

UCLA

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

Title

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

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MEMORANDUM

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

I. OVERVIEW

Alaska's anti-discrimination statute provides no protection against employment discrimination based on sexual orientation or gender identity. The state university system has rebuffed repeated attempts to add sexual orientation to the list of protected characteristics in its anti-discrimination policy. In addition, there are currently no municipal laws offering protection for local government workers (a 1993 Anchorage law was enacted and then repealed in the same year). In 2002, the governor issued an administrative order declaring that the "goal" of state officials is to prohibit and prevent job discrimination against state employees based on, inter alia, sexual orientation; gender identity is not included in the administrative order. However, there appear to be no remedies available under the order, beyond the possibility of filing a complaint.

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

- At public hearing in Anchorage in June 2009, a letter was submitted by a transgender woman who had been denied multiple state jobs because of her gender identity. She was a former Marine and had been told she was highly qualified for a position at the McLaughlin Youth Center. However, after she transitioned her repeated applications for a position there were rejected. She did get a job as a psychiatric nursing assistant at Alaska Psychiatric Institute, a state-run facility." However she was fired after three weeks when a problem arose because of her social security number. She explained her name change had caused the issue and then thought everything was fine. However, she was terminated without explanation a few days later with a letter that said her "services were no longer needed." Later, she also heard that a co-worker had been going around calling her "he/she." After she was terminated she was unable to find work in any of the fields she had experience in: security, corrections, youth corrections, or mental health counselor. Instead she now works as a cabdriver. She has over \$100,000 in student loans for degrees she cannot use in her employment."¹

¹ Letter from Laura E. O'Lacy to Anchorage Assembly, June 2009, *available at* <http://www.bentalaska.com/search/label/Testimony%20AO-64> (last visited Sept.16, 2009) (writing in support of Anchorage Ordinance 64).

- An African-American gay male inmate assigned to the Spring Creek Correctional Center worked for a nominal salary as a barber, cutting other inmates' hair. On August 4, 1997, he received a memo from his supervisor which read:

This memorandum is to inform you that you have been fired as an APS barber/rec worker. You are a lop, lame, sissy, cake-boy, and your girl is a mud-duck. You are in fact a no talented bum...In fact one of the brother's [sic] told me that you were white, and just had a really good tan. Maybe the kitchen is looking for a new pots and pans man!²

After reading the memo as "containing racial and sexual slurs and as being intended to terminate his employment,"³ he stopped reporting for work. Although he did not report the incident, he kept the memo, which was discovered when he was transferred to another facility; a departmental investigation resulted in his supervisor's termination. He subsequently sued the state, alleging intentional infliction of emotional distress and unlawful termination for racial or sexual reasons in violation of the Alaska Human Rights Act. The state made a settlement offer, which he rejected, and the trial jury returned a verdict for him for the unlawful termination.⁴

- The City of Soldotna paid \$50,000 in 1995 to settle a sex discrimination claim brought by police officer who asserted that the police department discriminated against her because officials thought that she was in a same-sex relationship.⁵
- An applicant for a clerk-typist position with the Alaska State Troopers in 1984 was asked in her interview if she was a lesbian. When she said yes, the interviewer told her that she was well-qualified for the position, and that she would consider her for the it if she agreed, to stop going to any of the gay bars in town. When she did not agree, on the grounds that a gay bar was one of the few places she could publicly socialize with her friends without fear of harassment, she was told she would not be considered further for the position. She says she does not believe the interviewer would even have thought about placing a similar restriction on a non-gay employee who frequented heterosexual bars."⁶
- In 1984, a gay youth counselor for the State of Alaska, who had worked in his position since early 1981, was told he could not take the youth he counseled out

² *Jones v. State Dep't of Corr.*, 125 P.3d 343, 345 (Alaska, 2005). Plaintiff had explained that he understood "sissy" and "cake-boy" to be derogatory terms for homosexual, "mud-duck" as a reference to someone who engaged in anal sex, and that the remainder of the memo's content was racially offensive – an attack on his African-American cultural identity. See *id.* at 345 n.1.

³ *Id.*

⁴ *Id.* at 350.

⁵ *State News*, ANCHORAGE DAILY NEWS, Oct. 2, 1995.

