

**UCLA**

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

**Title**

New Hampshire - Sexual Orientation and Gender Identity Law and Documentation of  
Discrimination

**Permalink**

<https://escholarship.org/uc/item/5t92f22j>

**Author**

Sears, Brad

**Publication Date**

2009-09-23



## MEMORANDUM

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

### I. Introduction

Since 1998, New Hampshire law has prohibited discrimination in employment, housing, and public accommodations on the basis of sexual orientation. Employment discrimination on the basis of gender identity is not prohibited in the state.

Documented examples of employment discrimination on the basis of sexual orientation and gender identity discrimination in New Hampshire include:

- In 2009, a transgender public school teacher who began to transition was fired because the principal said that "things were not working out." She had received no complaints or warnings prior to being let go.<sup>1</sup>
- In 2009, a teacher who had been at the school for 19 years was terminated when a new superintendent and principal were hired who said disparaging things about his being gay.<sup>2</sup>
- In 2008, a teacher was being considered for tenure at a public school. He had favorable reviews and compliments from his co-workers. The principal said it wasn't the "right fit" and he was denied tenure.<sup>3</sup>
- In 2007, a nurse at a public school in New Hampshire was harassed by the principal at her school because of her sexual orientation. The principal asked several co-workers about the nurse and her partner, who is a special education teacher at the school. Specifically, the principal asked about their sexual orientation and the nature of their relationship. The principal told a co-worker that if they were lesbians, they must be doing something inappropriate behind closed doors. The principal also noted that she didn't understand why they "had to hire" lesbians. The nurse complained to her union and to the human resource staff at the school, but she was told to "make nice."<sup>4</sup>

---

<sup>1</sup> E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

<sup>2</sup> *Id.*

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

<sup>4</sup> GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 19, 2007) (on file with GLAD) (hereinafter "GLAD Intake Form" ([date])).

- In 2007, a transgender correctional officer resigned after she endured three years of harassment and physical abuse based on her gender identity. Her immediate supervisor harassed her, saying “Your tits are growing” and “You look gay when you walk.” Other co-workers then began physically assaulting her; kicking her, snapping her in the breasts, and threatening to handcuff her to a flagpole and take off her clothes. One officer grabbed her and slammed her into a concrete wall while her co-workers watched. No one reported this event. She was later placed on a shift with the abusive officer. She resigned as a result of the harassment she faced.<sup>5</sup>
- In 2007, a corrections department applicant reported that she was discriminated against based on her sexual orientation. In applying for a position with a corrections department, she was required to take a polygraph test. During the test, she was asked twice about her marital status, through which she disclosed that she was a lesbian. She was then not hired for the job.<sup>6</sup>
- In 1995, Penny Culliton, a high school English teacher in New Ipswich, was fired for ‘gross insubordination’ for using three novels with gay themes as optional reading in her classes after the principal had ordered her not to. The books in question . . . were selected by a school board committee that included school board members, parents, students and community members and were purchased by Culliton with money from a grant from the Respect for All Youth Fund. According to Culliton, the principal informed her after the books had been purchased that the school board did not want books with gay and lesbian characters in the classroom. At that time, Culliton questioned the principal, the superintendent, and the school board chair with little response. Later in the school year, when they were scheduled to be read, she decided to use them as planned. The books had already been distributed to students by the time the school board ordered their recall. At the next board meeting, students and community members accused the board of censorship and presented a petition in protest. Subsequently, the superintendent recommended that Culliton be dismissed. The board agreed with that recommendation following a public dismissal hearing. Approximately 40 students walked out of class to protest her firing; they were suspended.<sup>7</sup>

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

---

<sup>5</sup> GLAD Intake Form (Nov. 26, 2007).

<sup>6</sup> GLAD Intake Form (Oct. 15, 2002).

<sup>7</sup> PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 79-80 (1995 ed.).

