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

Title

New Jersey- Sexual Orientation and Gender Identity Law and Documentation of
Discrimination

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MEMORANDUM

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

I. OVERVIEW

New Jersey’s Law Against Discrimination (“LAD”) protects against discrimination based on marital status, domestic partnership status, affectional or sexual orientation, gender identity or expression, and mental or physical disability, including AIDS and HIV related illnesses.¹ In addition to the LAD, New Jersey’s Administrative Code includes an anti-discrimination policy for state government employees.² This policy also prohibits discrimination on the basis of sexual orientation and gender identity.³

Despite having one of the nation’s strongest sets of laws prohibiting discrimination, incidents of sexual orientation and gender identity discrimination by state and local governments still arise. Documented examples include:

- In 2009, former police officer Robert Colle received a \$415,000 settlement against a New Jersey town after his police force discriminated against him because of his sexual orientation. Colle was ridiculed by his chief and by other officers because of his sexual orientation. Dispatch refused back-up after he called for assistance in apprehending a woman who had bit his finger to the bone.⁴
- In 2008, the town of Dover agreed to settle a discrimination claim brought by a lesbian former-police sergeant, for \$750,000. According to an announcement made by the Civil Service Commission, Sharon Whitmore received compensation for salary, pension and promotional pay dating back to her suspension from duty in 2004, which she challenged first in an administrative hearing and then a lawsuit in Superior Court, Morris County. Whitmore, described in a report by the Newark Star-Ledger as an openly-gay woman who was the only female member of the Dover police force, alleged that she was subject to “discriminatory, retaliatory or harassing conduct” by the male town supervisor, the police chief, and other department officials. Under the terms of the settlement, Whitmore was reinstated to the active payroll of the department as a sergeant for nine months, during which time she actively sought work, as her pay was to terminate either

¹ N.J. STAT. ANN. § 10:5-1-49 (2008).

² N.J. ADMIN. CODE § 4A:7-3.1 (2009).

³ § 4A:7-3.1(d)-(l) (2009).

⁴ Negotiated Settlement and General Release, *Colle v. City of Millville*, D. Conn., Civil Action No. 07-5834.

when she found a new job or by the end of the nine months, whichever came first. Whitmore was a twelve-year veteran of the department.⁵

- In 2006, an employee of a New Jersey State Department reported that she was demoted and assigned tasks below her skill level because she was a lesbian.⁶
- In 1997, fifteen years after he was hired by the New Jersey State Police, a trooper was attacked by other troopers while on assignment, due to his sexual orientation. The troopers were to join Schmitt in a sting operation, but instead headed straight for him when they arrived and began beating him with their batons. They knocked Schmitt to the ground and continued to beat and kick him while shouting anti-gay slurs. The incident made Schmitt fear for his safety and he suffered depression as a result of the hostility he faced at work.⁷
- George DeCarlo, a former substitute teacher who had been frequently harassed by students based on his perceived sexual orientation, sued Watchung Hills Regional High School District. In June 1994, he received a letter in which the district approved his application to be a substitute in the district for the following school year. However, in September, he failed to receive a single request to teach. In January of 1995, he was informed that he should have applied the year before and that his services were no longer needed by the district. DeCarlo filed a complaint with the State Division on Civil Rights. The agency found that “[i]t [was] reasonable to conclude that complainant was denied reappointment as a substitute because of his sexual orientation and as an act of reprisal.” DeCarlo then filed the sexual-orientation discrimination lawsuit against the district. In February, the court ruled that DeCarlo could not seek punitive damages from the school district but that he could seek lost and future wages and compensation for the emotional distress he had endured.⁸
- A heterosexual pilot filed a lawsuit in a county court alleging that he had been the victim of anti-gay harassment by staff at the New Jersey Air National Guard and that his complaints about the harassment had been ignored. Major Robert Scott sued four officers in the 177th Fighter Wing in March, alleging that had been harassed by his peers, who had assumed he was gay because he was not married, did not have a girlfriend, and lived with female flight attendants. Scott claimed that fellow enlistees suggested he had a boyfriend and that Major General James McIntosh had retaliated against Scott for complaining, by issuing a written reprimand about his relationship with an unmarried woman. A spokesperson said that the Air National Guard had completed its own investigation into the allegations but did not make its findings public. The court denied the state's

⁵ LESBIAN & GAY L. NOTES (Sept. 2008).

