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

Title

Administrative Complaints on the Basis of Sexual Orientation and Gender Identity

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Chapter 12: Administrative Complaints on the Basis of Sexual Orientation and Gender Identity

Employment discrimination complaints filed with state and local administrative agencies and non-governmental organizations (NGOs) also document a widespread and persistent pattern of sexual orientation and gender identity discrimination against LGBT state and local employees.

This chapter proceeds in five parts. The first part reviews academic scholarship analyzing the number and scope of administrative complaints that have been filed based on allegations of sexual orientation or gender identity discrimination. The second part presents original research by the Williams Institute conducted during 2008 and 2009 updating these studies. The Williams Institute study is based on administrative complaints filed by state and local employees alleging sexual orientation and gender identity discrimination from 18 states (Arizona, California, Connecticut, Florida, Georgia, Kentucky, Maine, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Pennsylvania, Vermont, Washington, and Wisconsin). The third part provides additional research by the Williams Institute, which compares sexual orientation, race, and sex discrimination administrative complaints, and finds that the filing rates are comparable when the underlying populations are taken into account. The fourth part discusses additional academic research that indicates that the number of administrative complaints is almost certainly lower than the rate of actual employment discrimination experienced by LGBT people. The final part presents additional new research by the Williams Institute conducted during 2009 reporting the nature and

number of complaints lodged with NGOs that provide legal representation to the LGBT community.

Key findings of this chapter include:

- A 1996 academic study gathered 809 sexual orientation discrimination complaints filed with state administrative agencies for 11 states, and 67 complaints filed with 22 local agencies. Although there are few data about the outcomes of these complaints, and many were still pending at the time of the study, more than 55 complaints filed were settled or received an administrative disposition favorable to the complainant. Though the focus of the research was to assess discrimination against state and local government employees, and many of the local laws only covered public employees, in some instances, it appears that the researchers were unable to obtain data from the agencies that separated out complaints filed by private sector employees.
- A 2002 United States Government Accountability Office (GAO) study reported 4,788 administrative complaints from 1993-2001 alleging sexual orientation discrimination from twelve states; however, the study did not distinguish complaints by public and private employees.
- A 2009 Williams Institute study found 430 complaints of sexual orientation and gender identity discrimination by state and local employees filed with state administrative agencies in eleven states from 1999-2007. Although not every state provided a breakdown between state

and local employees, at least 265 of these complaints were filed by state employees.

- For four of the five states that provided information about the dispositions for the claims by state employees, the rates of settlement or findings of probable cause averaged 30%. For the fifth state, California , 61% of complainants (of those where a disposition was provided) sought an immediate right to sue letter, which often indicates that the complainant has already found an attorney to take his or her case.
- An additional 23 cities and counties (from eleven different states), which prohibit sexual orientation and gender identity discrimination for local government employees, provided data about 147 complaints. For those complaints where the agency had already reached a known disposition (136), 21% had reached a favorable disposition ranging from a finding of probable cause to settlements and recovery of damages after litigation. An additional 2% of claimants sought an immediate right to sue letter and/or withdrew the complaint to litigate in court.
- Two recent studies by the Williams Institute demonstrate that when adjusted for population, the rate of complaints filed with state administrative agencies alleging sexual orientation discrimination in employment is comparable to the rate of complaints filed on the basis of race or sex: 5 per 10,000 workers for both sex and sexual orientation discrimination complaints and 7 per 10,000 workers for race discrimination complaints.

- Scholarship shows that the number of administrative filings most likely significantly under-represents the frequency of employment discrimination experienced by LGBT state and local workers. First, research shows that many LGBT workers are unlikely to file such complaints because they fear retaliation and wish to avoid “outing” themselves further to their workplace and community. Further, a study of employment law attorneys found that many sexual orientation discrimination claims never result in an administrative filing because they are settled via letters and negotiation before a filing is necessary.
- In addition, several academic studies demonstrate that state and local administrative agencies often lack the resources, knowledge, enforcement mechanisms and willingness to accept sexual orientation discrimination complaints.
 - For example, of the 122 city and county agencies that responded to the 2009 Williams Institute study, two incorrectly referred such complainants to the United States Equal Employment Opportunity Commission even though no federal law prohibits sexual orientation discrimination, one incorrectly said the city did not prohibit such discrimination, one incorrectly said there was no administrative enforcement mechanism for such complaints, five said they did not have the resources to enforce such claims and referred callers to their state administrative agency, and three said they lacked the resources to provide data requested by the

Williams Institute. Perhaps indicative of their ability to respond to individual complaints, another 81 city and county agencies never responded to phone calls, e-mails, letters, and formal requests for information by the Williams Institute.

- Similarly, of the 21 states that prohibit sexual orientation or gender identity discrimination, administrative enforcement agencies in only 11 of these states were able to provide a breakdown of public versus private complaints and only six were able to provide redacted copies of such complaints, often indicating a lack of resources and staff (See Chapter 16 for a full discussion).
- Four legal organizations serving the LGBT community reported a total of 104 contacts from public sector employees seeking advice regarding an incident of sexual orientation or gender identity discrimination in the workplace, including: 48 calls to Gay & Lesbian Advocates and Defenders (GLAD) from 2000-2009, 11 calls to Lambda Legal from 2007-2008, 33 calls to the National Center for Lesbian Rights from 2001-2009, and 12 calls to the American Civil Liberties Union (ACLU) from 2007-2008.