## II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

### A. State-Wide Employment Statutes

On January 1, 1998, the New Hampshire Legislature amended its employment non-discrimination law to include sexual orientation within its list of protected classes. New Hampshire law declares that “the opportunity to obtain employment without discrimination . . . is hereby recognized and declared to be a civil right” and that “no person shall be denied the benefits of the rights afforded by this section on account of that person’s sexual orientation.”<sup>8</sup> This protection generally applies both to public<sup>9</sup> and private employment.<sup>10</sup> Employers are prohibited from refusing to hire a person, discharging a person, or discriminating against a person in “compensation or in terms, conditions, or privileges of employment” on the basis of, *inter alia*, sexual orientation.<sup>11</sup> New Hampshire also forbids labor unions from excluding a person from full membership rights, expelling a person from membership, or discriminating “in any way against any of its members or against any employer or any individual employed by an employer” on the basis of, *inter alia*, sexual orientation.<sup>12</sup> Additionally, New Hampshire prohibits employers and employment agencies from printing and/or circulating statements which express any limitation, specification, or discrimination with respect to sexual orientation.<sup>13</sup>

The law has several exemptions. First, the law does not apply to employers with fewer than six employees.<sup>14</sup> Second, it does not apply to employers who are non-profit social clubs or fraternal or religious associations or corporations.<sup>15</sup> Third, an employer, agency, or labor union may defend against a claim for discrimination on the grounds that it is a “bona fide occupational qualification” of the particular job at issue to have someone in it who is not gay.<sup>16</sup>

Finally, New Hampshire expressly prohibits sexual harassment in the workplace.<sup>17</sup> Sexual harassment is defined as “unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature . . . when (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; (b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (c) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work performance or creating an intimidating, hostile, or offensive working

---

<sup>8</sup> N.H. REV. STAT. § 354-A:6.

<sup>9</sup> N.H. REV. STAT. § 21-I:42, XVI; N.H. REV. STAT. § 21-I:52, I.

<sup>10</sup> N.H. REV. STAT. § 354-A:7, I.

<sup>11</sup> N.H. REV. STAT. § 354-A:7, I.

<sup>12</sup> N.H. REV. STAT. § 354-A:7, II.

<sup>13</sup> N.H. REV. STAT. § 354-A:7, III.

<sup>14</sup> N.H. REV. STAT. § 354-A:2, VI. For purposes of this section an employer’s spouse, parent, or child do not count as employees. N.H. REV. STAT. § 354-A:2, VII.

<sup>15</sup> N.H. REV. STAT. § 354-A:2, VII.

<sup>16</sup> N.H. REV. STAT. § 354-A:7, I, II, III.

<sup>17</sup> N.H. REV. STAT. § 354-A:7, V.

environment.”<sup>18</sup> Both explicitly anti-gay harassment on the basis of sexual orientation and implicit conduct of a sexual nature are prohibited.<sup>19</sup>

## **B. Attempts to Enact State Legislation.**

In March 2009, the New Hampshire House of Representatives introduced a bill that would define gender identity and expression and add it to the list of classes of people protected from discrimination.<sup>20</sup> The bill would have inserted a new statutory definition of gender identity as “a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.”<sup>21</sup> The bill also would have added “gender identity or expression” to anti-discrimination provisions dealing with employment, housing, and public accommodations. During a public hearing for the proposed bill on April 23, 2009, a transgendered woman named Sarah Blanchette testified that she was fired after revealing to her employer that she intended to transition from a man to a woman. Blanchette said that “I had been a good person. A good employee. But because I was different, they were allowed to get rid of me.”<sup>22</sup> On April 29, 2009, the New Hampshire Senate deemed the bill “inexpedient to legislate,” stopping any further consideration of the bill in 2009.<sup>23</sup>

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

### **1. Executive Orders**

On February 25, 2005, Governor John Lynch issued Executive Order 2005-2, establishing a judicial selection commission. The purpose of the selection commission is to “seek out the best judicial talent in the State of New Hampshire, evaluate all potential applicants for judicial nominations, and recommend qualified applicants to the Governor.”<sup>24</sup> In exercising its responsibility, the commission is required to consider applicants “without regard to . . . sexual orientation.”<sup>25</sup>

### **2. State Government Personnel Regulations**

---

<sup>18</sup> *Id.*

<sup>19</sup> See GLAD, *New Hampshire: Overview of Legal Issues for Gay Men, Lesbians, Bisexuals and Transgender People* (December 2008) (hereinafter “GLAD Overview”) at 3; see also N.H. REV. STAT. § 14-B:1. In addition, a federal court in New Hampshire found that same-sex sexual harassment violated federal civil rights law. *King v. Town of Hanover*, 959 F. Supp. 62 (D.N.H. 1996).

