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

Title

Nevada - Sexual Orientation and Gender Identity Law and Documentation of Discrimination

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MEMORANDUM

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

I. OVERVIEW

With respect to employment, Nevada law has prohibited discrimination on the basis of sexual orientation since 1999.¹ However, the statute also contains a broad exception to its provisions for any 501(c)(3) non-profit organization. This exception applies solely to discrimination based on sexual orientation and not to any other protected class. There is no coverage in the statute for discrimination based on gender identity.

During legislative consideration of the bill, oral and written testimony entered into the record evidencing animus against LGBT persons included (i) arguments that protection should not be granted to persons who engage in deviant sexual conduct,² (ii) an article submitted as evidence that homosexuals were more likely to molest children than others,³ (iii) evidence that homosexuals have higher incomes than heterosexuals,⁴ (iv) testimony that the statute would force employers to hire individuals who may not be “trustworthy” or who are “perhaps infected with the AIDS virus,”⁵ and (v) testimony that the legislation was “fascist” and constituted “reverse discrimination” by requiring employers to hire homosexuals despite personal convictions on the immorality of homosexuality.⁶

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

- Since the enactment of the statute, 27 complaints have been filed with the Nevada Equal Rights Commission against state actors claiming discrimination on the basis of sexual orientation.⁷

¹ See *infra* Section II.A.1.

² See Minutes of Nev. Assem. Comm. (Mar. 10, 1999). Testimony in the record included an article published by the Family Research Council, entitled “Homosexuality Is Not A Civil Right,” which asserted: “Homosexual activists realize that when people become aware of common homosexual practices, such as anal intercourse, anal-oral contact -- along with other homosexual practices such as inserting arms inside each other’s bodies and ‘sports’ involving bodily excretions -- they will see that these behaviors do not merit special protection in our laws.” *Id.*; see Nev. Online Research Library, <http://bit.ly/3r2gOX> (last visited Sept. 7, 2009).

³ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

⁴ See Minutes of Nev. Sen. Comm. (May 6, 1999).

⁵ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

⁶ Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

⁷ See *infra* Section II.A.2.

- In 2008, a transgender public school teacher was fired because of her gender identity.⁸

Nevada's law concerning discrimination in places of public accommodations does not protect against discrimination on the basis of sexual orientation, gender identity or sex. While there is a bill pending that would prohibit discrimination on the basis of sexual orientation (and sex) in places of public accommodation (and extend protection against housing discrimination to discrimination on the basis of familial status), the same bill does not propose to extend Nevada's fair housing laws to prohibit discrimination on the basis of sexual orientation.⁹ Finally, despite the repeal of its sodomy law in 1993, the history behind that law, which applied only to same-sex sexual relations before its repeal, evidences a concerted bias against gays and lesbians.¹⁰

Nevada law contains no protections against discrimination on the basis of gender identity, and no such laws have been formally proposed.¹¹ Research uncovered several cases outside the employment discrimination context involving claims of discrimination on the basis of gender identity.¹²

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.

⁸ 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).

⁹ *See infra* Section IV.B.

¹⁰ *See infra* Section IV.A.

¹¹ *See* TRANSGENDER LAW & POLICY INSTITUTE: NON-DISCRIMINATION LAWS IN THE US THAT EXPLICITLY INCLUDE TRANSGENDER PEOPLE (2006), *available at* <http://www.transgenderlaw.org> (last visited Sept. 12, 2009).

¹² *See infra* Section IV.F.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

In 1999, Nevada enacted legislation to prohibit discrimination in employment based on sexual orientation.¹³ The statute provides, in pertinent part, that “it is unlawful employment practice for an employer: (a) [t]o fail or refuse to hire or to discharge any person, or otherwise discriminate against any person with respect to his compensation, terms, conditions or privileges of employment, because of his ... sexual orientation; or (b) [t]o limit, segregate or classify an employee in any way which would deprive or tend to deprive him of employment opportunities or otherwise adversely affect his status as an employee, because of his ... sexual orientation.”¹⁴ The statute defines “sexual orientation” as “having or being perceived as having an orientation for heterosexuality, homosexuality, or bisexuality.”¹⁵ The statute does not cover discrimination on the basis of gender identity.

In addition to general prohibitions on employment discrimination on the basis of sexual orientation, Nevada law prohibits (i) employment agencies, labor organizations, and employers, labor organizations or joint labor-management committees controlling apprenticeship or other training or retraining, from discriminating against any person on the basis of sexual orientation (among other factors),¹⁶ and (ii) any employer, labor organization or employment agency from publishing any advertisement relating to employment indicating a preference, limitation, specification or discrimination based on sexual orientation (among other factors).¹⁷

In addition to chapter 613, in 1999 Nevada revised certain other sections of the Nevada code pertaining to government entities to expressly prohibit discrimination on the basis of sexual orientation by government entities. Chapter 281 prohibits discrimination in employment by state actors, providing that state, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof shall not refuse to hire a person, discharge or bar any person from employment, or discriminate against any person in compensation or in other terms and conditions of employment because of his sexual orientation.¹⁸ Chapter 338 prohibits state contractors from discrimination on the basis of sexual orientation, and provides that contracts with such contractors must contain

¹³ NEV. REV. STAT. ANN. § 613.010 *et seq.* (2008) (amended by A.B. 311 (Nev. 1999)).

¹⁴ NEV. REV. STAT. ANN. § 613.330(1).

