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

Title

South Carolina – Sexual Orientation and Gender Identity Law and Documentation of
Discrimination

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MEMORANDUM

From: Williams Institute

Date: September 2009

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

I. OVERVIEW

South Carolina state and local law provides virtually no protection against job discrimination on the basis of sexual orientation or gender identity. No state-wide statute has been enacted in South Carolina to prohibit discrimination in employment on the basis of sexual orientation or gender identity despite substantial efforts to pass such legislation. South Carolina has enacted an extensive administrative grievance procedure for public employees, but an Attorney General's Opinion in 1975 concluded that "homosexuality is a valid ground for refusing State employment."¹ That opinion has not been changed or rescinded. Several South Carolina universities and one municipality have enacted non-discrimination policies. However, the one local ordinance addressing these issues does not cover employment discrimination.

Documented examples of discrimination on the basis of sexual orientation and gender identity in South Carolina include:

- A lesbian police officer who reported in 2007 that when she applied to a police department in South Carolina, she underwent a routine polygraph exam and was asked if she was a lesbian. She responded truthfully that the answer was "yes." She thereafter was not selected for the position. She learned from references she had given that they had not been contacted.² She had quit the state police academy in another state to move to South Carolina, received a good reference from her former employer, and had a clean background and a degree.
- In 2006, a gay emergency medical technician was fired by a county department because of his sexual orientation.³
- A junior high school teacher in Union County was suspended and put on probation for showing the Oscar-winning film *Philadelphia*, about a gay man with AIDS, to seventh and eighth graders. Parents and a local pastor complained that the film was vulgar and promoted homosexuality. The school superintendent criticized the teacher for not getting permission from the principal, the health committee, or the school board to show the film, but he did not agree that the

¹ See Part II. C. 2. below; S.C. Op. Att'y Gen. 4345, 172 (1975-76).

² E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

³ 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).

teacher was trying to promote homosexuality. One of the parents who complained said she had not wanted the teacher suspended. ‘We felt like she owed an apology to those students and those parents,’ she said, stating that she will be satisfied if the school district prevents the showing of such films in the future.⁴

- An employee of the State Law Enforcement Division (“SLED”) who alleged that he was constructively discharged because of his perceived sexual orientation after allegations that he had slept with a co-worker’s husband and was then harassing her at work.⁵ The employee denied the allegations, but the court found that the truth or falsity of the basis upon which the employee was discharged “neither enhances nor diminishes” his claim.⁶ The Court stated that it was not willing to extend the right of privacy to include the conduct at issue in this case, because such “activity clearly bears no relationship to marriage, procreation, or family life”⁷ and held that homosexual conduct is not protected under the due process clause of the Fourteenth Amendment.⁸ The Court also stated that “the constitutional right of privacy and free association do not preclude a law enforcement agency from inquiring into an officer’s off-duty same-sex relationships.”⁹ Further, it stated that the employee’s equal protection rights had not been violated because, in discharging Dawson based on his perceived engagement in homosexual activity, SLED had the “legitimate purpose of maintaining its order, discipline and mutual trust.”¹⁰ Dawson v. State Law Enforcement Div., 1992 WL 208967 (D.S.C. April 6, 1992).

A number of incidents reported in the press indicate the hostility of state and local officials in South Carolina to LGBT people and laws prohibiting employment discrimination against them:

- In 1998, the mayor of Myrtle Beach, South Carolina joined local business and religious leaders in attacking a statewide group and its plans for a gay pride festival. In voting against closing city streets to accommodate the pride festival, he expressed concern that allowing gay men and lesbians to parade through the streets would set a dangerous precedent and would encourage Black Panthers, white supremacist skinheads and other extremist groups to stage similar marches.¹¹

⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 96 (1995 ed.).

⁵ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *1-2 (D.S.C. April 6, 1992).

⁶ *Id.* at *5.

⁷ *Id.* at *6.

⁸ *Id.* at *1-2.

⁹ *Id.* at *5 (citing *Walls v. Petersburg*, 895 F.2d 188 (4th Cir.1990)).

¹⁰ *Id.* at *6.

¹¹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 130 (1998 ed.).

- In 1997, the Greenville County Council passed a resolution that condemned “homosexuality” as “incompatible” with community standards. The three-hour discussion of the resolution was marked by assertions that gays would go to hell, and that the devil brought gay men and lesbians to Greenville.¹²
- In 1993, a gay restaurant and bar sought a license for beer and wine sales and consumption.¹³ At a hearing for the license in 1993, state Senator Mike Fair testified against granting the license, stating that “homosexuality is a public health problem.”¹⁴ Despite that and other protests to the license, the administrative law judge determined that the club could be issued the license.¹⁵

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.