<sup>20</sup> 2009 H.B. 415 (NS).

<sup>21</sup> See *id.*, at proposed new N.H. REV. STAT. § 21:51.

<sup>22</sup> Jason Claffey, *Transgendered woman testifies on “bathroom bill,”* FOSTERS.COM, April 24, 2009 available at [http://www.fosters.com/apps/pbcs.dll/article?AID=/20090424/GJNEWS\\_01/704249871](http://www.fosters.com/apps/pbcs.dll/article?AID=/20090424/GJNEWS_01/704249871).

<sup>23</sup> Legislative Cumulative Report for New Hampshire at 5 available at <http://www.shrm.org/Advocacy/PublicPolicyStatusReports/State/PendingLegislativeReport/Documents/New%20Hampshire%201.22.09.pdf>; see also About New Hampshire’s Legislative Process, <http://www.portsmouthchamber.org/legislativeprocess.cfm> (last visited Sept. 9, 2009).

<sup>24</sup> N.H. Exec. Order 2005-2, ¶ 1.

<sup>25</sup> N.H. Exec. Order 2005-2, ¶ 5.

State employees may make complaints about employment discrimination on the basis of sexual orientation to the State Human Rights Commission, which, in turn, is authorized to investigate and pass upon complaints alleging violations of anti-discrimination laws.<sup>26</sup> Additionally, individuals who have experienced an unwelcome inquiry or comment about their actual or perceived sexual orientation by a member, officer, or employee of the state legislature may make a complaint to the Legislative Ethics Committee, which is empowered to investigate and act upon the complaint.<sup>27</sup>

The University System of New Hampshire (the “USNH”) prohibits discrimination on the basis of, *inter alia*, sexual orientation in the employment of faculty and staff; the awarding of grants, scholarships and other funds; in the acceptance of grants and donations; and in the operation of all courses, programs and services.<sup>28</sup> The University of New Hampshire, the largest component of the USNH, maintains a broad non-discrimination policy in order to “seek excellence through diversity among its administrators, faculty, staff, and students. The university prohibits discrimination on the basis of, *inter alia*, sexual orientation and gender identity or expression.”<sup>29</sup>

---

<sup>26</sup> See N.H. REV. STAT. ANN. § 354-A:5.

<sup>27</sup> N.H. REV. STAT. ANN. §§ 14-B:1, 14-B:4.

<sup>28</sup> See University System of New Hampshire Board of Trustees Bylaws, Article VI, available at <http://usnholpm.unh.edu/Bylaws/Article.6.htm>, last accessed June 16, 2009.

<sup>29</sup> Revised Nondiscrimination Policy of the University of New Hampshire, available at <http://www.unh.edu/diversity/pdf/RevNondiscrimPolicy.pdf>, last accessed June 16, 2009.

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

**A. Case Law**

**1. State & Local Government Employees**

None.

**2. Private Employees**

None.

**B. Administrative Complaints**

None.

**C. Other Documented Examples of Discrimination**

New Hampshire Public School

In 2009, a transgender public school teacher who began to transition was fired because the principal said that "things were not working out." She had received no complaints or warnings prior to being let go.<sup>30</sup>

New Hampshire Public School

In 2008, a teacher who had been at the school for 19 years was terminated when a new superintendent and principal were hired who said disparaging things about his being gay.<sup>31</sup>

New Hampshire Public School

In 2008, a teacher was being considered for tenure at a public school. He had favorable reviews and compliments from his co-workers. The principal said it wasn't the "right fit" and he was denied tenure.