¹⁵ NEV. REV. STAT. ANN. §§ 610.010(5), 613.310(6); *see also* NEV. REV. STAT. ANN. § 281.370(3)(b) (2008). In 2007, Nevada further amended its employment discrimination statute to expressly include human immunodeficiency virus (HIV) as a disability for which discrimination in employment is prohibited. NEV. REV. STAT. ANN. § 613.310(1)(a) (2008) (amended by A.B. 443 (Nev. 2007)).

¹⁶ NEV. REV. STAT. ANN. § 613.330(2)-(4) (2008). Nevada law also contains various provisions providing for the prohibition on discrimination on the basis of sexual orientation (among other factors) in the sponsorship, recruiting, selection employment and training of apprentices. NEV. REV. STAT. ANN. §§ 610.020(1), 610.150(10), and 610.185; NEV. ADMIN. CODE §§ 610.510, 610.530 and 610.665.

¹⁷ NEV. REV. STAT. ANN. § 613.340(2) (2008).

¹⁸ NEV. REV. STAT. ANN. § 281.370(2).

a provision pursuant to which the contractor agrees that, in the performance of the contract, it shall not discriminate against any employee or applicant for employment because of sexual orientation.¹⁹

Nevada's anti-discrimination law includes several exceptions. The provisions of the statute do not apply to any religious corporation, association or society "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of its religious activities."²⁰ The statute also provides that it is not an unlawful employment practice for a school or other educational institution to hire employees of a particular religion if the school is supported substantially by a religious organization or if the curriculum of the school is directed toward the propagation of a particular religion.²¹ There are also exceptions for cases where an otherwise prohibited basis for employment is a "bona fide occupational qualification"²² and, with respect to disability, specific instances where the lack of the disability is necessary to perform the work required.²³ For purposes of Nevada's employment discrimination laws, "employer" is defined to exclude persons or entities with fewer than fifteen employees, the United States or any corporation owned by the United States, Indian tribes, and "private membership clubs" exempt from taxation pursuant to 26 U.S.C. §501(c)(3).²⁴

In addition to the aforementioned exceptions, Nevada's employment discrimination law contains a broad exclusion under which its provisions "concerning unlawful employment practices related to sexual orientation do not apply to organizations that are exempt from taxation pursuant to 26 U.S.C. § 501(c)(3)."²⁵ No other exclusion to Nevada's employment discrimination statute is limited to employment practices related to a single class of individuals that are otherwise protected by the statute. Specifically, the aforementioned exclusions for religious organizations and private membership clubs apply to all classes of persons protected by the statute (e.g., race, sex, age, disability, etc.).²⁶ Further, the statute's exclusions for religious organizations are not blanket exclusions but, rather, exclusions tied to employees performing a specific job function (e.g., carrying on religious activities) or working in a specific setting (e.g., a parochial school).²⁷ By contrast, the exclusion of non-profit organizations from the statute's prohibition on discrimination on the basis of sexual orientation is a blanket exclusion.

¹⁹ NEV. REV. STAT. ANN. § 338.125.

²⁰ NEV. REV. STAT. ANN. § 613.320(1)(b).

²¹ NEV. REV. STAT. ANN. § 613.350(4).

²² NEV. REV. STAT. ANN. § 613.350(1).

²³ The exception for disability applies in instances "where physical, mental or visual condition is a bona fide and relevant occupational qualification necessary to the normal operation of that particular business or enterprise, if it is shown that the particular disability would prevent proper performance of the work for which the person with a disability would otherwise have been hired, classified, referred or prepared under a training or hiring program. NEV. REV. STAT. ANN. § 613.350(2).

²⁴ NEV. REV. STAT. ANN. § 613.310(2).

²⁵ NEV. REV. STAT. ANN. § 613.320(2).

²⁶ NEV. REV. STAT. ANN. §§ 613.320(2)(1)(b) & 613.350(4). Nevada's employment discrimination law also provides for circumstances under which it is not unlawful for an employer to consider a person's disability, but contains specific parameters to ensure the exception is applied narrowly. NEV. REV. STAT. ANN. § 613.350(2) (2009).

²⁷ NEV. REV. STAT. ANN. §§ 613.320(2)(1)(b) and 613.350(4).

2. Enforcement and Remedies

Nevada law provides for the processing of complaints under Nevada's equal opportunity employment statute by the Nevada Equal Rights Commission (the "NERC").²⁸ The NERC also administers the remedies for employment discrimination available under Nevada law.

The NERC administers complaints pertaining to discriminatory practices in employment. Nevada law charges the NERC with promulgating a process for the review of complaints and determining whether to hold informal meetings or investigations concerning a complaint.²⁹ Complaints must be filed within 300 days of the occurrence of the allegedly unlawful practice.³⁰

The process established by the NERC for filing and processing a complaint is as follows: (i) complainant completes and submits an intake form describing the alleged discriminatory employment practice, (ii) complaint is reviewed, and, if it falls within the NERC's jurisdiction, a formal charge is drafted for signature by the complainant and sent to the employer, (iii) complaint is submitted for investigation or an informal settlement meeting is scheduled (all complaints for which the settlement meeting is unsuccessful are submitted for investigation), (iv) both parties are offered the opportunity to present evidence supporting their position, with complainant bearing the initial burden of proof of demonstrating an unlawful employment practice, and (v) upon completion of investigation, the NERC issues a right to sue letter (valid for 90 days) or advises complainant that there does not appear to be a case of illegal employment discrimination.³¹

With respect to remedies, Nevada law provides that if attempts to settle a complaint fail, the NERC may order that a person cease and desist from unlawful employment practices and restore the benefits of the aggrieved person, including rehiring and back pay up to two years.³² The NERC may also apply to the district court to order injunctive relief with respect to any employment practice it deems to be unlawful.³³ Complainants also have a statutory right to submit an application to the district court for an order to restore rights after an unfavorable decision of the NERC.³⁴ However, Nevada

²⁸ NEV. REV. STAT. ANN. § 613.405.

