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

Title

Wisconsin - Sexual Orientation and Gender Identity Law and Documentation

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MEMORANDUM

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

I. OVERVIEW

In 1982 Wisconsin became the first state to pass a comprehensive statute prohibiting sexual orientation discrimination;¹ and its cities, Madison² and Milwaukee,³ recently expanded their local ordinances to prohibit employment and housing discrimination based on gender identity. On the other hand, Wisconsin singled out gays and lesbians from other protected groups when it denied affirmative action programs to remedy sexual orientation discrimination in its landmark 1982 legislation;⁴ Milwaukee's Equal Rights Commission, charged with receiving and reviewing complaints of private employer discrimination, has not operated for five years;⁵ and Wisconsin's statewide employment discrimination statute excludes gender identity protection⁶ and does not provide for a private right of action.⁷

The Wisconsin Department of Workforce Development ("DWD")⁸ has the authority to receive and investigate claims of discrimination brought under the state statute.⁹ Between 2002 and 2007, thirty-two complaints were filed with the DWD against public employers alleging sexual orientation discrimination.¹⁰ These complaints were filed by employees of the Wisconsin Department of Health and Family Services ("DHFS"), the Wisconsin Public Services Commission ("PSC"), Department of Corrections, University of Wisconsin-Eau Claire, and the Department of Public Safety.¹¹

¹ See Wis. Sess. Laws ch. 112 § 901 (1981), available at <http://bit.ly/EX9mm>; see also William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS WOMEN'S L.J. 91 (Spring 2007).

² MADISON CODE §§ 39.03(2)(hh), 39.03(4) and 39.03(8).

³ MILWAUKEE CODE §§ 109-41 and 109-45.

⁴ Turner, *supra* note 1, at 104-109 (discussing the legislative history that lead to the exclusion of affirmative action).

⁵ Interview of Amy Russell, Wis. Dep't of Workforce Dev., Milwaukee. See also Milwaukee Equal Rights Comm'n, <http://www.ci.mil.wi.us/der/ERC> (last visited Sept. 6, 2009) (explaining the City's current policy of referring investigations to state and federal agencies).

⁶ WIS. STAT. §§ 111.31 *et seq.*

⁷ *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 866 (7th Cir. 1996) (citing *Bachand v. Connecticut Gen. Life Ins. Co.*, 305 N.W.2d 149 (Ct. App. 1981)).

⁸ WIS. STAT. § 111.375.

⁹ WIS. STAT. § 111.39(1); see also *Aldrich v. Labor & Indus. Rev. Comm'n*, 751 N.W.2d 866, 869 (Wis. Ct. App. 2008) (stating that "[t]he exclusive means of asserting a claim is through the Department of Workforce Development's Equal Rights Division.").

¹⁰ Chart provided by the Williams Institute's Christy Mallory.

¹¹ See Discrimination Complaint, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).

Documented examples of discrimination on the basis of sexual orientation and gender identity in Wisconsin include the following:

- On March 23, 2005, an employee of the State of Wisconsin Department of Corrections filed an administrative complaint with the DWD alleging that she had been discriminated against on the basis of her sexual orientation. The state settled with the employee in a private settlement with undisclosed terms.¹² The employee began to experience hostile treatment from an office mate when she joined the Psychological Services Unit at the Oshkosh correctional facility. The co-worker would abruptly leave the office when the employee would enter the office. After the pattern had persisted for several months, the co-worker approached the employee and told her that “something had been bothering [her] about [the employee].” She proceeded to tell her that the fact that the employee was in a relationship with another female made her “extremely uncomfortable” and she could not work around her. The co-worker began to treat the employee differently than the other employees, making it difficult for the employee to work in the office. The employee reported the co-worker’s behavior to her supervisor, who agreed to handle the matter formally. However, the employee’s complaint was never addressed. The co-worker’s harassing behavior did not stop and the employee eventually suffered a breakdown for which she had to be placed on medical leave for nearly a month. Though the employee again requested that the matter be handled formally, a warden urged her to mediate instead. The mediation failed and no further action was taken by the employer.¹³
- On July 23, 2004, an employee of the State of Wisconsin Department of Health & Family Services filed an administrative complaint with the DWD alleging that he had been discriminated against on the basis of his sexual orientation. The state of Wisconsin settled with the employee, agreeing to let him tender a letter of resignation in lieu of termination and pay his legal fees in exchange for his promise not to sue.¹⁴ At the time of filing, the employee had been a Public Health Educator for the HIV/AIDS program for two years. One co-worker made the employee’s work environment particularly difficult, often making derogatory comments to and about the employee, including calling him a “fag,” “punk ass,” “punk bitch,” and “bitch”. The co-worker also lodged complaints about the employee’s work performance which were later found by a supervisor to be unsubstantiated. Co-workers complained that it was inappropriate for the

¹¹ Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (May 3, 2006).

¹² Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (May 3, 2006).

¹³ Discrimination Complaint, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).

¹⁴ Settlement Agreement and Release, [Redacted] v. Wisconsin Department of Health & Family Services, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR 200403028 (Mar. 7, 2006).

employee to have a book about anal sex on his desk, which the employee was using to prepare for a work-related presentation about HIV transmission. The employee also was forced to take down a desk calendar of men in fitness clothes, while another male employee had a calendar of women in swimming suits at his desk and was not confronted. The Department ultimately terminated the employee alleging that he had been “disrespectful” to a co-worker during a meeting in which he voted against an event she proposed.¹⁵ Brown v. Wis. Dep’t of Health & Family Serv., ERD Case No. CR200403028, EEOC Case No. 26GA401756.

