

UCLA

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

Title

Pennsylvania – Sexual Orientation and Gender Identity Law and Documentation of
Discrimination

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MEMORANDUM

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

I. OVERVIEW

Pennsylvania has no statute that prohibits employment discrimination based on sexual orientation or gender identity. There have been several attempts to amend the Human Relations Act to include prohibitions on sexual orientation and gender identity-based discrimination. To date, all have failed. There is currently an executive order that prohibits discrimination based on sexual orientation and gender identity or expression.¹

On the local level, 14 jurisdictions in Pennsylvania ban sexual orientation and/or gender identity discrimination in employment, housing, and public accommodations by local ordinance. Some of these ordinances have been attacked, with some success (for example, in Allegheny County).

Documented examples of employment discrimination based on sexual orientation or gender identity by the State or local governments include:

- In *Bianchi v. City of Philadelphia I*, a male firefighter brought a § 1983 action against the city asserting claims under Title VII, the Pennsylvania Human Rights Act (“PHRA”), and the state and federal constitutions.² Bianchi had been subjected to a pattern of gross and abusive harassment (including used condoms in his desk, urine or feces in his gear, and threatening letters), which he alleged was rooted in a belief that he was homosexual. While the Court recognized that the actions taken against Bianchi “constituted harassment,” the court held that the conduct was not actionable as sex discrimination under Title VII or the PHRA. However, the due process and First Amendment claims survived summary judgment and furnished the basis for an award of more than \$1 million in damages, which was upheld by the U.S. Court of Appeals for the Third Circuit in *Bianchi v. City of Philadelphia II*.³ *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002); *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).
- In *Taylor v. City of Philadelphia*,⁴ an employee of the City of Philadelphia Free Library alleged discrimination based on his sexual orientation. The District Court dismissed intentional infliction of emotional distress and punitive damages claims

¹ Pa. Exec. Order 2003-10 (July 28, 2003).

² *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002).

³ *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).

⁴ *Taylor v. City of Philadelphia*, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).

against the City. However, it is unclear from the opinion whether other claims were allowed to go forward, and no further opinions or rulings were available online. Before bringing suit, the plaintiff had filed a complaint in 1999 with the Philadelphia Human Relations Commission alleging that he had been discriminated against on the basis of his sexual orientation. The Commission determined that there was probable cause to support the charge.⁵ In 2000, the employee filed a second complaint against the Free Library of Philadelphia for discrimination on the basis of sexual orientation and for retaliation in response to his previous filing. Again, the Commission determined that there was probable cause to support the charge.⁶ Taylor v. City of Philadelphia, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).

- Plaintiff filed suit alleging that he was denied a proper pre-termination hearing on the same-sex sexual harassment charges filed against him. A jury awarded Plaintiff reinstatement of his tenured teaching position and \$134,081 back pay, but denied relief on his claims of emotional and reputational harm. Plaintiff filed a motion for a new trial, pointing to defense counsel's summation, which included statements that he actually may have committed the sexual harassment for which he was terminated. The court denied the motion, ruling that these statements did not require a new trial since they were not materially prejudicial as they were part of the evidence and were somewhat relevant.⁷
- Plaintiff, a high school art teacher and male-to-female transsexual, was fired without a hearing after returning to school for the new school year as a woman, having undergone a “sex-change” operation. The school cited “immorality” and other similar reasons for Plaintiff’s termination. The district court held that the lack of a hearing prior to Plaintiff’s dismissal was a violation of procedural due process, and ordered reinstatement to suspended status with pay pending the outcome of the hearing.⁸
- In 2006, an employee of the Philadelphia Police Department filed a complaint with the City of Philadelphia alleging that he had been discriminated against on the basis of his sexual orientation.⁹ The city settled with the employee.¹⁰
- On January 31, 2003, an employee of the Free Library of Philadelphia filed a complaint with the Pennsylvania Human Rights Commission alleging that she had been discriminated against on the basis of gender identity. The employee was

⁵ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep’t, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

⁶ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep’t, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

⁷ *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

⁸ *Ashlie v. Chester-Upland Sch. Dist.*, 1979 U.S. Dist. LEXIS 12516 (E.D. Pa. 1979).

⁹ Complaint, [Redacted] v. Philadelphia Police Department, Philadelphia Human Relations Commission, Complaint No. SGEN-6NQLXT (Apr. 10, 2006).

¹⁰ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep’t, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

harassed after she began to transition from male to female and was involuntarily transferred to an undesirable worksite.¹¹ The Commission found probable cause to support the charge.¹² On July 8, 2003, the employee filed a second complaint against the Free Library of Philadelphia alleging that that the library continued to discriminate against her and her co-workers continued to harass her, despite her previous complaint. She also alleged that the library was treating her badly in retaliation for filing the previous complaint.¹³ Again, the Commission found that there was probable cause to support the charge.¹⁴ On May 7, 2004, the employee filed a third complaint against the Free Library of Philadelphia alleging continued discrimination on the basis of sexual orientation and further retaliation based on her previous complaints.¹⁵ For the third time, the Commission determined that there was probable cause to support her charge.¹⁶

- In 2008, a transgender applicant for a state agency database analyst position was not hired because of his gender identity.¹⁷
- Plaintiff, a former policeman for the town of Walnutport, alleged that borough officials violated his free speech rights by retaliating against him when he complained about attempts to pry into his sexual orientation and off-duty conduct in response to a demand by a city council member. The claim was settled for \$5,000.¹⁸
- In 1996, a gay nurse at an adult health services center was subjected to a hostile work environment because of his sexual orientation.¹⁹
- Although not involving the state as an employer, in 1995 a state appellate court ruled that it was not against the public policy of the state for a private sector

¹¹ Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. PWIS-5JBKJJ (Jan. 31, 2003).

¹² Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹³ Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5P8LUH (July 8, 2003).

¹⁴ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹⁵ Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5YMHDX (May 7, 2004).

¹⁶ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹⁷ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

¹⁸ Lesbian & Gay L. Notes (Feb. 2005), *available at* <http://www.qrd.org/qrd/www/legal/lgl/02.2005.pdf>.

¹⁹ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

employer to specify in its employment contract that homosexuality was a ground for termination of employment.²⁰

In terms of non-employment rights for LGBT people in the state, several local jurisdictions provide domestic partner registration systems. However, the Pennsylvania Fair Educational Opportunities Act²¹ includes no protection for discrimination based on sexual orientation, gender and/or gender identity. Pennsylvania's high court struck down the state anti-sodomy law in 1995, and several court cases permit name changes based on sex-changes and same-sex partnerships.

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.

²⁰ *DeMuth v. Miller*, 438 Pa. Super. 437 (1995).

²¹ Pennsylvania Fair Educational Opportunities Act, Act of July 17, 1961, P.L. 776, as amended.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

None. Currently, the state of Pennsylvania has not enacted laws to protect sexual orientation and gender identity from discrimination.²²

B. Attempts to Enact State Legislation

Over the last six years, several bills intended to amend the Pennsylvania Human Relations Act²³ to include language regarding sexual orientation and gender identity were introduced. While each successive bill garnered increasing support among members, legislation has yet to be passed.

On April 24, 2003 four Pennsylvania senators introduced Senate Bill 608 to amend the Pennsylvania Human Relations Act to include prohibitions on discrimination because of sexual orientation or gender identity. Senate Bill 608 was referred to the Labor and Industry Committee and died without hearings.

On June 17, 2003, another bill, Senate Bill 706, was introduced in the Senate, this time with 18 sponsors. Senate Bill 706 was also designed to amend the Pennsylvania Human Relations Act to include prohibitions on discrimination because of sexual orientation or gender identity, but died after being referred to the Judiciary Committee.

²² Although there is no statewide legislation that prohibits discrimination on the basis of sexual orientation or gender identity, in 2002 Pennsylvania amended its Ethnic Intimidation and Institutional Vandalism Act to include protection from intimidation based on sexual orientation and gender identity. See 18 PA. STAT. § 2710. Subsequently, however, this protection was ruled unconstitutional by the Pennsylvania Supreme Court in *Marcavage v. Rendell*, 936 A.2d 188 (Pa. Cmwlth. 2007). The court based its decision on the ground that the Act amending the section changed its original purpose in violation of Art. III, section 1 of the state constitution, which prohibits changing the original purpose of a bill. The history of the bill at issue in *Marcavage* was as follows. The Pennsylvania House passed a bill in 2001 making crop destruction a crime under certain circumstances. When the bill went to the Senate, it was approved by the Agricultural Committee and was on its way through the approval process when it was seized upon by proponents of a hate crimes law as a vehicle for their purposes. The proponents of the hate crime law used the same bill number and proposed an amendment to the crop destruction bill that changed the title of the bill and deleted the language passed in the House, replacing it with language expanding the scope of protection under the state's Ethnic Intimidation statute. The new bill passed the legislature and governor, and became law. However, the Commonwealth Court ultimately determined that the process of adopting the bill violated the constitutional requirement that a measure could not be passed if its purpose was changed in the course of legislative consideration. The original purpose of the bill was to deter and punish improper crop destruction, with the aforementioned revisions, its new purpose was to deter and punish ethnic intimidation.

²³ Act of 1955, Pa. Laws 744, No. 222, as amended June 25, 1997 by Act of 1997, 43 PA. STAT. §§ 951-963. The Pennsylvania Human Relations Act established the Pennsylvania Human Relations Commission (formerly the Pennsylvania Fair Employment Practice Commission). The Commission acquired its present name in 1961 when its jurisdiction was broadened to include a wide range of discrimination problems covered in the two laws it was authorized to administer: the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act. See Pennsylvania Human Relations Commission, *About the Commission: History*, http://sites.state.pa.us/PA_Exec/PHRC/commission/about_history.html (last visited Sept. 9, 2009).

In 2006, bills were introduced in both the House and Senate: House Bill 3000 (October 20, 2006), and Senate Bill 912 (March 16, 2006) to amend the Pennsylvania Human Relations Act to include prohibition on discrimination because of sexual orientation or gender identity. Senate Bill 912 had 17 sponsors; it died in the Judiciary Committee. House Bill 3000, with 57 sponsors, was referred to the State Government Committee, but was not enacted.