A. Prior Scholarship Analyzing Complaints of Discrimination Filed by State and Local Government Employees

The first comprehensive study of discrimination against lesbian and gay public sector employees was published in 1996 by researchers Norma M. Riccucci and Charles W. Gossett.¹ As part of their research, Riccucci and Gossett contacted state and local

¹ Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, 26 AMERICAN REVIEW OF PUBLIC ADMINISTRATION 175 (1996).

agencies in charge of enforcing anti-discrimination statutes, ordinances, and executive orders in order to determine both the rate at which complaints were being filed by lesbian and gay government employees and the effectiveness of state and local enforcement mechanisms. Though the focus of the research was to assess discrimination against state and local government employees, and many of the local laws only covered public employees, in some instances, it appears that the researchers were unable to obtain data from the agencies that separated out complaints filed by private sector employees.

Tables 12-A & 12-B below reproduce their findings. Table 12-A shows the number of complaints filed in the seven states which then had statutory coverage and the two states with executive orders. Table 12-B shows the number of complaints identified by Riccucci and Gossett as having been filed with local agencies.

Both tables also contain information regarding the disposition of complaints. In the course of contacting the agencies, Riccucci and Gossett observed that in some states, the enforcement of statutes or executive orders was “questionable.”² Riccucci and Gossett reported that “officials from Minnesota and Washington seemed baffled when [Riccucci and Gossett] asked about the enforcement aspect of their state’s anti-discrimination measure.”³ Gossett and Riccucci concluded from these and other responses that “the responsible officials did not anticipate the possibility of actual complaints being filed under these protections[. A]t a minimum, the new policies did not result in the normal implementation steps we expect of a state bureaucracy.”⁴

² *Id.* at 182.

³ *Id.*

⁴ *Id.*

Table 12-A

**Administrative Complaints Filed on the Basis of Sexual Orientation at the State Level
Adapted from Riccucci and Gossett Study, 1996**

	Period	Number	Disposition
CA (statute)	1993	159 ^a	34 withdrawn or abandoned 23 dismissed, no jurisdiction 10 conciliated settlements ^b 19 ruled in favor of employer
CT (statute)	1991 – 1993	43 ^a	N.A. ^c
HI (statute)	1991 – 1993	18	all cases pending
MN (statute)	1993 – 1996	N.A. ^c	enforcement in question ^d
NJ (statute)	1992 – 1996	25 ^a	3 successful conciliations 2 not concluded 9 no probable cause 3 withdrawn by complainant 1 administrative closure 6 complainant unavailable or uncooperative 1 sent to EEOC on other charges
OH (executive order)	1988 – 1992	5	2 withdrawn by complainant 1 no probable cause 1 conciliated settlement ^b 1 administrative closure
PA (executive order)	1988 – 1996	1	N.A. ^c
VT (statute)	1992 – 1996	0	
WI (statute)	1983 – 1991 1992 – 1993	426 ^a 132 ^a	N.A. ^c 18 no probable cause 23 conciliated settlements ^c 3 no jurisdiction 20 pending 10 withdrawn by complainant
Total		809	

^aIncludes public- and private-sector claims in employment and other arenas. Wisconsin includes teachers.

^bResults of conciliation unknown.

^cNot available or provided by state. Where applicable, FOIA request made.

^dNo state official able to answer questions regarding how measure is enforced.

Table 12-B

Administrative Complaints Filed on the Basis of Sexual Orientation by City and County Employees against Local Governments Adapted from Riccucci and Gossett Study, 1996*

	Period	Number	Disposition
Cook County, IL	1993 – 1996	4	2 dismissed for lack of evidence 1 withdrawn by complainant 1 under investigation at time of request
Chicago, IL	1990 – 1996	1	1 under investigation at time of request
Urbana, IL	1988 – 1996	3	1 dismissed; lack of cooperation
Washington, DC	1977 – 1996	1	1 probable cause found for employee
Harrisburg, PA	1984 – 1996	2	2 withdrawn by complainant
Philadelphia, PA	1993 – 1996	5	Not available or not provided
Pittsburgh, PA	1990 – 1996	1	1 withdrawn by complainant
Boston, MA	1990 – 1996	6	1 withdrawn by complainant
Cambridge, MA	1990 – 1996	1	Not available or not provided
Albany, NY	1992 – 1996	1	1 no probable cause
Minneapolis, MN	1982 – 1993	2	2 no probable cause
Cincinnati, OH	1991 – 1993	1	1 successful conciliation
King County, WA	1991 – 1996	5	2 no probable cause 1 no jurisdiction 1 prefinding settlement 1 withdrawn with settlement
Seattle, WA	1985 – 1996	12	10 closed lack of evidence 1 successful conciliation 1 currently under investigation
Phoenix, AZ	1991 – 1996	5	1 successful conciliation 3 administrative closures
Berkeley, CA	1978 – 1996	1	1 no probable cause
Cupertino, CA	1975 – 1996	1	1 pending at time of request
Los Angeles, CA	1988 – 1993	5	Not available or not provided
Santa Barbara County, CA	1992 – 1993	2	2 successful conciliations
Santa Cruz County, CA	1993 – 1994	2	1 no probable cause 1 pending at time of request
Montgomery County, MO	1987 – 1996	1	1 no probable cause
Arlington County, VA	1992 – 1993	5	2 successful conciliation 3 no probable cause
Total		67	