⁶ E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

⁷ Email 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).

⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 88 (1997 ed.) (hereinafter HOSTILE CLIMATE ([YEAR])).

motion to dismiss Scott's claim and rejected the state's argument that this was an internal military matter over which the courts lacked jurisdiction.⁹

- A gay high school Spanish teacher, who was “outed” by one of his students, sued the Collingswood Board of Education for violating the Family & Medical Leave Act (“FMLA”) by refusing to allow him to return to work after taking a medical leave of absence.¹⁰ The plaintiff, Daniel Curcio, was harassed by students and fellow teachers once rumors of his homosexuality began to circulate throughout the school. In response to a question from a student, plaintiff disclosed his sexual orientation to the class and proceeded to inform each of his classes that he is gay. Rather than ending the rumors, these frank discussions exacerbated the problem. The school issued plaintiff a formal reprimand for discussing his homosexuality during class time, and plaintiff was put on administrative leave. At the start of the following school year, plaintiff again informed his students that he is gay, and again plaintiff was issued a reprimand. Although plaintiff stated that he did nothing more than state that he is gay, the school determined that he was misusing class time by discussing his sexuality with students. The school’s continued hostility and student harassment caused Curcio to suffer from a severe anxiety disorder and several stress-induced panic attacks. As a result, Curcio took a medical leave of absence at the recommendation of his doctor. When Curcio was medically cleared to return to work, the school refused to reinstate him unless he presented written medical reports indicating his diagnosis and fitness for duty. In addition, the Board reserved the right to conduct its own evaluation of Curcio’s fitness for duty. Based on Curcio’s prior dealings with the school, he determined that the Board was attempting to bar him from returning based on his sexual orientation. The District Court found that his leave of absence qualified under the FMLA and that, therefore, the Board interfered with his FMLA rights by refusing to allow him to return to work. The Court found that a genuine issue of material fact existed regarding Curcio’s claim of retaliation under the FMLA.
- DePiano, a corrections officer since 1987, brought an action against the County of Atlantic as well as Gary Merline, Warden of the Atlantic County Justice Facility (“ACJF”). DePiano alleged, *inter alia*, that Merline showed pictures of him in women's clothes to other employees, and circulated rumors that he was a cross-dresser. In allowing a sex stereotyping harassment claim to proceed, the court specifically held that “the LAD prohibits discrimination, including harassing conduct, on the basis of gender stereotyping. From the record, one could conclude that Merline and his staff harbored negative perceptions of DePiano as a male who did not conform to the male stereotype because he wore women's clothes.” The court also found that “the record in this case permits the conclusion that DePiano was subjected to severe and pervasive harassment because of his cross-dressing. DePiano was taunted throughout the facility by numerous officers. Furthermore, the inmates also knew of DePiano's cross-dressing and subjected him to their own taunts. Though Defendants do not acknowledge that the taunts of

⁹ HOSTILE CLIMATE238 (2000).

¹⁰ *Curcio v. Collingswood Bd. of Educ.*, 2006 WL 1806455 (D. N.J. Jun 18, 2006).

prisoners may create a hostile working environment, there appears no more effective a way to engender horrible working conditions for a prison guard than to reveal one of his embarrassing secrets to the general population. The cumulative effects of the frequent taunting endured by DePiano may have created a hostile work environment. For that reason, the Court will deny Defendants' motion for summary judgment on this claim."¹¹

