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

Title

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

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MEMORANDUM

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

I. OVERVIEW

Hawaii Revised Statutes Section 378, the Fair Employment Practices Act (the “Act”), prohibits public and private employment discrimination on the basis of race, sex, age, religion, color, ancestry, sexual orientation, disability, genetic information, marital status or arrest and court record.¹ Legislation that would have added gender identity to the Act’s list of protected categories passed in the Legislature but was vetoed by Governor Linda Lingle. In a court case, the Hawaii Civil Rights Commission (“HCRC”) argued that discrimination protections should extend to transsexual and transgender individuals.² However, on appeal, the First Circuit of the State of Hawaii disagreed.³

HCRC is the agency responsible for enforcing the Act.⁴ According to an HCRC Annual Report, there were 617 employment discrimination claims filed from 2007 to 2008; of which eight were instances of purported discrimination based upon sexual orientation.

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

- When an openly gay teacher at the Nanakuli High and Intermediate School complained to the administration about harassment and homophobic gossip by students, the principal responded by barring him from tutoring students after class and forcing him to remove decorations and books not directly related to coursework from his classroom. Other students at the school circulated a petition “calling for an end to the discriminatory atmosphere on campus” and other teachers at the school agreed that he was being discriminated against on the basis of his sexual orientation.⁵ In Hawai’i public school teachers are state employees.

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and polices involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such

¹ HAW. REV. STAT. § 378-1 --38 (1991).

² *In re HCRC No. 9951*, D..R. No. 02-0015 (H.C.R.C. June 28, 2002), <http://bit.ly/edeMI> (last visited Sept. 3, 2009).

³ *RGIS Inventory Specialist v. Haw. Civ. Rts. Comm’n*, Civ. No. 02-1-1703-07 (1st Cir. Haw. Jan. 27, 2003), available at <http://bit.ly/fwLE9>.

⁴ § 368.

⁵[1] Leland Kim, *Nanakuli Students Rally Around an Openly-Gay Teacher*, KHNL NBC 8 HONOLULU (n.d.) available at <http://www.khnl.com/Global/story.asp?S=7230012> (last visited Sept. 17, 2009).

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.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

Originally enacted in 1991, the Act prohibits employment discrimination on the basis of race, sex, age, religion, color, ancestry, sexual orientation, disability, genetic information, marital status or arrest and court record.⁶ The Act does not protect gender identity, which is explicitly excluded from the definition of “disability.”⁷ The most recent version of the legislation became effective on June 28, 2002 and protects public and private employers. However, the Act provides an exception for religious, charitable and educational organizations.⁸ The Act also contains other exceptions, such as bona fide occupational qualifications and undue hardship.⁹

Section 368-1 of the Act defines the purpose and intent of the law:

“The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations or access to services receiving state financial assistance is against public policy. It is the purpose of this chapter to provide a mechanism which provides for a uniform procedure for the enforcement of the State's discrimination laws. It is the legislature's intent to preserve all existing rights and remedies under such laws.”¹⁰

In the Hawaii House Judiciary Committee’s second reading of proposed amendments to the act—which included the “sexual orientation” classification—the Committee found “that the AIDS epidemic has compounded discriminatory treatment of gays and lesbians. To treat someone differently simply on the basis of what the person is and not in relation to the person’s behavior is unfair.”¹¹ Thus, the Committee

⁶§ 378-1 to 378-38.

⁷ 12 HAW. ADMIN. RULES, Chptr. 46, subchptr. 9 (hereinafter “RULES § 12-46-”), available at <http://hawaii.gov/labor/hcrc/hcrc-links/har9.shtml>; RULES § 12-46-182 (providing that

“disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs”).

⁸ HAW. REV. STAT. § 378-3.

⁹ 378-3.

¹⁰ § 368-1 (amended by Ch. 33, L. 1992).

¹¹ HAW. 16 H. J. 907, 1163 (1991).

recommended the legislation for a third reading; the sexual orientation language remained through the amendment's passage.