New Hampshire Public School

In 2007, a nurse at a public school in New Hampshire was harassed by the principal at her school because of her sexual orientation. The principal asked several co-workers about the nurse and her partner, who is a special education teacher at the school. Specifically, the principal asked about their sexual orientation and the nature of their relationship. The principal told a co-worker that if they were lesbians, they must be doing something inappropriate behind closed doors. The principal also noted that she didn't understand why they "had to hire" lesbians. The

---

<sup>30</sup> E-mail from Lee Swislow, Executive Director, GLAD, to Brad Sears, Executive Director, the Williams Institute (Sept. 16, 2009 8:08:00 PST) (on file with the Williams Institute).

<sup>31</sup> *Id.*

nurse complained to her union and to the human resource staff at the school, but she was told to “make nice.”<sup>32</sup>

#### County Corrections Department

In 2007, a transgender correctional officer resigned after she endured three years of harassment and physical abuse based on her gender identity. Her immediate supervisor harassed her, saying “Your tits are growing” and “You look gay when you walk.” Other co-workers then began physically assaulting her; kicking her, snapping her in the breasts, and threatening to handcuff her to a flagpole and take off her clothes. One officer grabbed her and slammed her into a concrete wall while her co-workers watched. No one reported this event. She was later placed on a shift with the abusive officer. She resigned as a result of the harassment she faced.<sup>33</sup>

#### Corrections Department

In 2007, a corrections department applicant reported that she was discriminated against based on her sexual orientation. In applying for a position with a corrections department, she was required to take a polygraph test. During the test, she was asked twice about her marital status, through which she disclosed that she was a lesbian. She was then not hired for the job.<sup>34</sup>

#### New Ipswich Public School

In 1995, Penny Culliton, a high school English teacher in New Ipswich, was fired for ‘gross insubordination’ for using three novels with gay themes as optional reading in her classes after the principal had ordered her not to.. The books in question were selected by a school board committee that included school board members, parents, students and community members and were purchased by Culliton with money from a grant from the Respect for All Youth Fund. According to Culliton, the principal informed her after the books had been purchased that the school board did not want books with gay and lesbian characters in the classroom. At that time, Culliton questioned the principal, the superintendent, and the school board chair with little response. Later in the school year, when they were scheduled to be read, she decided to use them as planned. The books had already been distributed to students by the time the school board ordered their recall. At the next board meeting, students and community members accused the board of censorship and presented a petition in protest. Subsequently, the superintendent recommended that Culliton be dismissed. The board agreed with that recommendation following a public dismissal hearing. Approximately 40 students walked out of class to protest her firing; they were suspended.<sup>35</sup>

---

<sup>32</sup> GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Mar. 19, 2007) (on file with GLAD) (hereinafter “GLAD Intake Form” ([date])).

<sup>33</sup> GLAD Intake Form (Nov. 26, 2007).

<sup>34</sup> GLAD Intake Form (Oct. 15, 2002).

<sup>35</sup> PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 79-80 (1995 ed.).



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

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

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

New Hampshire's sodomy law was repealed legislatively in 1975.

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

New Hampshire law guarantees as a civil right the opportunity to obtain housing without discrimination on account of a person's sexual orientation.<sup>36</sup> The law prohibits discrimination in connection with renting or selling (or negotiating to rent or sell) a dwelling or commercial structure; in the terms, conditions, or privileges of sale or rental of a dwelling or commercial structure; or in the listing of any property for rental or sale.<sup>37</sup> It is also illegal to misrepresent that any dwelling or commercial structure is unavailable for inspection, rental, or sale when such structure is so available,<sup>38</sup> or to induce or attempt to induce any person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person of a particular sexual orientation.<sup>39</sup> Moreover, it is unlawful to deny a person access or participation in any multiple-listing service, real estate brokers' association, or facility relating to the rental or sale of dwellings, or to discriminate against a person in the terms or conditions of such access or participation, on account of that person's sexual orientation.<sup>40</sup> Finally, it is illegal to discriminate in making mortgage and real estate loans because of the applicant's sexual orientation.<sup>41</sup>

There are several exceptions to the housing laws. First, a person who owns only one single-family house is exempt from the non-discrimination law in renting or selling the house, provided that they do not use the services of any broker (or like person) and provided that they do not circulate any discriminatory advertisements or notices.<sup>42</sup> Second, the owner of a one, two, or three-family unit who lives in one of the units is exempt with respect to the other units.<sup>43</sup> Third, an owner who lives in a dwelling is exempt in the rental of rooms in that dwelling, so long as he rents no more than five rooms.<sup>44</sup> Fourth, a religious organization (or organization supervised by a religious organization) that does not rent or sell property for commercial

---

<sup>36</sup> N.H. REV. STAT. ANN. § 354-A:8.