¹² PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 99 (1997 ed.).

¹³ *Treehouse Club v. S.C. Dep’t of Revenue*, 2003 WL 24004603, at *1. (S.C. Admin. Law. Judge. Div., 2003).

¹⁴ *Id.* at *2.

¹⁵ *Id.* at *5.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of South Carolina has not enacted laws to prohibit sexual orientation and gender identity employment discrimination.

B. Attempts to Enact State Legislation

Senate Bill No. 438 was introduced before the 117th Session of the South Carolina General Assembly on February 14, 2007.¹⁶ The bill was submitted to the Committee on the Judiciary and to the relevant sub-committee, but no further action was taken. The bill would have amended Section 1-13-80 of the South Carolina Code prohibiting discrimination in employment on the basis of race, religion, color, sex, age, national origin, or disability, so as to also prohibit such discrimination on the basis of sexual orientation or gender identity.

The bill would have established a cause of action against employers engaging in the “unlawful employment practices” outlined below, for which a court could have ordered an injunction or affirmative action as appropriate, including reinstatement, with or without back pay, payable by the employer, employment agency or labor organization responsible, and any other equitable relief the court deemed appropriate. The bill would have designated actions by the following entities as an “unlawful employment practice”:

(1) **Employer Action:** To discriminate in hiring/firing or compensation decisions or otherwise take action that would adversely affect the individual’s employment status or opportunities on the basis of sexual orientation or gender identity.

(2) **Employment Agency Action:** To fail/refuse to refer, or to refer or classify for employment, or otherwise discriminate on the basis of sexual orientation or gender identity.

(3) **Labor Organization Action:** To cause or attempt to cause an employer to discriminate, to exclude/expel from membership, or classify or otherwise take action that would deprive or limit employment opportunities on the basis of sexual orientation or gender identity.

(4) **Additional Action:** For any of the above entities to discriminate in admission to or employment in a program established to provide apprenticeship or other training on the basis of sexual orientation or gender identity.

¹⁶ S. 438, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

The bill defined “sexual orientation” and “gender identity” as follows: “sexual orientation means heterosexuality, homosexuality, or bisexuality, whether actual or perceived,” and “gender identity means a person’s self-perception, or perception of that person by another, of the person’s identity as a male or female based upon the person’s appearance, behavior, or physical characteristics that are in accord with or opposed to the person’s physical anatomy, chromosomal sex, or sex at birth.” Further, the bill set out to create or recognize advisory agencies and conciliation councils to study and make recommendations regarding discrimination on the basis of sexual orientation or gender identity and to foster goodwill, cooperation, and conciliation among the population of the State.

A substantially similar, if not identical, bill text was introduced as part of Senate Bill No. 443 before the 117th Session of the South Carolina General Assembly on February 14, 2007.¹⁷ The bill was referred to the Committee on the Judiciary and the relevant sub-committee, but was not passed.

1. Discrimination by State or Political Subdivisions in Public Employment, Public Education or Public Contracting Legislation

House Bill No. 4115 was introduced before the 112th Session of the South Carolina General Assembly on March 5, 1997.¹⁸ The bill would have prohibited the State or any of its political subdivisions from using race, sex, color, ethnicity, or national origin as a criterion for either discriminating against or granting preferential treatment to any individual or group in the operation of the state’s system of public employment, public education, or public contracting.

During the consideration of amendments in the House of Representatives, Amendment No. 37 was proposed which would have amended the bill so as to also prohibit discrimination on the basis of sexual orientation. However, the amendment was tabled.¹⁹

2. Employment Bill of Rights for Persons with Disabilities

Senate Bill No. 292 was introduced before the 110th Session of the South Carolina Senate on January 26, 1993.²⁰ The bill was referred to the Committee on the Judiciary and read favorably in the House before it was sent to the Senate, where it was referred to the Committee on Labor, Commerce and Industry, but no further action was taken. The bill would have prohibited employment discrimination on the basis of disability. However, the House Committee on the Judiciary proposed an amendment, which was adopted, providing that the term ‘disability’ would not include “homosexuality,

¹⁷ S. 443, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

¹⁸ H.R. 4115, 112th Gen. Assemb., Reg. Sess. (S.C. 1997).

¹⁹ S.C. H.R.J., 1998 Gen. Assemb., 112th Sess. (S.C. Feb. 12, 1998).