⁶ MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 53 (Identity Inc., 1989).

on “pass” to go out to movies or to shop, to reward them for their good behavior. The counselor learned that he was considered a risk because had been the leader of a “militant homosexual group” in Fairbanks. The only organization he could think of that might have caused that concern was his position as a discussion group leader for a sexual identity support group composed of young gays and lesbians. His facility director told him there was no way he would be granted a pass for his counselees because he was gay. Eventually he learned that the Anchorage Police Department had reported to his facility that he had been seen in gay bars. After his complaints about the unfairness of the restriction were rejected, he ultimately resigned because the incident, and the denial of what he considered “an important treatment tool,” had undermined his ability to do his job well.”⁷

- After she was seen celebrating after a softball tournament by one of her co-workers, a lesbian was terminated by the Alaska Marine Highway in 1981. She had been at a non gay bar, on the weekend, dancing with her friends in a circle when seen by her co-worker, who stared at her throughout the night to such an extent she eventually left. When she came to work the following Monday, her co-workers would not make eye-contact or talk with her. She felt they behaved as if she had “leprosy.” Just after lunch she was given a written note that she had been terminated on the grounds that she was not strong enough for the job. However, her co-workers had given her no previous indication that she was not ‘pulling her weight’ or that her job performance was less than adequate. She has performed much heavy physical work in subsequent jobs, and has never had any problems with it. When she contacted her union representative he told her that the union could provide her with no protection from discrimination on the basis of her sexual orientation. She was told that she could make a complaint of sex discrimination. Because she felt her that she would further out herself if she made a complaint, she decided not to take any further action.”⁸
- When a women applied to be on the Alaska State Commission on the Status of Women in 1981 (now the Alaska Women’s Commission), she became one of two finalists out of 80 applicants. The Commission met and voted that she should get the position, but as they were leaving one of the Commissioners mentioned that she was a lesbian. That night another one of the Commissioners called the chairperson at home to say that she had changed her vote to the other candidate. The woman says the Chair had already left a message for her to call on her answering machine; and had she called back immediately, the job would have been hers. As it happened, she did not return the call until after the chair permitted the vote change. She later learned about the vote alteration through

⁷ MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 50 (Identity Inc., 1989).

⁸ Melissa S. Green & Jay K. Brause, Identity Report: Sexual Orientation Bias in Alaska 45 (Identity Inc., 1989).

another Commissioner. She went to an attorney, who advised her that she had a strong case and could potentially win both the job and money damages, due to the Commission's inappropriate handling of the matter after an official adjournment. However, she did not feel up to a court battle. Instead she asked for an apology and a policy statement that the Commission would never again discriminate on the basis of sexual orientation. The Commission agreed to this compromise."⁹

In combination with these specific incidents, a series of lawsuits in which plaintiffs won judgments that the state university's benefits system violated the state's constitutional guarantee of equal protection made animosity towards homosexuals a highly visible factor in state politics in the 1990s. According to one newspaper account, in 1993, the issue pitched Anchorage, "into months of angry debate, threats of physical harm and political retribution, religious invocations, a petition drive, a ruling from the state Supreme Court and an election in 1993 that cost two people their seats on the city Assembly."¹⁰ Since 1993, Alaska's judicial branch has often been at odds with the state's executive and legislative branches.

In January 1995, Alaska's superior court in *Tumeo v. University of Alaska* held that the University of Alaska could not limit spousal benefits to married employees while denying those same benefits to similarly situated employees who had permanent domestic partners.¹¹ In response to that ruling, in March 1995, the state legislature introduced an amendment to the state's Human Rights Act, which, when enacted in 1996, permitted greater health and retirement benefits to employees who "have a spouse" as opposed to those employees who are single or have same-sex domestic partners.¹² Except for this carve-out for employee benefits, the Human Rights Act prevents an employer from discriminating against a person "based on race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood," but not for sexual orientation or gender identity.¹³

In February 1998, the Alaska superior court held in *Brause v. Bureau of Vital Statistics*¹⁴ that under the equal protection clause of Alaska's constitution, choosing one's life partner was a fundamental right, regardless of whether that partner was of the same or opposite sex, and the state must show a compelling state interest for the prohibition on same-sex marriages. In response to that decision, the legislature and 68% of the voters passed an amendment to the state's constitution to limit marriage to one man and one

⁹ MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 44 (Identity Inc., 1989).