²⁹ NEV. REV. STAT. ANN. § 233.157 (2008).

³⁰ NEV. REV. STAT. ANN. § 233.160(1)(b).

³¹ See Nevada Equal Rights Commission, Fact Sheet and Frequently Asked Questions (Nov. 2004), available at <http://bit.ly/RvyKs>.

³² NEV. REV. STAT. ANN. § 233.170(4)(b) (2008). The Nevada statute pertaining to the NERC provides for an award of actual damages and attorneys' fees for the prevailing party, as well as a civil penalty of up to \$25,000, for cases involving unlawful housing practices, however it does not expressly provide for such remedies for unlawful employment practices. *Id.* § 233.170(5). Discrimination on the basis of sexual orientation is not covered by Nevada housing law. See *infra* Section IV.B.; NEV. REV. STAT. ANN. §§ 118.020 and 118.100.

³³ NEV. REV. STAT. ANN. § 233.180.

³⁴ NEV. REV. STAT. ANN. § 613.420. Claims must be brought within 180 days of the complained action, however, that period is tolled while a complaint is pending before the NERC. NEV. REV. STAT. ANN. § 613.430 (2009). Pending legislation proposes to extend such period to 300 days. See A.B. 43 (Nev. 2008).

law also provides that an order of the NERC is a “final decision in a contested case for purposes of judicial review.”³⁵

B. Attempts to Enact State Legislation

Assemblyman David Parks³⁶ introduced A.B. 311 — the law that added sexual orientation to the prohibited bases of discrimination in employment — in the Nevada Assembly on February 23, 1999.³⁷ Mr. Parks and the other sponsors introduced the bill as the “Employment Non-Discrimination Act.”³⁸ The bill passed in the Assembly on April 1, 1999 by a 30-11 vote and in the Senate on May 20, 1999 by a 13-8 vote. The governor approved the bill on May 29, 1999, and it became effective on October 1, 1999.³⁹

Extensive debate over A.B. 311 took place during committee-level hearings in the Assembly and Senate.⁴⁰ Reflecting the tenor of the hearings on A.B. 311, during a work session of the Nevada Assembly Committee on Commerce and Labor, Chairman Barbara Buckley noted that “there were strong feelings both of support and concern. Some of the concerns made in the hearing were very hateful in her opinion and she did not think those statements were shared even by those who opposed the bill.”⁴¹

In committee hearings, proponents of A.B. 311 cited specific examples of discrimination against gays and lesbians as support for the need for protections against discrimination on the basis of sexual orientation. Proponents also cited, among other things, public support among Nevada citizens for the legislation, similar laws in other states, and similar policies already adopted by the Las Vegas Metropolitan Police Department, University of Nevada, Las Vegas, and University of Nevada, Reno, as support for passage of the legislation.⁴²

Opponents of the legislation raised various objections, citing concerns over immoral behavior, public health and safety, preservation of the family, freedom of religion, and freedom of association, among other arguments commonly raised against legislation seeking to grant rights to LGBT persons.⁴³ Opponents also argued that the bill was unnecessary to achieve its stated goals and would, instead, extend “special rights” to gay and lesbian persons by virtue of their sexual behavior.⁴⁴ Oral and written testimony

³⁵ NEV. REV. STAT. ANN. § 233.170(6) (2008).

³⁶ David Parks is currently Nevada’s only openly gay lawmaker and responsible for the proposal of many of Nevada’s statutes protecting LGBT persons and persons with HIV-AIDS. See Erin Neff, *Commentary: ‘Closed’ Is A Dirty Word*, L.V. REV.-J., Mar. 22, 2007, at 9B.

³⁷ See 70 NEV. ASSEM. J. 23 (Feb. 23, 1999).

³⁸ Senate committee minutes indicate that A.B. 311 was modeled after the failed federal legislation of the same name. Minutes of Nev. Senate Comm. (May 6, 1999).

³⁹ See A.B. 311 (1999) (legislative history).

⁴⁰ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999); Minutes of Nev. Assem. Comm. (May 6, 1999). The legislative history does not indicate any significant debate held on the floor of the Assembly or Senate. *Id.*

⁴¹ See Minutes of Nev. Assem. Comm. (Mar. 22, 1999).

⁴² See Minutes of Nev. Assem. Comm. (Mar. 22, 1999).

⁴³ See Minutes of Nev. Assem. Comm. (Mar. 22, 1999); Minutes of Nev. Sen. Comm. (May 6, 1999).