- In *Racine Unified School District v. Labor and Industry Review Commission*,¹⁶ decided in 1991, the Racine school board enacted a policy that “excluded” all HIV positive staff from regular attendance at work.¹⁷ The DWD administrative law judge determined that the policy had a disparate impact on gay employees because: (a) seventy-three percent of persons with AIDS are homosexual and bisexual males; (b) one school board member was quoted in a local newspaper as saying he voted for the policy because “he did not believe that homosexuals should be allowed to teach in the school district;” and (c) no other school official attempted to retract that statement.¹⁸ An appeals court reversed that holding¹⁹ but found that the policy discriminated based on handicap.²⁰
- A teacher filed a federal lawsuit against the Hamilton School District for failing to respond to severe harassment based on his sexual orientation from students, parents, fellow teachers and administrative staff during his tenure at the school from 1992 to 1995. He alleged that such harassment eventually resulted in a nervous breakdown that led to his termination. The middle school teacher said that he reported the harassment – including a death threat from a student – and sought to have the district’s anti-discrimination policies enforced, but no action was taken. The incidents began soon after he disclosed to a few faculty members that he was gay. According to the lawsuit, constant verbal harassment with slurs like ‘faggot’ and ‘queer’ soon followed. The teacher says he began to seek professional help and repeatedly requested a transfer to another school, but ‘each request was either ignored or denied.’ The teacher further asserts that when he reported that a student threatened to kill him because he was gay, the associate principal told him that ‘we can’t stop middle school students from talking.’ ‘Boys will be boys.’ The teacher accepted a transfer to an elementary school in 1996 despite his concerns that younger siblings of the same students attend the school. After the transfer, the harassment continued until he ultimately suffered a breakdown and resigned. Upon his resignation, the teacher filed a lawsuit alleging that the school district had violated his right to equal protection by failing

¹⁵ Discrimination Complaint, [Redacted] v. Wisconsin Department of Health & Family Services, Department of Workforce Development, Equal Rights Division, ERD No. CR 200403028 (July 23, 2004).

¹⁶ 476 N.W. 2d 707 (Wis. Ct. App. 1991).

¹⁷ *Racine*, 476 N.W.2d 707, 712 (Wis. App. 1991).

¹⁸ *Racine*, 476 N.W.2d at 718.

¹⁹ *Racine*, 476 N.W.2d at 719.

²⁰ *Racine*, 476 N.W.2d at 722-723.

to take reasonable measures to prevent further harassment after he reported such conduct to his supervisors. On summary judgment, the District Court held that he failed to raise a genuine issue of material fact and granted the motion in favor of the defendants. On appeal to the Seventh Circuit, the teacher argued that the defendants had “failed to address his complaints in the same manner that they handled complaints of harassment based on race or gender.” The Seventh Circuit disagreed; finding that the evidence on record demonstrated that the school had actually made an effort despite limited resources. As such, Court of Appeals affirmed the summary judgment ruling in favor of the defendants.²¹ Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002).

- A heterosexual male professor at University of Wisconsin-Whitewater filed suit under Title VII, claiming he had suffered retaliation for complaining about sex discrimination, and claiming that as a heterosexual he suffered discrimination at the hands of the lesbians who were running his department. He also claimed that two straight women in the department were denied tenure because they were friendly with him. He asserted that the lesbians gave him a low merit pay raise and refused to allow him to teach some summer classes that he had taught in the past. University officials denied discrimination or retaliation, but the jury ruled for Albrechtsen on his retaliation charge, awarding him \$250,000 for emotional distress, \$43,840 for lost income, and \$150,000 for legal fees.²²

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.

²¹ *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002).

²² Lesbian & Gay L. Notes (Summer 2001), available at <http://bit.ly/1OELhH>.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

In 1982, Wisconsin became the first state to pass a comprehensive law prohibiting employment discrimination based on sexual orientation. The amended Wisconsin Fair Employment Act (“WFEA”)²³ prohibits employment discrimination on the basis of sexual orientation.²⁴ The statute defines sexual orientation as “having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.”²⁵ The statute does not cover gender identity. The law prohibits employers, labor organizations, licensing agencies, employment agencies, and “other” people²⁶ from refusing to hire, barring from employment or terminating an individual based on sexual orientation.²⁷ It also bars discrimination in promotion, compensation, terms, conditions, and privileges of employment based on an individual’s sexual orientation.²⁸ The statute does not provide for any exceptions and it applies equally to discrimination based on sexual orientation as it does to other protected classes.²⁹

The 1982 law that amended the WFEA also amended several other employment-related anti-discrimination statutes to include sexual orientation as a protected class, including: (a) a prohibition against state and municipal employee labor organizations refusing membership because of the individual’s sexual orientation;³⁰ (b) a policy that all state personnel employment actions be based on merit and not an individual’s sexual orientation;³¹ (c) a prohibition against sexual orientation discrimination in hiring civil servants;³² and (d) a requirement that all contracts between certain state agencies their contractors prohibit the contractor from discriminating against employees on the basis of sexual orientation.³³ The contractor law also requires state contractors to incorporate

