “disparaging remarks by it clients.”¹⁵⁹

Lane v. Collins & Aikman Floorcoverings, Inc., 2002 WL 1870283 (S.D.N.Y. 2002).

¹⁴⁸ *Logan v. Salvation Army*, 10 Misc.3d 756, 757, 809 N.Y.S.2d 846, 847 (N.Y. Sup. Ct. 2005).

¹⁴⁹ *Id.* at 848.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Viruet v. Citizen Advice Bureau*, 2002 WL 1880731 at *1 (S.D.N.Y. 2002).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *2.

¹⁵⁷ *Id.* at *14 (*citing Simonton v. Runyon*, 232 F.3d 33, 35-36 (2d Cir. 2000)).

¹⁵⁸ *Viruet*, 2002 WL 1880731 at *21.

¹⁵⁹ *Id.* at *17.

Plaintiff brought an action against his former employer alleging defendants placed him on probation and subsequently terminated him on the basis of his sexual orientation in violation of the N.Y.C. Human Rights Law.¹⁶⁰ The defendant argued that plaintiff was terminated due to “poor sales performance in his Region under his stewardship.”¹⁶¹ The court determined the trial transcript reflected sufficient evidence from which reasonable jurors could have concluded plaintiff was placed on probation and fired due to his sexual orientation.¹⁶²

Acosta v. Loews Corp., 276 A.D.2d 214, 717 N.Y.S.2d 47 (1st Dep’t 2000).

Plaintiff who was a former employee of the Regency hotel brought an action alleging sexual orientation discrimination in violation of the N.Y.C. and N.Y.S. Human Rights Laws.¹⁶³ Plaintiff alleged he was constantly called names such as “homo,” “faggot,” and “marricone.”¹⁶⁴ Plaintiff also alleged other co-workers exposed their genitalia to plaintiff and on one occasion had his pants forcefully pulled down while another co-worker exposed their genitalia to plaintiff.¹⁶⁵ Plaintiff alleged the managerial personnel were fully aware of the incidents, but failed to step in to reprimand any of the co-workers.¹⁶⁶ The court determined the plaintiff set forth sufficient allegations to establish that the managerial personnel were fully aware of the co-worker’s harassment and abuse, and therefore required a jury trial to determine a factual review of the allegations.¹⁶⁷

Parry v. Tompkins County, 689 N.Y.S.2d 296 (N.Y.App. Div. 1999).

Nadine Parry was reassigned different duties as a youth counselor in December of 1995 after two female clients claimed they felt uncomfortable with alleged physical contact by her. Parry believed her reassignment was unlawfully motivated by sexual orientation discrimination, and filed a grievance with her union as well as a complaint of violation of the local ordinance. The union and Parry negotiated a settlement agreement on April 18, 1996, under which she was to return to work and the employer was to remove adverse documents from her files, but this agreement fell apart, and Parry resigned and moved out of state. She filed a notice of claim against the county in December 1996, but didn't file her lawsuit until Dec. 31, 1997. The county's motion to dismiss as untimely was granted. The court found that a one-year statute of limitations set by the ordinance had been exceeded, since Parry didn't file her lawsuit until more than a year after the settlement fell apart.¹⁶⁸

B. Administrative Complaints

¹⁶⁰ *Lane v. Collins & Aikman Floorcoverings, Inc.*, 2002 WL 1870283, at *1 (S.D.N.Y. 2002).

¹⁶¹ *Id.*

¹⁶² *Id.* at *2.

¹⁶³ *Acosta v. Loews Corp.*, 276 A.D.2d 214, 216, 717 N.Y.S.2d 47, 49 (1st Dep’t 2000).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Parry v. Tompkins County*, 689 N.Y.S.2d 296 (N.Y. App. Div. 1999).