²⁰ S. 292, 110th Gen. Assemb., Reg. Sess. (S.C. 1993).

bisexuality, transvestism, transsexualism, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”²¹

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

1. Executive Orders

Based on a non-exhaustive review of the executive orders available on the Governor’s website, no executive orders issued since 2003 discuss sexual orientation or gender identity discrimination in the context of employment.²²

2. State Government Personnel Regulations

Section 8-11-210 of the South Carolina Code establishes the State Personnel Division under the State Budget and Control Board “to administer a comprehensive system of personnel administration responsive to the needs of the employees and agencies and essential to the efficient operation of State Government”.²³ The State Budget and Control Board was granted the authority to manage almost every aspect of State personnel administration, including the development of fair employment policies to ensure that employment decisions are made “on the basis of merit and fitness without regard to race, sex, age, religion, political affiliation or national origin.”²⁴ Pursuant to the Code, the State Budget and Control Board has the authority to exercise final approval on all policies and programs incident to the administration of such duties.²⁵ With regard to this section, in 1975 the South Carolina Attorney General set forth an opinion stating that “homosexuality is a valid ground for refusing State employment.”²⁶ There is no record that that opinion has been changed or rescinded in the last thirty-five years.

The South Carolina Forestry Commission has a policy prohibiting “discrimination in all programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status.”²⁷

The University of South Carolina has banned discrimination in employment and educational opportunities on the basis of sexual orientation. The official policy states, “The University of South Carolina does not discriminate in educational or employment opportunities or decisions for qualified persons on the basis of race, color, religion, sex,

²¹ S.C. S.J., 1994 Gen. Assemb., 110th Sess. (S.C. Mar. 3, 1994).

²² See South Carolina, Office of the Governor, *Executive Orders in PDF File Format*, <http://governor.sc.gov/executive/orders/> (last visited Sept. 8, 2009).

²³ S.C. CODE ANN. § 8-11-210 (2007).

²⁴ S.C. CODE ANN. § 8-11-230.

²⁵ S.C. CODE ANN. § 8-11-240.

²⁶ S.C. Op. Att’y Gen. 4345, 172 (1975-76).

²⁷ South Carolina Forestry Commission, Home Page, <http://www.state.sc.us/forest/> (last visited Sept. 14, 2009).

national origin, age, disability, sexual orientation or veteran status.”²⁸ The University’s policy did not address health benefits to same sex couples or extend affirmative action policies at the school to include sexual orientation.²⁹ The policy was approved by the University’s Faculty Senate by a vote of 48-14 after the Student Government Association brought the issue before them.

The University of South Carolina, School of Law has instituted a similar policy of non-discrimination. In addition to the application of the policy to its own employment and educational opportunities, the School of Law extends this policy to employers who intend to utilize the law school’s facilities, stating “the law school’s facilities are available only to employers whose practices are consistent with this policy.”³⁰

There is some ambiguity as to whether the Medical University of South Carolina also has instituted a similar policy of non-discrimination: some of the program pages state that the university does not “discriminate on the basis of . . . sexual orientation or sex/gender” in its admissions and other educational activities and programs,”³¹ but the University’s official policy statement on Equal Employment Opportunity does not include sexual orientation.³²

3. Attorney General Opinions

As noted above., the Attorney General issued an opinion regarding Section 8-11-210 of the South Carolina Code stating that “homosexuality is a valid ground for refusing State employment.”³³ However, in 2007, in response to an inquiry from the Board of Trustees for the Medical University of South Carolina, the Attorney General released an opinion which concluded that no provision of State or federal law prevents the University of South Carolina or any public or private entity “from adopting a policy stating that it will not discriminate based on sexual orientation.” The Board of Trustees had received a proposal from the Student Government Association which aimed to expand the University’s non-discrimination policy to prohibit discrimination on the basis of sexual orientation.³⁴

D. Local Legislation

²⁸ University of South Carolina, Office of Equal Opportunity Programs (2002), *available at* <http://www.sc.edu/eop> (last visited Sept. 8, 2009).

²⁹ Jeff Stensland, *USC Faculty Would Ban Sexual Orientation Bias*, THE STATE, Dec. 6, 2001, *available at* http://www.glapn.org/sodomylaws/usa/south_carolina/scnews002.htm.

³⁰ Law School Admissions Council, *University of South Carolina School of Law: Nondiscrimination Policy* (2009), *available at* <http://www.lsac.org/SpecialInterests/lgbt/u-southcarolina.asp> (last visited Sept. 8, 2009).

³¹ See Medical University of South Carolina, *Physician Assistant Studies*, *available at* <http://www.musc.edu/chp/pa> (last visited Sept. 8, 2009).