<sup>37</sup> N.H. REV. STAT. ANN. § 354-A:10, I-III.

<sup>38</sup> N.H. REV. STAT. ANN. § 354-A:10, IV.

<sup>39</sup> N.H. REV. STAT. ANN. § 354-A:10, V.

<sup>40</sup> N.H. REV. STAT. ANN. § 354-A:10, VIII.

<sup>41</sup> N.H. REV. STAT. ANN. § 354-A:10, VII.

<sup>42</sup> N.H. REV. STAT. ANN. § 354-A:13, I-a.

<sup>43</sup> N.H. REV. STAT. ANN. § 354-A:13, I-b.

<sup>44</sup> N.H. REV. STAT. ANN. § 354-A:13, I-c.

purposes may give preference to members of that same religion (provided that membership in the religion is not restricted by race, color, or national origin).<sup>45</sup>

New Hampshire law also guarantees the opportunity for every person to have equal access to places of public accommodation without discrimination on account of that person's sexual orientation.<sup>46</sup> "Places of public accommodation" include any place that offers its services or facilities or goods to the general public, including "any inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store of other establishment" except for "any institution or club which is in its nature distinctly private."<sup>47</sup> Under New Hampshire law, it is an unlawful discriminatory practice for anyone to "refuse, withhold from or deny to [any] person any of the accommodations, advantages, facilities [or] privileges" of any place of public accommodations on account of a person's sexual orientation.<sup>48</sup> Moreover, it is illegal to publish or circulate any communication to the effect that any of the foregoing rights shall be refused, denied, or withheld from any person on account of their sexual orientation, or that a person is unwelcome or objectionable, or acceptable, desired, or solicited, on account of their sexual orientation.<sup>49</sup>

It is also a fundamental right for any guest receiving emergency shelter services in New Hampshire not to be discriminated against in any manner because of, *inter alia*, that person's sexual orientation.<sup>50</sup>

### C. Hate Crimes

New Hampshire's hate crimes law explicitly addresses sexual orientation and provides for increased penalties when a violent perpetrator is "substantially motivated to commit [a] crime because of hostility towards the victim's . . . sexual orientation."<sup>51</sup> In order to impose an extended term of imprisonment, a defendant must be notified of the possible application of the enhanced penalty twenty-one days prior to the commencement of jury selection for his or her trial.<sup>52</sup>

### D. Education

New Hampshire does not explicitly protect LGBT students from harassment and bullying in schools.<sup>53</sup> However, LGBT students are covered under a more general safe schools law, the

---

<sup>45</sup> N.H. REV. STAT. ANN. § 354-A:13, II.

<sup>46</sup> N.H. REV. STAT. ANN. § 354-A:16.

<sup>47</sup> N.H. REV. STAT. ANN. § 354-A:2, XIV.

<sup>48</sup> N.H. REV. STAT. ANN. § 354-A:17.

<sup>49</sup> N.H. REV. STAT. ANN. § 354-A:17.

<sup>50</sup> N.H. CODE ADMIN. R. ANN. He-M 314.04.

<sup>51</sup> N.H. REV. STAT. § 651:6, I(f).

<sup>52</sup> N.H. REV. STAT. § 651:6, III.

<sup>53</sup> See GLAD Overview at 38.

New Hampshire Pupil Safety and Violence Prevention Act, which requires any school employee with “reliable information that a pupil has been subjected to insults, taunts or challenges, whether verbal or physical in nature, which are likely to intimidate or provoke a violent or disorderly response” to report any such incident to the school principal, who shall then report the incident to the superintendent or school board.<sup>54</sup> Additionally, the school board must develop a “pupil safety and violence prevention policy” to proactively address school harassment,<sup>55</sup> and the state Board of Education must prepare an advisory to help school districts implement these policies.