New York State Department of Correctional Services

On August 23, 2005, an employee of the Department of Correctional Services filed an administrative complaint with the State Division of Human Rights alleging that he had been harassed because of his sexual orientation. The employee was a Head Cook at a state correctional facility where, at the time of filing, he had been employed for seven years. The employee's co-workers began to harass him because of his sexual orientation approximately one year before the complaint was filed. They posted pictures in the Department that had been altered to make it look as though the employee was engaging in sexual intercourse with the employees. Comments such as, "no more head cooks in the pc unit ha-ha how do you like that fag boy," were written on the employee bathroom walls and co-workers made lewd comments in the presence of the employee and inmates about the employee's sexual activity, including an accusation "that [the employee] was screwing [a female co-worker] because she was tighter than his boyfriend." The employee reported the harassment to two supervisors, but no corrective action was taken and the harassment continued. Thereafter, the employee had to take medical leave due to the effects of the harassment.¹⁶⁹ The Division investigated the matter and determined that there was probable cause to support the employee's charge. The state of New York settled the matter privately with the employee in exchange for discontinuing the proceeding.¹⁷⁰

On March 5, 2007, the employee filed a second complaint with the State Division of Human Rights alleging that he had been retaliated against based on his complaint of August 23, 2005. After the settlement was reached in that matter, he was passed over for overtime and was made to perform tasks outside of his job description, and was unfairly issued notices of discipline on multiple occasions.¹⁷¹ Again, the Division's investigation revealed probable cause to support the employee's charge. Again, the parties entered into a private settlement.¹⁷²

C. Other Documented Examples of Discrimination

New York City Department of Parks and Recreation

The Associated Press ran a story on July 16, 2009 of a transgender woman who had been fired from her job as a mailroom clerk with the New York City Department of Parks and Recreation because she had transitioned. Birden, a 27-year-old Harlem

¹⁶⁹ Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Aug. 23, 2005).

¹⁷⁰ Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10107432 (Jan. 28, 2008).

¹⁷¹ Verified Complaint, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Mar. 5, 2007).

¹⁷² Consent to Discontinuance, [Redacted] v. New York State Department of Correctional Services, State Division of Human Rights, Case No. 10116813 (Jan. 28, 2008).

resident, was also made fun of and called vulgar names by co-workers because of her gender change. At the time of press, she had filed a discrimination suit in Manhattan.¹⁷³

Suffolk County Police Department

In 2005, plaintiff, a bisexual man, sued the Suffolk County Police Department alleging that he was subjected to harassment based on sexual orientation. A federal jury awarded Plaintiff \$260,000 in damages. Post-verdict, an attorney for the Department indicated that its policies had been under review since the election of Suffolk County Executive Steve Levy, a Democrat whose predecessor had a much less supportive record on lesbian and gay rights. The attorney said that the goal of the “review” was to “avoid any of these lawsuits in the future.” She also noted that the jury verdict related solely to workplace harassment, and did not find that Plaintiff was discharged because of his sexual orientation or as retaliation for complaining about the harassment.¹⁷⁴

Chili Highway Department

In 2002, an openly-gay highway employee was suspended from work for three and a half days for wearing a baseball hat embroidered with a symbol of a half-red, half-rainbow-colored ribbon symbolizing the fight against AIDS. The *Rochester Democrat and Chronicle* reported that the employee’s foreman had asked the gay man three years earlier not to wear a cap with a rainbow pride flag logo, which the employee said he had agreed not to wear. The suspension was rescinded after the employee’s union argued that town rules make no mention of hats whatsoever. The man was reimbursed for lost wages and the suspension was removed from his personnel file. The man also received an apology from the town, a promise of no future retribution, and a monetary settlement to assist with lawyer fees.¹⁷⁵

City of Buffalo Mayor’s Office

In 2001, after she had been employed as a planner with the City of Buffalo for 14 years, a transgender woman was forced to resign because of hostile workplace treatment that began immediately after she began to transition. By 2001, she had a distinguished career and received a county-wide civic award for her improvement of a Federal program that sought to reduce homelessness among people living with HIV/AIDS. In 2001, she informed the Mayor of Buffalo that she would be transitioning from male to female. After she transitioned she was demoted, which included reassigning her away from the Federal program she had helped to develop. Though she had an unblemished record when she presented as a man, she received unwarranted criticism and faced workplace hostility immediately after she transitioned.

¹⁷³ Associated Press, *Transsexual Sues NYC Parks Department over Firing*, July 16, 2009, available at http://www.silive.com/news/index.ssf/2009/07/transsexual_sues_new_york_city.html (last visited Sept. 8, 2009).