²³ WIS. STAT. §§ 111.31 *et seq.*; see Turner, *supra* note 1, at 91. When Wisconsin amended the WFEA, it also amended numerous other anti-discrimination laws by passing ch. 112, 1981 Wis. Sess. Law 901. No legislative history is available in electronic format. A drafting record of the bill is available on microfiche from the Wisconsin Legislative Reference Bureau. See generally Turner, *supra* note 1 (discussing the historical context and files of state representative, David Clarenbach, who was the bill’s sponsor); see also, Michael J. Keane, *Wisconsin Briefs from the Legislative Reference Bureau: Researching Legislative History in Wisconsin*, BRIEF 06-10 (July 2006), available at <http://bit.ly/167GGH> (explaining available legislative history resources for Wisconsin legislation).

²⁴ WIS. STAT. § 111.36(1)(d)1.

²⁵ WIS. STAT. § 111.32(13m).

²⁶ WIS. STAT. § 111.36(1)(d)1.

²⁷ WIS. STAT. § 111.36(1)(d)1.

²⁸ WIS. STAT. § 111.36(1)(d)1.

²⁹ WIS. STAT. §§ 111.31 *et seq.*

³⁰ WIS. STAT. §§ 111.70(2); 111.85(2)(b).

³¹ WIS. STAT. § 230.01(2)

³² WIS. STAT. § 230.18.

³³ WIS. STAT. § 16.765(1).

affirmative action hiring programs for certain minority groups but does not include gays and lesbians among such groups.³⁴

2. Enforcement & Remedies

The WFEA is administered by the Wisconsin Department of Workforce Development (“DWD”).³⁵ The DWD has the authority to receive and investigate claims of discrimination brought under the statute.³⁶ An individual that wants to file a discrimination complaint must do so no more than 300 days after the alleged discrimination.³⁷ If the DWD finds there is probable cause of discrimination, then it “may endeavor to eliminate the discrimination by conference, conciliation or persuasion.”³⁸ If those efforts are unsuccessful, then the DWD can request the discriminating party to answer the complaint before a hearing examiner.³⁹ If the hearing examiner makes a finding that the respondent engaged in discrimination, then it may order administrative remedies that include back pay, reinstatement, compensation in lieu of reinstatement, and interim earnings.⁴⁰ Unfavorable findings can be appealed to the Labor and Industrial Review Committee.⁴¹

Under the WFEA, a complainant is not offered the opportunity to seek a Right to Sue letter from the DWD and must proceed through the entire administrative process before he or she is entitled to file in court.⁴² Only when the DWD had rendered a final decision in the case may the complainant seek judicial review.⁴³ Further, only when the DWD has made a ruling favorable to the complainant may he or she seek additional remedies by filing a civil action.⁴⁴ If a prevailing administrative complainant chooses to file a civil action for additional remedies, he or she may be awarded compensatory and punitive damages as well as attorney’s fees and costs.⁴⁵ Non-pecuniary, future pecuniary, and punitive damages are subject to the same graduated caps imposed by Title VII.⁴⁶

B. Attempts to Enact State Legislation

None.

³⁴ WIS. STAT. § 16.765(1).

³⁵ Wis. Stat. § 111.375.

³⁶ WIS. STAT. § 111.39(1); *see also Aldrich v. Labor & Indus. Review Comm’n*, 751 N.W.2d 866, 869 (Wis. Ct. App. 2008) (“The exclusive means of asserting a claim is through the Department of Workforce Development’s Equal Rights Division.”).

³⁷ WIS. STAT. § 111.39(1).

³⁸ WIS. STAT. § 111.39(4)(b).

³⁹ WIS. STAT. § 111.39(4)(b).

⁴⁰ WIS. STAT. § 111.39(4)(c).

⁴¹ WIS. STAT. § 111.39(5).

⁴² WIS. STAT. §§ 111.39, 111.395, 11.397.

⁴³ WIS. STAT. § 111.395.

⁴⁴ WIS. STAT. § 111.397.

⁴⁵ WIS. STAT. § 111.397(1)(a).

⁴⁶ WIS. STAT. § 111.397(2)(a).

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

1. Executive Orders

None.

2. State Government Personnel Regulations

The Wisconsin Department of Health Services has a personnel policy prohibiting employment discrimination based on sexual orientation.⁴⁷ The Wisconsin Technical College System Board⁴⁸ and the Department of Veteran Affairs⁴⁹ maintain similar policies.

3. Attorney General Opinions

None.

D. Local Legislation

1. City of Madison

In September of 2000, the Madison City Council voted unanimously to amend the City's Equal Opportunities Ordinance to include gender identity as a protected class against employment discrimination.⁵⁰ The ordinance also prohibits discrimination based on sexual orientation.⁵¹ The ordinance defines "gender identity" as:

“[t]he actual or perceived condition, status or acts of 1) identifying emotionally or psychologically with the sex other than one's biological or legal sex at birth, whether or not there has been a physical change of the organs of sex; 2) presenting and/or holding oneself out to the public as a member of the biological sex that was not one's biological or legal sex at birth; 3) lawfully displaying physical characteristics and/or behavioral characteristics and/or expressions which are widely perceived as being more appropriate to the biological or legal sex that was not one's biological or legal sex at birth, as when a male is perceived as feminine or a female is perceived as masculine; and/or 4) being physically and/or behaviorally androgynous.”⁵²

⁴⁷ WIS. ADMIN. CODE [DHS] § 36.10 (2008).