In addition, one federal court in New Hampshire has construed the federal prohibitions against harassment on the basis of sex in schools to include harassment of LGBT students. In that case, the plaintiffs argued that the harassment they experienced was actionable under Title IX because it arose from the perpetrators’ sex-based stereotypes.<sup>56</sup>

#### **E. Gender Identity**

New Hampshire issues new birth certificates to transsexuals who have undergone sex-reassignment surgery.<sup>57</sup>

#### **F. Health Care**

New Hampshire’s Patients’ Bill of Rights guarantees that patients will not be denied appropriate care on the basis of their sexual orientation.<sup>58</sup> Moreover, administrative regulations adopted by the state Department of Health and Human Services precludes discrimination on the basis of sexual orientation with respect to persons receiving drug and alcohol treatment services,<sup>59</sup> community mental health services,<sup>60</sup> developmental or acquired brain disorder services<sup>61</sup>, peer support services,<sup>62</sup> physical rehabilitative services,<sup>63</sup> or care in state mental health facilities<sup>64</sup> or long-term acute care hospitals.<sup>65</sup>

#### **G. Parenting**

---

<sup>54</sup> N.H. REV. STAT. ANN. § 193-F:3, II.

<sup>55</sup> N.H. REV. STAT. ANN. § 193-F:3, I.

<sup>56</sup> See, e.g., *Snelling v. Fall Mountain Regional School District*, No. Civ. 99-448-JD, 2001 WL 276975, at \*4 (D.N.H. Mar. 21, 2001).

<sup>57</sup> N.H. REV. STAT. ANN. § 5-C:87, V.

<sup>58</sup> N.H. REV. STAT. ANN. § 151:21, XVI.

<sup>59</sup> N.H. CODE ADMIN. R. ANN. He-A 303.04, 303.07.

<sup>60</sup> N.H. CODE ADMIN. R. ANN. He-M 309.04, 303.06.

<sup>61</sup> N.H. CODE ADMIN. R. ANN. He-M 310.04, 310.06.

<sup>62</sup> N.H. CODE ADMIN. R. ANN. He-M 315.03, 315.06.

<sup>63</sup> N.H. CODE ADMIN. R. ANN. He-Hea § 702.05.

<sup>64</sup> N.H. CODE ADMIN. R. ANN. He-M § 311.04.

<sup>65</sup> N.H. CODE ADMIN. R. ANN. He-Hea § 2102.05.

## 1. Adoption

Until 1999, it was illegal under New Hampshire statutory law for a homosexual person to adopt a child or to be a foster parent.<sup>66</sup> Indeed, it was illegal to place a child in a foster family home where one or more adults was homosexual. At present, New Hampshire law permits any unmarried adult (regardless of their sexual orientation) or a husband and wife jointly to petition to adopt a child.<sup>67</sup> New Hampshire also now permits any person, regardless of sexual orientation, to apply for a foster family care license.<sup>68</sup>

It is an open question, however, whether a same-sex couple may jointly petition to adopt. In 1987, the New Hampshire Supreme Court ruled that two unmarried adults may not jointly petition to adopt a child.<sup>69</sup> However in recent years several judges in the state have allowed same-sex couples to petition to adopt in some circumstances.<sup>70</sup> As of 2006, judges in six of New Hampshire's ten counties had permitted same-sex couples to jointly adopt.<sup>71</sup> While there is no explicit prohibition on a same-sex partner to petition to adopt his partner's child, no New Hampshire court has heard the issue.<sup>72</sup>

## 2. Child Custody and Visitation

There are no published cases addressing child custody and visitation rights where one of the parents seeking such rights is gay, lesbian, bisexual, or transgender. As a matter of general principle, New Hampshire will not consider factors that do not affect the best interests of the child. Moreover, there is a statutory presumption that "in the making of any order relative to such custody...joint legal custody is in the best interest of minor children."<sup>73</sup> The state Supreme Court has stated that the paramount and controlling consideration in deciding child custody is the overall welfare of the child, and that each case must be determined on its own set of particular facts.<sup>74</sup>