¹⁷⁴ Lesbian & Gay L. Notes (Mar. 2005).

¹⁷⁵ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 198-99(2002 ed).

One “casual Friday” she wore a gay pride t-shirt to work. She was told that someone in the department was offended by the shirt. When she refused to change, she was charged with insubordination and harassment. She was required to attend an informal hearing as a result of the charge, where she was told that the charges would be dropped if she agreed not to sue for any past grievances. She refused to sign and the harassment and hostility increased. She was unable to sleep and was diagnosed with depression. Eventually, worn down by stress and mistreatment, she resigned. She filed complaints with the City of Buffalo, the State of New York, and the EEOC but, because gender identity discrimination was not prohibited, her claims went nowhere.¹⁷⁶

Nassau County Sheriff’s Department

In 2000, James Manning, a corrections officer with the Nassau County Sheriff’s Department, brought equal protection and 42 U.S.C. § 1983 claims based on anti-gay harassment in the workplace. A federal jury awarded him \$1.5 million, finding the harassment at the county jail was so widespread that it constituted a “custom and practice” to discriminate against gay men. The Plaintiff presented evidence demonstrating that he encountered almost daily harassment from his co-workers for almost four years, including being called offensive names and the display of pornographic images depicting him as a pedophile, a transsexual and someone who engaged in bestiality. Plaintiff repeatedly complained to his superiors about the harassment, but they ignored him. Ultimately, a fellow corrections officer attacked him with a chair and injured his knee. Plaintiff left work and later went on disability leave. A doctor certified that he suffered from post-traumatic stress disorder.¹⁷⁷

New York Police Department

In 1999, two New York police officers filed a lawsuit for sexual harassment and violations of their civil rights. Thirteen-year veteran Joseph Baratto had joined East Harlem’s 23rd Precinct in 1989 and was allegedly the target of relentless harassment because he is gay. Baratto asserts that he was the victim of verbal anti-gay harassment and that he was repeatedly forced into his own locker. In addition, he asserts that on two occasions he was handcuffed and hung from a coat rack in the precinct lunchroom where he was subject to the ridicule of his co-workers and other officers once tried to physically force him to simulate an oral sex act with another officer. Steven Camacho, who is not gay, asserts that he was nonetheless the victim of sexual harassment by other officers simply because he was willing to work with Baratto. According to Camacho, other officers called him “Camacho the homo” drew pictures depicting Camacho engaged in

¹⁷⁶ 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).

¹⁷⁷ Human Rights Campaign, *Documenting Discrimination: A special report from the Human Rights Campaign Featuring Cases of Discrimination Based on Sexual Orientation in America’s Workplaces* (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf>.

sex acts with Baratto on precinct walls, and wrote graffiti on police station walls that read, “Camacho is a butt pirate.”¹⁷⁸

Saratoga Springs Police Department

In 1999, a Saratoga Springs police officer, who alleges he was derided and harassed because he was perceived to be gay, sued the city and several fellow officers for \$20.6 million for slander and sexual harassment. Robert C. Dennis, an eight-year veteran of the Saratoga Springs force, asserts that he became the target of anti-gay harassment by his colleagues after he was honored for his involvement in a robbery investigation in 1992. According to Dennis, harassment consisted of references to Dennis as “queenie,” and to his friends as his “boyfriends.” Other officers allegedly ridiculed him by blowing kisses to him derisively over the police radio, stalking him, and telling members of the community that he was gay. Dennis claims that the harassment irreparably tarnished his reputation in the community and caused him ‘enormous emotional distress.’ He also asserts that a city employee told a youth organization with which Dennis was involved that he was “light in the loafers” and therefore “should not be considered as a chaperone for a camping trip the organization was having.”¹⁷⁹

A New York Public School

In 2000, two years after he was hired, an English teacher at a New York public school was forced to resign. During his tenure, he intentionally disclosed his sexual orientation to only a few colleagues, but believed that the school principal knew he was gay. In April 2000, he was called into a meeting with the assistant principal. The assistant principal commended him for his hard work and conscientiousness, but told him that he would not be returning to work the following year because of “classroom management issues.” The assistant principal told the teacher that he would “do [him] a favor” and let him resign. If he did not agree to resign, he was told that he would receive an unfavorable evaluation. His union rep. discouraged him from taking up his grievance. Two days after the meeting, his classroom was vandalized and the word “faggot” was written across the chalkboard. Fearing that he would be terminated, he felt he had no option other than to resign.¹⁸⁰

