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

**Title**

North Dakota - Sexual Orientation and Gender Identity Law and Documentation of  
Discrimination

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## MEMORANDUM

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

### I. OVERVIEW

The North Dakota Human Rights Act (the “Act”) does not prohibit sexual discrimination on the basis of sexual orientation, gender identity or expression in the employment context. In 2009, the North Dakota Senate introduced and passed a bill that would have added these categories to the Act, but the bill was defeated in the North Dakota House of Representatives.

In 2003, two students in Kindred, North Dakota were verbally harassed by a school employee and other students due to their perceived homosexuality.<sup>1</sup> According to their complaint, the school principal failed to adequately investigate the matter and take their reports of harassment seriously. As a result, the former students filed a federal complaint, whereupon school officials then addressed their concerns.<sup>2</sup> The students stated that the purpose of their lawsuit was not financial gain; rather, they sought an admission of fault from school officials and an assurance that the same thing wouldn’t happen to other students in the future.<sup>3</sup> .

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

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<sup>1</sup> Testimony of Equality North Dakota in Support of S.B. 2216, House Education Committee, Mar. 4, 2003, available at <http://bit.ly/2gXGvY>.

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

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

## II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

### A. State-Wide Employment Statutes

None. Currently the state of North Dakota has not enacted laws to protect against discrimination based upon sexual orientation and gender identity in the employment context.<sup>4</sup> While “pregnancy, childbirth, and disabilities related to pregnancy or childbirth” are included in the definition of “sex” with respect to discrimination in the workplace, sexual orientation is not.<sup>5</sup>

The North Dakota Human Rights Act provides that it is the policy of the state to prohibit discrimination in employment on the basis of “participation in lawful activity off the employer’s premises during nonworking hours.” The Act prohibits such discrimination by employers within North Dakota who employ one or more individuals.<sup>6</sup> The Act further provides an exception to this prohibition “if that participation is contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer.”<sup>7</sup>

The Act’s reach is broad, declaring it unlawful for an employer to discriminate based upon an employees’ “participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.”<sup>8</sup> Indeed, the broad provisions precluding employer discrimination for lawful activity off the employer’s premises during non-working hours were initially enacted in 1991 to expand the law prohibiting employment discrimination

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<sup>4</sup> See N.D. CENT. CODE § 14-02.4-01 (2007); *see also* N.D. CENT. CODE § 14-02.4-03 (2007) (stating that

“[i]t is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.”).

While the North Dakota Constitution contains protections for North Dakota citizens with respect to employment, it neither expressly prohibits discrimination on the basis of sexual orientation or gender identity nor names any other bases for which discrimination is prohibited. The Constitution provides, in pertinent part, that

“[e]very citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person shall be deemed guilty of a misdemeanor”. N.D. Const. Art. I, § 7.

<sup>5</sup> § 14-02.4-02.

<sup>6</sup> §§ 14-02.4-01 and 14-02.4-03.

<sup>7</sup> § 14-02.4-08.

<sup>8</sup> § 14-02.4-03.

and preclude employers from inquiring into an employee's non-work conduct, including an employee's weight and smoking, marital, or sexual habits.<sup>9</sup>

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

Legislation was introduced on January 19, 2009 by Senators Fiebiger, Bakke and Warner, and Representatives Hawken, Johnson and Mock, to amend North Dakota's current employment discrimination provision to prohibit discrimination based on "sexual orientation" by state and government agencies in the granting privileges or conditions of employment.<sup>10</sup>

On February 18, 2009, the North Dakota Senate voted 27-19 to pass S.B. 2278 as amended. On February 26, 2009, the bill was introduced to the North Dakota House of Representatives and assigned to the Human Services Committee. SB 2278 was voted down by the North Dakota House of Representatives on April 3, 2009.