³² Raymond Greenberg, MD, Ph.D., President, Medical University of South Carolina, *Policy Statement: Medical University of South Carolina Commitment to Equal Employment Opportunity*, *available at* <http://www.musc.edu/eeo/nondis.html> (last visited Sept. 8, 2009).

³³ S.C. Op. Att’y Gen. 4345, 172 (1975-76).

³⁴ S.C. Op. Att’y Gen., 2007 WL 1651332 (S.C.A.G. May 2, 2007).

The ordinances for every county/municipality in South Carolina are available in an online database.³⁵ According to a press release by South Carolina Equality, as of March 5, 2008, Columbia was the only city to have enacted a human rights ordinance prohibiting sexual orientation or gender identity discrimination.³⁶

³⁵ See Municipal Code Corporation, *Online Library: South Carolina* (2005), available at http://www.municode.com/resources/code_list.asp?stateID=40 (last visited Sept. 8, 2009).

³⁶ See *infra* Part IV. B.

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

A. Case Law

1. State and Local Government Employees

Dawson v. State Law Enforcement Div., 1992 WL 208967 (D.S.C. April 6, 1992).

In *Dawson v. State Law Enforcement Division*, Dawson brought an action in federal district court against the State Law Enforcement Division (“SLED”) appealing an administrative decision upholding his discharge from SLED.³⁷ Dawson had filed a grievance under the State Employee Grievance Act, contending that his resignation was a constructive discharge on the basis of his perceived sexual orientation. Dawson had been accused of being involved in homosexual activity with another SLED employee’s husband. Although Dawson denied the allegations, SLED requested Dawson’s resignation based on concerns that this situation had caused problems in the workplace between Dawson and the SLED employee. The Grievance Committee upheld Dawson’s discharge, having found that Dawson had been terminated for attempting to intimidate the SLED employee at work following the incident involving her husband. The Court found that the Grievance Committee’s final decision was binding.³⁸

Dawson also claimed that the constructive termination by SLED violated his constitutional rights of privacy and freedom of association under the Fourteenth Amendment. According to the Court, homosexual conduct is not protected under the due process clause of the Fourteenth Amendment. Moreover, the Court stated that “the constitutional right of privacy and free association do not preclude a law enforcement agency from inquiring into an officer’s off-duty same-sex relationships.”³⁹ Dawson also argued that he had been terminated upon the *mistaken* belief that he was involved in homosexual conduct, but the Court found that the truth or falsity of the basis upon which Dawson was discharged “neither enhances nor diminishes petitioner’s claim.”⁴⁰ The Court stated that it was not willing to extend the right of privacy to include the conduct at issue in this case, because such “activity clearly bears no relationship to marriage, procreation, or family life.”⁴¹ Further, the Court stated that Dawson’s equal protection rights had not been violated because, in discharging Dawson based on his perceived engagement in homosexual activity, SLED had the “legitimate purpose of maintaining its order, discipline and mutual trust.”⁴²

2. Private Employees

B. Administrative Complaints

³⁷ 1992 WL 208967, at *1-2 (D.S.C. April 6, 1992).

³⁸ *Id.* at *1-2.

³⁹ *Id.* at *5 (citing *Walls v. Petersburg*, 895 F.2d 188 (4th Cir.1990)).

⁴⁰ *Id.*

⁴¹ *Id.* at *6.

⁴² *Id.*

Pursuant to the South Carolina Code, the State Employee Grievance Procedure Act was established to address grievances of public employees against public employers.⁴³ According to the Act, each agency is required to establish an employee grievance procedure which provides that all grievances be initiated by internal complaint to the agency. The grievances governed by this procedure concern terminations, suspensions, involuntary reassignments, and demotions.⁴⁴ Once the agency renders a decision, the employee may appeal to the State Human Resources Director who will refer proper appeals to mediation and then, if necessary, to the State Employee Grievance Committee for an administrative hearing. The employee may be represented by counsel and may call witnesses at this hearing. Only upon completion of this administrative review process can the employee seek judicial review before the Administrative Law Court.⁴⁵

Based on a non-exhaustive review of the decisions of the Administrative Law Court, no such decisions related to discrimination based on sexual orientation or gender identity were found. Also, note that, based on a review of the State Office of Human Resources' website, records of employee grievance proceedings do not appear to be available online.⁴⁶

C. Other Documented Examples of Discrimination

Police Department

In 2007, a lesbian police officer had quit the state police academy in another state to move to South Carolina. She received a good reference from her former employer, and she has a clean background and a degree. When the officer applied to a police department in South Carolina, she underwent a routine polygraph exam and was asked if she was a lesbian. She responded truthfully that the answer was "yes." She thereafter was not selected for the position. She learned from references she had given that they had not been contacted.⁴⁷

County Department

In 2006, a gay emergency medical technician was fired by a county department because of his sexual orientation.⁴⁸

⁴³ S.C. CODE ANN. § 8-17-310.