* Data appears for only 22 cities and counties because the other 43 cities and countries that responded to the survey stated that they had received no complaints or grievances from city or county employees based on sexual orientation⁵

⁵ *Id.*

In 2002, sponsors of United States Senate Bill 1284 (the Employment Non-discrimination Act) asked GAO to collect data on employment discrimination complaints that had been filed on the basis of sexual orientation.⁶ At the time of the report, twelve states had enacted statutory protection for sexual orientation in employment. GAO collected data from each state agency responsible for handling the complaints. Though GAO did not separate complaints made by state employees from those made by private or other public sector employees, the figures show a general record of discrimination against LGBT employees spanning periods of up to 11 years. The data obtained appear in Table 12-C.

Table 12-C

Administrative Complaints Filed with State Enforcement Agencies for Employment Discrimination on the Basis of Sexual Orientation Adapted from General Accounting Office Sexual Orientation-Based Employment Discrimination Report, 2002

	Period	Number^a
CA	1993 – 2001	2042
CT	1993 – 2001	295
HI	1992 – 2001	98
MA	1990 – 2001	1420 ^b
MN	1995 – 2001	206
NV	2000 – 2001	37
NH	1998 – 2001	26
NJ	1992 – 2001	233
RI	1996 – 2001	41
VT	1993 – 2001	39 ^c
WI	1996 – 2001	351
Total		4788

^a Generally, a complainant can allege other bases—sex, race, or religion, for example—in a complaint that also alleges employment discrimination on the basis of sexual orientation. In this table, a case is counted as a sexual orientation case whether or not other bases are also alleged in the same complaint.

^b Massachusetts provided data for all discrimination complaints filed and the number of sexual orientation complaints filed. The state does not keep separate records on the number of employment discrimination complaints, although the state told [GAO] that typically around 85 percent of all discrimination complaints are employment discrimination complaints.

^c The number listed for sexual orientation discrimination complaints include only those complaints where sexual orientation is listed as the only or the primary basis for complaint. The numbers do not include complaints where sexual orientation is listed as a secondary basis for complaint.

⁶ U.S. GEN. ACCOUNTING OFFICE, SEXUAL ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES' EXPERIENCE WITH STATUTORY PROHIBITION, GAO-02-878R (July 9, 2002).

**B. Updated Research on Complaints of Discrimination Filed by State
and Local Government Employees by the Williams Institute**

Updating the Riccucci and Gossett data described above, in 2008-2009, the Williams Institute contacted state and local agencies responsible for enforcing an anti-discrimination statute or ordinance to gather more recent data on employment discrimination against LGBT employees in the public sector. The Williams Institute contacted the agencies responsible for enforcing anti-discrimination statutes in 20 of the 21 states which currently offer statutory protection for sexual orientation and/or gender identity. An exception was made for Delaware because its statutory protection had not gone into effect at the time the study was conducted. The Williams Institute also contacted approximately 203 city and county agencies in localities with anti-discrimination ordinances prohibiting sexual orientation and/or gender identity discrimination in employment. The inquiries were made over a period of approximately ten months, from September, 2008 through June, 2009.

Upon contact with state and local agencies by phone, the agency was asked for the number of employment discrimination complaints filed on the basis of sexual orientation and/or gender identity by state or local government employees for each year since protection went into effect or, alternatively, as far back as the agency had a record. If the agency provided the data, the agency was asked if it would release redacted copies of the actual complaints filed and/or a record of case dispositions. If the agency refused to provide the data, the reason for refusal was logged. If the agency did not follow through on a request that was made by phone or failed to return a voicemail message, approximately four follow up contacts were made, either via phone calls, e-mails, or

written inquiries. If the agency had not produced the data after these additional contacts, a formal public records request was sent to the agency. If the agency refused to provide data in response to the public records request, the reason for refusal was logged.

The results of the Williams Institute study are shown in the following tables. Because many agencies maintain records only for a fixed period of years, many of the statistics reported below do not include the complaints listed in the Riccucci and Gossett table above, though there is some overlap.

State agency responses appear in Tables 12-D-12-F, which show the number of employment discrimination complaints filed with state agencies on the basis of sexual orientation and/or gender identity against the state as employer and the dispositions of these cases, where available. Of the 20 states contacted, 11 provided responses. Responses and inaction of state agencies that refused to provide data appear in Table 12-G.