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

### **1. Executive Orders**

None.<sup>11</sup>

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

In a proposed state employee benefits program for Public Employees Retirement System ("PERS"),<sup>12</sup> members would be allowed to choose a non-spouse beneficiary to receive their retirement benefits as a joint annuitant for the joint and survivor benefit option. The Executive Director of PERS, Mr. Sparb Collins, stated that the proposed provision would not be limited to family members. In a response to a question concerning individuals involved in GLBT relationships, Mr. Collins stated that the only restriction under the proposal would be that the non-spouse beneficiary selected for the joint and survivor benefit option would be required to be within ten years of the age of the member.<sup>13</sup>

The University of North Dakota ("UND"), a publicly-funded state university, has adopted an equal employment opportunity/affirmative action statement, which declares that the university

"practices a policy of nondiscrimination in recruiting,  
hiring, and promoting of all of its employees ... without

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<sup>9</sup> *Hougum v. Valley Memorial Homes*, 574 N.W.2d 812, 821 (N.D. 1998).

<sup>10</sup> S.B. 2278 (N.D. 2009). *See supra* Section I.

<sup>11</sup> *See* N.D. Archive of Exec. Orders, <http://governor.state.nd.us/exec/> (last visited Sept. 6, 2009).

<sup>12</sup> *See* N.D. Empl. Benefits Programs Comm. Bill 111.

<sup>13</sup> *See* North Dakota Legislative Council, Minutes of the N.D. Leg. Council Empl. Benefits Programs Comm. (July 29, 2008) available at <http://bit.ly/3b6aI1>.

regard to race, color, creed, national origin, religion, sex, sexual orientation, age, veterans' status, marital status, political affiliation or physical, mental or medical disability unrelated to the ability to engage in activities involved with the job.”<sup>14</sup>

A similar policy exists with respect to equal opportunity and access to all UND educational programs, activities and facilities. Such policy explicitly prohibits discrimination based on sexual orientation.<sup>15</sup> UND has also established a reporting procedure for any member of the UND community who is a victim of discrimination or harassment.<sup>16</sup>

According to UND School of Law admission requirements, the educational opportunities in the UND School of Law are available to all qualified applicants regardless of race, creed, color, national origin, sexual orientation, handicap, or sex. Furthermore, the UND School of Law is committed, as a state-supported institution, to achieving a diverse student body in terms of race, color, religion, sexual orientation, national origin, sex and age as a means to enhance the quality of educational experiences provided to all of its students.<sup>17</sup> In August of 2008, the Dean of the UND School of Law issued a statement reaffirming that “the University and the School of Law are welcoming and inclusive educational communities.” This message arrived on the heels of a local uproar concerning the school’s Law Review, which had featured a “future of the family” symposium.<sup>18</sup> Five of the six articles in the Review’s symposium edition featured authors affiliated with church-based law schools or organizations that oppose gay marriage.<sup>19</sup>

North Dakota State University (“NDSU”), a publicly-funded state university, has a similar equal opportunity and non-discrimination policy. Pursuant to its policy, NDSU proffers that it

“is fully committed to equal opportunity in employment decisions and educational programs and activities ... for all individuals without regard to race, color, national origin, religion, sex (gender), disability, age, Vietnam Era Veterans status, sexual orientation, status with regard to marriage or public assistance, or participation in lawful activity off the employer’s premises during nonworking

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<sup>14</sup> See University of North Dakota, Human Resources, Equal Employment Opportunity/Affirmative Action Statement, <http://humanresources.und.edu/html/eoo-aa.htm> (last visited Sept. 6, 2009).

<sup>15</sup>*Id.*

<sup>16</sup> See UNIVERSITY OF NORTH DAKOTA HUMAN RESOURCES PROCEDURE FOR COMPLAINTS OF DISCRIMINATION OR HARASSMENT (2005) available at <http://bit.ly/152dv0>.

<sup>17</sup> See University of North Dakota School of Law, Admission Requirements, available at <http://bit.ly/Mn9rX> (last visited Sept. 6, 2009).

<sup>18</sup> Open Letter from Paul LeBel, Dean of the University of North Dakota School of Law (July 30, 2008), available at <http://bit.ly/4pqaML>.

