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

Title

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

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MEMORANDUM

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

I. OVERVIEW

Until 2005, Maine had no state-wide protections against employment discrimination based on sexual orientation or gender identity, nor was there an Executive Order prohibiting such discrimination. In previous years there had been efforts to prohibit the state and municipalities from adding sexual orientation to the state's anti-discrimination law and local ordinances.

During discussion of a state law prohibiting sexual orientation discrimination in 1981, one Maine legislator called gay people “creepy crawlers,” and another said of lesbians that if any of them slept with him, they’d never sleep with another woman again.¹ In 1993, the state legislature passed a bill that would prohibit sexual orientation discrimination, but the governor vetoed it.² In 1995, a group called Concerned Maine Families obtained enough signatures to place on the state’s general election ballot a measure, Question 1, that would prohibit gay-rights laws from being passed anywhere in Maine and invalidate the only existing ordinances, in Portland and Long Island, but the measure failed by a 53 to 47% margin.³ In 1997, the state legislature passed and the governor signed a bill to prohibit sexual orientation discrimination. However, the law never took effect because a petition drive put the matter before Maine voters, who narrowly voted against the bill.⁴ In 2000, the governor again signed a bill that let Maine voters decide whether to amend Maine law to include protections against sexual orientation discrimination.⁵ Maine voters again narrowly rejected the amendments.⁶

Finally, in 2005, Maine became the last New England state to amend its anti-discrimination statute to prohibit sexual orientation and gender-identity motivated discrimination.⁷ Opponents of the 2005 amendments to Maine’s Human Rights Act (“MHRA”) tried to remove the prohibitions on sexual orientation discrimination in the

¹ See *Chronology of Maine’s Gay-Rights Legislation*, MAINE SUN. TELEGRAM, Feb. 18, 2001 and Susan Kinzie, *Gay Rights: Evolution of a Debate Once Rarely Discussed Publicly, Subject Now Out of the Closet*, BANGOR DAILY NEWS, Jan. 3, 1998

² Peter Poncha and Tess Nacelewiz, PORTLAND PRESS HERALD, MAINE SUNDAY TELEGRAM, Sunday January 25, 1998, *Maine Gay Rights Chronology* available at <http://people.maine.com/paula/pph/pph-1.25.98.html#linka>.

³ Lesbian & Gay L. Notes (Dec. 1995), available at <http://www.qrd.org/qrd/usa/legal/lgl/1995/12.95>.

⁴ *Chronology of Maine’s Gay-Rights Legislation*, MAINE SUNDAY TELEGRAM, Feb. 18, 2001.

⁵ *Id.*

⁶ *Id.*

⁷ Jeff Tuttle, *Debate Over Gay Rights Law Intensifies*, BANGOR DAILY NEWS, Oct. 15, 2005.

years following the 2005 changes, but in 2008 gave up on the efforts reportedly because of lack of funding and volunteers.⁸

Documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Maine include:

- A gay African-American male employee of the University of Maine, Augusta who reported in 2008 being called a "fagball" and "niggerball" and addressed in other demeaning ways by his immediate supervisor, a department dean. The employee filed a grievance with his head supervisor.⁹
- A gay firefighter who in 2008 reported that he had been harassed by his coworkers when his sexual orientation was disclosed at work. He was "outed" and then his coworkers made offensive and hostile comments. He met with department heads and expressed his discomfort several times, but allegedly the job environment has not changed.¹⁰
- A gay employee of the Maine Department of Corrections who in 2007 reported that he had experienced harassment and discrimination based on his sexual orientation at work, causing him to go on medical leave. The employee reported that inmates treated him badly because of his perceived sexual orientation and that his supervisors did nothing to address this harassment. He filed a complaint with the Maine Human Rights Commission and was successful in his case.¹¹
- The head coach of a high school varsity softball team who alleges that in 2006 she was not rehired after twelve successful years of coaching because of her sexual orientation. In 2009, the Supreme Judicial Court of Maine reversed a lower court's grant of summary judgment for the defendant school district and superintendent, and remanded the case for trial.¹²
- A staff member at a county recycling center who in 2007 reported being denied bereavement leave when her same-sex partner's father passed away. She knew that heterosexual coworkers, whose unmarried partner's relatives have passed away, had been able to use bereavement time. For example, a coworker was permitted to take bereavement leave for the death of his girlfriend's father.¹³

⁸ *Id.*

⁹ GLAD REP. OF EMPLOY. DISCRIM. (Apr. 11, 2008) (on file with GLAD).

¹⁰ GLAD REP. OF EMPLOY. DISCRIM (Feb. 19, 2008).

¹¹ GLAD REP. OF EMPLOY. DISCRIM (Oct. 31, 2007).

¹² Lesbian & Gay L. Notes (Summer 2009).