¹⁰ Steve Rinehart, *Gay Marriage Haunts Campaign; Lindauer Hits Knowles, Then Hedges On Same Sex Issue*, ANCHORAGE DAILY NEWS, Sept. 13, 1998, available at <http://bit.ly/XPP7G>. In a 1988 survey of 191 employers in Anchorage, Alaska, 27% said they would not hire gays or lesbians, 26% said they would not promote gays or lesbians, and 18% said they would fire them.

¹¹ No. 4 FA-94-43, 1995 WL 238359 (Alaska Super. Ct. Jan. 11, 1995), *aff'd*, *Univ. of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

¹² ALASKA STAT.. §18.80.220(c) (2008).

¹³ ALASKA STAT.. §18.80.220(a) (2008).

¹⁴ 3AN-95-6562 CI, Super. Ct. of Alaska, Feb. 27, 1998. *See also* Part IV.I.1, *infra*.

woman. In the discussion before the vote, one of the bill's supporters, Sen. Jerry Ward, said the amendment was designed to answer the question: "Do you believe that one man and one woman should be married, or do you believe a goat and a cow, or two homosexuals should be?"¹⁵

The Alaska Civil Liberties Union filed suit on behalf of nine same-sex couples (one member of each couple was an employee or retiree of Alaska or the Municipality of Anchorage) because health and other benefits were being denied to partners of employees and retirees of the state and its municipalities. In October 2005, the Alaska Supreme Court ruled in *Alaska Civil Liberties Union ex rel. Carter v. Alaska*¹⁶ that denying benefits to same-sex domestic partners of state and municipal employees and retirees to the same benefits offered to spouses of similarly situated employees and retirees was unconstitutional under Alaska's constitution as it violated the state's equal protection clause. This decision had no effect on the ban on same-sex marriage. Within four months, proposals were introduced in the legislature aimed at trumping the state Supreme Court's decision. The bills, which failed in the committees of the House and Senate, would have amended Alaska's constitution to restrict the benefits and obligations of marriage only to those who were legally married.

Then, as a result of the January 1, 2007 deadline to comply with the *Alaska Civil Liberties Union* decision, the legislature passed two bills in November 2006: (1) HB 4001 would have prohibited the Commissioner of Administration from granting benefits to state employees and retirees and (2) HB 4002 scheduled an advisory vote at a special election in April 2007 to determine whether the legislature should pursue a constitutional amendment to prohibit benefits to partners of same-sex employees and retirees. Governor Palin begrudgingly vetoed HB 4001 because she was advised that HB 4001 was unconstitutional and signing it would have been a violation of her oath of office.¹⁷ However, Governor Palin signed HB 4002 and noted that she disagreed "with the recent court decision because [she felt] as though Alaskans spoke on [the] issue with its overwhelming support for a Constitutional amendment in 1998 which defined marriage as between a man and woman."¹⁸ The ensuing advisory vote resulted in 53% of the voters voting in favor of the legislative pursuit of a constitutional amendment to strip benefits from same-sex partners of employees and retirees.

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. Because the cause and effect relationship between legislation and case holdings

¹⁵ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 65-66 (1999 ed.).

¹⁶ 122 P.3d 781 (Alaska 2005).

¹⁷ Press Release, Alaska Governor's Office, Governor Palin Vetoes HB4001 (Dec. 28, 2006).

¹⁸ Press Release, Alaska Governor's Office, Same Sex (Dec. 20, 2006).

is so integral to the understanding of the state's laws that exist today, a timeline summarizing those key legislation and cases is attached to this memorandum as Annex A.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Alaska has not enacted laws to protect sexual orientation and gender identity from employment discrimination.¹⁹

B. Attempts to Enact State Legislation

None.

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

1. Executive Orders

By an administrative order dated March 5, 2002, Governor Tony Knowles declared that “it was the continued goal of the executive branch to...prohibit and prevent discriminatory behavior in the state workplace based on race, sex, color, religion, physical or mental disability, sexual orientation, or economic status.”²⁰ Public employment protections based on gender identity were not specified in the order. The administrative order has not been revoked.²¹

2. State Government Personnel Regulations

(a) Teaching Profession Code of Ethics

¹⁹ ALASKA STAT. § 18.80.220 (xxxx).