Four hundred and thirty complaints of sexual orientation and gender identity discrimination by state and local employees were filed with administrative agencies in these eleven states from 1999-2007 (Table 12-D). Although not every state provided a break down between state and local employees, at least 265 of these complaints were by state employees (Table 12-E).

Although only 5 of these states provided information about the disposition of these complaints for a limited number of years and for only some of the claims within those years (See Table 12-F), at least 10 of the complaints by state employees for sexual orientation and gender identity discrimination were either settled and/or received a favorable administrative disposition. Many complainants with strong claims would seek

an immediate right to sue letter from the administrative agency, and these are not included in this number. For example of the 42 state discrimination claims between 2005-2007 with dispositions submitted by that the California Department of Fair Employment and Housing, 61% of complainants requested an immediate right to sue letter. A request for an immediate right to sue letter often means that the complainant has an attorney willing to take his or her case. For the four other states that provided dispositions for the claims by state employees, New Mexico, New York, Oregon, and Washington, the rates of settlement or findings of probable cause ranged from 13% to 50%, with an average of 30% of the state claims where a disposition was provided .

Tables 12-H and 12-I show the number of employment discrimination complaints filed with city and county agencies on the basis of sexual orientation and/or gender identity against the city or county as employer and the dispositions of these cases, where available. Of the 203 local agencies contacted, 86 cities and counties responded and 23 reported that they had received complaints on the basis of sexual orientation and/or gender identity from public sector employees. Several large metropolitan agencies failed to respond, including those in New York City, San Francisco, and Chicago. Table 12-J details responses given by local agencies that responded but declined to provide the number of complaints.

The 23 cities and counties that had received complaints of sexual orientation and gender identity discrimination reported 147 complaints. For those complaints where the agency had already reached a known disposition (136), 21% had reached a favorable disposition ranging from findings of probable cause by the administrative agency to settlements and the recovery of damages by the complainant after litigation. Another 2%

sought an immediate right to sue letter or withdrew the complaint to litigate the claim in court.

Table 12-D

Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by Public Sector Employees against State and Local Governments Combined

	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total
CA	+	16 ^x	22 ^x	23 ^x	27 ^x	24 ^x	22 ^x	26 ^x	23 ^x	183
ME	*	*	*	*	*	*	0	5	7	12
MN	4	5	2	4	8	3	4	0	2	32
NJ	2	1	1	2	1	1	4	5	1	18
NM	*	*	*	*	4	7	8	8	4	31
NY	*	*	*	*	18	24	21	26	10 ^x	99
OR	*	*	*	*	*	*	*	*	2	2
RI	0	1	0	0	0	0	2	2	0	5
VT	+	+	+	1	2	2	0	3	2	10
WA	*	*	*	*	*	*	*	3	4	7
WI	+	+	+	3	11	3	5	5	4	31
Total	6	23	25	33	71	64	66	83	59	430

- * No statutory protection in the given year
- + Data not available
- x State complaints only

Table 12-E

Breakdown of Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by Public Sector Employees against State and Local Governments

	1999	2000	2001	2002	2003	2004	2005	2006	2007
	State Local	State Local	State Local	State Local	State Local	State Local	State Local	State Local	State Local
CA	+ +	16 +	22 +	23 +	27 +	24 +	22 +	26 +	23 +
ME	* *	* *	* *	* *	* *	* *	0 *	2 3	2 5
MN	2 2	1 4	0 2	1 3	3 5	1 2	0 4	0 0	1 1
NJ	2 0	0 1	0 1	0 2	1 0	0 1	2 2	2 3	0 1
NM	* *	* *	* *	* *	1 3	3 4	4 4	5 3	1 3
NY	* *	* *	* *	* *	2 16	5 19	5 16	2 24	10 +
OR	* *	* *	* *	* *	* *	* *	* *	* *	1 1
VT	+ +	+ +	+ +	1 +	2 +	2 0	0 0	2 1	0 2
WA	* *	* *	* *	* *	* *	* *	* *	1 2	2 2
WI	+ +	+ +	+ +	1 2	5 6	1 2	2 3	3 2	2 2

- * No statutory protection in the given year
- + Data not available

Table 12-F

Dispositions of Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by State Employees against State Governments

	Period	Settlement	No Probable Cause or Other Dismissal	Probable Cause	Other Administrative*	Unavailable
CA	2005 – 2007	0	14	0	28*	29
NM	2003 – 2007	3	8	1	1	1
NY	2003 – 2007	2	12	0	1	9
OR	2007	1	0	0	1	0
WI	2002 – 2007	2	6	1	3	2

* Cases closed in absence of a merit decision, settlement, or other defined category

* Includes 26 requests for immediate Right-to-Sue

Table 12-G

Responses and Inaction of State Enforcement Agencies that Did Not Provide Data

	State Employee Response
CO	At time of request, protection too recently enacted to have compiled and maintained data in a way that made release feasible
CT	Limited data provided.
HI	Refused to provide data because of confidentiality requirement in anti-discrimination law (Haw. Rev. Stat. § 368-4)
IL	Unable to provide because Commission does not create or maintain the information requested
IA	Information cannot be generated
MD	Legal Department would not provide the information because it would require them to look up every case. When caller asked if there was a formal request procedure, Legal Department told caller to write a letter to the Executive Director. Executive Director did not respond to the request
MA	No response
NV	Information not available
NH	No response