Under the amended Act, employers may not employ, discharge or discriminate in compensation, terms, conditions or privileges of employment, or refuse to hire because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record.¹²

The Hawaii Administrative Rules expressly exclude transgender individuals from its definition of "disability," thereby precluding any protection under the statute.¹³ In a petition to the First Circuit of the State of Hawaii, the Executive Director of HCRC argued that employment discrimination against transgender or transsexual individuals is discrimination "because of" sex and should, therefore, be proscribed under the Act.¹⁴ The circuit court disagreed and reversed a lower court's previous order granting declaratory relief to a transsexual Plaintiff.¹⁵ The court found that Section 378-1 "does not prohibit discrimination which is directed to person's status as transgender or transsexual."¹⁶

2. Enforcement & Remedies

An aggrieved person must file a charge with the HCRC within 180 days of the occurrence or the last occurrence of a pattern of ongoing discrimination. In the alternative, the Commission may bring charges itself.¹⁷ Thereafter, if there is substantial evidence of a violation, the Commission will attempt to eliminate the effect of the alleged violation through a process of conference, conciliation and persuasion.¹⁸ If this is not successful, then a hearing examiner is appointed to conduct a hearing. Victims of discrimination may also pursue a private right of action; if successful, plaintiffs may be able to recover costs, including reasonable attorney's fees.¹⁹

Declaratory relief is also available. The employer may be ordered to cease and desist, to hire, to reinstate, to promote the complaining individual (with or without back-pay), to implement compliance reporting, and to pay for the costs of the action.²⁰

B. Attempts to Enact State Legislation

Since 1991, Hawaii has banned discrimination based on sexual orientation in the employment context. In 2005, Governor Linda Lingle vetoed a bill that would have added gender identity discrimination to the law. That same year, protection against housing discrimination based on sexual orientation and gender identity was successfully

¹² HAW. REV. STAT. § 378-1.

¹³ Rules, *supra* note 7, at § 12-46-9.

¹⁴ *In re HCRC*, D.R. No. 02-0015.

¹⁵ *RGIS Inventory Specialist*, Civ. No. 02-1-1703-07.

¹⁶ *Id.* at *4.

¹⁷ HAW. REV. STAT. § 368-11.

¹⁸ § 368-13.

¹⁹ § 368-14.

²⁰ § 378-5(c).

enacted.²¹ Sexual orientation and gender identity protections were added to the public accommodation law in 2006.²² Thus, transgender persons in Hawaii, while they enjoy other protections from discrimination, are singularly vulnerable when it comes to earning a living.

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

1. Executive Orders

There are no Executive Orders in Hawaii relating to sexual orientation discrimination.

2. State Government Personnel Regulations

The Hawaii Government Employees Association (“HGEA”), Hawaii’s largest union, provides no discussion of LGBT rights or issues in its online policies.²³

The State of Hawaii Department of Human Services Policies and Procedures provides that “[i]t shall be the policy of the Department of Human Services to provide all persons with an equal opportunity to participate in, and benefit from, all departmental programs, services and activities.”²⁴

3. Attorney General Opinions

There are no Attorney General opinions in Hawaii relating to sexual orientation.²⁵

D. Local Legislation

None.

E. Occupational Licensing Requirements

None.²⁶

²¹ Richard S. Ekimoto, *Sexual Orientation and Gender Identity Discrimination in Real Property Transactions Bill Signed by Governor*, HAWAII CONDO LAW, July 13, 2005, <http://bit.ly/IKAgk>.

²² Brian DeWitt, *Over Half the Nation Will be Covered by an Equality Law*, GAY PEOPLE’S CHRON., May 11, 2007, <http://bit.ly/jIPYy>.

²³ Haw. Gov. Employees Assoc., <http://www.hgea.org> (last visited Sept. 6, 2009).

²⁴ HAW. DEP’T OF HUM. SERV. POLICIES & PROC. § 4.10.1 (2007), <http://bit.ly/bevAf>.

²⁵ Archives of Attorney General Opinions, <http://hawaii.gov/ag/main/publications/opinions> (last visited Sept. 4, 2009).

²⁶ State of Hawaii Department of Commerce & Consumer Affairs Archive of Professional Licensing Requirements, <http://hawaii.gov/dcca/areas/pvl> (last visited Sept. 4, 2009).

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

A. Case Law

RGIS Inventory Specialist v. Haw. Civil Rts. Comm'n, Case No. 02-1-1703-07
(1st Cir. Haw. Jan. 28, 2003).