²⁰ Admin. Order No. 195 (Mar. 5, 2002), *available at* <http://gov.state.ak.us/admin-orders/195.html>.

²¹ Administrative orders are issued under the authority of law (and not under the force of law). Examples of administrative orders include:

“an order issued under AS 26.20.040 to declare a state of emergency or to exercise powers necessary for the protection of the population in time of attack; to dispose of the property of a dissolved city under AS 29.10.546; to assign functions in the executive branch under AS 44.17.060; to create interim advisory boards under AS 44.19.060.” Alaska Admin. Order No. 1 (Jan. 23, 1964), *available at* <http://www.gov.state.ak.us/admin-orders/001.html>.

If the statute from which the governor derives authority is found to be unconstitutional, then the administrative order is void. *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1144 (AK. 1987). By contrast, an executive order has the force of law and is subject to “disapproval” by the legislature. Alaska Admin. Order No. 1 (Jan. 23, 1964). That is, an executive order can change existing law because it is “issued under the authority of Article III, Sec. 23, Constitution of the State of Alaska” and reviewed by the legislature. *Id.* See also Alaska Att. Gen. Op 403 (1979); ALASKA CONST. Art. III §23 (stating that the:

“legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove [the] executive [order]. Unless disapproved by resolution concurred in by a majority of the members in joint session, [the order becomes] effective at a date thereafter to be designated by the governor.” *Id.*

The Alaska code of ethical standards governing members of the teaching profession states that educators ““may not, on the basis of race, color, creed, sex...or sexual orientation, deny to a colleague a professional benefit, advantage or participation in any professional organization, and may not discriminate in employment practice, assignment, or personnel evaluation.””²²

(b) **University of Alaska**

Various requests to insert “sexual orientation” (gender identity has never been proposed) in the University of Alaska Board of Regents’ nondiscrimination policy have been proposed since 1992, but none has been successful.²³ Specific proposals, which were not adopted, are described below:

i. University of Alaska-Anchorage

In 1995, the University of Alaska-Anchorage, which is operated by the state,²⁴ grappled with the issue of whether to add sexual orientation to its nondiscrimination policy. The student union recommended the addition of sexual orientation to the school’s existing anti-discrimination policies to the Board of Regents. The Anchorage Municipal Assembly voted 9-1 in a nonbinding resolution to urge the University of Alaska Anchorage to leave its anti-discrimination policies as they were.²⁵

ii. University of Alaska-Fairbanks

In 2001, the University of Alaska Fairbanks Staff Council and the Alaska Faculty Senate passed motions to forward a proposal to the University of Alaska Board of Regents to amend its nondiscrimination policy to include sexual orientation as a class protected from employment discrimination.²⁶ However, for unknown reasons, the motion was not included on the March 2002 Board of Regents agenda. The matter was addressed

²² 20 AK. ADMIN. CODE § 10.020(d) (2008).

²³ Section 04.03.01 of the University of Alaska Board of Regents’ Policy & University Regulation states:

“The University of Alaska does not discriminate on the basis of race, color, religion, national origin, citizenship, marital status, changes in marital status, pregnancy, childbirth or related medical conditions, parenthood, sex, age, disability or status as a veteran in employment...” See Memorandum from Kate Ripley, Director of Public Affairs of the Board of Regents’ Office, Board of Regents’ Discussions & Actions: Nondiscrimination Statements to Include Sexual Orientation (on file with Board of Regents’ Office).

²⁴ *Assembly to Take Stand On UAA Gay Policy Assembly News*, ANCHORAGE DAILY NEWS, Mar., 1995.

²⁵ *Assembly News*, ANCHORAGE DAILY NEWS, Mar. 8, 1995.

²⁶ Agenda, UAF Governance Coordinating Committee #51 (Nov. 14, 2001), <http://bit.ly/Y0Eht> (last visited Sept. 5, 2009). Policy 04.01.020, if enacted, would read as follows:

“In accordance with federal and state laws, illegal discrimination in employment against any individual because of race, color, religion, national origin, age, sex, veteran status, physical or mental disability, marital status or changes in marital status, pregnancy or parenthood, or sexual orientation is prohibited. Decisions affecting an individual’s employment will be based on the individual’s qualifications, abilities and performance, as appropriate.” *Id.* (emphasis added).

with the Board of Regents' president, who stated that revising the policy would "be bad for the budget." The matter was then postponed.²⁷

D. Local Legislation

1. City of Anchorage

Anchorage is the only city/municipality that has extensive news records discussing ordinances and other regulatory policies. Accordingly, this section solely addresses the City and Borough of Anchorage.