<sup>19</sup> Janell Cole, *Attorneys in Uproar over Law Review*, JAMESTOWN SUN, July 31, 2008.

hours which is not in direct conflict with the essential business-related interests of the employer.”<sup>20</sup>

NDSU provides students, faculty, staff and alumni with a web-based form for reporting acts of bias, bigotry or hate that occur on campus.<sup>21</sup>

**3. Attorney General Opinions**

None.<sup>22</sup>

**D. Local Legislation**

None.

**E. Occupational Licensing Requirements**

None.

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<sup>20</sup> See NORTH DAKOTA STATE UNIVERSITY SBHE POLICY MANUAL § 603.2 (2007), available at <http://bit.ly/2IFOt>.

<sup>21</sup> See NDSU Bias Reporting System, <http://bit.ly/EUY8B> (last visited Sept. 6, 2009).

<sup>22</sup> See N.D. Archive of Att’y Gen. Opinions, <http://bit.ly/17aaT7> (last visited Sept. 6, 2009).

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

#### A. Case Law

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

None.

##### 2. Private Employees

Hougum v. Valley Memorial Homes, 574 N.W.2d 812 (N.D. 1998).

In *Hougum v. Valley Memorial Homes*,<sup>23</sup> Mr. Hougum brought an action against his employer for wrongful termination of his employment in violation of the North Dakota Human Rights Act. A department store employee observed Mr. Hougum masturbating in an enclosed toilet stall in a men's public restroom at a Sears store in Grand Forks. The department store employee called the police and executed a citizen's arrest form. The police then entered the restroom and arrested Mr. Hougum for disorderly conduct. At the time of the incident, Mr. Hougum was an ordained minister employed by Valley Memorial Homes ("VMH") as a staff chaplain. According to VMH, it was concerned about the effect the Sears incident might have on his pastoral relationship with VMH residents. VMH also expressed concern about Mr. Hougum's work performance and his commitment to his duties as a chaplain. VMH placed Mr. Hougum on a leave of absence, and he agreed to undergo an evaluation. Approximately one month later, VMH formally terminated Mr. Hougum's employment. According to Mr. Hougum, a VMH manager told him the termination was due to the Sears incident.

Mr. Hougum subsequently sued VMH for violation of the North Dakota Human Rights Act and wrongful termination, among other things. Mr. Hougum requested that the Supreme Court of North Dakota extend the definition of "sex" to include sexual preference or orientation; he argued that VMH violated the Human Rights Act by discharging him because of his perceived homosexuality. While Mr. Hougum contended that he was not homosexual, he argued that VMH's concerns about the "conservative" attitude of many of its residents made clear that VMH considered him to be a homosexual, and further, that homosexuality would not be tolerated.

The court held that

"[w]e need not decide whether "sex" means sexual preference or orientation under the Act, because, assuming it does, Hougum has presented no evidence, other than his unsupported conclusory assertion, VMH held any beliefs regarding Hougum's sexual preference or orientation."

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<sup>23</sup> 574 N.W.2d 812 (N.D. 1998).

The court concluded that Hougum failed to present a *prima facie* case of “sex” discrimination.<sup>24</sup>

## B. Administrative Complaints

The North Dakota Administrative Code provides that a complaint or charge of discrimination alleging discriminatory practice in regard to employment based on any of the enumerated factors<sup>25</sup> may be filed with the North Dakota Department of Labor by any aggrieved person or the person’s duly authorized representative.<sup>26</sup> Because “sexual orientation” is not included among the enumerated factors, state employees who have been subjected to sexual orientation-based discrimination have no legal recourse under this provision of the code.

## C. Other Documented Examples of Discrimination

None.

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<sup>24</sup> *Id.* at 812.

<sup>25</sup> The enumerated factors are: wage payment, child labor, minimum wage, maximum hours, employment agencies, equal pay for equal work, discrimination because of age, race, color, religion, sex, or national origin, the presence of any mental or physical disability, or status with regard to marriage or public assistance, or participation in a lawful activity off the employer’s business premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer and labor disputes. *See* N.D. ADMIN. CODE § 46-01-01 (1996), *available at* <http://bit.ly/10CVgg>; N.D. ADMIN. CODE § 46-04-01 (2008), *available at* <http://bit.ly/10CVgg>.