New York State Law Department

In 1996, the Public Employees Federation, a union representing employees of the State Law Department, filed an unfair practice charge against the Department, asserting that a change in policy, which omitted “sexual orientation” from the executive order governing discrimination law in the Department, violated the Department's duty to bargain over changes in terms of employment. The change was made after Dennis C. Vacco was elected Attorney General of the State of New York in 1994 in a campaign

¹⁷⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 179 (1999 ed.).

¹⁷⁹ *Id.* at 183-84.

¹⁸⁰ 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).

where some of his supporters attacked his opponent, Karen Burstein, because she was a lesbian. Shortly after taking office, Vacco replaced his predecessor's executive order governing discrimination policy. Subsequently several openly lesbian or gay employees of the Department were fired in the course of a purported reorganization of the Department that generally downgraded civil rights enforcement functions.¹⁸¹

New York City Police Department

Two women, a lieutenant and a detective in the New York City Police Department, have filed a \$5 million lawsuit against the city, the Police Department, Police Chief Raymond Abruzzi and Commissioner William Bratton, charging their male coworkers with sexist and homophobic harassment. The officers in their Queens precinct allegedly hung a sign that said 'NLA' for 'No Lesbians Allowed,' spread rumors that the two women were lovers, referred to the Police Women's Endowment Association as 'Lesbians R Us' and called the lieutenant's phone 'the lesbian hotline.' Both the lieutenant, who commanded the precinct detective squad for nearly two years, and the detective were transferred by Chief Abruzzi after several male officers asked to be transferred because of the women.¹⁸²

¹⁸¹ *Public Employees Fed'n v. State of N.Y.*, PERB Case No. U-16702 (1996).

¹⁸² PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 83 (1995 ed.).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND 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

Prior to 1980, sodomy was illegal in New York. In the case of *People v. Onefre*,¹⁸³ the New York Court of Appeals struck down that law concluding it was an unconstitutional invasion of privacy. However, the sodomy law remained on the law books for the next twenty years until governor George Pataki signed the Sexual Assault Reform Act in 2000.¹⁸⁴

B. Housing & Public Accommodations Discrimination

Matter of Thomas, 2005 WL 5632053 (N.Y.C. Com. Hum. Rts. July 2005)

Petitioner who was a transsexual filed a complaint alleging that while in the process of retaining respondent's services in locating an apartment share, respondent questioned petitioner's gender and told her that he did not do business with transsexuals.¹⁸⁵ Respondent countered the allegation by simply denying the incident had occurred.¹⁸⁶ The commission concluded there was ample evidence of respondent's guilt based on the fact that respondent destroyed video evidence of the alleged incident in addition to having a history of discriminatory practices, which led to the loss of respondent's real estate license.¹⁸⁷ Thus, based on respondent's lack of credibility, the commission ordered respondent to pay a fine to the city, pay petitioner for compensatory damages, and attend sensitivity training.¹⁸⁸

C. Recognition of Same-Sex Couples

New York does not allow same-sex couples to marry in the state¹⁸⁹ nor does it provide domestic partnership benefits. However, New York does respect same-sex marriages entered into outside New York.

¹⁸³ *People v. Onefre*, 415 N.E.2d 936 (N.Y. 1980).

¹⁸⁴ See New York Prosecutor's Training Inst. & N.Y. District Att'y Ass'n Sexual Offense Sub-Comm., Know the Law: Sexual Assault Reform Act NYPTI Manual, <http://bit.ly/GGfRh> (last visited Sept. 8, 2009).

¹⁸⁵ *Matter of Thomas*, 2005 WL 5632053, at *1 (N.Y.C. Com. Hum. Rts. July 2005).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at *2.

¹⁸⁹ *Martinez v. County of Monroe*, 50 A.D.3d 189, 193, 850 N.Y.S.2d 740, 743 (4th Dep't 2008).