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

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South Dakota - Sexual Orientation and Gender Identity Law and Documentation of
Discrimination

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MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **South Dakota – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

At the state level, South Dakota has no formal laws banning discrimination based on sexual orientation. However, South Dakota State University, one city, and two counties in South Dakota have ordinances prohibiting discrimination in employment based on sexual orientation and/or gender identity.

Documented examples of discrimination on the basis of sexual orientation and gender identity by state and local governments in South Dakota include:

- A teacher who was terminated after twenty-nine years of service because he answered a question about same-sex sexual activity during an annual question and answer session, which he was asked to lead by his school for over 15 years, following a sex education video.¹ The South Dakota Supreme Court reversed the termination as arbitrary. Since 1980, the Faith School Board had made it a practice to contract with the community health nurse to provide sex education for elementary students. Following the sex education presentation, the boys then went to the classroom for a question and answer session led by the teacher, as requested by the health nurse. The teacher was instructed to answer the boys' questions as honestly as possible and he continued to carry out what had been an established practice for fifteen years. During the session in 1995, one of the boys related that he had heard that two men could have sex and asked how this was possible. The teacher preceded his explanation with the disclaimers that this type of conduct is frowned upon, most people do not believe in it, and the boys would find it gross. He then described oral and anal sex in explicit language. In response to complaints by parents, a termination hearing was held and the teacher was terminated. The Supreme Court reversed, indicating that it was arbitrary for the Board to ignore Collins' twenty-nine years of faithful service purely based on his indiscreet answer. Collins v. Faith Sch. Dist., 574 N.W.2d 889 (1998).

Other actions and statements by government officials indicate that LGBT people may face discrimination in the public sector in South Dakota. For example, in 2001, the Sioux Empire Gay and Lesbian Coalition ("Coalition") volunteered to adopt two miles of highway through the state's Adopt-A-Highway program. The South Dakota Department of Transportation, however, refused their request, based on the fact that the Coalition was an "advocacy" group. At that time, several other advocacy groups already were

¹ *Collins v. Faith Sch. Dist.*, 574 N.W.2d 889 (1998).

participants in the program, including College Republicans, the Yankton County Democrats, and the Animal Rights Advocates of South Dakota. The Coalition then filed a lawsuit alleging violations of its rights to free speech and equal protection. Governor Bill Janklow temporarily allowed the group to post their Adopt-A-Highway sign – but simultaneously announced he was terminating the program altogether.²

- In 1992, a justice of the South Dakota Supreme Court wrote a concurring opinion in a case limiting visitation for a mother who was a lesbian.³ In the opinion, he stated: “Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children. After years of treatment, she could then petition for rights of visitation. My point is: she is not fit for visitation at this time. Her conduct is presently harmful to these children. Thus, she should have no visitation. There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan “Egyptian Book of the Dead” bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement.”

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.

² Andrew Gumbel, *Adopt-A-Highway Dispute Pits Gay Coalition Against Governor*, INDEPENDENT (U.K.), Aug. 17, 2001, *available at* <http://www.independent.co.uk/news/world/americas/adoptahighway-dispute-pits-gay-coalition-against-governor-665882.html>; *S. Dakota Gay Group Gets Highway Sign, For A While*, L.A. TIMES, Aug. 18, 2001, at 18, *available at* <http://articles.latimes.com/2001/aug/18/news/mn-35549>.

³ *Chicoine v. Chicoine*, 479 N.W.2d 891 (1992).

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of South Dakota has not enacted laws to protect against employment discrimination based on sexual orientation or gender identity.⁴

B. Attempts to Enact State Legislation

None.

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

1. Executive Orders

None.

2. State Government Personnel Regulations

South Dakota State University's nondiscrimination policy includes sexual orientation among its categories of protected classes. The policy applies in the offering of all benefits, services, and educational and employment opportunities.⁵

3. Attorney General Opinions

None.

D. Local Legislation

The City of Brookings has enacted a local ordinance banning discrimination in public employment due to a person's sexual orientation. Minnehaha County has enacted an affirmative action policy stating that Minnehaha County officials should provide equal employment opportunities to all persons and that there shall be no discrimination on the basis of sexual orientation. In April 2009 Shannon County unanimously voted to add sexual orientation and gender identity to its nondiscrimination policy." In addition, Rapid City has recently publicly indicated that it will consider such legislation.⁶

1. City of Brookings

In 2004, the City of Brookings Human Rights Committee unanimously recommended modifying the language in the City Conflict of Interest Ordinance ("Conflict Ordinance") and City Charter to add "sexual orientation" as protected areas in

⁴ See S.D. Codified Laws §§ 20-13-10, 20-13-20, 20-13-23, 20-13-24 (2002).

⁵ See SOUTH DAKOTA STATE UNIVERSITY NON-DISCRIMINATION POLICY, <http://catalog.sdstate.edu/> (last visited Sept. 3, 2009).