- Karen Caggiano, a lesbian officer with the Essex County Sheriff 's Department, filed suit under the LAD, claiming harassment and discrimination based on gender and sexual orientation.¹² A jury awarded her nearly \$3 million in 2004.¹³ Her complaint detailed various incidents in which she was verbally and sexually harassed based upon her gender and sexual orientation. All but the last of the incidents on which she based her hostile environment claim occurred prior to the cut-off date set by the two-year statute of limitations, and the Superior Court dismissed the hostile environment claim, finding it could only consider the last incident which, by itself, was insufficient to sustain a hostile environment claim. The appellate court found, in line with the U.S. Supreme Court's reasoning under Title VII, that a sensible interpretation of the statute would allow the claim to relate back to all the conduct contributing to the hostile environment, so long as at least some of that conduct occurred within the time limit.
- In 2008, a gay public school bus driver reported that he was subjected to a hostile work environment and was fired because of his sexual orientation.¹⁴
- In 2007, the borough of Haledon and Sergeant James Len reached a settlement of Len's sexual orientation discrimination claim while the case was pending in Superior Court. Len, who had worked for the department since 1986, "came out" to his family as gay in 2002. Len claimed that soon after word spread about his sexual orientation, he began to suffer on-the-job harassment and discrimination at the hands of various co-workers and local government officials, including the mayor and a city council member. Under the terms of the settlement, Len received \$450,000 and was entitled to be considered for promotion without discrimination.¹⁵

In the non-employment context, the LAD also prohibits sexual orientation or gender identity discrimination in public accommodations and housing right."¹⁶

¹¹ *DePiano v. Atlantic County*, 2005 WL 2143972 (D. N.J. 2005).

¹² *Caggiano v. Fontoura*, 2002 WL 1677472 (July 25, 2002).

¹³ *Caggiano v. County of Essex*, No. L-1608-00, 42 (2084) G.E.R.R. (BNA) 1106 (N.J. Super. decided Nov. 15, 2004).

¹⁴ 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).

¹⁵ LESBIAN AND GAY L. NOTES (Feb. 2007).

¹⁶ N.J. STAT. ANN. § 10:5-4.

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

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

LAD prohibits all employers from discriminating in any job-related action, including recruitment, interviewing, hiring, promotions, discharge, compensation and the terms, conditions and privileges of employment on the basis of any of the law's specified protected categories. These protected categories are: race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy and sexual harassment), marital status, domestic partnership status, affectional or sexual orientation, gender identity, atypical hereditary cellular or blood trait, genetic information liability for military service, or mental or physical disability, including AIDS and HIV related illnesses. The LAD prohibits intentional discrimination based on any of these characteristics. Intentional discrimination may take the form of differential treatment or statements and conduct that reflect discriminatory animus or bias.¹⁷

In December 2006, the LAD was amended to specify that gender identity or expression is a protected class against discrimination.¹⁸ The 2006 Bill codified a New Jersey Superior Court decision holding that "gender dysphoria" (or transsexualism) is a handicap under the New Jersey LAD, and that the LAD precludes an employer from discriminating against a person based on that person's sexual identity or gender.¹⁹

2. Enforcement & Remedies

None.

B. Attempts to Enact State Legislation

None.

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

1. Executive Orders

Executive Order No. 39, issued by the Governor in 1991, prohibits executive branch agencies from discriminating in the provision of services or benefits on the basis of sexual orientation.²⁰ It provides, in part, that

¹⁷ N.J. STAT. ANN. § 10:5-1-49 (2008).

¹⁸ S.B. 362 (N.J. 2006) (Legislative History).

¹⁹ *Enriques v. West Jersey Health Sys.*, 342 N.J. Super. 501 (2001), *cert. denied*, 170 N.J. 211 (2001); 2006 Legis. Bill Hist. NJ S.B. 362.

²⁰ *See Rutgers Council of AAUP Chapters v. Rutgers*, 298 N.J. Super. 442, 462 (App. Div. 1997), *cert. denied* 153 N.J. 48 (1998).

“[n]o Executive Branch department, agency, board, commission or other body shall discriminate on the basis of sexual orientation against any person in the provision of any service or benefit by such department, agency, board, commission or other body.”