<sup>26</sup> *See id.*



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

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

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

In 1973, the North Dakota legislature adopted a comprehensive revision to its criminal code that functioned to repeal the state's consensual sodomy law. The revision took effect in 1975.

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

None.<sup>27</sup>

##### **C. Education**

There are no laws that specifically protect the safety of LGBT youth in schools.<sup>28</sup> As of 2003, North Dakota was the only state in the country without a single high school gay-straight student alliance.<sup>29</sup> Additionally, no detailed statistics are available for LGBT students in North Dakota because student surveys have not included questions regarding sexual orientation.<sup>30</sup>

In 2003, two students in Kindred, North Dakota were verbally harassed by a school employee and other students due to their perceived homosexuality.<sup>31</sup> According to their complaint, the school principal failed to adequately investigate the matter and take their reports of harassment seriously. As a result, the former students filed a federal complaint, whereupon school officials then addressed their concerns.<sup>32</sup> The purpose of the lawsuit was not financial gain; rather, the students sought an admission of fault from school officials and an assurance that the same thing wouldn't happen to other students in the future.<sup>33</sup> The legislation introduced in the 2009 session of the North Dakota

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<sup>27</sup> However, proposed legislation introduced in the 2009 session of the North Dakota legislature discussed above would amend North Dakota's fair housing and public accommodations laws to prohibit discrimination based on "sexual orientation." *See supra* Section I; Section 2.B.

<sup>28</sup> *See* Testimony of Equality North Dakota in Support of Senate Bill 2216, House Education Committee, Mar. 4, 2003, *available at* <http://bit.ly/2gXGvY>.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

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

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

legislature would not extend the scope of existing state law to prohibit discrimination based on “sexual orientation” by any educational institution in the state.<sup>34</sup>

The North Dakota Code of Professional Conduct for Educators governs all members of the teaching profession. The Code states that North Dakota educators

“shall not harass, discriminate against, or grant a discriminatory advantage to a student on the grounds of race, color, creed, sex, national origin, marital status, political or religious beliefs, physical or mental conditions, family, social, or cultural background, or sexual orientation; shall make reasonable effort to assure that a student is protected from harassment or discrimination on these grounds; and may not engage in a course of conduct that would encourage a reasonable student to develop a prejudice on these grounds.”<sup>35</sup>

In addition, in fulfilling their obligations to the profession, the Code mandates that North Dakota educators

“[s]hall not, on the basis of race, color, creed, sex, national origin, marital status, political beliefs, physical condition, family, social or cultural background, or sexual orientation, deny to a colleague a professional benefit, advantage, or participation in any professional organization, nor discriminate in employment practice, assignment, or evaluation of personnel.”<sup>36</sup>

#### **D. Health Care**

North Dakota code governs who may make medical decisions for incapacitated persons and minors, according to a prioritized list.<sup>37</sup> Individual with durable power of attorney (i.e., the authority to make medical decisions) are considered first, followed by family members who “have maintained significant contacts with the incapacitated person.” Close relatives or friends with “significant contacts with the incapacitated person” are then considered.

Accordingly, a same sex partner would be able to make medical decisions if that person has been given a durable power of attorney, or if he or she qualifies as a “close relative or friend” subsection. However, another close relative or spouse with significant contacts to the incapacitated person could contest this. Importantly, if a person with

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<sup>34</sup> See S.B. 2278 (N.D. 2009); *supra* Section I.

<sup>35</sup> N.D. CODE OF PROF'L CONDUCT FOR EDUCATORS § 67.1-03-01-02 (2002) (emphasis added), *available at* <http://bit.ly/Qu7Pv>.

<sup>36</sup> § 67.1-03-01-03 (emphasis added).