⁴⁸ WIS. ADMIN. CODE [TCS] § 6.06 (2008).

⁴⁹ WIS. ADMIN. CODE [VA] § 1.13 (2008).

⁵⁰ Judith Davidoff, *Council Bans Gender Identity Discrimination*, CAP. TIMES, Sep. 20, 2000, at 3A.

⁵¹ MADISON CODE § 39.03(1).

⁵² MADISON CODE § 39.03(2)(t).

The ordinance also defines “sexual orientation” as “homosexuality, heterosexuality, bisexuality and gender identity by preference or practice.”⁵³ All of the provisions that enumerate the protected classes mention sexual orientation but not gender identity, and the definition of sexual orientation encompasses gender identity, so a discrimination claim based on gender identity would be brought as a claim based on sexual orientation under this ordinance.⁵⁴

The Madison law creates the Madison Equal Opportunities Commission, which has the authority to hear complaints of discrimination against private entities.⁵⁵ Since 1988, the Commission has received 136 sexual orientation employment discrimination complaints.⁵⁶ Complaints against the city are handled internally by the City’s Affirmative Action Department.⁵⁷

2. City of Milwaukee

In 2007, the City of Milwaukee amended its Equal Rights law to include gender identity as a protected class against employment discrimination.⁵⁸ Under the Milwaukee law, “gender identity” means “a gender-related identity, appearance, expression or behavior of an individual, regardless of the individual’s assigned sex at birth.”⁵⁹ “Sexual orientation” means “homosexuality, heterosexuality, and bisexuality by preference or practice.”⁶⁰ The ordinance creates an Equal Rights Commission that has the power to receive complaints and pursue remedies for violations of the law.⁶¹ However, the Commission has not met in approximately five years. Instead, Milwaukee has been diverting investigations to state and federal agencies.⁶² This has had the deleterious effect of eliminating the ability to bring a complaint and seek a remedy for gender identity discrimination with the Milwaukee Equal Rights Commission.

E. Occupational Licensing Requirements

The WFEA prohibits sexual orientation discrimination by licensing agencies.⁶³

⁵³ MADISON CODE § 39.03(2)(hh).

⁵⁴ See MADISON CODE §§ 39.03(1), 39.03(2)(hh) and 39.03(8).

⁵⁵ MADISON CODE § 39.03(10).

⁵⁶ Letter and Chart from Cindy Wick, Executive Assistant, Madison Department of Civil Rights (on file with author).

⁵⁷ Telephone Interview with Cindy Wick, Executive Assistant, Madison Department of Civil Rights.

⁵⁸ MILWAUKEE CODE § 109-1; see also <http://www.ci.mil.wi.us/EqualRightsCommission19612.htm>.

⁵⁹ MILWAUKEE CODE § 109-3(11).

⁶⁰ MILWAUKEE CODE § 109-3(19).

⁶¹ MILWAUKEE CODE § 109-5(4)(b).

⁶² See *supra* notes 9-11, and accompanying text.

⁶³ WIS. STAT. § 111.36(1)(d)1.

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

A. Case Law

1. State & Local Government Employees

Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002).

Schroeder, a gay teacher, filed a federal lawsuit against the Hamilton School District for failing to respond to severe harassment he says he endured from students, parents, fellow teachers and administrative staff during his tenure at the school from 1992 to 1995. He alleged that such harassment eventually resulted in a nervous breakdown that led to his termination. The middle school teacher said that he reported the harassment – including a death threat from a student – and sought to have the district’s anti-discrimination policies enforced, but no action was taken.

The incidents began soon after Schroeder disclosed to a few faculty members that he was a homosexual. Word began to spread that the teacher was gay the year after he was hired, during the 1993-94 school year. According to the lawsuit, constant verbal harassment with slurs like ‘faggot’ and ‘queer’ soon followed. The teacher says he began to seek professional help and repeatedly requested a transfer to another school, but ‘each request was either ignored or denied,’ according to court papers. The teacher further asserts that when he reported that a student threatened to kill him because he was gay, the associate principal told him that ‘we can’t stop middle school students from talking.’ ‘Boys will be boys,’ she reportedly said. The teacher accepted a transfer to an elementary school in 1996 despite his concerns that younger siblings of the same students attend the school. After the transfer the harassment continued until he ultimately suffered a “mental breakdown” and resigned.

Upon his resignation, Schroeder filed a lawsuit alleging that the school district had violated his right to equal protection by failing to take reasonable measures to prevent further harassment after he reported such conduct to his supervisors. On summary judgment, the District Court held that Schroeder failed to raise a genuine issue of material fact and granted summary judgment in favor of the defendants. On appeal to the Seventh Circuit, Schroeder argued that the defendants had “failed to address his complaints in the same manner that they handled complaints of harassment based on race or gender.” The Seventh Circuit disagreed; finding that the evidence on record demonstrated that the school had actually made an effort despite limited resources. As such, the Court of Appeals affirmed the summary judgment ruling in favor of the defendants.⁶⁴

⁶⁴ *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002).

Racine Unified Sch. Dist. v. Labor and Indus. Review Comm'n, 476 N.W.2d 707 (Wis. Ct. App. 1991).