2. State Government Personnel Regulations

In addition to the LAD, the New Jersey Administrative Code contains a “policy prohibiting discrimination against state government employees in the workplace.”²¹ The relevant code section provides that

“[t]he State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race...sex/gender (including pregnancy), *marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression...* or disability. To achieve the goal of maintaining a work environment free from discrimination and harassment, the State of New Jersey strictly prohibits the conduct that is described in this policy. This is a zero tolerance policy. This means that the State and its agencies reserve the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment.”²²

The Administrative Code (the “Code”) lists “examples of behaviors that may constitute a violation” of the policy, such as “calling an individual by an unwanted nickname that refers to one or more of the above protected categories, or telling jokes pertaining to one or more protected categories.”²³ The Code delineates administrative procedures and policies for complaints, appeals, rehabilitation, training programs and disciplinary action.²⁴ Therefore, although the LAD applies to state government employers as well as private employers, the Administrative Code provisions are more specific with respect to the procedural and substantive protections given to state employees.

²¹ N.J. ADMIN. CODE § 4A:7-3.1 (2009).

²² § 4A:7-3.1(a) (2009) (emphasis added).

²³ § 4A:7-3.1(b) (2009).

²⁴ §§ 4A:7-3.1(d)-(l) and 4A:7-3.2 (2009) (the administrative code does not address a right of private action, although this may already be contemplated in the LAD).

3. **Attorney General Opinions**

None.

D. **Local Legislation**

None.

E. **Occupational Licensing Requirements**

None.

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

A. Case Law

1. State & Local Government Employees

Curcio v. Collingswood Bd. of Educ., 2006 WL 1806455 (D. N.J. Jun 18, 2006).

In New Jersey, a gay high school Spanish teacher who was “outed” by one of his students sued the Collingswood Board of Education for violating the Family and Medical Leave Act (“FMLA”) by refusing to allow him to return to work after taking a medical leave of absence.²⁵ The plaintiff, Daniel Curcio, was harassed by students and fellow teachers once rumors of his homosexuality began to circulate throughout the school. In response to a question from a student, plaintiff disclosed his sexual orientation to the class and proceeded to inform each of his classes that he is gay. Rather than ending the rumors, these frank discussions exacerbated the problem. The school issued plaintiff a formal reprimand for discussing his homosexuality during class time, and plaintiff was put on administrative leave. At the start of the following school year, plaintiff again informed his students that he is gay, and again plaintiff was issued a reprimand. Although plaintiff stated that he did nothing more than state that he is gay, the school determined that he was misusing class time by discussing his sexuality with students. The school’s continued hostility and student harassment caused Curcio to suffer from a severe anxiety disorder and several stress-induced panic attacks, which required him to take a doctor-recommended medical leave of absence. When Curcio was medically cleared to return to work, the school refused to reinstate him unless he presented written medical reports indicating his diagnosis and fitness for duty. In addition, the Board reserved the right to conduct its own evaluation of Curcio’s fitness for duty. Based on his prior dealings with the school, plaintiff determined that the Board was attempting to bar him from returning based on his sexual orientation. The District Court found that his leave of absence qualified under the FMLA and that, therefore, the Board interfered with his FMLA rights by refusing to allow him to return to work. The Court found that a genuine issue of material fact existed regarding Curcio’s claim of retaliation under the FMLA.

DePiano v. Atlantic County, 2005 WL 2143972 (D. N.J. 2005).

DePiano, a corrections officer since 1987, brought an action against the County of Atlantic and Gary Merline, Warden of the Atlantic County Justice Facility (“ACJF”). DePiano alleged, *inter alia*, that Merline had shown pictures of him in women’s clothes to other employees and circulated rumors that he was a cross-dresser. In allowing DePiano’s sex stereotyping harassment claim to proceed, the court specifically found that “the LAD prohibits discrimination, including harassing conduct, on the basis of gender stereotyping. From the record, one could conclude that Merline and his staff harbored

²⁵ *Curcio*, 2006 WL 1806455.

negative perceptions of DePiano as a male who did not conform to the male stereotype because he wore women's clothes.” The court also found that