⁴⁴ See Minutes of Nev. Assem. Comm. (Mar. 22, 1999); Minutes of Nev. Sen. Comm. (May 6, 1999).

entered into the record evidencing animus against LGBT persons included (i) arguments that protection should not be granted to persons who engage in deviant sexual conduct,⁴⁵ (ii) an article submitted as evidence that homosexuals were more likely to molest children than others,⁴⁶ (iii) evidence that homosexuals have higher incomes than heterosexuals,⁴⁷ (iv) testimony that the statute would force employers to hire individuals who may not be “trustworthy” or who are “perhaps infected with the AIDS virus”,⁴⁸ and (v) testimony that the legislation was “fascist” and constituted “reverse discrimination” by requiring employers to hire homosexuals despite personal convictions on the immorality of homosexuality.⁴⁹

Debate on A.B. 311 led to one amendment of particular significance. Opponents of the bill claimed that the existing exclusions in Nevada’s anti-discrimination law for private clubs and religious organizations were insufficient to address the concerns of non-profit organizations, such as the Boy Scouts of America, that prohibit homosexuals from participation.⁵⁰ In light of these concerns, the Senate added a provision providing that the provisions of Nevada’s equal employment statute “concerning unlawful employment practices related to sexual orientation do not apply to organizations that are exempt from taxation pursuant to 26 U.S.C. § 501(c)(3).”⁵¹ As discussed in Section II.A.1, *supra*, this is the only blanket exclusion to Nevada’s equal opportunity employment statute that applies to a single class of individuals otherwise protected by the statute.

Certain other amendments were made to A.B. 311 after its introduction.⁵² The bill originally contained a provision that prohibited employees from inquiring into or

⁴⁵ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999). Testimony in the record included an article published by the Family Research Council, entitled “Homosexuality Is Not A Civil Right,” which asserted: “Homosexual activists realize that when people become aware of common homosexual practices, such as anal intercourse, anal-oral contact -- along with other homosexual practices such as inserting arms inside each other’s bodies and ‘sports’ involving bodily excretions -- they will see that these behaviors do not merit special protection in our laws.” *Id.*; see Nev. Online Research Library, <http://bit.ly/3r2gOX> (last visited Sept. 7, 2009).

⁴⁶ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

⁴⁷ See Minutes of Nev. Sen. Comm. (May 6, 1999).

⁴⁸ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

⁴⁹ Minutes of Nev. Assem. Comm. (Mar. 10, 1999).

⁵⁰ See Minutes of Nev. Assem. Comm. (Mar. 10, 1999); Minutes of Nev. Sen. Comm. (May 6, 1999). A lobbyist for the Boy Scouts of America testified at the Senate Committee on Commerce and Labor hearing on A.B. 311. See Minutes of Nev. Sen. Comm. (May 6, 1999).

⁵¹ See 70 NEV. ASSEM. JOUR. 111 (May 22, 1999) (Assembly resolution adopting Senate amendment to A.B. 311 (Nev. 1999), codified at NEV. REV. STAT. § 613.320(2)).

⁵² For example, Assemblyman Parks described multiple instances in which he had been discriminated against in a work setting. In 1984, he was fired as a department head for the City of Las Vegas because his superiors admittedly believed he was a gay man dying of AIDS. Assemblyman Parks then was flatly told in a government job interview that he should not consider applying for the position because he was openly gay. A deputy attorney general in Nevada, Pam Roberts, also testified in the A.B. 311 hearings about her personal experiences with employment discrimination. Ms. Roberts had worked at a public school in Nye County, teaching and coaching, before she was outed for being a lesbian. During class one day, she received a message over the intercom to report to the principal’s office. The principal explained the accusations that Ms. Roberts was gay; stated that the accuser demanded Ms. Roberts’ dismissal; fired Ms. Roberts on the spot; and then suggested that Ms. Roberts move to a larger and more accepting city. Since that time, Ms. Roberts enrolled in law school and became a successful attorney in the public sector, though

investigating the sexual orientation of an employee or prospective employee unless sexual orientation is a “bona fide occupational qualification.”⁵³ The Assembly struck this provision in a draft circulated on March 29, 1999, but there is no discussion of the rationale in the legislative history.⁵⁴

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

1. Executive Orders

None.

2. State Government Personnel Regulations

Nevada law expressly prohibits discrimination on the basis of sexual orientation by state agencies. Consistent with this policy, the University of Nevada, Las Vegas and University of Nevada, Reno, both publicly-funded state universities, maintain equal employment programs under which they state a commitment to provide equality in employment and educational opportunities regardless of sexual orientation (among other factors).⁵⁵ Other state entities, such as the Las Vegas Metropolitan Police Department, also maintain policies prohibiting discrimination on the basis of sexual orientation (among other factors).⁵⁶

The Nevada Department of Personnel has also advanced an equal employment opportunity policy that includes sexual orientation. The Nevada Administrative Code provides, in pertinent part, that the Department of Personnel will “identify barriers in the personnel management system which may adversely affect the ability of applicants and employees to reach their full employment potential without regard to ... sexual orientation,” among other factors.⁵⁷ To effectuate the purposes of this law, the Director of the Department of Personnel sent an “Affirmative Action Plan” to all department directors on July 16, 2007. The stated purpose of the plan was to provide an amended, comprehensive guide for supervisors and managers to “identify and remove discriminatory barriers to equal employment opportunity” in state employment.⁵⁸

in 1999 she continued to fear being laid off if a new, more socially conservative attorney general was elected.

⁵³ Proposed as NEV. REV. STAT. § 613.340(3)(b).

⁵⁴ Compare A.B. 311 (Nev. Feb. 23, 1999) with A.B. 311 (Nev. Mar. 29, 1999). Other changes made to A.B. 311 were generally non-substantive or unrelated to sexual orientation.