In 2007, 21 sponsors introduced Senate Bill 761, which again sought to amend the Pennsylvania Human Relations Act to include sexual orientation and gender identity language.²⁴ The bill was referred to the Judiciary Committee. On June 18, 2007, House Bill 1400 was introduced by 71 sponsors and was referred to the State Government Committee. The House State Government Committee held a series of public hearings throughout Pennsylvania in the Fall of 2007. Public hearings were held in Pittsburgh, Erie and Philadelphia on October 4, 5 and November 15, 2007, respectively.²⁵ The vast majority of the speakers testified on behalf of the Bill; only the Pennsylvania Catholic Conference²⁶ and Pennsylvania Family Institute²⁷ testified in opposition.²⁸

On September 22, 2008, the State Government Committee voted to adopt the amendment by a vote of 18-8, with 3 non-votes.²⁹ A motion to table the bill was defeated by a vote of 13-13.³⁰

In March of 2009, House Bill 300 (2009)³¹ passed the General Assembly committee on state government. It would amend the Pennsylvania Human Relations Act to prohibit discrimination in employment, housing and public accommodation including the discrimination on the basis of sexual orientation and gender identity or expression.

²⁴ See S.B. 761 (April 12, 2007).

²⁵ Written statements were also submitted in advance of the hearing. See, e.g., Northwestern Pa. National Organization for Women, Statement for HB1400 hearings in Erie, Pa. (Oct. 5, 2007), available at http://www.legis.state.pa.us/cfdocs/legis/TR/transcripts/2007_0193_0007_TSTMNY.pdf.

²⁶ See Pennsylvania Catholic Conference Institute for Public Policy, Home Page, <http://www.pacatholic.org> (last visited Sept. 9, 2009).

²⁷ The Pennsylvania Family Institute is a conservative NGO whose professed mission is “to strengthen families by restoring to public life the traditional, foundational principles and values essential for the well-being of society.” See Pennsylvania Family Institute, Home Page, <http://www.pafamily.org/> (last visited Sept. 9, 2009).

²⁸ A non-exhaustive search for transcripts of the hearings was unsuccessful, though details of the hearings were provided in press releases and blogs. See, e.g., Equality Advocates California, *LIVE BLOGGING the State Government Committee Hearing!*, <http://bit.ly/PBdYa> (last visited Sept. 9, 2009); Philadelphia Gay News, *Person of the Year: Cardinal Justin Rigali* (Dec. 31, 2008), <http://bit.ly/M5Mfh> (last visited Sept. 9, 2009); Mike Mahler, *Hearing in Erie about PA HB 1400*, ERIE GAY News, (n.d.), <http://www.eriegaynews.com/news/article.php?recordid=200711hearing> (last visited Sept. 9, 2009).

²⁹ See Pennsylvania House of Representatives, *House Committee Role Call Votes: HB 1400, Motion to Adopt* (Sept. 22, 2008), <http://bit.ly/2bFijY>.

³⁰ See Pennsylvania House of Representatives, *House Committee Role Call Votes: HB 1400, Motion to Table* (Sept. 22, 2008), <http://bit.ly/BOGf7>.

³¹ HB 300 would amend the Pennsylvania Human Relations Act, P.L. 744, No. 222 (Oct. 27, 1955), protecting citizens from discrimination in employment, housing and public accommodations on the basis of sexual orientation and gender identity. See Pennsylvania General Assembly, *Regular Session 2009-2010: House Bill 300*, <http://bit.ly/OObh8> (last visited Sept. 9, 2009).

On March 11, 2009, the House State Government Committee voted 12 to 11 in favor of the bill. The bill is now pending before the House.

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

1. Executive Orders

In 1975, Governor Milton J. Shapp promulgated Executive Order 1975-5, which began, “In furtherance of my commitment to provide leadership in the effort to obtain equal rights for all persons in Pennsylvania, I am committing this administration to work towards ending discrimination against persons solely because of their affectional or sexual preference.” The order directed two agency heads in the Human Services and Community Advocate Unit of the state’s Department of Justice to review and monitor the effort, and “work with state agencies and private groups to further define the problem and make recommendations for further actions.” Further, the order instructed state departments and agencies to fully cooperate “in the effort to end this type of discrimination.”

In 1976, Governor Shapp amended E.O. 1975-5 and established the Pennsylvania Council for Sexual Minorities. The order tasked the Council to study the problems of sexual minorities and to recommend policy and legislative changes to the Governor “needed to further the goal of obtaining equal rights for all persons.” Among other things, the Council developed an annual report, and was authorized to receive complaints from persons claiming they had been discriminated against on the basis of “sexual or affectional preference.” Governor’s Executive Order 1975-5 “Commitment Toward Equal Rights as Amended September 19, 1978 eventually became 4 Pa. Code sections 5.91 *et seq.*..

During Shapp’s administration the Council identified a host of issues related to governmental services, including the insufficiencies in traditional governmental services such as children and youth, drug and alcohol, STI testing and treatment, mental health, and health education in serving people of all orientations and identities. The Council sought to protect state employees from discrimination, fund mental health centers, and train state workers and others (even distributing a booklet entitled “What is a sexual minority anyway?” by the Department of Education).³² Governor Shapp left office in 1994. Subsequent governors curtailed the activities of the Council other than to develop AIDS policies. It is currently dormant.³³

³² See PENNSYLVANIA DEPARTMENT OF EDUCATION, WHAT IS A SEXUAL MINORITY ANYWAY? (1977), available at http://www.publichealth.pitt.edu/docs/What_Is_A_Sexual_Minority.pdf (last visited Sept. 9, 2009).

³³ However, the University of Pittsburgh currently has a graduate center called the Center for Research on Health and Sexual Orientation, which states that it grew from Governor Shapp’s Council. See University of Pittsburgh, Graduate School of Public Health, *Center for Research on Health and Sexual Orientation*, <http://www.publichealth.pitt.edu/section.php?pageID=221> (last visited Sept. 9, 2009).

The current Governor, Edward Rendell, issued Executive Order 2003-10 (July 28, 2003), which prohibits discrimination by any agency under the jurisdiction of the Governor based on sexual orientation or gender identity and expression.

2. State Government Personnel Regulations

The Pennsylvania Code is the official publication of the Commonwealth of Pennsylvania. It contains regulations and other documents filed with the Legislative Reference Bureau under the Commonwealth Documents Law. It consists of 55 titles.³⁴ The following sections of the Pennsylvania Code prohibit discrimination on the basis of sexual orientation or gender identity in employment situations:³⁵

- 4 PA. CODE § 1.161(a): “**An agency under the jurisdiction of the Governor may not discriminate** against an employee or applicant for employment because of race, color, religious creed, ancestry, union membership, age, gender, **sexual orientation, gender identity or expression**, national origin, AIDS or HIV status or disability.”
- 4 PA. CODE § 5.91 [regarding the establishment of the Council on Sexual Minorities, described in detail in section II.F, *infra*]: “The council is established to work towards ending discrimination against persons because of their sexual or affectional orientation. There may be **no discrimination by any Commonwealth department, board, commission or other official entity under the Governor’s jurisdiction, or any representative thereof, because of sexual or affectional orientation in hiring or employment**, housing, credit, contracting, provisions of services or other matters whatsoever. Nothing, however, in this subchapter may be construed to require a review or statistical analyses of the composition of the work force or other class of persons affected hereby.”
- 4 PA. CODE § 5.93 [also regarding the establishment of the Council on Sexual Minorities, described in detail in section II.F, *infra*]: “(a) The Council shall study problems of sexual minorities and make recommendations to the Governor as to

³⁴ Act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1102, 1201—1208 and 1602) and 45 PA. CONS. STAT. chs. 5, 7 & 9. See Pennsylvania Code, About Page, <http://www.pacode.com/about/about.html> (last visited Sept. 9, 2009). The Code contains proclamations and executive orders of the Governor which are general and permanent in nature, administrative and gubernatorial regulations, statements of policy, home rule charters adopted under PA. CONST. art. IX § 2, rules of the Supreme Court of Pennsylvania, Rules of the Judicial Council of Pennsylvania and the Supreme and Commonwealth Courts, judicial documents that are general and permanent in nature, and documents which the Governor, the Joint Committee or the Bureau finds to be general and permanent in nature. See 1 PA. CODE § 3.1.

³⁵ Title 4 “is designed to provide comprehensive statements of policy and procedure on matters that affect agencies and employees under the Governor’s jurisdiction.” 4 PA. CODE § 1.1. Title 22 applies to the State Board of Education of the Commonwealth of Pennsylvania (“Board”); the Department of Education of the Commonwealth of Pennsylvania (“Department”); and the Secretary of the Department of Education of the Commonwealth of Pennsylvania (“Secretary”). Title 28 relates to Health and Safety. Title 37 relates to Law, including the State Police, the Board of Probation and Parole, and various state agencies and offices. Title 55 relates to the Department of Public Welfare of the Commonwealth of Pennsylvania. Title 201 contains the Rules of Judicial Administration for the Commonwealth of Pennsylvania.

policy, program, and legislative changes needed to further the goal of obtaining equal rights for all persons. (b) **The Council shall work with State agencies to end discrimination against Commonwealth employees, clients, the general public and employees of firms which contract with the Commonwealth solely on the basis of their affectional or sexual preference.** (c) The Council shall work to educate State personnel and the public in general concerning problems and issues affecting sexual minorities. The Council shall outline plans for educating state employees concerning the problems of sexual minorities, review these plans with appropriate agency officials, develop timetables for their implementation, provide qualified speakers for educational seminars it shall organize, and evaluate the results of its programs. (d) **The Council is authorized to receive complaints from persons claiming that they have been the victims of discrimination for their sexual or affectional orientation.** Where feasible, the complaints shall be referred to the appropriate agency for resolution. The Council shall compile a record of complaints received and their disposition. Agencies receiving the complaints directly will inform the Council of their nature and disposition.”

- 28 PA. CODE § 709.30(2) [regarding general standards of **freestanding drug/alcohol treatment facilities**, specially as to client rights]: “The project director shall develop written policies and procedures on client rights and shall demonstrate efforts toward informing clients of the following: . . . The project **may not discriminate in the provision of services** on the basis of age, race, creed, sex, ethnicity, color, national origin, marital status, **sexual orientation**, handicap or religion.”
- 37 PA. CODE § 200.1001(a)(5) [regarding standards governing the operation of the juvenile probation merit system]: “(a) **Juvenile probation office staff** shall be employed in conformance with the merit principles adopted under Title II of the Intergovernmental Personnel Act of 1970 (42 U.S.C.A. § § 4721—4727). These principles, which comprise the “Standards for a Merit System of Personnel Administration” (5 CFR 900.603 (relating to standards for a merit system of personnel administration)) include: . . . (5) Assuring **fair treatment of applicants and employees** in all aspects of personnel administration without regard to political affiliation, race, color, national origin, gender, **sexual orientation**, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This ‘fair treatment’ principle includes compliance with the Federal equal employment opportunity and nondiscrimination laws.”
- 201 PA. CODE Rule 201(c) [regarding **employment policies within the judicial system**]: “The Supreme Court of Pennsylvania is committed to the principles of equal employment opportunity to ensure legal and appropriate hiring and employment practices, and to promote public confidence in the fairness and integrity of the judicial system and the judicial process. It is, therefore, **the policy of the Supreme Court that there shall be no discrimination** because of race, color, sex, **sexual orientation**, national origin, age, disability or religion by any

Personnel of the System or Related Staff in any employment-related action (such as, hiring, promotion, terms or privileges of employment, and the like), or by any Personnel of the System, Related Staff or attorney in any court-related action.”