“the record in this case permits the conclusion that DePiano was subjected to severe and pervasive harassment because of his cross-dressing. DePiano was taunted throughout the facility by numerous officers. Furthermore, the inmates also knew of DePiano's cross-dressing and subjected him to their own taunts. Though Defendants do not acknowledge that the taunts of prisoners may create a hostile working environment, there appears no more effective a way to engender horrible working conditions for a prison guard than to reveal one of his embarrassing secrets to the general population. The cumulative effects of the frequent taunting endured by DePiano may have created a hostile work environment. For that reason, the Court will deny Defendants' motion for summary judgment on this claim.”²⁶

Caggiano v. Fontoura, 2002 WL 1677472 (July 25, 2002).

Karen Caggiano, a lesbian officer with the Essex County Sheriff 's Department, filed suit under the New Jersey Law Against Discrimination, claiming harassment and discrimination based on gender and sexual orientation. A jury awarded her nearly \$3 million in 2004.²⁷ Her complaint detailed various incidents in which she was verbally and sexually harassed based relating to her gender and sexual orientation. All but the last of the incidents on which she based her hostile environment claim occurred prior to the cut-off date set by the two-year statute of limitations, and the Superior Court dismissed the hostile environment claim, finding it could only consider the last incident which, by itself, was insufficient to sustain a hostile environment claim. The appellate court found, in line with the U.S. Supreme Court's reasoning under Title VII, that a sensible interpretation of the statute would allow the claim to relate back to all the conduct contributing to the hostile environment, so long as at least some of that conduct occurred within the time limit.²⁸

Gish v. Bd. of Educ., 145 N.J. Super. 96 (N.J. Super. Ct. App. Div. 1976), cert. denied, 74 N.J. 251 (N.J. 1977), cert. denied, 98 S. Ct. 233 (1977).

New Jersey public school forced Gish, a teacher, to undergo psychiatric testing after he publicly supported gay rights and became president of a gay rights activist group. The school admitted that Plaintiff's participation in the gay rights movement was the basis for the required psychiatric testing. Gish subsequently filed suit, arguing that the examination violated his First and Fourteenth Amendment rights. The court held that the

²⁶ *DePiano*, 2005 WL 2143972.

²⁷ *Caggiano*, No. L-1608-00, 42 (2084) G.E.R.R. (BNA) 1106.

²⁸ *Caggiano v. Fontoura*, 2002 WL 1677472.

school could require Plaintiff to undergo the psychiatric testing, so as to determine whether he posed a danger to “impressionable” students because of the unconventional nature of his political activities, which showed evidence of “deviation” from normal mental health. The court also found that the board’s determination that Gish was unfit for interacting with students was a fair and reasonable one.²⁹

In re Grossman, 316 A.2d 39 (N.J. 1974).

Grossman, a tenured elementary school music teacher and male-to-female transsexual, was fired after undergoing sex-reassignment. The school district suspended Plaintiff without pay and filed multiple charges against Plaintiff, including charges of “deviant” behavior. The state Board of Education affirmed Plaintiff’s dismissal, finding that Plaintiff was “incapacitated to teach children because of potential psychological harm to the students.” The court upheld Plaintiff’s dismissal, relying upon the potential for psychological harm to the students. The court found that when a teacher’s mere presence will have an adverse effect on the students in the classroom, a determination of “incapacity” is properly supported.³⁰

2. Private Employers

Enriques v. West Jersey Health Sys., 342 N.J. Super. 501 (2001), cert. denied, 170 N.J. 211 (N.J. 2001).