In *Racine Unified School District v. Labor and Industry Review Commission*,⁶⁵ the Racine school board enacted and published a policy that “excluded” all HIV positive staff from regular attendance at work and placed HIV positive employees on either sick leave or a leave of absence.⁶⁶ The teacher’s union brought a claim under the WFEA for discrimination based on sexual orientation and handicap. The union argued that the policy would have a disparate impact on homosexuals. In agreeing with the union, the administrative law judge relied up on the following facts: (a) seventy-three percent of persons with AIDS are homosexual and bisexual males; (b) one school board member was quoted in a local newspaper as saying he voted for the policy because “he did not believe that homosexuals should be allowed to teach in the Racine Unified School District;” and (c) no attempt by any school official was made to retract this statement.⁶⁷ But the court of appeals found the administrative law judge’s analysis insufficient to support a disparate impact theory, thereby ruling that the policy did not discriminate based on sexual orientation.⁶⁸ However, the court did find that the policy discriminated based on handicap.⁶⁹

Hazelton v. State Personnel Comm’n, 505 N.W.2d 793 (Wis. App. 1993).

In *Hazelton v. State Personnel Commission*,⁷⁰ decided in 1993, the Wisconsin Army National Guard involuntarily transferred Hazelton to standby reserve after he tested positive for HIV.⁷¹ Hazelton had served for 27 years, and this action prevented him from eligibility for retirement benefits.⁷² Hazelton brought a claim under the WFEA for discrimination based on sexual orientation and handicap. The court did not reach the merits of his claim, however, because it found that the federal policy that the Wisconsin Army National Guard was enforcing against Hazelton preempted the WFEA.⁷³

B. Administrative Complaints

WFEA complaints must be filed with the Department of Workforce Development’s Equal Rights Division. Wisconsin has published a detailed guide for the raising, investigating, and hearing of employment discrimination complaints brought before the DWD.⁷⁴ Sexual orientation discrimination complaints brought against private actors for the years 2002 to 2007 numbered 79, 59, 71, 54, 46, and 54, respectively.⁷⁵ Sexual orientation discrimination complaints brought against public employers for that

⁶⁵ *Racine*, 476 N.W.2d at 707.

⁶⁶ *Racine*, 476 N.W.2d at 712.

⁶⁷ *Racine*, 476 N.W.2d at 718.

⁶⁸ *Racine*, 476 N.W.2d at 719.

⁶⁹ *Racine*, 476 N.W.2d at 722-723.

⁷⁰ *Hazelton v. State Personnel Comm’n*, 505 N.W.2d 793 (Wis. App. 1993).

⁷¹ *Hazelton*, 505 N.W.2d at 795.

⁷² *Hazelton*, 505 N.W.2d at 795.

⁷³ *Hazelton*, 505 N.W.2d at 798.

⁷⁴ WIS. ADMIN. CODE §§ 218 *et seq.*

⁷⁵ Chart of Annual Reports of Discrimination, 2002-07 (on file with the Williams Institute).

same period numbered 3, 11, 3, 5, 5, and 5, respectively.⁷⁶ These complaints were filed by employees of the Wisconsin Department of Health and Family Services (“DHFS”), the Wisconsin Public Services Commission (“PSC”), Department of Corrections, University of Wisconsin-Eau Claire, and the Department of Public Safety.⁷⁷

[Redacted] v. State of Wisconsin Dep’t of Corr., ERD Case No. CR200500985 (May 3, 2006).

On March 23, 2005, an employee of the State of Wisconsin Department of Corrections filed an administrative complaint with the Equal Rights Division of the Department of Workforce Development alleging that she had been discriminated against on the basis of her sexual orientation. The employee began to experience hostile treatment from an officemate when she joined the Psychological Services Unit at the Oshkosh correctional facility. The co-worker would abruptly leave the office when the employee would enter the office. After this pattern had persisted for several months, the co-worker approached the employee and told her that “something had been bothering [her] about [the employee].” She proceeded to tell her that the fact that the employee was in a relationship with another female made her “extremely uncomfortable” and she could not work around her. The co-worker began to treat the employee differently than the other employees, making it difficult for the employee to work in the office. The employee reported the co-worker’s behavior to her supervisor who agreed to handle the matter formally. However, the employee’s complaint was never addressed. The co-worker’s harassing behavior did not stop and the employee eventually suffered a breakdown for which she had to be placed on medical leave for nearly a month. Though the employee again requested that the matter be handled formally, a warden urged her to mediate instead. The mediation failed and no further action was taken by the employer.⁷⁸ The state of Wisconsin settled with the employee in a private settlement with undisclosed terms.⁷⁹

Brown v. Wis. Dep’t of Health & Family Serv., ERD Case No. CR200403028, EEOC Case No. 26GA401756.

On July 23, 2004, an employee of the State of Wisconsin Department of Health & Family Services filed an administrative complaint with the Equal Rights Division of the Department of Workforce Development alleging that he had been discriminated against on the basis of his sexual orientation. At the time of filing, the employee had been a Public Health Educator for the HIV/AIDS program for two years. The employee was

⁷⁶ Chart of Annual Reports of Discrimination, 2002-07 (on file with the Williams Institute).

⁷⁷ See Discrimination Complaint, [Redacted] v. State of Wisconsin Dep’t of Corr., Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).