- 201 PA. CODE Rule 202(a)(1) [regarding **employment policies within the judicial system**]: “**Discrimination and harassment** because of race, color, sex, **sexual orientation**, national origin, age, disability or religion are **prohibited**. The discrimination and harassment constitute an abuse of authority that will not be tolerated by the UJS. Further, the discrimination and harassment constitute misconduct, warranting appropriate disciplinary action. Judicial officers and managerial and supervisory Personnel of the System shall ensure adherence to, and compliance with, this Policy. (1) Under this Policy, discrimination includes actions by an individual or organization that cause an individual or a group of individuals to be denigrated or treated less favorably than another person or group because of one’s race, color, sex, sexual orientation, national origin, age, disability or religion. The discriminatory conduct may include, but is not limited to, actions relating to the following: (i) Recruitment and hiring by Personnel of the System or Related Staff; or (ii) Provision of salary, benefits, or other terms or conditions of employment by Personnel of the System or Related Staff; or (iii) Provision of training and other education opportunities by Personnel of the System or Related Staff; or (iv) Promotions, transfers, discharge or other employment actions by Personnel of the System or Related Staff; or (v) Any matter relating to the judicial process by Personnel of the System, Related Staff or attorneys.”
- Various provisions pursuant to the Home Rule Charter:³⁶
 - 306 PA. CODE § 11.7-701: (City of Reading) “No individual shall be discriminated against with respect to any position or office because of age, gender, race, creed, handicap, color, religion, ancestry, veterans status, national origin, **sexual orientation**, political opinions or affiliations, or lawful activity in any employee organization. The City shall adopt adequate and reasonable affirmative action policies in accordance with Pennsylvania law.”
 - 315 PA. CODE § 41.11-1102(1): (Borough of West Chester) “The following activities shall be prohibited in the operation of the government of the Borough: (1) No person shall, in his or her employment by the Borough in any capacity, or appointment to any board, authority, commission or agency, or removal there from, be favored or discriminated against because of age, race, gender, **sexual orientation**, disability, political or religious opinions or affiliations.”

³⁶ Title 306 refers to the municipality of the Commonwealth of Pennsylvania known as the City of Reading. *See* 306 PA. CODE § 11.1-101. Title 315 refers to the Borough of West Chester, Chester County, Pennsylvania. *See* 315 PA. CODE § 41.1-101. Title 339 refers to the municipality of the Commonwealth of Pennsylvania known as the City of Allentown. *See* 339 PA. CODE § 11.1-101.

- 339 PA. CODE § 11.6-601: (City of Allentown) “No individual shall be discriminated against with respect to any position or office because of age, gender, race, creed, handicap, color, religion, ancestry, veterans status, national origin, **sexual orientation**, political opinions or affiliations or lawful activity in any employee organization.”

3. **Attorney General Opinions**

None located.

D. **Local Legislation**

Currently, 14 local jurisdictions have ordinances or executive orders banning discrimination in employment, housing and public accommodations due to a person’s sexual orientation and/or gender identity.³⁷ Several prohibit sexual orientation and/or gender identity or expression discrimination in public employment only.

- Cheltenham Township (sexual orientation only, not available online)³⁸
- Lower Merion School District (sexual orientation only)³⁹
- Oxford (sexual orientation only, not available online)⁴⁰
- Reading City (sexual orientation only)⁴¹
- William Penn School District (sexual orientation only, not available online)⁴²

1. City of Pittsburgh

In 1990, the City of Pittsburgh amended its Code of Ordinances to include protections from discrimination on the basis of sexual orientation in connection with employment, housing, and public accommodations.⁴³ “Sexual orientation” is defined as “male or female homosexuality, heterosexuality and bisexuality or perceived homosexuality, heterosexuality and bisexuality.”⁴⁴ The ordinance allows for an exemption from the prohibition of discrimination in cases of a “bona fide occupational

³⁷ See 6 PITTSBURGH CODE OF ORDINANCES §§ 659.02-04, 07; Am. Ord. 2-1990, eff. 4-3-90.

³⁸ See Equality Advocates Pennsylvania, *LGBT Employment Rights: A Guide for Pennsylvania Employees* 2 (September 2, 2008), available at <http://www.equalitypa.org/var/actionlink/file/87-employmentrts.pdf> [hereinafter E.A.P., *LGBT Employment Rights*].

³⁹ Lower Merion School District Pol’y No. 104, Equal Opportunity Program for Employment Practices (revised May 16, 2005), available at <http://bit.ly/ZH6n7>.

⁴⁰ See E.A.P., *LGBT Employment Rights*, *supra* note 38, at 2.

⁴¹ READING ADMIN. CODE § 1-204 (rev’d Apr. 22, 2002), available at <http://bit.ly/1dqbY>.

⁴² See E.A.P., *LGBT Employment Rights*, *supra* note 38, at 2.

⁴³ See PENNSYLVANIA HUMAN RELATIONS COMMISSION, ANNUAL REPORT 2006-2007, at 3, available at http://sites.state.pa.us/PA_Exec/PHRC/publications/reports/0607%20Annual.pdf.

⁴⁴ 6 PITTSBURGH CODE OF ORDINANCES § 651.04(n).

exemption” certified by the City of Pittsburgh Human Relations Commission.⁴⁵ In order to receive such an exemption, the requesting party must prove to the Commission “that the occupation or position reasonably requires the employment of persons of a particular race, color, religion, ancestry, national origin, place of birth, sex, sexual orientation, age, handicap or disability or use of support animals because of the handicap or disability of the user, and that such certification is not sought as a means of circumventing the spirit and purpose of this Article.”⁴⁶

Complaints of discrimination are reviewed by the City of Pittsburgh Human Relations Commission.⁴⁷ Upon receiving a complaint, the Commission must investigate and attempt to resolve the issue. To that end, the Commission may seek injunctive relief,⁴⁸ hold public hearings and award damages, or assess civil penalties.⁴⁹ If the Commission is unable to enter into a conciliation agreement, the complainant has the right to “bring an action in the courts of Common Pleas of the Commonwealth based upon the right to freedom from discrimination granted by this Article.”⁵⁰

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

2. City of Philadelphia

Chapter 9-1100 of The Philadelphia Code (also known as the Philadelphia Fair Practices Ordinance) addresses fair practices in employment, housing, and accommodations. In 1982, this Chapter was amended to include protections from discrimination based on “sexual orientation.” “Sexual orientation” is defined as “male or female homosexuality, heterosexuality and bisexuality, by preference, practice or as perceived by others.”⁵¹ On February 3, 1987, Mayor W. Wilson Goode issued Executive Order 1-87 extending the prohibitions against discrimination to the provision of city services. On May 19, 1998, the Code was again amended by Bill No. 970750 by including “life partner” within the definition of “marital status.”⁵² In addition, “gender identity” was added to the Code through the passage of Bill No. 010719 on May 29, 2002. “Gender identity” is defined as “self-perception, or perception by others, as male or female, and shall include a person's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one’s physical anatomy, chromosomal sex, or sex assigned at birth; and shall include, but is not limited to, persons who are undergoing

⁴⁵ 6 PITTSBURGH CODE OF ORDINANCES § 659.02.

⁴⁶ 6 PITTSBURGH CODE OF ORDINANCES § 653.05(d).

⁴⁷ 6 PITTSBURGH CODE OF ORDINANCES §§ 653.02-04.

⁴⁸ 6 PITTSBURGH CODE OF ORDINANCES § 655.05.

⁴⁹ 6 PITTSBURGH CODE OF ORDINANCES § 655.06.

⁵⁰ 6 PITTSBURGH CODE OF ORDINANCES § 655.07.

⁵¹ PHILADELPHIA CODE § 9-1102(y).

⁵² Bill No. 970750 (May 19, 1998). From 1998 through 2007, 529 same-sex couples have registered with the Philadelphia Commission on Human Relations. *See* PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2007, at 5, *available at* http://www.phila.gov/humanrelations/pdfs/2007_Annual_Report.pdf.

or have completed sex reassignment.”⁵³ The Pennsylvania Supreme Court upheld Bill Number 970750 (which became Philadelphia Code section 9-1102) in *Devlin v. City of Philadelphia*.⁵⁴

The Philadelphia Commission on Human Relations (“PCHR”) administers and enforces the protections detailed in Chapter 9-1100.⁵⁵ The PCHR was established in 1952, as mandated by the Home Rule Charter to enforce the Philadelphia Fair Practices Ordinance.⁵⁶ Upon receiving a complaint, or on its own initiative, the Commission will investigate allegations of unfair employment, housing, and accommodations practices.⁵⁷ After investigating a complaint, the Commission will attempt to persuade the violator to cease such practices. In the event that persuasion is unsuccessful, the Commission has several enforcement options, including civil penalties, as described in Sections 9-1106 to 9-1109 of the Code. Notwithstanding the provisions of Section 9-1106 to 9-1109, any person aggrieved by a violation has a right of action in a court of competent jurisdiction for damages.⁵⁸

3. City of Allentown

In 1963, Bill No. 10193 established a Human Relations Commission for the City of Allentown, Pennsylvania.⁵⁹ Title 11 of the Codified Ordinance of the City of Allentown describes the city’s anti-discrimination policy with respect to employment, housing, real estate practices and public accommodations, as well as the duties of the Commission. These ordinances were amended by Bill No. 13964 on April 4, 2002, to add prohibitions against discrimination based on sexual orientation and gender identity. “Sexual orientation” is defined as “male or female homosexuality, heterosexuality and bisexuality, by preference, practice or as perceived by others,” and “gender identity” is defined as “self-perception, or perception by others, as male or female, including a

⁵³ PHILADELPHIA CODE § 9-1102(h.1).

⁵⁴ 580 Pa. 564 (2004). In *Devlin*, several residents sought to have the ordinances addressing health benefits, discrimination, and realty transfer tax that provided for the status of “life partner” between members of the same sex declared invalid, and to permanently enjoin implementation of the “life partner” registry. In pertinent part, the court held that the city had not exceeded its home rule powers by enacting the ordinances, that it was entitled to extend employee benefits to employees’ same-sex “life partners,” and that the city was not authorized to prohibit discrimination based on an individual’s status as a registered “life partner.” The third ruling was because the provision invited individuals who neither lived nor worked in the city to register as “life partners” solely as a means to solidify their full rights to be free from discrimination on account of their “life partner” status when, if ever, they came into the city. The city could not exercise any powers or authority beyond its city limits, except those conferred by act of the General Assembly, which this was not. *Id.* at 587-588. In sum, the court invalidated the portions of Bill number 970750 that seek to provide anti-discrimination protections for “life partners,” but it upheld the provisions that required designated employers to offer employees benefits to Life Partners on the same basis that they offer benefits to their employees’ dependents. *Id.* at 593.