<sup>37</sup> N.D. CENT. CODE § 23-12-13 (2007).

“higher status,” according to this prioritized list, refuses to give informed consent, all others of “lower status” are barred from giving consent.<sup>38</sup>

### E. Gender Identity

The North Dakota Department of Health will amend the birth certificate of an individual as a result of a gender identity change. According to the North Dakota Administrative Code,

“the birth certificate of a person born in this state who has undergone a sex conversion operation may be amended as follows: (a) [u]pon written request of the person who has undergone the operation; and (b) [a]n affidavit by a physician that the physician has performed an operation on the person, and that by reason of the operation, the sex designation of such person’s birth certificate should be changed; and (c) an order of a court of competent jurisdiction decreeing a legal change in name.”<sup>39</sup>

### F. Parenting

North Dakota courts have used sexual orientation as a basis to deny custody in child custody hearings.<sup>40</sup> However, the Supreme Court of North Dakota overturned this practice in *Damron v. Damron*.<sup>41</sup>

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<sup>38</sup>§ 23-12-1(2).

<sup>39</sup> N.D. ADMIN. CODE § 33-04-12-02 (2008). The North Dakota Department of Motor Vehicles (“NDDMV”) permits a licensed driver to change his or her gender on their driver’s license. To have a driver’s license issued with the proposed gender change, the individual must present to the NDDMV medical papers signed by a physician that the physician has performed an operation on the person that changed the sex designation of that individual and that the gender reassignment procedure has been completed. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 826 n.428 (2008).

<sup>40</sup> *See Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981) (stating that

“[i]t is not inconceivable that one day our society will accept homosexuality as “normal.” . . . We are not prepared to conclude, however, that it is not a significant factor to be considered in determining custody of children, at least in the context of the facts of this particular case. . . . [I]t is the conceded fact that after the divorce [the mother and her female lover] would establish a relationship in which they would be living together which gives us concern. . . . Our statutes do not prohibit sexual relations between adult persons who are not married to other persons. Although [the N.D.C.C.] makes it a crime for a person to live openly and notoriously with a person of the opposite sex as a married couple without being married to the other person, the statutes contain no such provision with regard to persons of the same sex. The reason is obvious - neither North Dakota or [sic] any other State in this nation, insofar as we can determine, recognizes a legal sexual relationship between two persons of the same sex. Thus, despite the fact that the trial court determined the relationship between [the mother and her female lover] to be a ‘positive one,’ it is a relationship which, under the existing law of the state, never can be a legal relationship. . . . Furthermore, we cannot lightly dismiss the fact that living in the same house with their mother and her lover may well cause the children to ‘suffer from

In *Damron*, a father attempted to overturn a custody ruling rendered two years prior by claiming that the Court's prior ruling in the *Jacobson* case "effectively created a presumption of harm to children living in a lesbian household and eliminated any requirement for evidence of actual or potential harm to the children."<sup>42</sup> The court, basing its decision on North Dakota Custody Code Section 14-09-06.6(5)(b),<sup>43</sup> held that "[t]o the extent *Jacobson* can be read as creating such a presumption, it is overruled."<sup>44</sup> The Court continued, stating that

"a custodial parent's homosexual household is not grounds for modifying custody within two years of a prior custody order in the absence of evidence that environment endangers or potentially endangers the children's physical or emotional health or impairs their emotional development."<sup>45</sup>

North Dakota law is silent regarding adoption by homosexuals. According to the North Dakota Revised Uniform Adoption Act, the following individuals may adopt: (1) a husband and wife together although one or both are minors, (2) an unmarried adult, (3) the unmarried father or mother of the individual to be adopted, and (4) a married individual without the other spouse joining as a petitioner, if the individual to be adopted is not the adopting person's spouse, and if certain other conditions are met.<sup>46</sup>

Although there are no specific statutory prohibitions on homosexuals or real or perceived gender nonconforming individuals with regard to adoption, it remains unclear as to whether North Dakota would permit a same-sex couple to jointly petition to adopt. It also remains unclear whether North Dakota would permit a same-sex partner of a biological parent to petition to adopt the partner's child.<sup>47</sup>