⁴⁴ S.C. CODE ANN. § 8-17-330.

⁴⁵ S.C. CODE ANN. § 8-17-340.

⁴⁶ Note that attempts to contact the State Office of Human Resources to determine if records of employee grievance proceedings are publicly available have been unsuccessful. State Human Resources Department Contact: (803) 737-0900.

⁴⁷ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute).

⁴⁸ 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).

Union County Public School

A junior high school teacher in Union County was suspended and put on probation for showing the Oscar-winning film *Philadelphia*, about a gay man with AIDS, to seventh and eighth graders. Parents and a local pastor complained that the film was vulgar and promoted homosexuality. The school superintendent criticized the teacher for not getting permission from the principal, the health committee, or the school board to show the film, but he did not agree that the teacher was trying to promote homosexuality. One of the parents who complained said she had not wanted the teacher suspended. ‘We felt like she owed an apology to those students and those parents,’ she said, stating that she will be satisfied if the school district prevents the showing of such films in the future.⁴⁹

⁴⁹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 96 (1995 ed.).

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

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

A. Criminalization of Same-Sex Sexual Behavior

South Carolina Code Section 16-15-120 provides, “whoever shall commit the abominable crime of buggery, whether with mankind or with beast” shall be guilty of a felony, punishable by five years in prison or a \$500 fine.⁵⁰ This law, while still on the books in South Carolina, is no longer valid after the U.S. Supreme Court decision in *Lawrence v. Texas*.⁵¹

B. Housing & Public Accommodations Discrimination

Senate Bill No. 443 (“SB 443”) appears to have been the most substantial and widely applicable proposed legislation in South Carolina. It was introduced during the 117th Session of the General Assembly on February 14, 2007.⁵² SB 443 would have amended Section 31-21-40 of the South Carolina Code prohibiting discrimination pursuant to the South Carolina Fair Housing Law, concerning the purchasing, selling or renting of dwellings on the basis of race, color, religion, sex, handicap, familial status, or national origin, so as to also prohibit such discrimination on the basis of sexual orientation or gender identity. The bill would have also made it unlawful to refuse to sell, rent or negotiate, to discriminate in the terms, conditions or privileges of sale or rental or the provisions of services in connection therewith, to advertise a preference or limitation with respect to a sale or rental, or to induce any person to sell or rent by representations regarding the entry into the neighborhood on the basis of sexual orientation or gender identity. The bill would have provided the same definition for “sexual orientation” and “gender identity” as was provided in Senate Bill No. 438, the employment discrimination legislation described above. The bill was referred to the Committee on the Judiciary and the relevant sub-committee, but was not passed.

A substantially similar, if not identical, bill text was introduced as Senate Bill No. 441 before the 117th Session of the South Carolina General Assembly on February 14, 2007.⁵³ The bill was referred to the Committee on Labor, Commerce and Industry, but was not passed.

⁵⁰ S.C. CODE ANN. § 16-15-120.

⁵¹ 538 U.S. 558 (2003).

⁵² S. 443, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

⁵³ S. 441, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

On March 5, 2008, the Columbia City Council voted unanimously to pass ordinances prohibiting discrimination on the basis of sexual orientation or gender identity in housing and public accommodations. According to a press release by South Carolina Equality, Columbia was the first municipality in South Carolina to pass comprehensive human rights ordinances in housing and public accommodations including sexual orientation and gender identity

Pursuant to Section 11-392 of the Columbia Municipal Code, “It is the policy of the City of Columbia, South Carolina, that no person shall be discriminated against in the sale or rental of housing on the basis of race, color, religion, sex, age, national origin, familial status, handicap, disability, or sexual orientation.”⁵⁴ The code defines sexual orientation to mean “a person’s real or perceived heterosexuality, homosexuality, or bisexuality or gender identity or expression.”⁵⁵ This provision applies to real estate owners, operators, real estate salesman, or any individual employed or acting on behalf of such persons. Sexual orientation was added to this provision by Order No. 2008-023 on March 5, 2008.