⁵⁵ PHILADELPHIA CODE, § 9-1106.

⁵⁶ <http://www.phila.gov/phils/docs/Inventor/Graphics/agencies/A148.htm> (last viewed 3/13/09).

⁵⁷ PHILADELPHIA CODE § 9-1107.

⁵⁸ PHILADELPHIA CODE § 9-1110.

⁵⁹ See Pennsylvania Human Relations Commission, *Codified Ordinances of the City of Allentown: Discrimination: Article 181: Human Relations Commission*, <http://www.accessibilitypa.state.pa.us/law/L7-CityofAllentown.html>.

person's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex, or sex assigned at birth."⁶⁰ On appeal, Bill No. 13964 was upheld in *Hartman v. City of Allentown*.⁶¹

Pursuant to Section 181.08, any person can file a complaint with the Human Relations Commission within 180 days of the alleged act of discrimination. Upon receipt of a complaint, the Commission must investigate and encourage a voluntary and informed settlement between the parties.⁶² If the Commission determines that it is unable to eliminate any unlawful practice through persuasion, it must send written notice to the party named in the complaint and hold a hearing.⁶³ At the conclusion of the hearing, the Commission may issue findings and may award damages and/or levy civil penalties.⁶⁴ Where a complainant invokes the procedures set forth above, the complainant still maintains a private right of action.⁶⁵

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

4. Borough of West Chester

On September 20, 2006, the Borough of West Chester added Chapter 37A to its code of ordinances.⁶⁶ This section, which details West Chester's anti-discrimination policies, prohibits discrimination in housing, employment, and public accommodations on the basis of sexual orientation or gender identity or expression.⁶⁷ "Sexual orientation" is defined as "actual or perceived homosexuality, heterosexuality and/or bisexuality."⁶⁸ "Gender identity or expression" is defined as "self-perception, or perception by others, as male or female, and shall include an individual's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one's physical anatomy, chromosomal sex, or sex assigned at birth, and shall include, but is not limited to, persons

⁶⁰ CODIFIED ORDINANCES OF ALLENTOWN § 181.02.

⁶¹ 880 A.2d 737 (2005). The court held that the Pennsylvania Human Relations Act did not preempt the human rights ordinance enacted pursuant to the city's police powers, although the ordinance prohibited discrimination on the basis of sexual orientation and gender identity while PHRA did not; there was no inherent conflict between PHRA and the ordinance, the enforcement of PHRA was not impeded by the ordinance, and PHRA was not intended to be exclusive in the field of anti-discrimination. *Id.* at 751-752.

⁶² CODIFIED ORDINANCES OF ALLENTOWN § 181.08.B.

⁶³ CODIFIED ORDINANCES OF ALLENTOWN § 181.08.D-F.

⁶⁴ CODIFIED ORDINANCES OF ALLENTOWN § 181.08.G.

⁶⁵ CODIFIED ORDINANCES OF ALLENTOWN § 181.99.C.

⁶⁶ Vote of 6-0. See NATIONAL GAY AND LESBIAN TASK FORCE, TRANSGENDER CIVIL RIGHTS PROJECT, 2006 YEAR IN REVIEW, [hereinafter NGLTF, TCRP, 2006] available at http://www.thetaskforce.org/downloads/reports/fact_sheets/transgender_year_in_review.pdf (last visited Sept. 9, 2009).

⁶⁷ CODE OF THE BOROUGH OF WEST CHESTER § 37A-3.

⁶⁸ CODE OF THE BOROUGH OF WEST CHESTER § 37A-2.

who are undergoing or have completed sex reassignment.”⁶⁹ Chapter 37A contains an exception on the basis of religion.⁷⁰

Chapter 37A grants the West Chester Human Relations Commission the power to administer and enforce the section.⁷¹ Section 37A-6 defines the procedures by which the Commission investigates and enforces discriminatory practices.⁷² In addition, Chapter 37A allows for a private right of action in the Chester Court of Common Pleas.⁷³

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

5. City of Easton

On July 12, 2006, the City of Easton passed Ordinance 4826, which added Title 11, Article 183 to its code of ordinances.⁷⁴ This section details Easton’s anti-discrimination policies prohibiting discrimination in housing, employment, and public accommodations on the basis of sexual orientation or gender identity or expression.⁷⁵ “Sexual orientation” is defined as “actual or perceived homosexuality, heterosexuality and/or bisexuality.”⁷⁶ “Gender identity or expression” is defined as “self-perception, or perception by others, as male or female, and shall include an individual’s appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one’s physical anatomy, chromosomal sex, or sex assigned at birth, and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment.”⁷⁷ Article 183 contains an exception on the basis of religion.⁷⁸

Article 183 grants the Easton Human Relations Commission the power to administer and enforce the section.⁷⁹ Section 183.06 defines the procedures by which the Commission investigates and enforces discriminatory practices.⁸⁰ In addition, Section 183.07 allows for a private right of action in the Northampton Court of Common Pleas.⁸¹

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

⁶⁹ CODE OF THE BOROUGH OF WEST CHESTER § 37A-2.

⁷⁰ CODE OF THE BOROUGH OF WEST CHESTER § 37A-4.

⁷¹ CODE OF THE BOROUGH OF WEST CHESTER § 37A-5.

⁷² CODE OF THE BOROUGH OF WEST CHESTER § 37A-6.

⁷³ CODE OF THE BOROUGH OF WEST CHESTER § 37A-7.

⁷⁴ Vote of 5-0. See NGLTF, TCRP, 2006, *supra* note 66.

⁷⁵ CODE OF ORDINANCES OF THE CITY OF EASTON, Art. 183.

⁷⁶ CODE OF ORDINANCES OF THE CITY OF EASTON § 183.02.

⁷⁷ CODE OF ORDINANCES OF THE CITY OF EASTON § 183.02.

⁷⁸ CODE OF ORDINANCES OF THE CITY OF EASTON § 183.04.

⁷⁹ CODE OF ORDINANCES OF THE CITY OF EASTON §§ 183.05-06.

⁸⁰ CODE OF ORDINANCES OF THE CITY OF EASTON. § 183.06.

⁸¹ CODE OF ORDINANCES OF THE CITY OF EASTON § 183.07.

6. City of Harrisburg

The City of Harrisburg passed a nondiscrimination ordinance (Ordinance 17) in 1992. Chapter 4-101 prohibits discrimination in employment, housing, public accommodations, education and obtaining loans and extensions of credit on the basis of, among other things, sexual preference/orientation.⁸² “Sexual preference/orientation” is defined as “male or female homosexuality, heterosexuality and bisexuality, by preference, practiced or as perceived by others.”⁸³ In addition, “sex” is defined to include “those persons who are changing or have changed their sex.”⁸⁴

Chapter 4-103 establishes and describes the Harrisburg Human Relations Commission and Chapters 4-107 and 4-109 detail the process for investigating and enforcing discriminatory practices.

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

7. Lancaster City

Chapter 125 of the Code of the City of Lancaster outlines the city’s anti-discrimination policies. It was amended on November 27, 2001 by Ordinance No. 10-2001 to include a prohibition against discrimination in employment, housing, real estate and public accommodations based on sexual orientation. “Sexual orientation” is defined as “male or female homosexuality, heterosexuality, bisexuality and any other gender identity, by practice or as perceived by others.”⁸⁵

Chapter 125 grants the Lancaster City Human Relations Commission the power to administer and enforce the section.⁸⁶ Sections 125-6 through 125-16 define the procedures by which allegations of discrimination are investigated and enforced.⁸⁷

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

8. Borough of Lansdowne

On March 15, 2006, the Borough of Lansdowne adopted Chapter 38 of the Lansdowne Borough Code by Ordinance No. 1215, which established a Human Relations Commission in and for the Borough of Lansdowne.⁸⁸ Chapter 38 also created broad

⁸² HARRISBURG CITY CODE §§ 4-101.1 and 4-101.2.

⁸³ HARRISBURG CITY CODE § 4-101.6(dd).

⁸⁴ HARRISBURG CITY CODE § 4-101.6(cc).

⁸⁵ LANCASTER CITY CODE § 125-4.

⁸⁶ LANCASTER CITY CODE § 125-6.

⁸⁷ LANCASTER CITY CODE. §§ 125-6 to 125-16.

⁸⁸ Vote of 7-0. *See* NGLTF, TCRP, 2006, *supra* note 66.

protections against discrimination, including prohibiting discrimination on the basis of sexual orientation or gender identity and expression.⁸⁹ “Sexual orientation” is defined as “actual or perceived homosexuality, heterosexuality and bisexuality.”⁹⁰ “Gender identity and expression” is defined as “self-perception, or perception by others, as male or female, and shall include an individual’s appearance, behavior or physical characteristics that may be in accord with, or opposed to, one’s physical anatomy, chromosomal sex or sex assigned at birth, and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment.”⁹¹ Chapter 38 grants the Borough Human Relations Committee the power to administer and enforce the section.⁹²

In 2007, the Borough of Lansdowne adopted a provision creating a registry for domestic partnerships.⁹³

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

9. Borough of New Hope

Chapter 129 of the New Hope Borough Code of Ordinances was adopted on September 10, 2002 by Ordinance No. 2002-4.⁹⁴ This Chapter provides New Hope’s ordinances relating to nondiscrimination in employment, housing, and places of public accommodation.⁹⁵ Chapter 129 makes it unlawful to discriminate in employment, housing, and with regard to public accommodations on the basis of sexual orientation or gender identity.⁹⁶ “Sexual orientation” is defined as “actual or perceived homosexuality, heterosexuality and bisexuality.”⁹⁷ “Gender identity” is defined as “self-perception, or perception by others, as male or female, and shall include a person’s appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one’s physical anatomy, chromosomal sex, or sex assigned at birth; and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment.”⁹⁸ Complaints arising under this section are filed with, and investigated and enforced by the Borough Manager of New Hope.⁹⁹ A person must file a complaint within 60 days of the alleged act of discrimination.¹⁰⁰

⁸⁹ LANSDOWNE BOROUGH CODE § 38-3.

⁹⁰ LANSDOWNE BOROUGH CODE § 38-2.