On January 12, 1993, the Anchorage Municipal Assembly passed an ordinance that prohibited discrimination in public employment and of municipal contractors on the basis of an individual's sexual orientation.²⁸ The Mayor of Anchorage, Tom Fink, vetoed the ordinance three days later, but the veto was overridden by the Anchorage Municipal Assembly on January 19. Soon thereafter a citizens' group, "Citizens to Repeal the Homosexual Ordinance," formed and collected 20,000 petition signatures within a month for a referendum to repeal the ordinance at the municipal election (a minimum of 5,672 signatures was required). Supporters of the new ordinance sought to block the vote on grounds that state law required the wording on ballot propositions, such as the referendum to appeal the ordinance, be impartial.

In *Faipeas v. Anchorage*,²⁹ the Alaska Supreme Court held that the municipal referendum circulated by the citizens group had a misleading title: "Referendum Petition to Repeal a "Special Homosexual Ordinance." The court said, "While opponents of the ordinance regard it as giving special rights to homosexuals, proponents view it as merely adding sexual orientation to the list of other important personal characteristics . . . protected from discrimination in public employment."³⁰ The Alaska Supreme Court said the vote should be postponed until the lower court reconsidered the question of possible bias, because voters would be upset if they voted to repeal the ordinance at the election, but had it later overturned by the court. The Anchorage Municipal Assembly, however, with a few newly elected assemblymen, later repealed the ordinance in 1993, making a revised referendum moot. As a result of their support of the ordinance, two people on the

²⁷ *Id.* at Section IV ("Old Business").

²⁸ The ordinance would have banned discrimination based on sexual orientation for 3,300 city employees and workers hired through municipal contractors. Associated Press, *Opinions In Anchorage Divided As Gay-Rights Measure Goes To Voters*, SEATTLE TIMES, Apr. 12, 1993, available at <http://bit.ly/OQtnt>. This ordinance is not new. A similar anti-discrimination ordinance was enacted by the Anchorage Assembly in 1976, but the mayor, George Sullivan, vetoed the ordinance. Megan Holland, *Gay Rights Ordinance Gets 2nd Assembly Hearing Tonight*, ANCHORAGE DAILY NEWS, June 15, 2009, available at, <http://bit.ly/VQVLQ>.

²⁹ 860 P.2d 1214 (Alaska 1993).

³⁰ *Id.* at 1216.

Anchorage Municipal Assembly lost their seats in 1993.³¹ Soon thereafter, the new session of Anchorage Municipal Assembly repealed the ordinance.³²

In August 2009, Anchorage Mayor Dan Sullivan vetoed an ordinance that would have banned several forms of discrimination, including employment, on the basis of sexual orientation. The mayor claimed that “the vast majority of those who communicated their position on the ordinance [were] in opposition.” The ordinance had been approved by the Anchorage Assembly on a vote of 7-4 the previous week. Eight votes are necessary to override a mayoral veto. When vetoing the ordinance, the mayor pointed to a “lack of quantifiable evidence necessitating the ordinance.”³³ In response, one Assembly member expressed disappointment with the mayor’s use of “circular logic” in his claim that there was a lack of complaints filed, when no method for filing complaints existed. Mayor Sullivan’s father, former-Mayor George Sullivan, vetoed the initial measure prohibiting discrimination on the basis of sexual orientation in 1976. The measure was defeated several more times in the following decades.³⁴

Anchorage district employee contracts also contain language prohibiting harassment over sexual orientation.³⁵

E. Occupational Licensing Requirements

While there are no specific licensing requirements addressing sexual orientation or gender identity, several state licensing statutes reference “moral turpitude”³⁶ and “character,” terms which may be used to discriminate against a licensee based on sexual orientation or gender identity.

Certified Public Accountant License: An applicant for the license must be of good moral character.³⁷

Acupuncture License: The applicant for a license to practice acupuncture must be of a good moral character.³⁸

Collection Operator License: The applicant must be of a good moral character.³⁹

³¹ Steve Rinehart, *Gay Marriage Haunts Campaign; Lindauer Hits Knowles, Then Hedges On Same Sex Issue*, ANCHORAGE DAILY NEWS, Sept. 13, 1998.