⁵⁵ See University of Nevada, Las Vegas, Official University Statements, <http://www.unlv.edu/about/statements.html> (last visited Sept. 6, 2009); University of Nevada, Reno, Equal Opportunity & Affirmative Action, <http://www.unr.edu/eoaa/ada.html> (last visited Sept. 6, 2009). In their affirmative action statements, both universities also state a general commitment to enhancing diversity, citing gender, race and ethnicity, but not sexual orientation, as examples of valued forms of diversity. *Id.*

⁵⁶ See *supra* Section II.B.

⁵⁷ NEV. ADMIN. CODE § 284.114(2)(a) (2008).

⁵⁸ See Nevada Department of Personnel, <http://dop.nv.gov/fshome.html> (last visited Sept. 6, 2009).

3. **Attorney General Opinions**

None.

D. **Local Legislation**

None.

E. **Occupational Licensing Requirements**

There are several state licensing requirements that reference “good moral character” and similar allusions that could be interpreted so as to discriminate against LGBT persons.⁵⁹ However, non-exhaustive research of electronic sources did not uncover any specific examples of occupational licensing standards being applied in a discriminatory manner to LGBT applicants.

⁵⁹ See NEV. ADMIN. CODE §§ 118B.140, 489.628, 504.600, 616C.353, 624.137, 628.020, 628.280, 630.310, 630.500, 630.510, 630A.535, 631.170, 632.175, 633.295, 634A.075, 638.0525, 638.760, 638.810, 639.295, 639.900, 641.025, 641.028, 641B.126, 644.151, 644.255, 644.260, 645.095, 645.180 and 706.453 (2008).

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

A. Case Law

1. State and Local Government Employees

None.

2. Private Employers

Jespersen v. Harrah's Operating Co., ECR Inc., 444 F.3d 1104 (9th Cir. 2006).

In *Jespersen v. Harrah's Operating Company, ECR Inc.*,⁶⁰ a female bartender was terminated after she refused to adhere to her employer's new policy which required certain female employees to wear makeup. Ms. Jespersen brought an action claiming that the policy constituted disparate treatment sex discrimination in violation of Title VII. Ms. Jespersen contended that the appearance requirements of the casino in which she worked forced her to conform to sex stereotypes. In affirming the district court's decision, the Ninth Circuit found, *en banc*, that Ms. Jespersen could not proceed with her claim of sex discrimination in that she failed to demonstrate that the casino's grooming policy impeded her work or singled her out in any way, as all other bartenders were required to comply with the same grooming policy, and she failed to demonstrate that the policy imposed an unreasonable burden on women as opposed to men. The court noted, further, that the basis for Ms. Jespersen's claim was a product of her own "subjective" view, and there was no evidence of a stereotypical motivation on the part of the employer. Citing the *Rene* case, among others, the court noted that, while Ms. Jespersen failed to make such a claim, a claim of sex discrimination can be made on the basis of gender stereotyping, for example when an employee is harassed by co-workers as a result of a failure to conform with certain gender stereotypes.⁶¹ In his dissent, Judge Pregerson argued that the grooming standards in the *Jespersen* case were in fact a policy motivated by gender stereotyping and Ms. Jesspersen was in fact terminated "because of" her sex.⁶²

Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002).

In *Rene v. MGM Grand Hotel, Inc.*,⁶³ in an *en banc* decision, the Ninth Circuit found in favor of an openly-gay employee who brought a claim of sexual harassment under Title VII after he was subject to severe sexual harassment by his male co-workers. Mr. Rene presented extensive evidence that his coworkers subjected him to a hostile work environment on an almost daily basis, calling him "sweetheart" and "muñeca" (Spanish for "doll"), telling crude jokes, giving him sexually-oriented joke gifts, and forcing him to look at pictures of men having sex. Mr. Rene's co-workers went as far as to grab his crotch, put their fingers in his anus, and fondle his body "like they would to a

⁶⁰ 444 F.3d 1104 (9th Cir. 2006).

⁶¹ *Jespersen*, 444 F.3d at 1112-13.

⁶² *Jespersen*, 444 F.3d at 1113-14 (J. Pregerson, dissenting).

⁶³ 305 F.3d 1061 (9th Cir. 2002).

woman”. The district court dismissed Mr. Rene’s claim on the basis that title Title VII did not protect against discrimination on the basis of sexual orientation. The Ninth Circuit reversed, finding that Mr. Rene’s sexual orientation was irrelevant to a finding of hostile work environment sexual harassment. The court noted that the assault and ridicule of Mr. Rene clearly met Title VII’s requirement that the discrimination be “because of sex” since it was sexual in nature; it did not matter that the harassment might also have been because of Mr. Rene’s sexual orientation.⁶⁴

B. Administrative Complaints

According to research conducted by The Williams Institute since 1999, annual complaints filed with respect to state actors between 1999 and 2007 have ranged from two to five, with five complaints filed in 2007 and a total of twenty-seven filed between 1994 and 2007. Copies of complaints filed with the NERC are not available through electronic sources, and non-exhaustive electronic searches of news articles did not uncover details concerning specific complaints received the NERC about employment discrimination by state or local government agencies on the basis of sexual orientation or gender identity.

Since 1999, the year Nevada’s law prohibiting discrimination on the basis of sexual orientation went into effect, documented complaints of sexual orientation discrimination (both private and public) have ranged from two (2000) to a high of forty-six (2003) in a given year. In 2007, the number of such complaints stood at thirty.⁶⁵

C. Other Documented Examples of Discrimination

Nevada Public School

In 2008, a transgender public school teacher was fired because of her gender identity.⁶⁶

⁶⁴ *Rene*, 305 F.3d at 1067 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)).