¹³ GLAD REP. OF EMPLOY. DISCRIM (Apr. 5, 2007).

- A gay police officer in Maine who reported in 2002 that he was being harassed at work based on his sexual orientation. He was called a "fudgepacker" and a "faggot" by his coworkers.¹⁴

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.

¹⁴ GLAD REP. OF EMPLOY. DISCRIM (May 16, 2002).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

On November 8, 2005, Mainers voted to keep in place the amendments made to the state's Human Rights Act ("MHRA") by the state legislature and governor to prohibit the discrimination of people on the basis of "sexual orientation" in employment, housing, public accommodations, credit, and education.¹⁵ The MHRA's definition of "sexual orientation" is broadly defined to include discrimination based on an individual's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.¹⁶ The statute applies to both private and public entities.¹⁷ It forbids employers from refusing to hire, or deciding to fire, someone on the basis of their actual or perceived sexual orientation or gender identity, and forbids employers from taking into account a person's perceived sexual orientation or gender identity in making promotion, transfer, compensation, conditions, or privilege determinations.¹⁸ However, the MHRA does not cover non-profit religious or fraternal corporations or associations.¹⁹

2. Enforcement and Remedies

In order to make a claim under the MHRA, an individual must file a claim with the Maine Human Rights Commission ("MHRC") within six months of the alleged discriminatory act or acts.²⁰ Once the MHRC receives a complaint, an investigator will first attempt to resolve the matter.²¹ If the investigator is unable to do so, the MHRC will investigate whether there are reasonable grounds to believe the alleged unlawful discriminatory actions took place.²² During this investigation, the MHRC may examine persons, places and documents, require attendance at a fact-finding hearing, and issue subpoenas for both persons and documents.²³ If the MHRC concludes that there are reasonable grounds to believe that the alleged unlawful discriminatory acts took place, then it will attempt to settle the matter.²⁴ If no settlement is reached, the MHRC may bring the case itself in superior court.²⁵

If the MHRC does not find that there are reasonable grounds to believe the alleged unlawful discriminatory actions took place or if it is unable to settle the case, the

¹⁵ See 5 Me. Rev. Stat. § 4552 *et seq.*; see also GLAD, Anti-Discrimination Law in Main, Questions and Answers, <http://www.glad.org/rights/maine/c/anti-discrimination-law-in-maine> (last visited Sept. 4, 2009) (hereinafter "GLAD").

¹⁶ 5 Me. Rev. Stat. § 4553(9-C).

¹⁷ See 5 Me. Rev. Stat. § 4553(4).

¹⁸ See 5 Me. Rev. Stat. § 4572(1)(A).

¹⁹ See 5 Me. Rev. Stat. § 4553(4).

²⁰ See 5 Me. Rev. Stat. § 4611.

²¹ See GLAD, *supra* note 15.

²² *Id.*

²³ *Id.*

²⁴ See 5 Me. Rev. Stat. § 4612.

²⁵ *Id.*

complainant may file an action in superior court.²⁶ In addition, a complainant may obtain a right to sue letter from the MHRC if there has been no court action or conciliation agreement in the case within 180 days after the complaint was filed.²⁷

If a plaintiff prevails under the MHRA, she or he may be entitled to hiring, reinstatement, or promotion with or without pay, cease and desist orders, and/or damages caused by the unlawful discrimination, including court costs and attorneys' fees.²⁸

B. Attempts to Enact State Legislation

Proponents of amending the MHRA to include prohibitions against sexual orientation and gender identity discrimination had been fighting for these provisions in the state legislature since 1977.²⁹ In 1981, debate on the issue became so heated that the gallery was cleared of children.³⁰ In 1983, the state senate passed a version of the MHRA that would have included prohibitions against sexual orientation discrimination, but the state house defeated the measure.³¹ In 1989, the state house passed a version of the MHRA that would have included prohibitions against sexual orientation discrimination, but the state senate defeated it.³²

In 1993, both chambers of the state legislature passed a bill that would prohibit sexual orientation discrimination, but the governor vetoed it.³³ In 1995, a group called Concerned Maine Families obtained enough signatures to place on the state's general election ballot a measure, Question 1, that would prohibit gay-rights laws from being passed anywhere in Maine and invalidate the only existing ordinances, in Portland and Long Island, but the measure failed by a 53 to 47% margin.³⁴ Finally, in 1997, the state legislature passed and the governor signed a bill amending the MHRA to include prohibitions on sexual orientation discrimination. However, the law never took effect because a petition drive put the matter before Maine voters, who narrowly voted against the bill.³⁵ In 2000, the state legislature again passed and the governor again signed a bill that let Maine voters decide whether to amend the MHRA to include protections against sexual orientation discrimination.³⁶ Despite public polls showing broad support for

²⁶ *Id.*

²⁷ *Id.*

²⁸ See 5 Me. Rev. Stat. § 4582.