Table 12-H

Administrative Complaints Filed with Local Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by City Employees against City Governments

	Period*	Number	Basis	Disposition
Tucson, AZ	2004 – 2009	1	1 sexual orientation	1 withdrawn by complainant
Berkeley, CA	2004 – 2009	4	4 sexual orientation	3 discrimination found 1 unsubstantiated
Los Angeles, CA	1999 – 2009	9*	9 sexual orientation	Not available
San Jose, CA	2006 – 2009	9	9 sexual orientation	7 unsubstantiated 2 substantiated
Hartford, CT	2002 – 2009	1	1 sexual orientation	1 currently under review
Gainesville, FL	Not available	1	1 sexual orientation	1 pending
Tampa, FL	1995 – 2009	1	1 sexual orientation	1 no reasonable cause
Atlanta, GA	2002 – 2009	12	12 sexual orientation	12 no probable cause
Louisville, KY	Not available	1	1 sexual orientation	1 unsubstantiated
Cincinnati, OH	Not available	3	3 sexual orientation	1 sustained 1 not sustained ^o 1 offender disciplined and moved to resolve
Columbus, OH	Not available	2	2 sexual orientation	2 no probable cause
Portland, OR	2000 – 2009	7	6 sexual orientation 1 gender identity	3 unsubstantiated 3 substantiated 1 withdrawn
Providence, RI	2005 – 2008	5	5 sexual orientation	3 no probable cause 2 probable cause
Harrisburg, PA	Not available	5	5 sexual orientation	2 withdrawn 1 no probable cause 1 administrative closure 1 unknown closure
Philadelphia, PA	1982 – 2009	40	35 sexual orientation 5 gender identity	5 substantiated 1 settlement 13 unsubstantiated 3 withdrawn 2 right to sue 8 other administrative closure 1 unknown 7 open cases
Pittsburgh, PA	1990 – 2009	6	6 sexual orientation	2 withdrawal of complaint 2 withdrawal with benefits 2 no probable cause
Seattle, WA	2000 – 2009	3	3 sexual orientation	2 withdrawal without benefits 1 no cause
Spokane, WA	Not available	2	1 sexual orientation	1 no discrimination
Tacoma, WA	Not available	1	1 sexual orientation	1 no probable cause
Total		123		

* “2009” means approximately May 1, 2009—date on which data requests were made

* There may also have been complaints of gender identity discrimination filed, however these are coded as sex discrimination and the number cannot be ascertained from the record kept by City of Los Angeles

^o Though the complaints was not sustained in the city administrative process, the employee filed a complaint in court and prevailed

Table 12-I

Administrative Complaints Filed with Local Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by County Employees against County Governments

	Period*	Number	Basis	Disposition
Santa Cruz County, CA	Not available	1	1 sexual orientation	1 withdrawn and filed in court where complainant recovered monetary damages
Miami-Dade County, FL	2003 – 2009	3	3 sexual orientation	2 settled 1 no probable cause
Pinellas County, FL	Not available	1	1 sexual orientation	1 resolved through mediation
King County, WA	1987 – 2009	19	19 sexual orientation	10 no reasonable cause 2 administrative closure (filed in court) 1 withdrawn to litigate 1 withdrawn with settlement 2 prefinding settlement 2 no jurisdiction 1 administrative closure (failure to cooperate)
Total		24		

* “2009” means approximately May 1, 2009—date on which data requests were made

Table 12-J

Responses Given by City & County Agencies that Refused to Provide Data

	City or County Employee Response
San Diego, CA	Information requested is confidential
Breckenridge, CO	Human Resources employee “not at liberty to discuss” the number of filings based on sexual orientation, but if there were complaints, the Colorado Civil Rights Commission would handle them rather than the city
Lake Worth, FL	Due to lack of City resources, City will not compile data
Indianapolis, IN	EEOC handles complaints by City employees against the city
Cedar Rapids, IA	Complaints against the city are referred to the Iowa Civil Rights Commission
Davenport, IA	Complaints against the city are referred to the Iowa Civil Rights Commission
Portland, ME	No established body to oversee administrative process so only civil action enforcement is available
Prince Georges County, MD	Information requested is confidential
Amherst, MA	Due to budget constraints, City will not compile the data
Boston, MA	City lacks resources to handle the complaints so they are referred to the Massachusetts Commission Against Discrimination
Kansas City, MO	EEOC handles complaints by City employees against the city
Albany County, NY	Records cannot be sorted as requested
Salt Lake City, UT	Caller was referred to the Utah Antidiscrimination & Labor Division. Director of UALD told caller that there was no protection for sexual orientation in employment at any level within the state. Director maintained this position even after caller mentioned Salt Lake City ordinance prohibiting discrimination based on sexual orientation in city employment—City Code ch. 2, art. 53 § 35

C. Comparisons of Per Capita Rates of Sexual Orientation, Race, and Sex, Discrimination State Administrative Complainants

Two recent studies by the Williams Institute demonstrate that when the complaint rate is adjusted for population, the rate of complaints filed alleging sexual orientation discrimination in employment is nearly as high as the rate of complaints filed on the basis of sex or race.