⁷⁷ Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (May 3, 2006).

⁷⁸ Discrimination Complaint, [Redacted] v. State of Wisconsin Dep’t of Corr., Wisconsin Department of Workforce Development, Equal Rights Division, ERD No. CR200500985 (Mar. 23, 2005).

⁷⁹ Order of Dismissal-Private Settlement-Confidential Terms, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD Case No. CR200500985 (May 3, 2006).

forced to take down a desk calendar of men in fitness clothes, while another male employee had a calendar of women in swimming suits at his desk and was not confronted. Co-workers complained that it was inappropriate for the employee to have a book about anal sex on his desk, which the employee was using to prepare for a work-related presentation about HIV transmission. One co-worker made the employee's work environment particularly difficult, often making derogatory comments to and about the employee, including calling him a "fag," "punk ass," "punk bitch," and "bitch". The co-worker also lodged complaints about the employee's work performance which were later unsubstantiated by a supervisor. The Department ultimately terminated the employee alleging that he had been "disrespectful" to a co-worker during a meeting in which he voted against an event she proposed.⁸⁰ The state of Wisconsin settled with the employee, agreeing to let him tender a letter of resignation in lieu of termination and pay his legal fees of \$2,250.00 in exchange for his promise not to sue.⁸¹

[Redacted] v. State of Wisconsin Dep't of Corr., ERD Case No. CR 200303555 (Aug. 27, 2003).

On August 27, 2003, an employee of the State of Wisconsin Department of Corrections filed an administrative complaint with the Equal Rights Division of the Department of Workforce Development alleging that she had been discriminated against on the basis of her sexual orientation. The employee was denied training on multiple occasions by a hostile supervisor who often demeaned her.⁸² She was granted a hearing, but her claim was dismissed because she failed to appear for the hearing.⁸³

C. Other Documented Examples of Discrimination

University of Wisconsin-Whitewater

Professor Steven Albrechtsen of University of Wisconsin-Whitewater filed suit under Title VII, claiming he had suffered retaliation for complaining about sex discrimination, and claiming that as a heterosexual he suffered discrimination at the hands of the lesbians who were running his department. He also claimed that two straight women in the department were denied tenure because they were friendly with him. He asserted that the lesbians gave him a low merit pay raise and refused to allow him to teach some summer classes that he had taught in the past. University officials denied discrimination or retaliation, but the jury ruled for Albrechtsen on his retaliation charge,

⁸⁰ Discrimination Complaint, [Redacted] v. Wisconsin Department of Health & Family Services, Department of Workforce Development, Equal Rights Division, ERD No. CR 200403028 (July 23, 2004).

⁸¹ Settlement Agreement and Release, [Redacted] v. Wisconsin Department of Health & Family Services, Wisconsin Department of Workforce Development, Equal Rights Division, ERD Case No. CR 200403028 (Mar. 7, 2006).

⁸² Discrimination Complaint, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD Case No. CR 200303555 (Aug. 27, 2003).

⁸³ Order of Dismissal, [Redacted] v. State of Wisconsin Department of Corrections, Wisconsin Department of Workforce Development, Equal Rights Division, ERD Case No. CR200303555 (July 23, 2004).

awarding him \$250,000 for emotional distress, \$43,840 for lost income, and \$150,000 for legal fees.⁸⁴

⁸⁴ Lesbian & Gay L. Notes (Summer 2001), *available at* <http://bit.ly/1OELhH>.

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

The Wisconsin legislature repealed the state's sodomy law in 1983.⁸⁵ There is no online legislative history available for this act.⁸⁶

B. Housing & Public Accommodations Discrimination

The same 1982 law that amended the employment discrimination statutes to include sexual orientation also amended the equal housing laws to include sexual orientation as a protected class.⁸⁷ Wisconsin law prohibits sexual orientation discrimination in housing, but it does not prohibit gender identity discrimination.⁸⁸ Wisconsin law also requires local laws with respect to housing to be at least as protective as the state law, which means they must prohibit housing discrimination based on sexual orientation.⁸⁹ There are two municipalities, Madison⁹⁰ and Milwaukee,⁹¹ that have expanded their anti-discrimination housing ordinances to include gender identity as a protected class. Further, Wisconsin has a law that expressly prohibits sexual orientation discrimination by housing authorities for elderly people.⁹²

The 1982 law also amended the public accommodations law to include sexual orientation as a protected class. Wisconsin law prohibits the following discrimination based on sexual orientation by a public place of accommodation or amusement: (a) charging a higher price; (b) giving preferential treatment; and (c) advertising as a place of public accommodation where any of the facilities will be denied to individuals because of their sexual orientation.⁹³ The city of Madison has broadened its public accommodations anti-discrimination law to include gender identity as a protected class.⁹⁴

C. HIV/AIDS Discrimination

⁸⁵ See Wis. Act 17, Sess. Laws 37 (1983), available at <http://bit.ly/Mg6tw>.

⁸⁶ Microfiche, Wis. Leg. Ref. Bureau (available by telephone at (608) 266-7040 upon requesting "drafting record" for "Wis. Act 17, Sess. Laws 37 (1983)").

⁸⁷ See Wis. Sess. Laws ch. 112, 901.

⁸⁸ WIS. STAT. §§ 106.50(1) and 106.50(1m)(h).