⁶⁵ Chart of Discrimination Claims (2009) (on file with the Williams Institute).

⁶⁶ 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).

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

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

A. Criminalization of Same-Sex Sexual Behavior

In 1993, the Nevada legislature repealed Nevada's law prohibiting consensual, same-sex sexual relations.⁶⁷ Prior to its repeal, Nevada's sodomy law prohibited the "infamous crime against nature" defined as "anal intercourse, cunnilingus or fellatio between natural persons of the *same sex*" (emphasis added). Despite the decriminalization of consensual, same-sex sodomy, Nevada criminal law continues to distinguish between same-sex and opposite-sex sexual conduct. The crime of "solicitation of a minor to engage in acts constituting crimes against nature" applies only to sexual conduct between persons of the same sex.⁶⁸

Non-exhaustive research of electronic sources identified no case in which Nevada's sodomy law was used to support other forms of discrimination on the basis of sexual orientation or gender identity.

B. Housing & Public Accommodations Discrimination

Nevada law does not prohibit discrimination on the basis of sexual orientation or gender identity in housing practices.⁶⁹ A.B. 43, currently pending in the Senate, proposes to revise Nevada's housing law to add familial status to the prohibited bases for discrimination in housing, but does not propose to add sexual orientation.⁷⁰

⁶⁷ LAWS OF NEV. ch. 236 (1993). In 1986, a constitutional challenge to Nevada's sodomy law had been unsuccessful. The court dismissed the case as there was no evidence that the law had been enforced against consenting adults. *Doe v. Bryan*, 728 P.2d 443 (Nev. 1986); *see also Jones v. Nevada*, 456 P.2d 429 (Nev. 1969) (finding that fact that statute might be unconstitutional to extent it applied to conduct of consenting adults did not render it unconstitutional with respect to defendant charged with committing the crime by force against a 12-year-old victim). In 1993, the same year Nevada repealed its sodomy law, the Nevada Supreme Court had upheld the convictions of four men for consensual sexual relations in a public restroom despite privacy arguments raised in the case. *Young v. Nevada*, 849 P.2d 336 (decided Mar. 24, 1993).

⁶⁸ When Nevada repealed its prohibition on consensual, same-sex sodomy, it did so by narrowing its crimes against nature law to cover only the solicitation of minors to engage in "crimes against nature." Thus, the law uses the same definition of the "infamous crime against nature" as the Nevada sodomy statute used prior to its repeal. *See* NEV. REV. STAT. ANN. § 201.195(2) (2009); *see also* GEORGE PAINTER, *THE SENSIBILITIES OF OUR FOREFATHERS, THE HISTORY OF SODOMY LAWS IN THE UNITED STATES* (2001), available at <http://www.sodomylaws.org>.

⁶⁹ NEV. REV. STAT. ANN. §§ 118.020 & 118.100 (2009). The NERC also does not include sexual orientation as a prohibited basis for discrimination in housing in its educational material. *See* Nevada Equal Rights Commission, *Housing Discrimination*, <http://bit.ly/hW1fg> (last visited Sept. 6, 2009).

⁷⁰ NEV. REV. STAT. ANN. §§ 118.020 and 118.100.

Nevada's statute providing for equal enjoyment of places for public accommodation does not expressly prohibit discrimination on the basis of sexual orientation or gender identity or even sex.⁷¹ However, Nevada law states that it is the "public policy of the State of Nevada ... to foster the rights of all persons to seek and be granted services in places of public accommodation without discrimination" because of sexual orientation (among other factors).⁷² Nevada law also charges the NERC with the power to investigate "tensions, practices of discrimination and acts of prejudice" against any person or group in public accommodation because of sexual orientation (among other factors).⁷³ In 2005, the Nevada Attorney General affirmed that the NERC may accept and investigate charges of discrimination based upon sexual orientation by places of public accommodation.⁷⁴

In 2009, the Nevada legislature passed a bill amending the state's non-discrimination law to prohibit discrimination by places of public accommodation on the basis of sexual orientation.⁷⁵

C. Hate Crimes

Nevada's hate crimes law, enacted in 2001, explicitly includes sexual orientation, and provides for enhanced remedies for such crimes.⁷⁶ The law does not include gender identity.

D. Education

No provision of Nevada law explicitly addresses school safety or other education matters with respect to gender identity or sexual orientation.

There are two federal cases in which a student brought a discrimination claim against a school district in Nevada involving gender identity, including one case that resulted in a school district promulgating policies with respect to discrimination against gay and lesbian students.

In *Henkle v. Gregory*,⁷⁷ a student sued school district claiming violations of his rights under Fourteenth Amendment, First Amendment, and Title IX due to discriminatory treatment while enrolled in district schools. The student alleged severe

⁷¹ NEV. REV. STAT. ANN. § 651.070 (2009).

⁷² NEV. REV. STAT. ANN. §§ 233.010 (2009).

⁷³ NEV. REV. STAT. ANN. §§ 233.150 (2009). The NERC accepts complaints with respect to violation of the state's public policy with respect to discrimination in public accommodations. See Nevada Equal Rights Commission, Public Accommodations, available at <http://bit.ly/8GXLz> (last visited Sept. 6, 2009).