⁹¹ LANSDOWNE BOROUGH CODE § 38-2.

⁹² LANSDOWNE BOROUGH CODE § 38-4.

⁹³ LANSDOWNE BOROUGH CODE, §§ 170-1 through 170-6. Adopted May 16, 2007, by Ord. No. 1226.

⁹⁴ Vote of 6-0. *See* NGLTF, TCRP, 2006, *supra* note 66.

⁹⁵ *See generally* NEW HOPE BOROUGH CODE OF ORDINANCES § 129.

⁹⁶ NEW HOPE BOROUGH CODE OF ORDINANCES §§ 129-2 through 129-4.

⁹⁷ NEW HOPE BOROUGH CODE OF ORDINANCES § 129-1.

⁹⁸ NEW HOPE BOROUGH CODE OF ORDINANCES § 129-1.

⁹⁹ NEW HOPE BOROUGH CODE OF ORDINANCES § 129-5.

¹⁰⁰ NEW HOPE BOROUGH CODE OF ORDINANCES § 129-5.

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

10. City of Scranton

On December 8, 2003, Chapter 296 was adopted by Ordinance No. 243-2003 as part of the General Code of the City of Scranton.¹⁰¹ Chapter 296 prohibits discriminatory employment, housing, real estate, and public accommodations practices on the basis of sexual orientation or gender identity.¹⁰² “Sexual orientation” is defined as “male or female homosexuality, heterosexuality and bisexuality, by preference, practice or as perceived by others.”¹⁰³ “Gender identity” is defined as “self-perception, or perception by others, as male or female, including a person’s appearance, behavior or physical characteristics, that may be in accord with, or opposed to, ones physical anatomy, chromosomal sex or sex assigned at birth.”¹⁰⁴

The Human Relations Commission of the City of Scranton enforces Chapter 296.¹⁰⁵ Sections 296-8 through 296-10 describe the procedures by which the Commission investigates and enforces discriminatory conduct.

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

11. Borough of Swarthmore

On March 13, 2006, the Borough of Swarthmore passed Ordinance No. 1000, which created the Borough of Swarthmore Human Relations Commission and codified prohibitions against discrimination in housing, employment and public accommodations.¹⁰⁶ Chapter 207 contains prohibitions against such discrimination on the basis of sexual orientation and gender identity and expression.¹⁰⁷ “Sexual orientation” is defined as “actual or perceived homosexuality, heterosexuality and bisexuality.”¹⁰⁸ “Gender identity and expression” is defined as “self-perception, or perception by others, as male or female, and shall include an individual’s appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one’s

¹⁰¹ Vote of 5-0. See NGLTF, TCRP, 2006, *supra* note 66.

¹⁰² GENERAL CODE OF SCRANTON §§ 296-3 through 296-6.

¹⁰³ GENERAL CODE OF SCRANTON § 296-2.

¹⁰⁴ GENERAL CODE OF SCRANTON

¹⁰⁵ GENERAL CODE OF SCRANTON § 296-7.

¹⁰⁶ See SWARTHMORE CODE OF ORDINANCES Ch. 207. Vote of 7-0. See NGLTF, TCRP, 2006, *supra* note 66.

¹⁰⁷ SWARTHMORE CODE OF ORDINANCES § 207.03.

¹⁰⁸ SWARTHMORE CODE OF ORDINANCES § 207.01.

physical anatomy, chromosomal sex, or sex assigned at birth, and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment.”¹⁰⁹

The Borough of Swarthmore Human Relations Commission enforces complaints filed under Chapter 207 following “the procedures for filing and disposition of complaints as are set forth under the Pennsylvania Human Relations Act.”¹¹⁰

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

12. City of York

On September 15, 1998, the City of York passed the City of York Human Relations Ordinance (Ordinance No. 9-98) for the purpose of outlawing unfair and discriminatory housing, employment, and public accommodations practices.¹¹¹ Protection from discrimination on the basis of sexual orientation is included in Article 185. “Sexual orientation” is defined as “male or female heterosexuality, homosexuality, bisexuality, or any other gender identity or practice or as perceived by others.”¹¹² York’s anti-discrimination ordinances are extensive, comprising more than eleven pages of text.

The City of York Human Relations Commission enforces Article 185.¹¹³ Sections 185.10 through 185.15 describe the procedures by which the Commission investigates and enforces discriminatory conduct.¹¹⁴

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

13. Erie County

In 2007, the Erie County Council amended Ordinance 59 (2004) with respect to the Erie County Human Relations Commission.¹¹⁵ Ordinance 39 protects against unlawful discriminatory practices in employment, housing and public accommodations. The Ordinance also describes the powers and duties of the Commission, as well as the procedures for filing, investigating and enforcing complaints of discrimination. Pursuant to the Ordinance, “sexual orientation” is defined as “male or female heterosexuality, homosexuality, bisexuality, or any other gender identity, excluding any activity of a

¹⁰⁹ SWARTHMORE CODE OF ORDINANCES § 207.01.

¹¹⁰ SWARTHMORE CODE OF ORDINANCES § 207.04.

¹¹¹ CODIFIED ORDINANCES OF YORK §§ 185.02-03. *See also*, CODIFIED ORDINANCES OF YORK Art. 183 (Fair Housing). Article 183 was amended by Ordinance 3-1993 on February 16, 1993 to include, among other things, protection from discrimination on the basis of sexual orientation.

¹¹² CODIFIED ORDINANCES OF YORK § 185.04(z).

¹¹³ CODIFIED ORDINANCES OF YORK § 185.10.

¹¹⁴ CODIFIED ORDINANCES OF YORK §§ 185.10 – 185.15.

¹¹⁵ *See* Erie County Ordinance 39.

sexual nature prohibited by Title 18 of the Pennsylvania Consolidated Statutes or any other law of the Commonwealth of Pennsylvania.”¹¹⁶

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

14. Borough of State College

On December 17, 2007, the Borough of State College unanimously passed its own anti-discrimination ordinance.¹¹⁷ The ordinance, codified at Chapter V, Part I, prohibits discrimination in all matters involving employment.¹¹⁸ In addition, the ordinance established the Human Relations Commission for the Borough of State College, which began operations in 2008.¹¹⁹ Among the classes of discrimination prohibited in the ordinance are sexual orientation and gender identity or expression. “Sexual orientation” is defined as “actual or perceived homosexuality, heterosexuality and/or bisexuality.”¹²⁰ “Gender identity or expression” is defined as “self-perception, or perception by others, as male or female, and shall include a person’s appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one’s physical anatomy, chromosomal sex, or sex assigned at birth, and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment.”¹²¹ Section 905 provides for a religious exception.¹²² This ordinance was adopted in addition to the Borough’s Fair Housing Ordinance, which was enacted March 9, 1993, and which also provides protection from discrimination on the basis of sexual orientation.¹²³

The Human Relations Commission for the Borough of State College enforces Chapter V, Part I and the procedures by which it acts are described in Sections 906 through 911.

Specific information regarding the number or type of complaints filed with the Commission was not available online, and a non-exhaustive search for hearing transcripts was unsuccessful.

15. Allegheny County

On July 8, 2008, the County Council for Allegheny County proposed Bill No. 4201-08 to amend the Allegheny County Code of Ordinances and create a Human Relations Commission to establish a countywide nondiscrimination requirement in housing and employment on the basis of sexual orientation and gender identity or

¹¹⁶ Erie County Ordinance 39, Art. 4FF.

¹¹⁷ Unanimous vote. *See* NGLTF, TCRP, 2006, *supra* note 66.

¹¹⁸ STATE COLLEGE CODE OF ORDINANCES § 901.

¹¹⁹ STATE COLLEGE CODE OF ORDINANCES § 906.

¹²⁰ STATE COLLEGE CODE OF ORDINANCES § 903.

¹²¹ STATE COLLEGE CODE OF ORDINANCES § 903.

¹²² STATE COLLEGE CODE OF ORDINANCES § 905.

¹²³ *See* STATE COLLEGE CODE OF ORDINANCES §§ 501 – 510.

expression.¹²⁴ Bill No. 4201-08 was sponsored by 12 of the 15 County Council members. The proposed ordinance was referred to the County Committee on Government Reform.

Following the January 15, 2009 public hearing on Bill No 4201-8 in which supporters and opponents of the Bill spoke, press reports described efforts mounted in opposition by the American Family Association of Pennsylvania.¹²⁵

On July 1, 2009 the Allegheny County Council approved Bill 4201-8, and it was signed by the County's Chief Executive on July 6, 2009. It amends the Allegheny County Code of Ordinance, Division 2, Ch. 215, Art. V to prohibit discrimination on the basis of sexual orientation, gender identity, or gender expression and establishes a Human Rights Commission.

E. Occupational Licensing Requirements

Title 49 of the *Pennsylvania Code* provides professional and vocational standards for occupations requiring a state license. While several provisions relate to “moral character” and/or “sexual misconduct/impropriety,” a non-exhaustive search of news articles and websites did not uncover any information concerning specific examples of the occupational licensing standards being applied to LGBT applicants.

¹²⁴ Allegheny County Council Agenda Synopsis, July 8, 2008 at 3.

¹²⁵ See, e.g., The Pittsburgh Channel, *Pittsburgh Lawmakers To County: Anti-Discrimination Bill No Brainer' Allegheny County Lawmakers Waver On Bill Addressing Sexual Orientation*, *supra* note 25. See also Pittsburgh Independent Media Center, *Proposed Allegheny County Non-Discrimination Ordinance Draws Support and Criticism* (Jan. 26, 2009), <http://bit.ly/1Sd6B> (last visited Sept. 9, 2009). An AFA press release asserted that “[t]his ordinance is an attempt to normalize a very dangerous lifestyle...” American Family Association of Pennsylvania, News Release, *Allegheny County Trying to Force Homosexual/Bisexual/Transgender Lifestyle on Citizens* (Jan. 15, 2009), *available at* http://www.afaofpa.org/news_release_allegheny_county_hr_ordinance_1.15.09.htm

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

A. Case Law

1. State and Local Government Employees

Bianchi v. City of Philadelphia I, 183 F.Supp.2d 726 (2002).