In 2001, William B. Rubenstein conducted the third empirical assessment of employment discrimination complaints filed on the basis of sexual orientation.⁷ Unlike the prior two, however, Rubenstein's study included comparisons to the number of state agency complaints that alleged race and sex discrimination. To study relative rates, Rubenstein placed the actual number of filed sexual orientation complaints in the context of the total number of gay and lesbian people in the workforce. He then used the same procedure to obtain the prevalence of complaint filing by women and people of color on the bases of sex and race. Finally, he compared the population-adjusted complaint rate for gay and lesbian people with the population-adjusted complaint rates for women and people of color. He found that in six of ten surveyed states, the incidence of sexual orientation filings fell between the incidence of sex and race discrimination filings. In two other states, the prevalence of sexual orientation filings exceeded that of both race and sex and only in two states did sexual orientation filings fall below race and sex filings.

Rubenstein drew the following conclusions from his data:

⁷ William B. Rubenstein, *Do Gay Rights Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 65-68 (2001).

- When considered in the context of the number of gay people in the workforce, gay rights laws are used with greater frequency than the raw numbers imply; and,
- the utilization of gays rights laws, per gay worker, is roughly equivalent to, if not slightly higher than, the utilization of sex discrimination laws by female workers.

In 2008, the Williams Institute replicated Rubenstein's 2001 study and reached the same conclusions, although the number of states prohibiting sexual orientation discrimination had grown significantly.⁸ The Williams Institute gathered data on complaint filings on the basis of race, sex, and sexual orientation in 16 of 20 states that statutorily prohibited sexual orientation discrimination in employment as of November, 2008 and Washington D.C. Using the same methodology as Rubenstein in 2001, the Williams Institute then adjusted the complaint rate for the workforce population of each marginalized group, specifically people of color, women, and gay, lesbian, or bisexual people. When the Williams Institute compared the adjusted rates for the protected classes, it found the following:

- On the national level, of those states with available data, the adjusted rate for both sex and sexual orientation complaint filings is 5 per 10,000 workers; the adjusted rate for race complaint filings is higher at 7 per 10,000.
- The adjusted rate for sexual orientation discrimination is higher than the adjusted rate for sex discrimination in eight of the seventeen states⁹ surveyed.

⁸ Christopher Ramos, M.V. Lee Badgett, & Brad Sears, the Williams Institute, *Evidence of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity* (Nov. 2008), available at <http://www.law.ucla.edu/williamsinstitute/pdf/PACR.pdf>.

⁹ Includes Washington D.C.

- The adjusted rate for sexual orientation is higher than the adjusted rate for race discrimination in three of the seventeen states surveyed.

The Williams Institute study and the Rubenstein study demonstrate that sexual orientation laws are utilized at frequencies comparable to those protecting race and sex while also demonstrating that, because of the relatively small size of the national LGBT population, there is no threat of sexual orientation and gender identity protection engendering an overwhelming number of administrative and civil complaints.

D. Academic Research Indicates That The Extent of Discrimination Against LGBT Employees Greatly Exceeds the Number of Administrative Complaints Filed

It is well established in academic literature that the pervasiveness of employment discrimination based on sexual orientation and/or gender identity is understated by the number of administrative complaints. The scholarly publications that have addressed this issue specifically have identified a variety of factors, mostly related to the nature of the discrimination or to the capacity of often under-funded state or local agencies, which put the raw numbers in perspective.

In 2000, Roddrick A. Colvin published an analysis of state non-discrimination laws prohibiting sexual orientation and/or gender identity discrimination and identified reasons for the disparity between the number of complaints filed with administrative agencies and the pervasiveness of discrimination.¹⁰ Colvin found a smaller than expected number of claims had been filed on the basis of sexual orientation or gender identity discrimination, given the extent of discrimination reported in surveys. Colvin concluded that the discrepancy was due to design flaws in the laws which inhibited full implementation. Colvin found that state laws were lacking sufficient accountability measures, including active support from constituents and policy makers, explicit commissions or advisory boards to oversee implementation of the policy, and committed and skillful enforcement staff. The implementation barriers that arise from these deficiencies include the inability to make employees aware of their legal rights, poor enforcement mechanisms, and a fear of retaliation experienced by potential claimants.

¹⁰ Roddrick A. Colvin, *Improving State Policies Prohibiting Public Employment Discrimination Based on Sexual Orientation*, 20 REVIEW OF PUBLIC PERSONNEL ADMINISTRATION 5 (2000).