²⁹ *Chronology of Maine's Gay-Rights Legislation*, MAINE SUN. TELEGRAM, Feb. 18, 2001.

³⁰ *Id.* One legislator called gay people "creepy crawlers," and another said of lesbians that if any of them slept with him, they'd never sleep with another woman again. See Susan Kinzie, *Gay Rights: Evolution of a Debate Once Rarely Discussed Publicly, Subject now out of the Closet*, BANGOR DAILY NEWS, Jan. 3, 1998.

³¹ *Chronology of Maine's Gay-Rights Legislation*, MAINE SUNDAY TELEGRAM, Feb. 18, 2001.

³² *Id.*

³³ *Id.*

³⁴ Peter Poncha and Tess Nacelewiz, Portland Press Herald, Maine Sunday Telegram, Sunday January 25, 1998, *Main Gay Rights Chronology* available at <http://people.maine.com/paula/pph/pph-1.25.98.html#linka>.

³⁵ *Id.*

³⁶ *Id.*

amending the MHRA to include these protections, Maine voters again narrowly rejected the amendments.³⁷

In 2005, after the state legislature and governor once more amended the MHRA to include protections against sexual orientation discrimination (which, as defined, includes gender identity), Mainers voted by a 55% to 45% margin to let the amendments stand.³⁸ Opponents of the 2005 amendments to the MHRA tried to remove the prohibitions on sexual orientation discrimination in the years following the 2005 changes, but in 2008 gave up on the efforts reportedly because of lack of funding and volunteers.³⁹

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

1. Executive Orders

Researchers reviewed the state's available archive of executive orders, but none were on point.⁴⁰

2. State Government Personnel Regulations

As noted above, the MHRA's scope includes public entities.

3. Attorney General Opinions

None.

D. Local Legislation

Portland, Falmouth, South Portland, Long Island, Orono, Sorrento, Westbrook, Bangor, Ogunquit, and Bar Harbor have local ordinances prohibiting discrimination on account of a person's sexual orientation or gender identity.⁴¹ In 1993, The Lewiston City Council passed an ordinance banning discrimination based on sexual orientation. But that same year it was overturned by voters by a 2-1 ratio.⁴²

1. City of Portland

The Portland City Council found that "(a) The population of the city consists of people of every sexual orientation, some of whom are discriminated against in

³⁷ *Id.*

³⁸ Paul Carrier, *League Halts Gay-Rights Repeal Effort*, PORTLAND PRESS HERALD, June 20, 2008.

³⁹ *Id.*

⁴⁰ See Maine Office of the Governor Archive of Executive Orders, http://www.maine.gov/governor/baldacci/news/executive_orders/index.shtml (last visited Sept. 4, 2009).

⁴¹ See GLAD, *supra* note 15; Tuttle, *supra* note 7; *Gay Rights Activists Regroup: Tourist Towns Work to Reassure Visitors of Tolerance, Acceptance*, BANGOR DAILY NEWS, June 29, 1998.

⁴² Peter Poncha and Tess Nacelewiz, Portland Press Herald, Maine Sunday Telegram, Sunday January 25, 1998, *Main Gay Rights Chronology* available at <http://people.maine.com/paula/pph/pph-1.25.98.html#linka>.

employment opportunities, housing, access to public accommodations and in the extension of financial credit; ... (c) There has been a disturbing increase in the number of violent incidents within the city in which individuals have been attacked because of their sexual orientation; and (d) The lack of legal protection for individuals discourages them from publicizing acts of discrimination out of fear of reprisal.⁴³

2. **Town of Falmouth**

The Falmouth town council found that “The population of the Town of Falmouth is diverse and includes people of every sexual orientation (they are our family members, neighbors, friends, employees, taxpayers, landlords and tenants, lenders and borrowers), some of whom are at risk of being discriminated against in employment opportunities, housing, access to public accommodations, education, and the extension of financial credit.”⁴⁴

3. **City of Portland**

The City of Portland found that “The population of the City of Portland is diverse and includes people of every sexual orientation, some of whom are at risk of being discriminated against in employment opportunities, housing, access to public accommodations and in the extension of financial credit.”⁴⁵

E. **Occupational Licensing Requirements**

After reviewing the professional licensing requirements of a variety of occupations in Maine, none appeared to raise the specter of potential indirect sexual orientation or gender identity discrimination.⁴⁶

⁴³ See City of Portland, Code of Ord., Ch. 13.5, Art. II, § 13.5-21, *available at* http://www.ci.portland.me.us/Chapter013_5.pdf.

⁴⁴ See Falmouth Code of Ord. (2009), *available at* <http://www.municode.com/resources/gateway.asp?pid=12125&sid=19>.