Pursuant to Section 11-502 of the Columbia Municipal Code, “It is the policy of the City of Columbia, South Carolina, that no person shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation on the basis of race, color, religion, sex, age, national origin, familial status, handicap, disability or sexual orientation.”⁵⁶ Sexual orientation is given the same definition as above. This provision applies to all places which serve the public and require a license or permit issued by the State of South Carolina, its agencies or the City of Columbia to operate, except for private clubs or other establishments not open to the general public. This provision was enacted by Order No. 2008-024 on March 5, 2008.⁵⁷

C. Hate Crimes

SB 443 would have established penalties for a person convicted of a non-capital criminal offense where the offender had the intent to commit the crime on the basis of the actual or perceived race, religion, color, national origin, ancestry, age, disability, gender, sexual orientation or gender identity of the victim. The bill would have provided the same definition for “sexual orientation” and “gender identity” as was provided in Senate Bill No. 438, the employment discrimination legislation described above.

⁵⁴ COLUMBIA, S.C. CODE § 11-395 (2008).

⁵⁵ COLUMBIA, S.C. CODE § 11-393.

⁵⁶ COLUMBIA, S.C. CODE §§ 11-503 & 11-504.

⁵⁷ South Carolina Equality, *Columbia, S.C., Bans Housing Discrimination on Basis of Sexual Orientation and Gender Identity: Council Passes Ordinances Prohibiting Discrimination in Housing and Public Accommodations*, THE MIAMI HERALD, Mar. 5, 2008, available at <http://miamiherald.typepad.com/gaysouthflorida/2008/03/columbia-sc-ban.html>.

Several substantially similar bills were also introduced before the South Carolina General Assembly, including House Bill No. 3738 before the 117th Session on May 20, 2007,⁵⁸ Senate Bill No. 37 before the 112th Session on January 14, 1997,⁵⁹ Senate Bill No. 440 before the 117th Session on February 14, 2007,⁶⁰ and House Bill No. 3161 before the 113th Session on January 6, 1999,⁶¹ each of which was referred to the appropriate committee, but was not passed. In addition, Senate Bill No. 45 before the 113th Session on January 12, 1999 and Senate Bill No. 708 before the 113th Session on April 8, 1999⁶² were each reviewed favorably by the Senate and sent to the House, where they were referred to the Committee on the Judiciary, but were not passed.⁶³

E. Education

House Bill No. 4840 was introduced before the 112th Session of the South Carolina General Assembly on March 18, 1998.⁶⁴ The bill was referred to the Committee on Education and Public Works, but was not passed. The bill would have amended the Comprehensive Health Education Act which governs the health education curriculum in the public schools. As introduced, the bill provided that “homosexuality may be discussed only in the context of saying that homosexual behavior and homosexual marriages are not legal in this State.”⁶⁵

House Bill No. 4907 was introduced before the 117th Session of the South Carolina General Assembly on April 1, 2008.⁶⁶ The bill was referred to the Committee on Education and Public Works, but was not passed. The bill would have provided that a public school could not present, or allow to be presented, a program that involved instruction or discussion of “alternative sexual behavior.” The bill defined “alternative sexual behavior” to include “homosexuality, bisexuality, lesbianism, transsexuality, transgenderism, cross-dressing, pansexuality, promiscuity, sodomy, pederasty, prostitution, oral sex, anal sex, bestiality, and similar behaviors,” as well as “issues and relationships deriving from those behaviors, including sexual orientation and alternative family, parenting, and marriage contracts.”

In 1988, South Carolina enacted the Comprehensive Health Education Act to provide guidelines for health education programs to be implemented by each local school board. The statute outlines the subjects that must be included in the comprehensive health education instruction as well as those which may not be included. According to South Carolina Code Section 59-32-30, instruction “may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to,

⁵⁸ H.R. 3738, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

⁵⁹ S. 37, 112th Gen. Assemb., Reg. Sess. (S.C. 1997).

⁶⁰ S. 440, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

⁶¹ H.R. 3161, 113th Gen. Assemb., Reg. Sess. (S.C. 1999).

⁶² S. 708, 113th Gen. Assemb., Reg. Sess. (S.C. 1999).

⁶³ S. 45, 113th Gen. Assemb., Reg. Sess. (S.C. 1999).

⁶⁴ H.R. 4840, 112th Gen. Assemb., Reg. Sess. (S.C. 1998).

⁶⁵ S.C. Leg. Update, 1998 Gen. Assemb., 112th Sess. (S.C. Mar. 24, 1998).