Factors very similar to those reported by Colvin were documented in academic literature describing the role of agencies enforcing state and local civil rights laws prior to enactment of the Civil Rights Act of 1964. Just prior to passage of the federal law, 25 states had enacted statutes prohibiting race discrimination in employment,¹¹ closely tracking in number the 21 states today with statutes prohibiting sexual orientation discrimination. Blumrosen found that the state agencies charged with the enforcement of these laws had restricted budgets and hesitant administrators.¹² Another scholar reported wide variations and significant deficiencies in the state laws of that period, although he concluded that the New York statute was sufficiently successful to serve as a model for the Congress to follow in 1964.¹³

The 2009 Williams Institute study further supports the findings of this research. Of the 36 city and county agencies that responded to the 2009 Williams Institute study, two incorrectly referred such complainants to the EEOC even though there is no federal law prohibiting sexual orientation discrimination, one incorrectly said the city did not prohibit such discrimination, one said there was no administrative enforcement mechanism for such complaints and callers had to file in court, five said they did not have the resources to enforce such claims and referred callers to their state administrative agency, and three said they lacked the resources to compile the requested data. Another 136 city and county agencies, two-thirds of those contacted, never responded in any manner to repeated phone calls, e-mails, letters, and formal requests for information by the Williams Institute.

¹¹ BNA Incorporated, *STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION* 1 (1964).

¹² Alfred W. Blumrosen, *BLACK EMPLOYMENT AND THE LAW* 14 (1971).

¹³ Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Laws*, 52 *IOWA L. REV.* 1043, 1073-78, 1083 (1967).

In 2002, Roddrick A. Colvin and Norma M. Riccucci published a study in which they assessed the effectiveness of non-discrimination policies that protect sexual orientation or gender identity by surveying employment attorneys who had personally handled such cases.¹⁴ The attorneys reported that in all situations but one, the claims were settled before going to court, and in most situations were settled via letters and negotiation. These findings demonstrate that one reason for the discrepancy between the incidence of discrimination and the number of complaints is that matters are often resolved before formal legal procedures become necessary.

Survey data corroborate the existence of under-reporting. The Minnesota State Bar Association Survey found that 67% of employees who had experienced employment discrimination or harassment based on their sexual orientation or gender identity did not report the incident.¹⁵ Among the reasons proffered for not reporting were that the employee feared retaliation and that the employee had hidden his or her sexual orientation from a supervisor and did not want to be forced “out” because he or she had been the victim of discrimination. Further, a Report of the NEA Task Force on Sexual Orientation found that “the very nature of the problem ensures that many cases of discrimination go unreported”—revealing that many education professionals do not report discrimination because they fear further adverse employment action if they do so or are reluctant to publicly “out” themselves.¹⁶ Transgender respondents to the Good

¹⁴ Roddrick A. Colvin & Norma M. Riccucci, *Employment Nondiscrimination Policies: Assessing Implementation and Measuring Effectiveness*, 25 INT’L. J. OF PUBLIC ADMIN. 95 (2002).

¹⁵ TASK FORCE ON DIVERSITY IN THE PROFESSION, MINNESOTA STATE BAR ASSOCIATION, 2005 SELF-AUDIT FOR GENDER AND MINORITY EQUITY: A RESEARCH STUDY OF MINNESOTA LAW FIRMS, NON-FIRM EMPLOYERS AND INDIVIDUAL LAWYERS (Sept. 2006), *available at* <http://www.ncbp.org/2009/Handouts-2-09/1B/2005%20Self-Audit%20for%20Gender%20and%20Minority%20Equity%20Report.pdf>.

¹⁶ NATIONAL EDUCATION ASSOCIATION, REPORT OF THE NEA TASK FORCE ON SEXUAL ORIENTATION (Feb. 8, 2009) *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/225-1.pdf (reprinted by GLSEN with permission from the NEA).

Jobs NOW! survey disclosed similar rates of non-reporting with only 12% of those discriminated against filing a complaint of any kind and only 3% having done so with an agency that had the authority to enforce non-discrimination law.¹⁷

E. Incidents Reported to NGO's Reinforce the Widespread and Continuing Nature of Discrimination Against LGBT Public Sector Employees

Because most states in the U.S. lack state-wide anti-discrimination protection and because many LGBT Americans are less reluctant to contact community organizations than government officials, the Williams Institute asked several NGO's operating in the LGBT community to furnish examples of incidents of discrimination recently reported to their "help lines" or through similar channels. The results obtained are not scientific studies, but the patterns demonstrated nonetheless provide compelling evidence that the discrimination faced by public sector LGBT employees continues today and exists throughout the nation.

The four organizations contacted by the Williams Institute reported a total of 104 contacts from public sector employees seeking advice regarding an incident of sexual orientation or gender identity discrimination in the workplace, including: 48 calls to Gay & Lesbian Advocates and Defenders (GLAD) from 2000-2009, 11 calls to Lambda Legal from 2007-2008, 33 calls to the National Center for Lesbian Rights from 2001-2009, and 12 calls to the American Civil Liberties Union (ACLU) from 2007-2008.

¹⁷ The San Francisco Bay Guardian & Transgender Law Center, *Good Jobs NOW! A Snapshot of the Economic Health of San Francisco's Transgender Communities* (2006), available at <http://www.transgenderlawcenter.org/pdf/Good%20Jobs%20NOW%20report.pdf>.