⁶ See Press Release, Equality South Dakota, Victory in Shannon County, <http://www.eqsd.org/news/30-state/282-victory-in-shannon-county.html> (last visited Sept. 3, 2009).

the anti-discrimination sections of both documents.⁷ In 2006, the Brookings City Council amended the City Charter to read: “No person shall be appointed to or removed from, or in any way favored or discriminated against with respect to any city position or appointive city administrative office because of race, gender, sexual orientation, age, handicap, religion, country of origin, or political affiliation.”⁸ The Conflicts Ordinance was updated to read: “No person shall be appointed to or removed from, or in any way favored or discriminated against with respect to any city position or appointive city administrative office because of race, gender, sexual orientation, age, handicap, religion, country of origin, or political affiliation.”⁹ A similar provision applies for appointments to the “Brookings Health System Board of Trustees.”¹⁰ Violations of these provisions are punishable under the general penalty provision of the Brookings City Code, as well as through various actions that may be taken by the City Manager to remedy any violation.¹¹

2. **Rapid City**

Several members of a city council committee in Rapid City have publicly announced their desire to add gays, lesbians, bisexuals and transgender people to the groups of people protected from discrimination under the city’s human relations ordinance.¹² However, lawyers for the city have stated that such additions could lead to more lawsuits and higher costs for taxpayers.¹³ One member of the City Council has stated that the existing ordinance already covers sexual orientation. The issue is to be revisited by the Legal and Finance Committee by mid-February. The current discrimination ordinance defines discrimination as any “act or attempted act which because of race, color, sex, creed, religion, ancestry, disability or national origin results in the unequal treatment or separation or segregation of any person, or denies, prevents, limits or otherwise adversely affects or if accomplished would deny, prevent, limit or otherwise adversely affect, the benefit or enjoyment by any person of employment, membership in a labor organization, ownership or occupancy of real property, a public accommodation, a public service or an educational institution.”¹⁴

E. **Occupational Licensing Requirements**

None.

⁷ See Brookings City Council Meeting Minutes, June 1, 2004, *available at* <http://cityofbrookings.org/council/minutes/pdfs/2004Jun01Minutes.pdf>.

⁸ City of Brookings Charter § 7.02(a)(1).

⁹ City of Brookings Code of Ordinances § 2.63(k)(1).

¹⁰ City of Brookings Code of Ordinances § 42.92(f).

¹¹ City of Brookings Code of Ordinances §§ 1.8, 2.63(m)

¹² *Rapid City Wants to Ban Discrimination Based on Sexual Orientation*, ARGUS LEADER, Jan 16, 2009, <http://www.argusleader.com/apps/pbcs.dll/article?AID=200990116002> (last visited Sept. 3, 2009).

¹³ *Id.*

¹⁴ Rapid City Code of Ordinances § 2.64.020.

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

A. Case Law

Collins v. Faith Sch. Dist., 574 N.W.2d 889 (1998).

In *Collins v. Faith School District*,¹⁵ the South Dakota Supreme Court held that a school board's termination of a teacher on the basis of alleged incompetence, stemming from his indiscreet answer with regard to homosexual activity during a question and answer session following a sex education video, was arbitrary.

Since 1980, the Faith School Board (“Board”) had made it a practice to contract with the community health nurse to provide sex education for elementary students. Following the sex education presentation, the boys then went to the classroom of Richard Collins for a question and answer session, as requested by the health nurse. Collins was instructed to answer the boys' questions as honestly as possible and he continued to carry out what had been an established practice for fifteen years. During the session in 1995, one of the boys related that he had heard that two men could have sex and asked how this was possible. Collins preceded his explanation with the disclaimers that this type of conduct is frowned upon, most people do not believe in it, and the boys would find it gross. Collins then described oral and anal sexual intercourse in explicit language. Soon after, parents' complaints critical of Collins' comments were received by the superintendent. In response, a termination hearing was then scheduled before the Board to consider Collins' dismissal. Notice for the hearing made vague references to issues other than the parental complaints, but the only evidence the Board heard pertained to the question and answer session and Collins' inappropriate response. The high school principal testified that it was inappropriate and immoral for a teacher to discuss homosexual activities with fourth and fifth grade boys, and the superintendent testified without elaboration that the incident adversely affected Collins' ability to perform his teaching duties. At the conclusion of the hearing, the Board voted to terminate Collins' contract on the basis of incompetency, which termination was subsequently upheld by the circuit court. However, the Supreme Court reversed, indicating that it was arbitrary for the Board to ignore Collins' twenty-nine years of faithful service and terminate Collins' teaching contract on the basis that he was incompetent purely based on his indiscreet answer with regard to homosexual activity.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

None.

¹⁵ *Collins*, 574 N.W.2d at 889.