⁶⁶ H.R. 4907, 2007 Gen. Assemb., 117th Sess. (S.C. 2007).

homosexual relationships except in the context of instruction concerning sexually transmitted diseases.”⁶⁷

In response to an inquiry regarding a particular health education program being used in many of South Carolina’s public schools, the Attorney General released an opinion that the program violated the Comprehensive Health Education Act because it was “quite graphic in its references to homosexuality and alternative sexual activities.”⁶⁸ According to the Attorney General, the legislative history of the Comprehensive Health Education Act indicates that the legislation was intended to teach abstinence as the primary method of combating sexually transmitted diseases and teenage pregnancy. In a statement endorsing the bill, Senator McDonald stated that the legislation “does not authorize instruction on homosexuality or other sexual practices unless reference is absolutely necessary to answer questions or inform teenagers about AIDS or other sexually transmitted diseases.” The Attorney General concluded that the programs in question “ignored this expressed intent at virtually every turn” by informing the students about contraceptives and thereby promoting premarital sex.

In response to a separate inquiry by Representative Sandifer, Member of the South Carolina House of Representatives, regarding a particular magazine being proposed as part of the health education program, the Attorney General released an opinion that inclusion of the magazine in the program would violate the Comprehensive Health Education Act.⁶⁹ Representative Sandifer found it objectionable that the magazine included an article which discussed sexual orientation. The article provided a true-life story of a gay high school student and stated “because heterosexuality is the predominant sexual orientation in most societies, there are many young people who look upon homosexuality as abnormal and unacceptable. As a result, many young people who think they are homosexual attempt to hide - even reject - their new sense of who they are.” The Attorney General discussed the provisions of the Comprehensive Health Education Act which limit the discussion of “alternate sexual lifestyles” to instruction concerning sexually transmitted diseases. The opinion found that the Comprehensive Health Education Act defined “the limits of the discussion of homosexual relationships in the classroom of the State’s schools. Such a statutory requirement is reasonably related to legitimate pedagogical concerns and thus is constitutionally valid.” The Attorney General concluded that the magazine article at issue did not involve instruction concerning sexually transmitted diseases and therefore violated the provisions limiting discussion of homosexuality in South Carolina public schools.

F. Health Care

SB 443 would have required health care facilities to establish protocols allowing patients to designate any individual as an authorized visitor, regardless of the blood or legal relationship of the patient to the individual. This bill applied to “health care facilities,” as defined in South Carolina Code Section 44-7-130, “acute care hospitals,

⁶⁷ S.C. CODE ANN. § 59-32-30 (2007).

⁶⁸ S.C. Op. Att’y Gen., 2000 WL 1347161 (S.C.A.G. Aug. 18, 2000).

⁶⁹ S.C. Op. Att’y Gen., 1997 WL 569098 (S.C.A.G. Aug. 21, 1997).

psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which Certificate of Need review is required by federal law.”

House Bill No. 4882 was introduced before the 108th Session of the South Carolina House of Representatives on March 21, 1990.⁷⁰ The bill proposed a concurrent resolution requesting the Department of Highways and Public Transportation to take whatever measures necessary to prevent the interstate rest areas from becoming “places for homosexual acts” and to request that the Department of Health and Environmental Control not place condom machines in those rest areas. The concurrent resolution was adopted by the House of Representatives and ordered sent to the Senate where it was referred to the Committee on Transportation, but was not passed.

G. Parenting

House Bill No. 3470 was introduced before the 111th Session of the South Carolina General Assembly on February 2, 1995.⁷¹ The bill was referred to the Committee on Medical, Military, Public and Municipal Affairs, but was not passed. The bill would have prohibited foster care placements with persons who have a history of child abuse or neglect or a criminal record for certain crimes, or who are homosexual or bisexual. Also, the bill would have prohibited adoptions by person who have a history of child abuse or neglect, or a criminal record for certain crimes, or who are homosexual or bisexual.

A substantially similar bill was introduced as House Bill No. 3649 before the 110th Session of the South Carolina General Assembly on January 18, 1994.⁷² The bill was adopted by the House of Representatives and sent to the Senate, where it was referred to the Committee on the Judiciary, but was not passed. In debate over this bill, Representative Waites spoke against the bill, stating “this bill implies that children raised by gays, lesbians or bisexuals would be subjected to abuse or neglect. There is no evidence to support that presumption.”⁷³

I. Recognition of Same-Sex Couples

In 1996, House Bill No. 4502 and Senate Bill No. 1151 were passed, providing that same-sex marriages performed in other states shall not be valid or recognized by the State of South Carolina. The law was subsequently signed into law by then Governor Beaseley.⁷⁴ In response to an inquiry from Representative Haskins, Speaker Pro Tempore of the South Carolina House of Representatives, the Attorney General released

⁷⁰ H.R. 4882, 1990 Gen. Assemb., 108th Sess. (S.C. 1990).

⁷¹ H.R. 3470, 1995 Gen. Assemb., 111th Sess. (S.C. 1995).