A transsexual was hired by the medical center as a man, and was terminated after she assumed female traits and began to identify as transsexual. The plaintiff argued that gender dysphoria or transsexualism was a handicap under the LAD, and that the LAD prohibited an employer from discriminating on the basis of sexual identity or gender. The court found that sex discrimination under the LAD included gender discrimination so as to protect the transsexual from gender stereotyping and discrimination for transforming herself from a man to a woman. The court held that the term “sex” embraced an individual’s gender, and was broader than anatomical sex, and that the LAD should be interpreted to include protecting from discrimination on the basis of sex or gender. The court found that gender dysphoria is a handicap and a recognized disability under the LAD because it is a recognized mental or psychological disability that could be demonstrated psychologically by accepted clinical diagnostic techniques.³¹

B. Administrative Complaints

2002 N.J. AGEN LEXIS 1492 (Feb. 13, 2002), N.J. Dep’t L. & Pub. Safety Div. Civil Rts.

²⁹ *Gish v. Bd. of Educ.*, 145 N.J. Super. 96 (N.J. Super. Ct. App. Div. 1976), cert. denied, 74 N.J. 251 (N.J. 1977), cert. denied, 98 S. Ct. 233 (1977).

³⁰ *In re Grossman*, 316 A.2d 39 (N.J. 1974).

³¹ *Enriques*, 342 N.J. Super. at 501.

Respondents engaged in unlawful discrimination by refusing to hire complainant because of his sexual orientation and perceived disability (HIV-positive) in violation of the LAD. Both the administrative law judge and the Director found for the complainant, and ordered lost wages and emotional distress damages.

C. Other Documented Examples of Discrimination

Municipal Police Department

In 2009, former police officer, Robert Colle, procured a \$415,000 settlement against his New Jersey town after he was discriminated against by the force because of his sexual orientation. Colle was ridiculed by his chief and other officers because of his sexual orientation and was refused back up when a woman he was apprehending bit his finger to the bone.³²

Town of Dover Police Department

In 2008, the town of Dover agreed to settle a discrimination claim brought by a lesbian former police sergeant for \$750,000, according to an announcement on July 31 by the Civil Service Commission. Sharon Whitmore received compensation for salary, pension and promotional pay dating back to her suspension from duty in 2004, which she challenged first in an administrative hearing and then a lawsuit in Superior Court, Morris County. Whitmore, described in a report by the Newark Star-Ledger as an openly-gay woman who was the only female member of the Dover police force, alleged that she had been subjected to “discriminatory, retaliatory or harassing conduct” by the male town supervisor, the police chief, and other department officials. Under the terms of the settlement, Whitmore was reinstated to the active payroll of the department as a sergeant for nine months, during which time she actively sought work, as her pay was to terminate when she finds a new job or by the end of the nine months, whichever came first. Whitmore was a twelve-year veteran of the department.³³

New Jersey Public School.

In 2008, a gay public school bus driver reported that he was subjected to a hostile work environment and was fired because of his sexual orientation.³⁴

Borough of Haledon Police Department

In 2007, the borough of Haledon and Sergeant James Len reached a settlement of Len’s sexual orientation discrimination case while it was pending in Superior Court. Len, who had worked for the department since 1986, “came out” to his family as gay in 2002. Len claimed that soon after word spread about his sexual orientation, he began to

³² Negotiated Settlement and General Release, *supra* note 4.

³³ LESBIAN & GAY L. NOTES (Sept. 2008).

³⁴ 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).

suffer on-the-job harassment and discrimination at the hands of various co-workers and local government officials, including the mayor and a city council member. Under the terms of the settlement, Len received \$450,000 and was entitled to be considered for promotion, discrimination-free.³⁵

New Jersey State Agency.

In 2006, an employee of a New Jersey State Department reported that she was demoted and assigned tasks below her skill level because she was a lesbian.³⁶

New Jersey State Police

In 1997, fifteen years after he was hired by the New Jersey State Police, a trooper was attacked by other troopers while on assignment because of his sexual orientation. The troopers were to join Schmitt in a sting operation, but instead headed straight for him when they arrived and began beating him with their batons. They knocked him to the ground and continued to beat and kick him while shouting anti-gay slurs. The incident made Schmitt fear for his safety and he suffered depression as a result of the hostility he faced at work.³⁷