---

<sup>66</sup> See N.H. REV. STAT. ANN. §§ 170-B:4, 161:2 (1999). The New Hampshire legislature enacted the explicit ban on homosexuals adopting and acting as foster parents in 1987 after the New Hampshire Supreme Court ruled that such a law would not violate the Due Process or Equal Protection Clauses of the New Hampshire or U.S. Constitutions. See *Opinion of the Justices*, 530 A.2d 21 (N.H. 1987). The Court reasoned that since the U.S. Supreme Court had ruled that there was no fundamental right to engage in homosexual behavior, and that statutes discriminating against homosexuals were subject to rational basis review only, the provisions in the 1987 law were constitutional. See *id.* at 22-24.

<sup>67</sup> N.H. REV. STAT. ANN. § 170-B:4. New Hampshire permits the following adults to adopt: (1) husband and wife together; (2) an unmarried adult; (3) the unmarried parent of the adoptee; or (4) in certain circumstances, a married person without that person's spouse joining as a petitioner.

<sup>68</sup> N.H. CODE ADMIN. R. He-C 6446.03.

<sup>69</sup> *In re Jason C.*, 533 A.2d 32 (N.H. 1987).

<sup>70</sup> See HUMAN RIGHTS CAMPAIGN, HRC New Hampshire Adoption Law, available at <http://www.hrc.org/issues/parenting/adoptions/8464.htm>.

<sup>71</sup> See Advocate.com, "Gay adoption policies vary by county in New Hampshire," THE ADVOCATE, available at [http://www.advocate.com/news\\_detail\\_ektid29397.asp](http://www.advocate.com/news_detail_ektid29397.asp), last accessed June 16, 2009.

<sup>72</sup> See HUMAN RIGHTS CAMPAIGN, HRC New Hampshire Adoption Law, available at <http://www.hrc.org/issues/parenting/adoptions/8464.htm>.

<sup>73</sup> N.H. REV. STAT. ANN. § 458:17.

<sup>74</sup> See *Del Pozzo v. Del Pozzo*, 309 A.2d 151 (N.H. 1973).

### 3. Surrogacy

While New Hampshire generally will enforce surrogacy agreements, New Hampshire law requires the “intended parents” to sign the surrogacy contract and to subsequently receive judicial preauthorization.<sup>75</sup> The definitions section of the surrogacy statute defines “intended parents” as “people who are married to each other, and who enter a surrogacy contract with a surrogate by which they are to become the parents of the resulting child.”<sup>76</sup> When New Hampshire’s marriage equality law takes effect, presumably same-sex spouses will be treated the same as different-sex spouses in the state.

#### H. Recognition of Same-Sex Couples

##### 1. Marriage, Civil Unions & Domestic Partnership

In 2009, New Hampshire extended marriage to same-sex couples.<sup>77</sup> When the law takes effect, it will modify the New Hampshire statutes which previously prohibited same-sex marriages.<sup>78</sup> In 2007, the state legislature passed a bill creating the legal status of civil unions for same-sex couples, affording couples who registered all state-level spousal rights and responsibilities. The bill took effect on January 1, 2008. The newly-signed marriage bill permits any couple who entered into a civil union before January 1, 2010 to apply to convert their civil union into a marriage.<sup>79</sup> Any couple in a civil union that has not applied for a marriage license by January 1, 2011 will be automatically considered married by the state of New Hampshire.<sup>80</sup> Under the law, civil unions entered into outside of New Hampshire will be treated as marriages in New Hampshire.<sup>81</sup>

##### 2. Benefits

In *Bedford v. New Hampshire Community Technical College System*,<sup>82</sup> two lesbians employed at the publicly-funded New Hampshire Technical Institute appealed a New Hampshire Commission for Human Rights (the “Commission”) finding of no probable cause over the couples’ claim for unlawful employment discrimination in connection with the provision of health benefits to their partners. Each petitioner, as a full-time employee, was entitled to receive employee benefits, including health and dental insurance, dependent care, and bereavement leave. After seeking to extend these benefits to their partners, petitioners were informed that they were not entitled to them based upon applicable state statutes, administrative rules, and their collective bargaining agreement. Petitioners filed a complaint with the Commission alleging that the failure to provide benefits to their partners constituted unlawful employment discrimination.