In *Bianchi v. City of Philadelphia I*, a male firefighter brought a § 1983 action against the city asserting claims under Title VII, the Pennsylvania Human Rights Act (“PHRA”), and the state and federal constitutions.¹²⁶ The substantive discrimination claims were based on sex-based discrimination allegations. Bianchi alleged that the sexual harassment was rooted in a belief that he was homosexual. Bianchi also alleged retaliation in connection with the sex-based claims. The constitutional claims alleged violations of Bianchi’s due process and First Amendment rights during the course of the harassment and by his subsequent constructive termination.¹²⁷

More specifically, Bianchi alleged that he: discovered several used condoms in his desk drawer; began finding explicit homosexual playing cards inside his desk, his uniform, and his running gear; received a postcard at the firehouse insinuating that he was homosexual; found envelopes with the return address from the Gay Firefighter’s Association on his desk; found urine or feces on the sleeve of his running gear that he claimed to have caused a fungal infection around his mouth; and received threatening letters calling him a “queer.”¹²⁸

The Court held that Bianchi’s allegations could not support the substantive claims brought under Title VII and the PHRA because he could not demonstrate that he was discriminated against because of his “sex.” While the Court recognized that the actions taken against Bianchi “constituted harassment,” the court held that the actions did not meet the burden for proving same-sex harassment.¹²⁹ More specifically, the Court held that Title VII or the PHRA did not bar the type of harassment suffered by Bianchi.

¹²⁶ *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002).

¹²⁷ Bianchi also alleged that when he reported the harassment to his supervisors it was not addressed and that after filing a formal complaint he was removed from his lieutenant position, placed in an administrative position, and after taking medical leave on the advice of his doctor, was constructively terminated because the fire department refused to reinstate him. *Id.*

¹²⁸ 183 F.Supp.2d at 731-733.

¹²⁹ According to the Court, Bianchi could not prove the same-sex harassment fell within the bounds of any of the methods for proving same-sex harassment established in prior case law:

“(1) demonstrating a scenario in which the harassment is motivated by the aggressor’s sexual desire; (2) showing that [the] harasser display[ed] hostility towards the participation of a particular sex in the workplace or performing a particular function; or (3) illustrating that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.”

183 F.Supp.2d at 734-735 (citing *Bibby v. Philadelphia Coca Cola Bottling Company*, 260 F.3d 257 (3d. Cir. 2001)).

Therefore, the City of Philadelphia was granted summary judgment as to the substantive sexual harassment claims.

Despite the fact that the sex-based harassment claims were not allowed to go forward, the retaliation, due process and First Amendment claims survived summary judgment. In *Bianchi v. City of Philadelphia II*, the Third Circuit Court of Appeals found no abuse of discretion by the trial judge and affirmed a \$1,237,500 damages award based on the retaliation and due process claims.¹³⁰

Taylor v. City of Philadelphia, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).

In *Taylor v. City of Philadelphia*,¹³¹ an employee of the City of Philadelphia Free Library alleged discrimination based on his sexual orientation. The District Court dismissed intentional infliction of emotional distress and punitive damages claims against the City. However, it is unclear from the opinion whether other claims were allowed to go forward, and no further opinions or rulings were available online.

Before bringing suit, Taylor had filed two complaints with the Philadelphia Human Relations Commission, one in 1999¹³² and one in 2000¹³³, alleging discrimination based on his sexual orientation and, in 2000, alleging retaliation in response to his previous filing. Both times, the Commission determined that there was probable cause to support the charge.

McDaniels v. Delaware County Cmty. Coll., 1994 WL 675292 (E.D.Pa. Nov. 21, 1994).

Plaintiff filed suit alleging that he was denied a proper pre-termination hearing on the same-sex sexual harassment charges filed against him. A jury awarded Plaintiff reinstatement of his tenured teaching position and \$134,081 back pay, but denied relief on his claims of emotional and reputational harm. Plaintiff filed a motion for a new trial, pointing to defense counsel's summation, which included statements that he actually may have committed the sexual harassment for which he was terminated. The court denied the motion, ruling that these statements did not require a new trial since they were not materially prejudicial as they were part of the evidence and were somewhat relevant.¹³⁴

Ashlie v. Chester-Upland Sch. Dist., 1979 U.S. Dist. LEXIS 12516 (E.D. Pa. 1979).

¹³⁰ *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).

¹³¹ *Taylor v. City of Philadelphia*, 2001 WL 1251454 (E.D. Pa., Sept. 24, 2001).

¹³² Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹³³ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹³⁴ *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

Plaintiff, a high school art teacher and male-to-female transsexual, was fired without a hearing after returning to school for the new school year as a woman, having undergone a “sex-change” operation. The school cited “immorality” and other similar reasons for Plaintiff’s termination. The district court held that the lack of a hearing prior to Plaintiff’s dismissal was a violation of procedural due process, and ordered reinstatement to suspended status with pay pending the outcome of the hearing.¹³⁵

2. Private Employees

Demuth v. Miller, 438 Pa. Super. 437 (1995).

In *Demuth v. Miller*, a Pennsylvania Superior Court upheld, on appeal, a \$110,000 jury verdict awarded in a suit to enforce a noncompetition clause against a homosexual former employee.¹³⁶ The noncompetition clause was triggered when the defendant, fired because he was homosexual and had appeared on a local television program in support of a gay and lesbian organization, opened a competitive consulting firm and solicited the plaintiff’s clients.

In addition to the noncompetition clause, the employment contract in question contained a termination clause that classified homosexuality as cause for termination.¹³⁷ The clause was the admitted reason for the termination of the defendant’s employment. Among the considerations on appeal was whether the termination clause violated public policy and/or state and federal constitutions rendering the remainder of the contract, including the noncompetition clause, unenforceable.¹³⁸ In affirming the judgment, the Court held that there was no evidence the termination clause violated public policy.¹³⁹ Furthermore, the Court held that discrimination based on homosexuality was not actionable under any Pennsylvania statute, the Pennsylvania Constitution or the due process and equal protection doctrines contained in the Fourteenth Amendment of the United States Constitution.¹⁴⁰

Wood v. C.G. Studios, Inc., 660 F.Supp.176 (E.D. Pa.)(1987).

In 1987, the District Court for the Eastern District of Pennsylvania considered whether the Pennsylvania Human Relations Act (“PHRA”) extended to discrimination

¹³⁵ *Ashlie v. Chester-Upland Sch. Dist.*, 1979 U.S. Dist. LEXIS 12516 (E.D. Pa. 1979).

¹³⁶ See *DeMuth v. Miller*, 438 Pa. Super. 437 (1995).

¹³⁷ “Cause shall include, but is not limited to, moral turpitude, being charged with a felony, use of illicit drugs, intoxication while working, insulting Employer’s family and clients, not working, intentionally working slowly, intentionally losing clients, engaging in sexual activities in the office, and homosexuality.” 438 Pa. Super. at 440, emphasis added.

¹³⁸ 438 Pa. Super. at 449.

¹³⁹ 438 Pa. Super. at 454-455.

¹⁴⁰ “...the appellant has not claimed to have been treated discriminatorily because he is a male, but rather because he is a homosexual who chose to publicize his sexual preference. This type of claim is not actionable under any Pennsylvania statute or its constitution and is certainly not in violation of the doctrines of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution.” 438 Pa. Super. at 454.

against those undergoing sex reassignment surgery.¹⁴¹ In *Wood v. C.G. Studios, Inc.*, the plaintiff alleged that her employer discriminated against her based on sex and in violation of the PHRA when it failed to promote her and terminated her employment solely because it learned she had undergone surgery to correct her hermaphroditic condition.

In *Wood*, a diversity action which interpreted Pennsylvania state law, the Court held that “the Supreme Court of Pennsylvania would find, as a matter of law, that discrimination on the basis of gender-corrective surgery did not constitute discrimination on the basis of sex under Section 5(a) of the PHRA.”¹⁴² The Court held that there was no evidence the PHRA was intended to remedy discrimination against individuals having undergone gender-corrective surgery.¹⁴³ Furthermore, because there were no PHRA cases on point and Pennsylvania state courts had expressly recognized Title VII cases as persuasive authority on the subject of sex discrimination to that point, the Court considered Title VII cases in reaching its decision. In doing so, the Court was further persuaded by the fact that Title VII cases unanimously held it was not intended to extend protection to transsexuals or those undergoing sexual reassignment surgery.¹⁴⁴

B. Administrative Complaints

The Pennsylvania Human Relations Commission (“PHRC”) handles administrative complaints filed under the PHRA, the states’ equivalent to Title VII. The complaints are not available via electronic sources. However, a search of relevant case law uncovered at least one instance where a complaint filed with the PHRC alleging discrimination based on homosexuality and disability (HIV-positive condition) was dismissed by the PHRC.¹⁴⁵ In contrast, there are other cases where a plaintiff that filed a harassment claim with the PHRC was issued a right-to-sue letter and ultimately lost in federal court.¹⁴⁶

¹⁴¹ *Wood v. C.G. Studios, Inc.*, 660 F.Supp.176 (E.D. Pa.)(1987).

¹⁴² 660 F. Supp. at 176.

¹⁴³ The court’s interpretation of the PHRA was echoed in *Dobre v. National Railroad Passenger Corporation (“AMTRAK”)*, 850 F.Supp.284 (1993) (After analyzing the legislative history of the PHRA and relevant case law, a second District Court held that the PHRA did not extend protections to a transsexual undergoing hormone treatment and living as a female who alleged discrimination based upon the fact that she was not permitted to dress as a female, use the women’s restroom or be addressed by her female name at her place of employment).

¹⁴⁴ 660 F. Supp. at 178.

¹⁴⁵ *Ruberg v. Outdoor World Corporation*, 2005 WL 315070 (M.D.Pa.) (A homosexual male criticized by supervisor for being a homosexual, implored “to be normal” and diagnosed with HIV alleges that his termination was a pretext for discrimination on those bases and; therefore, violative of the PHRA.)

¹⁴⁶ See *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48 (2005) (A homosexual male alleged sexual harassment where among other things, a photocopied flier for a gay phone line was left in his mailbox with a harassing message, he was called a “fag,” and he received harassing voice mail messages that included the words, “faggot” and “fem.”) See also *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (2001) (A homosexual male alleged sexual harassment based on his belief that his employer and co-workers perceived him as having HIV/AIDS after he experienced medical complications at work and where a co-worker started a physical altercation with him in which he repeatedly stated, “everybody knows you’re gay as a three dollar bill,” “everybody knows you take it up the ass”).

The PHRC maintains a Public Hearing Opinion Library of all the final decisions that are approved by the Commission. None of the published opinions allege sexual orientation or gender identity discrimination.¹⁴⁷

In addition to the PHRC, there are local human relations commissions that interpret local anti-discrimination ordinances.¹⁴⁸ A review of the Philadelphia Human Relations Commission webpage detailed that in 2007, 219 employment discrimination complaints were docketed with the Commission.¹⁴⁹ Out of these, 19 involved allegations of discrimination on the basis of sexual orientation, and one involved allegations of discrimination on the basis of gender identity.¹⁵⁰ In 2006, 256 employment discrimination complaints were docketed (14 sexual orientation and 3 gender identity).¹⁵¹ The City of Philadelphia Law Department provided dispositions of cases filed against Philadelphia government employers pursuant to a written request, including the six cases briefly mentioned below.