Watchung Hills Regional High School District

George DeCarlo, a former substitute teacher who had been frequently harassed by students based on his perceived sexual orientation, sued Watchung Hills Regional High School District. In June of 1994, he received a letter in which the district approved his application to be a substitute in the district for the following school year. However, in September, he failed to receive a single request to teach. In January of 1995, he should have applied a year earlier, and that his services were no longer needed by the district. DeCarlo filed a complaint with the State Division on Civil Rights. The agency found that “[i]t [was] reasonable to conclude that complainant was denied reappointment as a substitute because of his sexual orientation and as an act of reprisal.” DeCarlo then filed the sexual-orientation discrimination lawsuit against the district. In February, the court ruled that DeCarlo could not seek punitive damages from the school district, but that he could seek lost and future wages and compensation for the emotional distress he had endured.³⁸

New Jersey Air National Guard

A heterosexual pilot filed a lawsuit in a county court alleging that he had been the victim of anti-gay harassment by staff at the New Jersey Air National Guard and that his complaints about that had been ignored. Maj. Robert Scott sued four officers in the 177th

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³⁸ HOSTILE CLIMATE 88 (1997).

Fighter Wing in March, saying he had been harassed by his peers, who had assumed he was gay because he was not married, did not have a girlfriend, and lived with female flight attendants. Scott claimed that fellow enlistees suggested he had a boyfriend and that Major General James McIntosh had retaliated against Scott for complaining, by issuing a written reprimand about his relationship with an unmarried woman. Scott also alleged that Captain James Gordon, the unit's only black member, was taunted by peers with racist epithets and jokes. According to Scott, after Gordon complained about the harassment, his flight privileges were suspended for ten weeks. A spokesperson said that the Air National Guard had completed its own investigation into the allegations but did not make public its findings. The court denied the state's motion to dismiss Scott's claim and rejected the state's argument that this was an internal military matter that should not be handled in the courts.³⁹

³⁹ HOSTILE CLIMATE 238 (2000).

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

The LAD also provides protections beyond employment, as follows:

“All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination.”⁴⁰

Sexual orientation and gender identity are protected characteristics in each of these fields.

B. HIV/AIDS Discrimination

Poff v. Caro, 228 N.J. Super. 370 (1987).

The New Jersey Division of Civil Rights sought a preliminary injunction to prevent defendant landlord from renting an apartment while a complaint was pending for refusing to rent to three gay men. The court found that the defendant had refused to rent to the men because he feared they would contract AIDS and spread it to his family, who lived in the same building. The court determined that under the LAD, persons with AIDS were considered handicapped and protected by the statute as well as those who were perceived as likely to contract AIDS. Because plaintiff had made a strong *prima facie* case of discrimination and because there was a local housing shortage, the court issued a preliminary injunction to prevent irreparable harm to the men.

C. Hate Crimes

New Jersey hate crime law now expressly covers crimes motivated by animus based on gender identity and sexual orientation.⁴¹

D. Education

New Jersey expressly prohibits discrimination and harassment based on sexual orientation and gender identity or expression in public schools. School districts are required to adopt harassment and bullying prevention policies. Notice of the school district’s policy must appear in any publication of the school district that contains the

⁴⁰ N.J. STAT. ANN. § 10:5-4.

⁴¹ § 2C:16-1 (2002).

comprehensive rules, procedures and standards of conduct for schools in the district, and in any student handbook.⁴²

L.W. ex rel. L.G. v. Toms River Reg. Sch. Bd. of Educ., 189 N.J. 381 (2007).

In this case, a child was repeatedly subjected to harassment by his peers due to his perceived sexual orientation; plaintiffs claimed that the district's failure to take corrective action violated the LAD. The record before the court demonstrated that the minor had been taunted with homosexual epithets like "gay," "homo," and "fag" since the fourth grade, and that the district had adopted a zero-tolerance discrimination policy, but had failed to enforce the policy. The offenders were often counseled by school officials after harassing the minor, but the minor missed many days of school and, in high school, was transferred to a different district. The court held that a cause of action against a school district, alleging student-on-student affectional or sexual orientation harassment that was not reasonably addressed by the school district, was cognizable under the LAD. The court noted that school districts were shielded from liability when their preventive and remedial actions were reasonable in light of the totality of the circumstances.