⁸⁹ WIS. STAT. §§ 66.1011(1)-(2).

⁹⁰ MADISON CODE § 39.03(4).

⁹¹ MILWAUKEE CODE § 109-41.

⁹² WIS. STAT. § 66.1213(3).

⁹³ WIS. STAT. §§ 106.52(3)(a)1-3.

⁹⁴ MADISON CODE § 39.03(5).

In 1985, Wisconsin passed a law making it illegal for an employer to require employees to take an HIV test as a condition of employment or to offer benefits and privileges to employees that take an HIV test.⁹⁵

Research located a couple of published HIV employment discrimination cases where the complainants believed they were being discriminated against because of their sexual orientation.

In *Racine Unified School District v. Labor and Industrial Review Commission*,⁹⁶ the Racine school board enacted and published a policy that “excluded” all HIV positive staff from regular attendance at work and placed HIV positive employees on either sick leave or a leave of absence.⁹⁷ The teacher’s union brought a claim under the WFEA for discrimination based on sexual orientation and handicap. The union argued that the policy would have a disparate impact on homosexuals. In agreeing with the union, the administrative law judge relied up on the following facts: (a) seventy-three percent of persons with AIDS are homosexual and bisexual males; (b) one school board member was quoted in a local newspaper as saying he voted for the policy because “he did not believe that homosexuals should be allowed to teach in the Racine Unified School District;” and (c) no attempt by any school official was made to retract this statement.⁹⁸ But the court of appeals found the administrative law judge’s analysis insufficient to support a disparate impact theory, thereby ruling that the policy did not discriminate based on sexual orientation.⁹⁹ However, the court did find that the policy discriminated based on handicap.¹⁰⁰

In *Hazelton v. State Personnel Commission*,¹⁰¹ the Wisconsin Army National Guard involuntarily transferred Hazelton to standby reserve after he tested positive for HIV.¹⁰² Hazelton had served for 27 years, and this action prevented him from eligibility for retirement benefits.¹⁰³ Hazelton brought a claim under the WFEA for discrimination based on sexual orientation and handicap. The court did not reach the merits of his claim, however, because it found that the federal policy that the Wisconsin Army National Guard was enforcing against Hazelton preempted the WFEA.¹⁰⁴

D. Hate Crimes

⁹⁵ WIS. STAT. § 103.15 (1985).

⁹⁶ *Racine*, 476 N.W.2d at 707.

⁹⁷ *Racine*, 476 N.W.2d at 712.

⁹⁸ *Racine*, 476 N.W.2d at 718.

⁹⁹ *Racine*, 476 N.W.2d at 719.

¹⁰⁰ *Racine*, 476 N.W.2d at 722-723.

¹⁰¹ *Hazelton*, 505 N.W.2d at 793.

¹⁰² *Hazelton*, 505 N.W.2d at 795.

¹⁰³ *Hazelton*, 505 N.W.2d at 795.

¹⁰⁴ *Hazelton*, 505 N.W.2d at 798.

Wisconsin's hate crimes law covers sexual orientation, but it does not extend to gender identity.¹⁰⁵ One recent case involved a gay University of Wisconsin-Platteville student who had been verbally and physically assaulted by two men because of his sexual orientation.¹⁰⁶ The case recently became the first anti-gay case to settle that was brought under the civil provision in the hate crime law.¹⁰⁷ The terms of the settlement are undisclosed

E. Education

In 1985, Wisconsin passed a law that protects its students from being denied admission to any public school or participation in any curricular, extra-curricular, pupil services or recreational activity because of their sexual orientation among other factors.¹⁰⁸ In 1990, Wisconsin passed a law that prohibits sexual orientation discrimination in the

In *Nabozny v. Podlesny*,¹⁰⁹ a public school student in Ashland, Wisconsin was subjected to repeated harassment and physical abuse because he was gay.¹¹⁰ The teachers' and administrators' complete failure to respond to the abuse, despite repeated warnings and attempts to obtain their assistance, resulted in the student's successful § 1983 action brought on equal protection grounds.¹¹¹ The court found that the student introduced sufficient evidence to show that the school officials' discriminatory behavior was motivated by his homosexuality.¹¹² The evidence included a statement by one school official that the student should expect to be harassed because he is gay. The court reached the merits of the equal protection claim and found that there was no "rational basis for permitting one student to assault another based on the victim's sexual orientation."¹¹³

F. Health Care

An adult may designate his or her same-sex partner to have the authority to make medical decisions on his or her behalf through the state's power of attorney for healthcare law.¹¹⁴ Adults can also designate their same-sex partners as approved visitors at a hospital or healthcare facility under Wisconsin's patient visitation law.¹¹⁵

¹⁰⁵ WIS. STAT. § 939.645.

¹⁰⁶ See *supra* note 10.

¹⁰⁷ See Press Release, Lambda Legal, Lambda Legal Reaches Settlement on Behalf of University of Wisconsin Student Who Suffered Violent Anti-Gay Attack (Mar. 24, 2008), *available at* <http://bit.ly/141nlh>.

¹⁰⁸ WIS. STAT. § 118.13 (1985).

¹⁰⁹ 92 F.3d 446 (7th Cir. 1996).

¹¹⁰ *Nabozny*, 92 F.3d at 451-452.

¹¹¹ *Nabozny*, 92 F.3d at 460.