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

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

A. Criminalization of Same-Sex Sexual Behavior

The South Dakota state legislature repealed the state's sodomy law in 1977.

B. Health Care

The South Dakota Department of Human Services, Division of Mental Health includes gender identity disorders in childhood and adolescence among its list of diagnoses and codes used for psychiatric inpatient data regarding minors.¹⁶

C. Parenting

Chicoine v. Chicoine, 479 N.W.2d 891 (1992).

*Chicoine v. Chicoine*¹⁷ involved the review of a lower court order dividing marital property and awarding child visitation. Michael and Lisa Chicoine divorced in 1989 following Lisa's engagement in a series of affairs with women. Michael was awarded custody of the children, and Lisa, who was undergoing treatment for various psychological problems, did not contest the custody award. Lisa was awarded visitation, which included alternate weekends, with the only restriction being that no unrelated female or homosexual male could be present during the children's visits.

The court stated that "Lisa has experienced a myriad of psychological problems including . . . active homosexual relationships with several female partners." The court also noted that "Lisa and her lover were affectionate toward each other in front of the children," and that "Lisa has openly exposed her homosexual feelings in front of her sons on more than one occasion." In light of these facts, the court reversed the lower court's visitation order and remanded so that the trial court might consider further measures aimed at assuring the well-being of the children, including requiring a home study.

In a concurrence to the court's decision, Justice Henderson states:

"[The] Lesbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor

¹⁶ See SD Admin. Art. 46:24, Ch. 46:24:01, App. A, §§ 302.60, 302.85.

¹⁷ 479 N.W.2d 891 (1992).

judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children. After years of treatment, she could then petition for rights of visitation. My point is: she is not fit for visitation at this time. Her conduct is presently harmful to these children. Thus, she should have no visitation.

There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan “Egyptian Book of the Dead” bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement

D. Recognition of Same-Sex Couples

In 1996, the legislature passed a measure defining marriage as a “personal relation between a man and a woman,”¹⁸ making South Dakota one of the first states to expressly ban same-sex marriage.¹⁹ In 2000, the legislature enacted an additional law declaring that the state will respect any marriage contracted out of state “except a marriage contracted between two persons of the same gender.”²⁰ In 2006, South Dakota voters approved (52% to 48%) an amendment to the state constitution indicating that only marriage between a man and a woman would be recognized in the state.²¹ The amendment goes on to state that the “uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.”²²

¹⁸ S.D. Codified Laws §§ 25-1-1.

¹⁹ *See* Press Release, National Gay and Lesbian Task Force, Major Hot Air Balloon Crashes as Gay Sponsors Withdraw Following Passage of Anti-Marriage Law, http://www.qrd.org/qrd/usa/south_dakota/gay.sponsors.withdraw.from.event-02.28.96 (last visited Sept. 3, 2009).

²⁰ S.D. Codified Laws §§ 25-1-38.

²¹ S.D. Const., Art. 21, § 9.

²² *Id.*

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

Comment 3 to Rule 8.4 (Misconduct) of the South Dakota Rules of Professional Conduct for attorneys states that attorneys may not engage in conduct exhibiting bias or prejudice in the course of representing a client based upon numerous classifications, including sexual orientation. Attorneys engaging in such conduct may be deemed to violate Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).²³

In 2001, the Sioux Empire Gay and Lesbian Coalition (“Coalition”) volunteered to adopt two miles of State Highway 38 west of Sioux Falls through the state’s Adopt-A-Highway program. The South Dakota Department of Transportation, however, refused to allow the Coalition to erect an Adopt-A-Highway sign that this particular two mile stretch was sponsored by the Coalition. The state based its argument on the fact that the Coalition was an “advocacy” group, despite the fact that several other advocacy groups already were participants in the program, including College Republicans, the Yankton County Democrats, and the Animal Rights Advocates of South Dakota. The Coalition then filed a lawsuit alleging violations of its rights to free speech and equal protection. Governor Bill Janklow then temporarily allowed the group to post their sign, apparently to diffuse the lawsuit. However, Governor Janklow simultaneously announced he was terminating the program, declaring that all Adopt-A-Highway signs would be taken down by the end of the year.²⁴

²³ STATE BAR OF S.D. RULES OF PROF’L CONDUCT (2004), *available at* http://www.sdbar.org/Rules/Rules/PC_Rules.htm.

²⁴ Andrew Gumbel, *Adopt-A-Highway Dispute Pits Gay Coalition Against Governor*, INDEPENDENT (U.K.), Aug. 17, 2001, *available at* <http://www.independent.co.uk/news/world/americas/adoptahighway-dispute-pits-gay-coalition-against-governor-665882.html>; *S. Dakota Gay Group Gets Highway Sign, For A While*, L.A. TIMES, Aug. 18, 2001, at 18, *available at* <http://articles.latimes.com/2001/aug/18/news/mn-35549>.