Philadelphia Police Department

In 2006, an employee of the Philadelphia Police Department filed a complaint with the City of Philadelphia alleging that he had been discriminated against on the basis of his sexual orientation.¹⁵² The city settled with the employee.¹⁵³

Free Library of Philadelphia

On January 31, 2003, an employee of the Free Library of Philadelphia filed a complaint with the Pennsylvania Human Rights Commission alleging that she had been discriminated against on the basis of gender identity. The employee was harassed after she began to transition from male to female and was involuntarily transferred to an undesirable worksite.¹⁵⁴ The Commission found probable cause to support the charge.¹⁵⁵

¹⁴⁷ Pennsylvania Human Relations Commission, Legal Opinion Library, *available at*: http://sites.state.pa.us/PA_Exec/PHRC/legal/opinion_library.html.

¹⁴⁸ *See Dolan v. Community Medical Center Health-Care System*, 500 F.Supp.2d 503 (2007) (Unsuccessful job applicant who alleged the employer discriminated against her on the basis of sexual orientation filed a written complaint with the Human Relations Commission of the City of Scranton.) *See also* Philadelphia Commission on Human Relations, *About Us*, *available at*: http://www.phila.gov/humanrelations/Mission_Statement.html.

¹⁴⁹ PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2007, *available at* http://www.phila.gov/humanrelations/pdfs/2007_Annual_Report.pdf.

¹⁵⁰ PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2007, *available at* http://www.phila.gov/humanrelations/pdfs/2007_Annual_Report.pdf.

¹⁵¹ PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2006, *available at* <http://www.phila.gov/humanrelations/pdfs/2006AnnualReportFINA.pdf>.

¹⁵² Complaint, [Redacted] v. Philadelphia Police Department, Philadelphia Human Relations Commission, Complaint No. SGEN-6NQLXT (Apr. 10, 2006).

¹⁵³ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹⁵⁴ Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. PWIS-5JBKJJ (Jan. 31, 2003).

On July 8, 2003, the employee filed a second complaint against the Free Library of Philadelphia alleging that the library continued to discriminate against her and her co-workers continued to harass her, despite her previous complaint. She also alleged that the library was treating her badly in retaliation for filing the previous complaint.¹⁵⁶ Again, the Commission found that there was probable cause to support the charge.¹⁵⁷

On May 7, 2004, the employee filed a third complaint against the Free Library of Philadelphia alleging continued discrimination on the basis of gender identity and further retaliation based on her previous complaints.¹⁵⁸ For the third time, the Commission determined that there was probable cause to support her charge.¹⁵⁹

C. Other Documented Examples of Discrimination

Pennsylvania State Department

In 2008, a transgender applicant for a state agency database analyst position was not hired because of his gender identity.¹⁶⁰

Walnutport Police Department

Plaintiff, a former policeman for the town of Walnutport, alleged that borough officials violated his free speech rights by retaliating against him when he complained about attempts to pry into his sexual orientation and off-duty conduct in response to a demand by a city council member. The claim was settled for \$5,000.¹⁶¹

Adult Health Services Center

In 1996, a gay nurse at an adult health services center was subjected to a hostile work environment because of his sexual orientation.¹⁶²

¹⁵⁵ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹⁵⁶ Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5P8LUH (July 8, 2003).

¹⁵⁷ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Department, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹⁵⁸ Complaint, [Redacted] v. Free Library of Philadelphia, Philadelphia Human Relations Commission, Complaint No. MCOL-5YMHDX (May 7, 2004).

¹⁵⁹ Letter from Christopher R. DiFusco, Divisional Deputy City Solicitor, City of Philadelphia Law Dep't, to Christy Mallory, the Williams Institute (July 6, 2009) (on file with the Williams Institute).

¹⁶⁰ E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 26, 2009, 17:09:00 EST) (on file with the Williams Institute).

¹⁶¹ Lesbian & Gay L. Notes (Feb. 2005), *available at* <http://www.qrd.org/qrd/www/legal/IgIn/02.2005.pdf>.

¹⁶² E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND GENDER IDENTITY RELATED LAW

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

A. Criminalization of Same-Sex Sexual Behavior

Pennsylvania's voluntary deviate sexual intercourse statute was ruled unconstitutional in *Commonwealth of Pennsylvania v. Bonadio*. The statute was formerly repealed in 1995.¹⁶³

In *Commonwealth of Pennsylvania v. Bonadio*,¹⁶⁴ the Court held that the statute "exceed[ed] the valid bounds of police power while infringing the right to equal protection of the laws guaranteed by the Constitution of the United States and of [the] Commonwealth."¹⁶⁵ In doing so, the Court expressed its opinion that the statute, which suggested that "deviate acts" were improper if performed by unmarried persons but acceptable when done by married persons, could not meet the rational basis standard.¹⁶⁶

B. Hate Crimes

In 2002, the Pennsylvania legislature amended Pennsylvania's ethnic intimidation statute to define the offense as including acts of malicious intention based on perceived sexual orientation, gender or gender identity.¹⁶⁷ However, the amendment was subsequently ruled unconstitutional in *Marcavage v. Rendell*.¹⁶⁸ In *Marcavage*, arrestees charged with ethnic intimidation for evangelizing against individuals at a gay rights event brought an action challenging the constitutionality of the 2002 amendment. The appeals court ultimately held that the 2002 amendment was unconstitutional because it violated a constitutional provision that prohibited altering the original purpose of a bill after it is introduced by amendment. In other words, the process of enacting the 2002 amendment did not meet procedural requirements contained in the state constitution. The Court did not address the substantive question of whether an amendment criminalizing conduct

¹⁶³ 18 PA.CONS. STAT. § 3124. Voluntary deviate sexual intercourse (Repealed March 31, 1995).

¹⁶⁴ *Commonwealth v. Bonadio*, 490 Pa. 91 (1980).

¹⁶⁵ *Bonadio*, 490 Pa. at 50.

¹⁶⁶ *Bonadio*, 490 Pa. at 51.

¹⁶⁷ Act of December 3, 2002, P.L. 1176, No. 143 (Act 143) amended Section 2710 of the Crimes Code (ethnic intimidation) to read as follows: "(a) Offense defined. A person commits the offense of ethnic intimidation if, with malicious intention toward the race, color, religion or national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals, he commits an offense under any other provision of this article..."

¹⁶⁸ *Marcavage v. Rendell*, 936 A.2d 188 (2007), order affirmed by *Marcavage v. Rendell*, 951 A.2d 345 (2008).

based on perceived sexual orientation, gender or gender identity could be constitutional if enacted properly. For further discussion of *Marcavage*, see Section II.A, fn. 1.

C. Education

The Pennsylvania Fair Educational Opportunities Act¹⁶⁹ declares the state's policy with regard to discriminatory practices in education. The Act includes no protection for discrimination based on sexual orientation, gender and/or gender identity. The relevant provision of the Act reads as follows: "It is hereby declared to be the policy of this Commonwealth that all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability."¹⁷⁰

There are also three provisions in the Pennsylvania Code that speak to protections against sexual orientation/gender identity-based discrimination:

- 22 PA. CODE § 12.4: "Consistent with the Pennsylvania Human Relations Act (43 P. S. § § 951—963), a student may not be denied access to a free and full public education, nor may a student be subject to disciplinary action on account of race, sex, color, religion, sexual orientation, national origin or disability."
- 22 PA. CODE § 235.4(b)(4): "Professional educators shall exhibit consistent and equitable treatment of students, fellow educators and parents. They shall respect the civil rights of all and not discriminate on the basis of race, national or ethnic origin, culture, religion, sex or sexual orientation, marital status, age, political beliefs, socioeconomic status, disabling condition or vocational interest. This list of bases or discrimination is not all-inclusive."
- 22 PA. CODE § 235.8(1): "The professional educator may not: (1) Discriminate on the basis of race, National or ethnic origin, culture, religion, sex or sexual orientation, marital status, age, political beliefs, socioeconomic status; disabling condition or vocational interest against a student or fellow professional. This list of bases of discrimination is not all-inclusive. This discrimination shall be found to exist by an agency of proper jurisdiction to be considered an independent basis for discipline."

D. Health Care

Several provisions within the Pennsylvania code protect against sexual orientation and/or gender identity-based discrimination within the health care area:

4 PA. CODE § 257.4(e)(2) [regarding County-run drug and alcohol treatment programs]: "The case management system shall not discriminate on the basis of age, race, creed, sex, ethnicity, color, national origin, marital status, sexual orientation, handicap or religion."

¹⁶⁹ Pennsylvania Fair Educational Opportunities Act, Act of July 17, 1961, P.L. 776, as amended.

¹⁷⁰ Pennsylvania Fair Educational Opportunities Act, at § 2(a).

55 PA. CODE § 2600.42(a) [regarding personal care facilities, i.e., nursing homes]: “A resident may not be discriminated against because of race, color, religious creed, disability, handicap, ancestry, sexual orientation, national origin, age or sex.”

55 PA. CODE § 3800.32(a) [regarding child residential and day treatment facilities, applicable to children under 18 with mental retardation, a mental illness or a serious emotional disturbance]: “A child may not be discriminated against because of race, color, religious creed, disability, handicap, ancestry, sexual orientation, national origin, age or sex.”

E. Gender Identity

The State of Pennsylvania addressed the issue of transgender name changes in four decisions spanning between 1977 and 1998.¹⁷¹ All four cases involved pre-operative transsexual males who wanted to change their name to comport with their identity as a female. The relevant name change statute contained statutory requirements, but also required court approval before a formal name change could be processed.¹⁷² The statute only listed fraud (e.g. avoiding payment of taxes of debt) as cause for denying a petition.¹⁷³

Despite the statute’s limited justification for denial, the Courts in the first two cases interpreted an earlier case, *The Supreme Court of Pennsylvania in Faluccci Name Case*, as granting them broad discretion to grant or refuse a name change petition.¹⁷⁴ In accordance with this perceived discretion, they held that permitting a name change prior to sex reassignment surgery did not “comport with good sense, common decency and fairness to all concerned, especially the public.”¹⁷⁵

In the latter two cases, the petitioners were denied name changes in the lower courts; however, the appellate courts ultimately held that the trial court’s failure to grant a name change was improper.¹⁷⁶ In the 1998 case on the matter, the state Supreme Court expressed its opinion that *Faluccci* did not permit a judge “concerned about a male assuming a female identity in mannerism and dress...a matter which is of no concern to the judiciary, and which has no bearing on the outcome of a simple name change

¹⁷¹ See *In Re Dowdrick*, 4 Pa. D. & C.3d 681 (1978); *In Re: the Petition of Percy Richardson to Change Name*, 23 Pa. D. & C.3d 199 (1982); *In re Brian Harris, a/k/a Lisa Harris*, 707 A.2d 225 (Pa. Super. Ct. 1997); *In the Matter of Robert Henry McIntyre*, 552 Pa. 324 (1998).