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the slings and arrows of a disapproving society' to a much greater extent than would an arrangement wherein the children were placed in the custody of their father with visitation rights in the mother. Although we agree with the trial court that the children will be required to deal with the problem regardless of which parent has custody, it is apparent to us that requiring the children to live, day-to-day, in the same residence with the mother and her lover means that the children will have to confront the problem to a significantly greater degree than they would if living with their father. . . . [W]e believe that because of today's society, because [the mother] is engaged in a homosexual relationship in the home in which she resides with the children, and because of the lack of legal recognition of the status of a homosexual relationship, the best interests of the children will be better served by placing custody of the children with [the father].").

<sup>41</sup> 670 N.W.2d 871 (N.D. 2003)

<sup>42</sup> *Id.* at 875.

<sup>43</sup> N.D. CUSTODY CODE § 14-09-06.6(5)(b) (providing that the court should award custody based on the best interests and welfare of the child).

<sup>44</sup> *Damron*, 670 N.W.2d at 875

<sup>45</sup> *Id.* at 876.

<sup>46</sup> N.D. CENT. CODE § 14-15-03 (2007).

<sup>47</sup> Human Rights Campaign, State Law Listings: North Dakota Adoption Law, <http://bit.ly/z9NwK> (last visited Sept. 6, 2009).

## G. Recognition of Same-Sex Couples

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

The North Dakota Constitution includes the following provision: “Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”<sup>48</sup>

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

### Domestic Violence Policy

The North Dakota Model Law Enforcement Domestic Violence Policy, promulgated in October 2005 and endorsed by the North Dakota Attorney General’s Office, includes “sexual orientation” as a factor that should not be considered in making an arrest.<sup>49</sup>

### Judicial Conduct

The North Dakota Supreme Court has adopted the North Dakota Code of Judicial Conduct (the “Judicial Code”), which states that

“[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, *sexual orientation* or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so. A judge shall refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge’s direction and control.”<sup>50</sup>

The Judicial Code also states that

“[a] judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national

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<sup>48</sup> N.D. CONST. Art. 11 § 28 (emphasis added).

<sup>49</sup> See NORTH DAKOTA MODEL LAW ENFORCEMENT DOMESTIC VIOLENCE POLICY (2005), available at <http://bit.ly/16GB6U>.

<sup>50</sup> N.D. CODE OF JUD. CONDUCT Canon 3B(5) (1998) (emphasis added), available at <http://bit.ly/197Ehl>.

origin, disability, age, *sexual orientation*, or socioeconomic status, against parties, witnesses, counsel or others.”<sup>51</sup>

With respect to the conduct of state judges, the Judicial Code mandates that a judge may engage in extrajudicial activities, except as prohibited by law or the Judicial Code. However, a judge must conduct all extrajudicial activities so that they do not “(1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.”<sup>52</sup> A comment to the explains that

“[e]xpressions of bias or prejudice by a judge, even outside the judge’s judicial activities, may cast reasonable doubt on the judge’s capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, *sexual orientation* or socioeconomic status.”<sup>53</sup>

#### Commission on Legal Council

The North Dakota Commission on Legal Counsel, an agency of the Executive Branch primarily responsible for the delivery of indigent legal services, has issued a similar policy. Such policy states that employees “shall perform duties without bias or prejudice, and shall not manifest, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.”<sup>54</sup>

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<sup>51</sup> N.D. CODE OF JUD. CONDUCT Canon 3B(6) (emphasis added).

<sup>52</sup> N.D. CODE OF JUD. CONDUCT Canon 4A.

<sup>53</sup> N.D. CODE OF JUD. CONDUCT Canon 4A, cmts. (emphasis added).

<sup>54</sup> N.D. COMM’N ON LEGAL COUNSEL FOR INDIGENTS BUS. CODE OF ETHICS (2008), *available at* <http://bit.ly/tPt2b>.