E. Health Care

New Jersey law gives a civil union partner the same rights and responsibilities as a spouse with regard to "laws relating to emergency and non-emergency medical care and treatment, hospital visitation and notification, and any rights guaranteed to a hospital patient."⁴³

An adult may execute an advance directive giving his or her same-sex partner the authority to make medical decisions on their behalf. The advance directive must be signed and dated by, or at the direction of, the declarant in the presence of two subscribing adult witnesses.⁴⁴

F. Gender Identity

New Jersey will issue an amended birth certificate upon receipt of a physician's affidavit and a certified copy of the name change.⁴⁵

G. Parenting

New Jersey law permits any adult to petition to adopt.⁴⁶ The Department of Youth and Family Services is also specifically required to allow any adult to petition to adopt, regardless of sexual orientation.⁴⁷

⁴² §§ 18A:37-13-17.

⁴³ § 37:1-32(j).

⁴⁴ §§ 26: 2H-53 to 2H-91, § 26:2H-56 ("New Jersey Advanced Directives for Health Care Act").

⁴⁵ 26:8-40.12.

⁴⁶ § 9:3-43.

⁴⁷ N.J. ADMIN. CODE § 10:121C-2.6.

Courts typically will not consider a parent's sexual orientation in custody and visitation determinations unless it is shown to adversely affect or harm the child. State law does not permit the consideration of factors that do not affect the best interests of the child to be used in custody and visitation determinations. New Jersey courts will allow a former same-sex partner with no legal or biological relationship to the children to petition for visitation.⁴⁸

In re H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

This case held that same-sex co-parents may adopt their partner's children.

In re J.M.G., 267 N.J. Super. 622 (1993).

This case held that the adoption of the biological child of lesbian partner was in the best interests of the child, and there were no legal barriers to prevent the adoption from proceeding.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In October of 2006, the New Jersey Supreme Court ruled that it is unconstitutional to deny same-sex couples the rights and responsibilities of marriage. The Court deferred to the New Jersey Legislature on the question of how to extend these rights and responsibilities to same-sex couples. In December of 2006, the Legislature passed a measure establishing civil unions for same-sex couples, which took effect on February 19, 2007.⁴⁹

2. Benefits

New Jersey AB 873 extends six weeks of paid family leave to covered private and public employees who are caring for new children or family members with health problems. The bill applies to civil union partners and children of civil union partners. On April 7, 2008, the bill passed both houses. Governor Corzine signed the bill into law on May 2, 2008.⁵⁰

Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442 (N.J. App. Div. 1997), cert. denied, 153 N.J. 48 (1998).

Appellant employees were denied health insurance coverage under the state health benefits plan for their same-sex domestic partners based on the failure to satisfy the

⁴⁸ N.J. STAT. ANN. § 9:2-4; *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 142 N.J. Super. 499 (App. Div. 1976); *A.B. v. S.E.W.*, 818 A.2d 1270 (N.J. 2003); *A.F. v. D.L.P.*, 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 784 A.2d 721 (N.J. 2001); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

⁴⁹ Human Rights Campaign, State Law Listings, New Jersey Marriage/Relationship Recognition Law, <http://www.hrc.org/1548.htm> (last visited Sept. 4, 2009).

⁵⁰ N.J. A.B. 873 (2008).

statutory definition of “dependents” as spouses under New Jersey law. Appellants and their union sought review of the decision. The court held that the decision to deny same-sex domestic partners health insurance benefits did not violate the LAD because a statutory exception to the LAD intended to place programs such as the one appellants are under, outside the scope of the LAD. The court further held there was not a violation of Equal Protection because the statute was facially neutral and appellants could not show a discriminatory intent behind the marital status classification. The court also held that there was no violation of the executive order that prohibited executive branch agencies from discriminating on the basis of sexual orientation because the state health benefits plan referred to marital status, not sexual orientation