¹⁷² See 54 PA.CONS. STAT. §§ 701-705.

¹⁷³ *In Re Dowdrick, supra*, 4 Pa. D. & C.3d at 683.

¹⁷⁴ See *The Supreme Court of Pennsylvania in Faluccci Name Case*, 355 Pa. 588 (1947) (“whenever the court has discretion in any matter (as it has in the matter of a change of name) it will exercise that discretion in such a way as to comport with good sense, common decency and fairness to all concerned and to the public”).

¹⁷⁵ *In Re Dowdrick, supra*, 4 Pa. D. & C.3d at 685; *In Re: the Petition of Percy Richardson to Change Name, supra*, Pa.D. & C.3d at 200 (“as we see it is that we are being asked to lend the dignity of the court and the sanctity of the law to this freakish rechristening”).

¹⁷⁶ *In re Brian Harris, a/k/a Lisa Harris, supra*, at p. 228; *In the Matter of Robert Henry McIntyre, supra*, at 329-330.

application” to deny a name change petition.¹⁷⁷ Furthermore, the Court held that there was no public interest being protected by the denial of a transsexual name change petition and that they saw no reason to impose restrictions on name change petitions beyond those expressly contained in the statute.¹⁷⁸

Similarly, in *In re Nadine Ann Miller*, the Superior Court of Pennsylvania considered whether denial of a woman’s petition to change her surname to that of her life companion was improper.¹⁷⁹ The name change petition had been denied by the Court of Common Pleas, when the Court held that the name change offended law and public policy insofar as it would have “give[en] the appearance of approval of a same-sex marriage.”¹⁸⁰ The Superior Court ultimately held that there was no acceptable public policy reason for denying the name change and; therefore, that the trial court abused its discretion in denying the petition.¹⁸¹

F. Parenting

Constant A. v. Paul C.A. remains good law on the issue of custody, where a homosexual parent has borne children in a prior heterosexual relationship.¹⁸² In the case, a Pennsylvania Superior Court upheld a lower court’s denial of a lesbian mother’s petition for expanded shared custody of her children. The lower court’s denial was rooted in a belief that the mother’s lesbian relationship rendered her immoral.¹⁸³ While the Court acknowledged that the trial court’s finding concerning the moral nature of the mother’s relationship was “gratuitous,” it ultimately agreed with the lower court’s ruling.¹⁸⁴ Among other things the Court established that, “where there is a custody dispute between members of a traditional family environment and one of homosexual composition, *the presumption of regularity applies to the traditional relationship* and the burden of proving no adverse effect of the homosexual relationship falls on the person advocating it.”¹⁸⁵ Furthermore, it insinuated that allowing the children, particularly the female child, to be exposed to the mother’s relationship would indicate that homosexuality “[was] a suitable life style for the children.”¹⁸⁶

¹⁷⁷ *In the Matter of Robert Henry McIntyre*, at 330.

¹⁷⁸ *In the Matter of Robert Henry McIntyre*, at 330.

¹⁷⁹ *In re Nadine Ann Miller*, 824 A.2d 1207 (2003).

¹⁸⁰ *In re Nadine Ann Miller*, at 1212.

¹⁸¹ *In re Nadine Ann Miller*, at 1214.

¹⁸² *Constant A. v. Paul C.A.*, 496 A.2d 1 (Pa. Super. Ct.1985).

¹⁸³ In its decree, the lower court stated: “Notwithstanding the efforts of the so called ‘Gay Rights’ movement, we conclude that the natural mother’s lesbian relationship shows her moral deficiency; however, there is no proof that the mother’s homosexuality constitutes a grave threat to the children. Therefore, under such circumstances, we will consider the factor of the natural mother’s lesbian relationship only to limit visitation and not to completely deny it.” 496 A.2d at 3.

¹⁸⁴ “[W]e find, after a careful review of the record, the briefs of the parties including the Amicus Brief of the Civil Liberties Union, and the Opinion of the trial court, that the lower court, in its findings, was basically correct and his decree must be sustained.” 496 A.2d at 7-8.

¹⁸⁵ 496 A.2d at 5.

¹⁸⁶ 496 A.2d at 8.

In the cases of *In Re Adoption of C.C.G. and Z.C.G.* and *In Re Adoption of R.B.F. and R.C.F.* two Pennsylvania Superior Courts considered whether Pennsylvania's Adoption Act permits a domestic partner to adopt their partner's children without the partner (and each child's natural parent) relinquishing parental rights.¹⁸⁷ Both cases required interpretation of the Act, which, if strictly interpreted, did not permit a non-spouse to adopt a child where the legal parents had not relinquished their parental rights.¹⁸⁸ Both courts ultimately held that the plain language of the Act did not permit the adoptions. The dissent in *In Re Adoption of C.C.G. and Z.C.G.* expressly stated its dissatisfaction with the majority's discriminatory analysis, which it believed "erroneously focused upon the relationship between the [parents] rather than the parent-child relationship."¹⁸⁹

On appeal, the Supreme Court of Pennsylvania reversed the decisions, ruling that the Act gave courts the discretion to deviate from its express language for good cause.¹⁹⁰ The Court's opinion contained the following: "There is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents. It is therefore absurd to prohibit their adoptions merely because their children were either the biological or adopted children of their partners prior to the filing of the adoption petition."¹⁹¹

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions, & Domestic Partnership

As noted in section II.D, *supra*, several of Pennsylvania's cities and boroughs have same-sex "life partnership" registries. Relevant state statutes specifically define marriage as between "one man and one woman." When the statute limiting marriage to one man and one woman came to a vote in 1997, the Senate passed it 43-5 and the House, 189-13. One representative commented after the hearing, "I just thank God I'm going back to Oakdale, where men are men and women are women, and believe me boys, there's one hell of a difference."¹⁹²

In *De Santo v. Barnsley*,¹⁹³ the Court held that as a matter of law, two persons of the same sex cannot contract a common law marriage. The Court concluded that even though the law with regard to common law marriage did not expressly prohibit same-sex marriage,¹⁹⁴ the practical effect of expanding common law marriage to include same-sex

¹⁸⁷ *In Re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724 (2000); *In Re Adoption of R.B.F. and R.C.F.*, 569 Pa. 269 (2002).

¹⁸⁸ 23 PA.CON.S. STAT..ANN. § 2711(d).

¹⁸⁹ *In Re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 728.

¹⁹⁰ *In re Adoption of R.B.F. and R.C.F.*, 569 Pa. 269 (2002).

¹⁹¹ 569 Pa. at 281-282.

¹⁹² PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 97 (1997 ed.).

¹⁹³ *De Santo v. Barnsley*, 476 A.2d 952 (1984).

¹⁹⁴ "A common law marriage is one affected by agreement of the parties without the benefit of the formality of a church ceremony or officiating officer, and without a license." *In re: Manfredi's Estate*, 399

marriage would have been to amend the Marriage Law, something only the legislature could do.¹⁹⁵ However, see section II.D.2., *supra*, for a discussion of *Devlin v. City of Philadelphia*, which upheld the Philadelphia Bill that included “life partner” within the definition of “marital status.”

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

Prison Cases

The United States District Court for the Eastern District of Pennsylvania considered whether state prison officials were “deliberately indifferent” to a transsexual inmate’s serious medical needs in *Wolfe v. Horn*.¹⁹⁶ In *Wolfe*, state prison officials abruptly terminated prescribed hormonal treatment for an inmate who suffered from a gender identity disorder and whose medical history reflected depression, alcoholism and suicidal impulses without treatment.¹⁹⁷ In considering the state’s motion for summary judgment, the court held that the termination of treatment might have risen to the level of “deliberate indifference,” in which case it violated the Eighth Amendment’s ban against “cruel and unusual punishment.” Accordingly, it ordered that the Eighth Amendment claim go forward to trial.¹⁹⁸ Subsequent opinions and rulings were not available online and an internet search did not provide any details about whether the plaintiff ultimately prevailed.

In *Abdullah v. Fetrow*,¹⁹⁹ the court considered alleged denigration based on sexual orientation by a police officer to an accused. The accused, Abdullah, was an African-American, homosexual, disabled male, whose sister reported that he was using her social security number to open lines of credit.²⁰⁰ Abdullah had injuries that required him to use an adult diaper.²⁰¹ In response to the sister’s accusations, Officer Fetrow allegedly burst into Abdullah’s apartment where he was asleep with his partner, called him a “little baby faggot” and refused to allow him to dress.²⁰² Thereafter, the officers allegedly refused to accommodate Abdullah’s disabilities during his stay in prison pending charges.²⁰³ On appeal, the court reversed dismissal of Abdullah’s claims of discrimination based on his homosexuality because the complaint impliedly alleged that Officer Fetrow had charged Abdullah with a crime because of his sexual orientation.²⁰⁴

Pa. 285 (1960). “A common law marriage may be created by uttering words in present tense with intent to establish a marital relationship.” *Com. v. Sullivan*, 484 Pa. 130 (1979).

¹⁹⁵ 484 Pa. at 956.

¹⁹⁶ *Wolfe v. Horn*, 130 F.Supp.2d 648 (2001).

¹⁹⁷ 130 F.Supp. at 650.

¹⁹⁸ 130 F.Supp. at 653.

¹⁹⁹ 2006 WL 1274994 (M.D. Pa.).

²⁰⁰ *Id.* at *1.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at *7.

This violated the Fourteenth Amendment, which forbids punishment based on something other than conduct.²⁰⁵

Non-employment Administrative Complaints

A review of the Philadelphia Human Relations Commission webpage detailed that in 2006 it docketed seven non-employment related discrimination complaints based on sexual orientation and resolved six.²⁰⁶ In 2007, it docketed three such complaints based on sexual orientation and resolved five.²⁰⁷ It is not clear from either report what percentage of complaints docketed or resolved were filed against state or local actors. No local non-employment related discrimination complaints came up during the course of our research.

²⁰⁵ *Id.*

²⁰⁶ PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2006, *available at* <http://www.phila.gov/humanrelations/pdfs/2006AnnualReportFINA.pdf>.

²⁰⁷ PHILADELPHIA COMMISSION ON HUMAN RELATIONS & FAIR HOUSING COMMISSION, ANNUAL REPORT 2007, *available at* http://www.phila.gov/humanrelations/pdfs/2007_Annual_Report.pdf.