In HCRC Declaratory Relief Petition D.R. No. 02-0015, the Executive Director argued that employment discrimination against transgender or transsexual individuals is discrimination “because of” sex and therefore proscribed under the Act.²⁷ In *RGIS Inventory*, the Circuit Court of the First Circuit of the State of Hawaii disagreed and reversed an order of declaratory relief that a lower court had granted in favor of a transsexual plaintiff.²⁸ The court found that H.R.S. Section 378 “does not prohibit discrimination which is directed to person’s status as transgender or transsexual.”²⁹

Voluntary Assoc. v. Waihee, 800 F. Supp 882 (Dist. Haw. 1992).

Voluntary Association v. Waihee arose shortly after the initial passage of the law banning employment discrimination based on sexual orientation. Religious leaders challenged this law, claiming, *inter alia*, that it violated their freedom of speech and religious freedom under the First Amendment to the U.S. Constitution.³⁰ In dismissing the case, the court found that: “[t]he Hawaii state legislature has declared that sexual orientation discrimination in employment is against public policy.”³¹ The court cited the legislative history amending H.R.S. Section 368 to add sexual orientation as an example of such policy in action.³²

1. State & Local Government Employees

None.

2. Private Employers

Duda v. Rockwell Power Sys. Co., Case No. 95-0251(2) (2nd Cir. Aug.
10, 1998).

In *Duda v. Rockwell Power Systems Company*, the Circuit Court for the Second Circuit of Hawaii held that a homosexual engineer had failed to establish a *prima facie* case of intentional infliction of emotional distress when he was subject to taunting jokes and remarks by co-workers and his employer demanded that he continue to attend work nonetheless. The court found that the Plaintiff had presented no evidence that the

²⁷ *In re HCRC*, D.R. No. 02-0015.

²⁸ *RGIS Inventory Specialist*, No. 02-1-1703-07.

²⁹ *Id.* at 4.

³⁰ *Voluntary Association v. Waihee*, 800 F. Supp 882 (Dist. Haw. 1992).

³¹ *Id.* at 882 (internal citations omitted).

³² *Id.*

employer had acted intentionally. Moreover, because the employee had never mentioned the harassing conduct to superiors, the court held that there was no genuine issue of material fact as to whether the employer should have recognized its actions might result in emotional distress. In finding for the employer, the court found that the employer had legitimate business reasons for terminating the Plaintiff's employment.³³

B. Administrative Complaints

HCRC files are confidential.

C. Other Documented Examples of Discrimination

None.

³³ *Duda v. Rockwell Power Sys. Co.*, No. 95-0251(2) (2d Cir. Aug. 10, 1998).

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. Housing & Public Accommodations Discrimination

H.R.S. Section 489 is designed “to protect the interests, rights, and privileges of all persons within the State with regard to access and use of public accommodations by prohibiting unfair discrimination...”³⁴ This law proscribes discrimination based on sexual orientation and gender identity.³⁵ The law provides that

“[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.”³⁶

B. Parenting

Hawaii permits single parent GLBT adoption.³⁷ It does not “clearly prohibit” joint gay adoption.³⁸ Second-parent adoption is allowed “in some areas.”³⁹

C. Recognition of Same-Sex Couples

In 1997, Hawaii became the first state to institute state-wide domestic partnership (“reciprocal beneficiary”) benefits but did not authorize same-sex marriage. In 1998, Hawaii voters ratified a constitutional amendment permitting (although not requiring) the legislature to restrict marriage to opposite-sex couples. In 1999, the Hawaii Supreme Court denied legal marriage to same-sex couples.⁴⁰

³⁴ HAW. REV. STAT. § 489-1 (internal citations omitted).

³⁵ § 489-2.

³⁶ § 489-3.

³⁷ Ramon Johnson, *Where is Gay Adoption Legal?*, ABOUT, Nov. 5, 2008, <http://gaylife.about.com/od/gayparentingadoption/a/gaycoupleadopt.htm> (last visited Sept. 3, 2009).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See CRAIG A. RIMMERMAN ET. AL., *THE POLITICS OF GAY RIGHTS* 324-26 (2000).