---

<sup>75</sup> N.H. REV. STAT. ANN. § 168-B:25.

<sup>76</sup> N.H. REV. STAT. ANN. § 168-B:1.

<sup>77</sup> See 2009 Chaptered Law 59 (2009 N.H. H.B. 436 (NS)). At the hearing on H.B. 436 was held before the House Judiciary Committee on February 5, 2009.

<sup>78</sup> See N.H. REV. STAT. ANN. §§ 457:1, 457:2. See 2009 Chaptered Law 59 (2009 N.H. H.B. 436 (NS)).

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

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> Nos. 04-E-229, 04-E-230, 2006 WL 1217283 (N.H. Super. May 3, 2006).

Petitioners argued that because those same benefits were available to the married partners of state employees, and because state law prohibits same-sex marriage, conditioning eligibility for employment benefits upon marriage unlawfully discriminates based upon sexual orientation. The Commission found it lacked jurisdiction to “override the various statutes and statutory schemes set in place by the legislature which do not extend benefits to same-sex partners” and that even if it could, it found no probable cause to believe that petitioners were discriminated against on the basis of sexual orientation.<sup>83</sup>

Reviewing the Commission’s findings, the Court found that the women had established a *prima facie* case of sexual orientation discrimination under both a disparate treatment and a disparate impact theory. Reversing the Commission’s finding that the law did not discriminate because the petitioners were similarly situated to unmarried heterosexual employees, the Court found that because New Hampshire then prohibited same-sex marriage, same-sex partners had no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of. Thus, unmarried heterosexual employees were not similarly situated to unmarried GLBT employees for purposes of receiving benefits.<sup>84</sup> The Court further found that the State’s justification for the policy -- that the laws do not permit the extension of employment benefits like those sought to same-sex couples -- was insufficient because the state’s anti-discrimination law trumps any contradictory agency or regulatory rule. Thus, the Court found, the petitioners met their burden under a disparate treatment analysis of showing that the policy impermissibly discriminates on the basis of sexual orientation.<sup>85</sup> Accordingly, the Court reversed the Commission’s decision.

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

The Rules of the New Hampshire Supreme Court states that “a judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.”<sup>86</sup> Additionally judges cannot engage in extra-judicial activities that interfere with the proper performance of his or her judicial duties -- including making remarks or remarks demeaning individuals on the basis of, *inter alia*, sexual orientation as it may cast reasonable doubt on the judge’s capacity to act impartially.<sup>87</sup>

As with judges, it is professional misconduct for an attorney licensed by the State of New Hampshire, in the course of representing a client, to knowingly manifest by words or conduct any bias or prejudice based on race, sex, religion, national origin, disability, age, sexual

---

<sup>83</sup> *Id.* at \*2.

<sup>84</sup> *Id.* at \*6-\*7.

<sup>85</sup> *Id.* at \*10. The Court also noted, without much analysis, that the policy would also violate state law on a disparate impact theory.

<sup>86</sup>N.H. Sup. Ct. Rules, Rule 38, Code of Jud. Conduct, Canon 3.

<sup>87</sup> N.H. Sup. Ct. Rules, Rule 38, Code of Jud. Conduct, Canon 4 § A(3).

orientation or socioeconomic status when such actions are prejudicial to the administration of justice.<sup>88</sup>

With respect to nurses licensed by the State of New Hampshire, it is considered an act of misconduct to practice “in a manner that discriminates on the basis of age, race, sex, handicap, national origin, sexual orientation, nature of illness or health status, physical or mental infirmity.”<sup>89</sup>

---

<sup>88</sup> N.H. Rules of Prof. Conduct, Rule 8.4 (2004 ABA Commentary to Model Code Rule 8.4).

<sup>89</sup> N.H. CODE ADMIN. R. Nur. § 402.04.