⁴⁵ See City of Portland Ord. 97/98 (2008-2009), *available at* <http://www.memun.org/SchoolsProject/Resources/Ordinance/SexOrientationSP.htm>.

⁴⁶ See Maine Office of Licensing & Registration, List of Professions and Occupations, <http://www.maine.gov/pfr/professionallicensing/professions.htm> (last visited Sept. 4, 2009).

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

A. Case Law

1. State & Local Government Employees
2. Private Employers

B. Administrative Complaints

Since 2005, 35 cases have been filed under the MHRA alleging unlawful sexual orientation discrimination.⁴⁷ Of these cases, 12 were filed against public entities.⁴⁸

C. Other Documented Examples of Discrimination

Brewer School District

In 2009, the Supreme Judicial Court of Maine reversed a lower court's grant of summary judgment to defendant school district and school superintendent in a sexual orientation discrimination case. Finding disputed issues of material fact, the court remanded for trial Kelly Cookson's claim that she was not rehired as head coach of the Brewer High School varsity softball team because of her sexual orientation.

Cookson was head coach for 12 years between 1993 and 2005. The team was by all accounts quite successful during that period, and made the playoffs in every year but one. Despite the team's success, Cookson was not rehired for the 2005-2006 season. Claiming sexual orientation discrimination and slander, Cookson filed suit against the Brewer School Department and the school superintendent, Daniel Lee. Her complaint alleged that she was not rehired because she was a lesbian, and that Lee made false and defamatory statements about her to the parents of the members of her team. The school claimed that Cookson was not rehired because of nondiscriminatory reasons: that she was involved in hazing, in violation of school policy, and that she failed to provide a balanced sports program.⁴⁹

University of Maine- Augusta

In 2008, a gay, African-American male employee was called a "fagball" and "niggerball" and addressed in other demeaning ways by his immediate supervisor, a department dean. The employee filed a grievance with his head supervisor.⁵⁰

⁴⁷ See Williams Institute Complaint Chart (2009) (on file with the Williams Institute). As noted above, the MHRA's definition of "sexual orientation" includes protections against both sexual orientation and gender identity discrimination.

⁴⁸ *Id.*

⁴⁹ Lesbian & Gay L. Notes (Summer 2009).

⁵⁰ GLAD REP. OF EMPLOY. DISCRIM. (Apr. 11, 2008) (on file with GLAD).

City Government Department

In 2008, a gay firefighter reported that he had been harassed by his coworkers when his sexual orientation was disclosed at work. He was "outed" and then his coworkers made offensive and hostile comments. He met with department heads and expressed his discomfort several times, but allegedly the job environment has not changed.⁵¹

Maine Department of Corrections

In 2007, a gay employee of the Maine Department of Corrections reported that he had experienced harassment and discrimination based on his sexual orientation at work. As a result of discrimination and harassment, the employee went on medical leave. The employee was investigated, but his supervisors would not tell him why the investigation was undertaken. The employee reported that inmates treated him badly because of his perceived sexual orientation and that his supervisors did nothing to address this harassment. The employee filed a complaint with the Maine Human Rights Commission and was successful in his case.⁵²

County Recycling Department

In 2007, a staff member at a county recycling center was denied bereavement leave when her same-sex partner's father passed away. She knew that heterosexual coworkers, whose unmarried partner's relatives have passed away, had been able to use bereavement time. For example, a coworker was permitted to take bereavement leave for the death of his girlfriend's father. The department policy states that in the case of an immediate family member's death, including a spouse's parent, staff may take bereavement time.⁵³

Police Department

In 2002, a gay police officer in Maine reported that he was being harassed at work based on his sexual orientation. He was called a "fudgepacker" and a "faggot" by his coworkers.⁵⁴

⁵¹ GLAD REP. OF EMPLOY. DISCRIM (Feb. 19, 2008).

⁵² GLAD REP. OF EMPLOY. DISCRIM (Oct. 31, 2007).

⁵³ GLAD REP. OF EMPLOY. DISCRIM (Apr. 5, 2007).

⁵⁴ GLAD REP. OF EMPLOY. DISCRIM (May 16, 2002).

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, 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. Housing & Public Accommodations Discrimination

The MHRA prohibits discrimination on the basis of sexual orientation in housing and public accommodations.⁵⁵

B. Education

The MHRA prohibits discrimination on the basis of “sexual orientation” in education.⁵⁶

C. Recognition of Same-Sex Couples

In 2009, Maine enacted a law granting same-sex couples the right to marry.

⁵⁵ See 5 Me. Rev. Stat. § 4552 *et seq.*; see also GLAD, *supra* note 15.

⁵⁶ See 5 Me. Rev. Stat. § 4552 *et seq.*; see also GLAD, *supra* note 15.