⁷⁴ Nev. Att'y. Gen. Op. No. 11 (2005).

⁷⁵ S.B. 207, 75th Reg. Sess. (Nev. 2009) (enacted).

⁷⁶ A.B. 43 § 41.690 (in addition to other liability imposed by law, person who suffered injury may bring an action to recover actual damages and punitive damages and, if successful, court shall award reasonable attorney's fees); A.B. 43 § 193.1675 (in addition to term of imprisonment prescribed by statute for the crime, perpetrator may be punished by imprisonment for a minimum term of one year and maximum term of 20 years, depending on the circumstances); A.B. 43 § 179A.175 (establishing program requiring collection of data with respect to crimes that manifest evidence of prejudice).

⁷⁷ 150 F. Supp. 2d 1067 (D. Nev. 2001).

harassment while enrolled at three district high schools and that school officials, after being notified of the harassment, failed to take any action, including in an instance where the student was subjected to physical violence by fellow students after they called him a “fag” and other anti-gay epithets.⁷⁸ The school district moved to dismiss the action, and the court found that, while the student’s § 1983 action was subsumed by his Title IX claims, the student could move forward with his Title IX and First Amendment claims.⁷⁹ In a settlement brokered by Lambda Legal, the school district paid the student \$451,000 and agreed to implement new policies to protect gay and lesbian students from discrimination, including policies requiring the training of staff on preventing and responding to harassment.⁸⁰

In *Doe v. Clark County School District*,⁸¹ parents of a preoperative male-to-female transgendered student claimed that school’s stated intention to bar her from using the communal ladies’ room violated her rights under the Fourteenth Amendment and Title IX.⁸² Plaintiffs contended that they enrolled their daughter in a charter school rather than a district high school after the principal of the district high school took the position that the student should use a unisex nurse’s restroom.⁸³ Court found that plaintiffs could not proceed with their claim as they failed to demonstrate an “injury in fact”; the parents never enrolled their daughter in any district high school and the district never told the student or her parents that she could not enroll in any district high school.⁸⁴ Court held further that even if the principal had prohibited the student from use of the communal ladies’ room upon enrollment, there would have been no Title IX violation as Title IX requires discrimination under an educational program or activity and use of a restroom is not such a program or activity.⁸⁵

E. Health Care

Nevada law does not permit a partner to make decision on behalf of his or her same-sex partner unless a durable power of attorney has been executed designating such partner.⁸⁶

Nevada law requires the adopting party in a surrogacy agreement to have a valid marriage.⁸⁷ Therefore, gays and lesbians are unable to enter into such agreements, whether individually or together as a couple. Further, Nevada law recognizes a legal

⁷⁸ *Henkle*, 150 F. Supp. 2d at 1069-70.

⁷⁹ *Henkle*, 150 F. Supp. 2d at 1072-78.

⁸⁰ See Press Release, Lambda Legal, Groundbreaking Legal Settlement is First to Recognize Constitutional Right of Gay and Lesbian Students to be Out at School & Protected From Harassment (Aug. 8, 2002), available at <http://www.lambdalegal.org/news/pr/groundbreaking-legal.html>.

⁸¹ No. 206-CV-1074-JCM (RJJ), 2008 WL 4372872 (D. Nev. Sept. 17, 2008).

⁸² *Doe*, 2008 WL 4372872 at *1.

⁸³ *Doe*, 2008 WL 4372872 at *3.

⁸⁴ *Doe*, 2008 WL 4372872 at *1-*2.

⁸⁵ *Doe*, 2008 WL 4372872 at *3.

⁸⁶ NEV. REV. STAT. ANN. §§ 449.626 & 449.810.

⁸⁷ NEV. REV. STAT. ANN. § 126.045.

relationship to the resulting child between a sperm donor and woman only if such persons are married.⁸⁸

F. Gender Identity

The state registrar of Nevada will amend an individual's birth records upon receipt of a court order verifying that the individual has undergone sex-reassignment surgery.⁸⁹

Doe v. Bellam.⁹⁰ Transsexual plaintiff alleged violation of his right against an unreasonable search when, in connection with his arrest for a misdemeanor, sheriff's deputies ordered plaintiff to lift his shirt and drop his pants subjecting plaintiff to a humiliating strip search.⁹¹ Plaintiff alleged that after he informed arresting officer that he was a transsexual, the officer told other deputies at the jail that arrestee was a transsexual and those deputies assembled and ordered him to drop his pants so they could "check out his equipment."⁹² Defendants argued that there was a reasonable suspicion for the search since, when patting down the plaintiff, a deputy identified something "unusual" in plaintiff's crotch area. Plaintiff had told the deputy that he was a transsexual and there was a rolled-up sock in his crotch area.⁹³ The court had previously found that the county's policy of strip searching all arrestees absent reasonable suspicion that the arrestee was smuggling contraband was impermissible. In this case, the court found that the plaintiff's rights had not been violated as the deputies had a reasonable suspicion that something would be uncovered by the search and were not required to take the arrestee at his word that all he was concealing was a rolled-up sock. The court noted that failure to perform the search could in fact have resulted in liability for the jail if the arrestee went on to use contraband to injure other occupants of the jail.⁹⁴

G. Parenting

Nevada law permits any adult person or married couple to adopt.⁹⁵ Further, Nevada law provides that the application process for the adoption of a child through an agency that provides child welfare services must be available to all persons regardless of sexual orientation (among other factors) and that such factors may only be considered "to the extent they affect or may affect the ability of the person to meet the needs of a specific child."⁹⁶

Nevada law does not expressly prohibit or permit a same-sex couple to jointly petition to adopt, and no court has heard the question of whether such a petition can be filed. Similarly, Nevada law does not expressly prohibit or permit a same-sex partner to

⁸⁸ NEV. REV. STAT. ANN. § 126.061.