When contacting the organizations, several employees provided factual information about the discrimination and harassment they had experienced. The callers reported harsh, hostile, and unrelenting discrimination in their workplaces. A number of employees had developed anxiety and other stress-related medical conditions as a result of facing sexual orientation or gender identity discrimination at work. Several examples of the discrimination suffered by public sector employees follow.

- An employee of a Connecticut State maintenance department was repeatedly subjected to harassment from his co-workers because of his sexual orientation. On one occasion, his co-workers tied his hands and feet together and locked him in a workplace locker. At the time the call was made, he was attempting to have the incident handled internally.
- An employee of a Massachusetts trial court suddenly began to experience severe demotions and unfair treatment after her co-workers discovered that she had married her female partner. The court employee was demoted, suffered a pay cut, and had holiday pay wrongfully taken away from her. After she had been suspended for two weeks following a verifiable medical absence, her union steward told her that her supervisor was out to fire her.
- A fire department paramedic in Illinois reported a history of hostility at the fire station. One co-worker told him he “wished all fags would die of AIDS” and his fire chief advised him to “change the way [he] was” because “any other chief would find him unfit for duty,” suggesting that he was unqualified for the job because he was gay. The employee’s

bedding was removed from firehouse quarters and his car window was broken while it was parked in the fire station lot. Eventually, he began sleeping in the ambulance during his down time to avoid harassment from his chief and co-workers.

- An employee of the Georgia Division of Family and Children Services was forced to answer invasive personal questions during an institutional interview. The interview was the result of complaints by the employee's coworkers to her supervisor about working with her because she was a lesbian. During the four hour interview, supervisors asked her if she was a lesbian, with whom she lived, who looked after her children, and who her friends were. At the close of the interview, she was instructed not to tell anyone that the interview had occurred. She was suspended two weeks later for "alleged misconduct."
- An Arizona Department of Child Support Enforcement employee's work environment quickly turned hostile after she disclosed that she was a lesbian to co-workers. Several co-workers began to regularly refer to the employee as "faggot" and "dyke" and told her she smelled of "shit and piss." They circulated a rumor around the office that she had sexually transmitted diseases and was mentally ill. Eventually, the offending co-workers were transferred to a different department, but no disciplinary action was taken, and the harassment did not stop.

In 2001, the Human Rights Campaign published a report featuring personal stories of discrimination in workplaces across the county.¹⁸ The report contained 13 anecdotes from public sector employees. Among the examples were the following:

- A California Highway Patrol officer who suffered through five years of constant harassment from co-workers because he was gay.¹⁹ Anti-gay pornographic cartoons were taped to his mailbox. A ticket for “sex with dead animals” was left on his car windshield. He found urine on his clothes in his locker. When the harassment continued despite reprimands from supervisors, the officer decided that he had no choice but to resign.
- Another employee, a county corrections officer from New York, encountered daily harassment from his co-workers who called him offensive names and displayed graphic images portraying him as a pedophile and someone who practices bestiality.²⁰ The officer’s supervisors did not intervene, but rather watched and laughed while the harassment took place. Just before going on medical leave for post-traumatic stress disorder, he was attacked with a chair by a fellow corrections officer.
- A Nassau County police officer was subjected to a nine-year campaign of abuse after his sexual orientation was disclosed to fellow officers by an assistant district attorney who was arrested for public indecency.²¹ Other

¹⁸ 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>.

¹⁹ *Id.* at 40-41.

²⁰ *Id.* at 26.

²¹ *Id.* at 27.

officers hung pornographic pictures and doctored records around the station house, portraying the gay officer as a child molester. They hid his uniform, put rocks in his hubcaps, and once placed a nightstick—labeled as a sexual device—in his squad car. His complaints to supervisors were ignored. He was involuntarily transferred to a less desirable precinct. Even after the officer retired, the harassment did not stop and he was forced to relocate to upstate New York. In 1999, a New York District Court jury awarded the officer \$380,000 in a suit against the government entity for violation of his constitutional rights.

Conclusion

Published scholarship and recent research tracking the number of employment discrimination complaints filed on the basis of sexual orientation or gender identity with state and local enforcement agencies show a pattern of pervasive discrimination against LGBT employees in the public sector. Academics studying the filing rate of sexual orientation and gender identity employment discrimination complaints have concluded that the numbers do not represent the prevalence of discrimination for several reasons, including insufficient laws that lack effective implementation and accountability measures and the frequency of settlement before formal legal steps must be taken. Additionally, two studies reveal that when proper population controls are applied to the numbers, sexual orientation and gender identity employment discrimination complaints are filed more often than the raw numbers imply and, in fact, the filing rate is roughly equivalent to, and in some states higher than, that of sex discrimination complaints. Self-report survey data corroborates the existence of under-reporting. Finally, reports of

discrimination received by NGOs evidence discrimination against public sector employees; many of whom are employed by states and localities without prohibitions on discrimination and therefore are currently unable to file a formal complaint.