⁷² H.R. 3649, 1994 Gen. Assemb., 110th Sess. (S.C. 1994).

⁷³ S.C. H.R.J., 1994 Gen. Assemb., 110th Sess. (S.C. Jan. 18, 1994).

⁷⁴ S.C. CODE ANN. § 20-1-15 (2007).

an opinion which concluded that certain legislation proposed by Representative Haskins prohibiting recognition of same-sex marriages would be constitutional.⁷⁵

Senate Bill No. 326 was introduced before the 117th Session of the South Carolina General Assembly on January 24, 2007.⁷⁶ The bill was referred to the Committee on Judiciary and the relevant sub-committee, but was not passed. The bill would have enacted the Civil Union Equality Act, providing that two persons of the same sex could form a civil union and all laws applicable to marriage would apply to civil unions.

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

Senate Bill No. 1423 was introduced before the 117th Session of the South Carolina General Assembly on May 27, 2008.⁷⁷ The bill was referred to the Committee on the Judiciary, but was not passed. The bill would have amended sections of the South Carolina Code relating to the Law Enforcement Training Council, so as to create an Office of Professional Standards to investigate and hear complaints against law enforcement officers. This bill would have established an administrative process and complaint procedure to handle citizen complaints against law enforcement officers alleging abuse or misuse of police power while on duty or in the course and scope of employment. Pursuant to the bill, in order for such claims to be heard, they would first have to be screened by the Office of Professional Standards, which office shall have the authority to review and dismiss for cause, or refer the claim to the Law Enforcement Training Council for a hearing. The types of complaints handled by this process would have included those claiming discriminatory treatment on the basis of sexual orientation.

In 1998, the mayor of Myrtle Beach, South Carolina joined local business and religious leaders in attacking a statewide gay group and its plans for a pride festival. Organizers had chosen Myrtle Beach because the mayor, when a city councilman, had protested a gay bar opening in downtown Myrtle Beach. The mayor entered the fray as the only council member to vote against closing city streets to accommodate the pride festival. He expressed concern that allowing gay men and lesbians to parade through the streets would set a dangerous precedent and would encourage Black Panthers, white supremacist skinheads and other extremist groups to stage similar marches.⁷⁸

In 1997, the Greenville County Council passed a resolution that condemned “homosexuality” as “incompatible” with community standards, and defunded activities that would ‘contravene’ such community standards, on a vote of nine to three. The three-

⁷⁵ S.C. Op. Att’y Gen., 1996 WL 265499 (S.C.A.G. April 11, 1996).

⁷⁶ S. 326, 2007 Gen. Assemb., 117th Sess. (S.C. 2007).

⁷⁷ S. 1423, 117th Gen. Assemb., 2d Reg. Sess. (S.C. 2007).

⁷⁸ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 130 (1998 ed.).

hour discussion of the resolution was marked by assertions that gays would go to hell, and that the devil brought gay men and lesbians to Greenville.⁷⁹

According to an article in the Myrtle Beach Sun News, the State implemented a “South Carolina is so Gay” ad campaign aimed at potential European gay tourists in London. The ad campaign focused on South Carolina’s plantations and “gay beaches.”⁸⁰ However, according to the article, there was substantial negative reaction to the spending of public money on the ad campaign. Governor Mark Sanford’s office made a statement that public money shouldn’t be spent on “political or social agendas.” The ad campaign was subsequently cancelled and renounced by state officials.⁸¹

In *The Treehouse Club v. South Carolina Department of Revenue*, The Treehouse Club sought a license for beer and wine sales and consumption. Due to the multiple protests filed against the application, a hearing was required. According to the Court, The Treehouse Club represents itself as “Greenville’s Only Gay Restaurant and Nightclub.”⁸² At the hearing, Senator Mike Fair testified against granting the license, stating that “homosexuality is a public health problem.”⁸³ Despite the multiple protests, the administrative law judge determined that The Treehouse Club fulfilled the requirements for the license, and the license must be issued.⁸⁴

⁷⁹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 99 (1997 ed.).

⁸⁰ Issac J. Bailey, *A Different Perspective: Tourism Ad Uproar ‘So Stupid’*, MYRTLE BEACH SUN NEWS, Aug. 10, 2008, 2008 WLNR 14988497.

⁸¹ Alex Johnson, *Gay Tourism Ad Causes Uproar in S. Carolina*, MSNBC, Jul. 15, 2008, <http://www.msnbc.msn.com/id/25677373/>.

⁸² 2003 WL 24004603, at *1. (S.C. Admin. Law. Judge. Div., 2003).

⁸³ *Id.* at *2.