⁸⁹ NEV. REV. STAT. ANN. ch. 440, § 130 (2008).

⁹⁰ 524 F. Supp. 2d 1238 (D. Nev. 2007).

⁹¹ *Bellam*, 524 F. Supp. 2d at 1239-40.

⁹² *Bellam*, 524 F. Supp. 2d at 1240.

⁹³ *Bellam*, 524 F. Supp. 2d at 1241-42.

⁹⁴ *Bellam*, 524 F. Supp. 2d at 1243.

⁹⁵ NEV. REV. STAT. § 127.030 (2008).

⁹⁶ NEV. ADMIN. CODE § 127.351 (2008).

petition to adopt his or her partner's child, and no court has heard the question of whether such a petition can be filed.⁹⁷

Nevada law provides that a child placement or child welfare services agency may deny approval of an applicant based on concerns "relating to the applicant's moral character" (among other factors).⁹⁸ No cases have been reported where homosexuality was used to support a finding that an applicant lacked good moral character and, thus, could not adopt a child.

There are no reported custody or visitation cases concerning gay or lesbian parents or same-sex co-parents.⁹⁹ Under Nevada law, a court may only consider the "best interest of the child."¹⁰⁰ Nevada law provides that the court shall order custody with preference, among other things, to the persons "in whose home the child has been living and where the child has had a wholesome and stable environment" unless the best interest of the child requires otherwise.¹⁰¹

Nevada courts have used a parent's gender identity as a factor in determining custody and visitation rights. In *Daly v. Daly*,¹⁰² the father revealed to his daughter that he was a transsexual and would undergo sex reassignment surgery in a visitation session. When the daughter returned home, she was withdrawn and exercised atypical behavior. The mother, advised by a psychologist that it would be dangerous for her daughter to be in the company of her father again, sought to terminate the father's parental rights. The lower court terminated the father's rights and the father appealed. The Nevada Supreme Court upheld the decision, stating that if visitation were permitted, "there would be a risk of serious maladjustment, mental or emotional injury."¹⁰³ In affirming the lower court's conclusion that terminating the father's rights was in the best interest of the child, the Supreme Court also noted the father's infrequent communication with the child and failure to pay support for over one year.¹⁰⁴

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Beginning in 2009, with the adoption of Senate Bill 283 (the Domestic Partnership Act), Nevada has recognized domestic partnerships between same-sex couples. The Nevada state constitution bans same-sex marriages.¹⁰⁵

⁹⁷ Human Rights Campaign, Nevada Adoption Law, <http://www.hrc.org/1285.htm> (last visited Sept. 6, 2009).

⁹⁸ NEV. ADMIN. CODE §§ 127.240 and 127.42 (2008).

⁹⁹ See Human Rights Campaign, Nevada Custody and Visitation Law, <http://www.hrc.org/1280.htm> (last visited Sept. 6, 2009).

¹⁰⁰ NEV. REV. STAT. ANN. § 125.480(3) (2008).

¹⁰¹ NEV. REV. STAT. ANN. § 125.480(3)(b).

¹⁰² 715 P.2d 56 (Nev. 1986).

¹⁰³ *Daly*, 715 P.2d at 50.

¹⁰⁴ *Daly*, 715 P.2d at 59-60.

¹⁰⁵ Nev. Const. Art. I, § 21; see also NEV. REV. STAT. ANN. § 122.020 (2008).

2. Benefits

The extension of benefits to the same-sex partners of state employees has been the subject of recent debate. In January 2008, the state board that oversees public benefits recommended that the legislature extend benefits to domestic partners.¹⁰⁶ However, it appears that the proposed regulations have been held up in the legislature due to budget concerns.¹⁰⁷

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

Matthews v. Endel.¹⁰⁸ In a *pro se* action, a prison inmate brought various claims of violation of his constitutional rights, including violation of his Fourteenth Amendment equal protection rights, when state prison allegedly failed to place him in protective segregation on the basis of his sexual orientation.¹⁰⁹ The inmate had been labeled by prison officials as an “aggressive homosexual”, including in a note in the prisoner’s file.¹¹⁰ The court found that the inmate’s equal protection claim failed as homosexuals are not a protected class under the Fourteenth Amendment and the inmate failed to show that there was no rational, non-discriminatory basis to support the prison’s actions.¹¹¹

¹⁰⁶ See Sean Whaley, *Panel OKs Domestic Partner Benefits*, L.V. REV.-J., Jan. 11, 2008, available at <http://bit.ly/mpvr0>.

¹⁰⁷ See Press Release, GLAAD, Nevada Legislators Consider Domestic Partner Benefits (Aug. 27 2008) available at <http://bit.ly/yyY2V> (last visited Sept. 6, 2009).

¹⁰⁸ No. 306-CV-00401-RLH-VPC, 2009 WL 44001 (D. Nev. Jan. 5, 2009).

¹⁰⁹ *Matthews*, 2009 WL 44001 at *4.

¹¹⁰ *Matthews*, 2009 WL 44001 at *1.

¹¹¹ *Matthews*, 2009 WL 44001 at *4.