¹¹² *Nabozny*, 92 F.3d at 457.

¹¹³ *Nabozny*, 92 F.3d at 458.

¹¹⁴ WIS. STAT. § 155.10

¹¹⁵ WIS. STAT. § 146.95.

G. Parenting

Wisconsin courts do not typically consider the sexual orientation of a petitioner for custody of a child. A court must determine the best interest of the child, and the statute provides numerous factors to guide the court in making its decision.¹¹⁶ The petitioner's sexual orientation is not one of the factors. In *Dinges v. Montgomery*,¹¹⁷ the court gave no weight to the homosexuality of a parent because there was no evidence that it was harmful to the child.¹¹⁸

Wisconsin courts will allow a former same-sex partner to petition for visitation where there is no biological or legal relationship to the child. In *In re H.S.H.K.*,¹¹⁹ the Wisconsin Supreme Court held that a court can award visitation to anyone with a parent-like relationship to the child so long as it is in the best interest of the child.¹²⁰ The court also identified the elements necessary to have a parent-like relationship in Wisconsin.¹²¹ The court held that a former same-sex partner could petition for visitation even though the state visitation statute was originally intended for dissolution of marriage cases.¹²² The court determined that the legislature did not intend for the statute to be the exclusive means for the court to order visitation, and the court discussed the history of the Wisconsin courts' power to grant visitation.¹²³ The court held that a "circuit court has equitable power to hear a petition for visitation when it determines that the petitioner has a parent-child like relationship and a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."¹²⁴

Any unmarried adult can adopt a child under Wisconsin law.¹²⁵ It is unclear if a same-sex couple could jointly petition to adopt, but the Wisconsin Supreme Court did rule, in *In re Angel*,¹²⁶ that a same-sex partner cannot petition to adopt the adopted child of his or her partner. Because the statute only allows adoption of minors whose parents' parental rights have been terminated, the court ruled that the parental rights of both parents must be terminated before a minor is eligible for adoption.¹²⁷ This means that if one same-sex partner has adoptive rights, then his or her parental rights would have to be terminated before his or her partner could adopt the minor. This case suggests that petitions for adoption are not jointly available to unmarried couples.

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

¹¹⁶ WIS. STAT. § 767.41(5).

¹¹⁷ 1993 WL 388288 (Wis. Ct. App. 1993).

¹¹⁸ *Dinges*, 1993 WL 388288 at *3.

¹¹⁹ 533 N.W.2d 419 (Wis. 1995).

¹²⁰ *In re H.S.H.K.*, 533 N.W.2d at 421.

¹²¹ *In re H.S.H.K.*, 533 N.W.2d at 421.

¹²² *In re H.S.H.K.*, 533 N.W.2d at 424-425.

¹²³ *In re H.S.H.K.*, 533 N.W.2d at 430-434.

¹²⁴ *In re H.S.H.K.*, 533 N.W.2d at 435.

¹²⁵ WIS. STAT. § 48.82(1)(b).

¹²⁶ 516 N.W.2d 678, 680 (Wis. 1994).

¹²⁷ *In re Angel*, 516 N.W.2d at 683.

In November 2006, Wisconsin voters approved a constitutional amendment banning same-sex marriage.¹²⁸ The amendment further states that “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”¹²⁹ Accordingly, Wisconsin does not recognize same-sex marriages or civil unions undertaken in other states.¹³⁰

Wisconsin passed a domestic partnership law that was signed by the Governor on June 29, 2009 and went into effect on August 3, 2009.¹³¹ The newly created domestic partnership status confers limited legal protections, including inheritance and survivor protections, family and medical leave, immunity from testifying akin to spousal immunity, and medical, hospital, and visitation rights. According to the May 6, 2009 opinion from the Wisconsin Legislative Council, domestic partnerships provide couples with only 43 legal protections while marriage provides over 200. As such, it concluded that the domestic partnerships “do not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s.13.” Nevertheless, a conservative group called “Wisconsin Family Action” filed a petition with the Wisconsin Supreme Court challenging the domestic partnership status as being “substantially similar to that of marriage.” The Wisconsin Supreme Court has not yet ruled on whether it will hear the challenge.

2. Benefits for State Employees

In 1992, in *Phillips v. Wisconsin Personnel Commission*,¹³² a state employee brought an action against the Department of Health and Social Services claiming discrimination based on sexual orientation and marital status under the WFEA because her partner was being denied health benefits that the spouses of married employees received. The court dismissed her complaint while noting that the basis of her complaint was really a challenge to the state’s marriage laws rather than a claim of sexual orientation employment discrimination.¹³³

Part of that same bill passed in 2009 to provide for domestic partnerships also amends the state budget to grant such domestic partnership benefits to state employees.¹³⁴

¹²⁸ WIS. CONST. Art. XIII, § 13; *see also* Turner, *supra* note 1 at 91.

¹²⁹ WIS. CONST. Art. XIII, § 13.

¹³⁰ WIS. STAT. § 765.04(1).

¹³¹ Assem. B. 75 (Wis. 2009).

¹³² 482 N.W.2d 121 (Wis. Ct. App. 1992).

¹³³ *Phillips*, 482 N.W.2d at 221-222; non-exhaustive research of electronic sources found no appeals of this decision.

¹³⁴ Assem. B. 75 (Wis. 2009).