³² *Id.*

³³ Editorial, *Our View: Gay Rights Veto*, ANCHORAGE DAILY NEWS, Aug. 18, 2009, available at <http://bit.ly/ZWJsC>.

³⁴ William Yardley, *Anchorage Gay Rights Measure is Set Back by Mayor’s Veto*, N.Y. TIMES, Aug. 18, 2009.

³⁵ *Schools May Add to Harassment Ban; Sexual Orientation: Board to Consider Additions to District’s Policy*, ANCHORAGE DAILY NEWS, June 7, 2001.

³⁶ Note that licenses may not be issued if a person has been indicted or convicted of a crime involving moral turpitude. Because sodomy laws have been repealed by statute, a list of those statutes has not been included in this list.

³⁷ ALASKA STAT. §§08.04.110; 08.04.195 (2008).

³⁸ *Id.* at §08.06.010.

³⁹ *Id.* at §08.24.110.

Pharmacy License: To be licensed as a pharmacist, the applicant must submit attestations to such person's good moral character.⁴⁰ Further, the board regulating the practice of pharmacy may impose disciplinary sanctions on a licensee if such licensee engaged in conduct involving moral turpitude or gross immorality.⁴¹

Clinical Social Work License: The applicant must be of a good moral character.⁴²

Postsecondary Educational Institutional License: The chief executive officer, trustees, directors, owners, administrators, supervisors, staff, and instructors of the institution must be of good reputation and character.⁴³

Agent of Postsecondary Educational Institution Permit: A person desiring to be an agent of a postsecondary institution must be of good reputation and character.⁴⁴

National Guard or Naval Militia: A person must be of good character to be eligible for enlistment.⁴⁵

Correctional Officer: To receive a correctional officer certificate, the person must attest and subscribe to the municipal correctional officer Code of Ethics, which states that such person will not discriminate on the basis of sexual orientation.⁴⁶

Alcoholic Beverage License: A person may lose their liquor license if the licensee permits a public offense involving moral turpitude to occur on the licensed premises.⁴⁷

Money Transmission Licenses: For a bank or financial institution to hold a license in money transmission, the character and general fitness of the applicant's executive officers, managers, directors, and persons in control of the applicant are considered.⁴⁸

Currency Exchange License: For a bank or financial institution to hold a license in currency exchange, the character and general fitness of the applicant's executive officers, managers, directors, and persons in control of the applicant are considered.⁴⁹

BIDCO License: Formation of a business entity under the State of Alaska's Business and Industrial Development Corporations (BIDCO) Act requires each

⁴⁰ *Id.* at §§08.80.110; 08.80.145.

⁴¹ *Id.* at §08.80.261.

⁴² *Id.* at §08.95.110.

⁴³ *Id.* at §14.48.060.

⁴⁴ *Id.* at §14.48.080.

⁴⁵ *Id.* at §26.05.240.

⁴⁶ 13 ALASKA. ADMIN. CODE §85.235 (2008).

⁴⁷ *Id.* at § 04.11.370 . In some states, sale of liquor to homosexuals or the act of permitting the congregation of homosexuals at the licensed premises has been grounds for suspension or revocation of liquor license. 27 A.L.R.3d 1254 (2008).

⁴⁸ ALASKA STAT. §06.55.105 (2008).

⁴⁹ *Id.* at §06.55.203.

director, officer and controlling person of the applicant to be of a good character.⁵⁰

Employment Agency Permit: To operate an employment agency, the applicant must be of a good moral character.⁵¹

Registration for certain applications: To register as an architect, engineer, land surveyor, or landscape architect, the applicant must be of a good moral character and reputation.⁵²

⁵⁰ *Id.* at §§10.13.050; 10.13.410; 10.13.420 (2008).

⁵¹ ALASKA STAT. §23.15.410 (2008).

⁵² ALASKA STAT. §08.48.171.

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

A. Case Law

1. State & Local Government Employees

Unpublished Case (1995).⁵³

In 1995, the City of Soldotna, Alaska, agreed to pay \$50,000 to settle a 1994 sex discrimination lawsuit filed by an ex-police officer who asserted that she had been wrongly discharged. The lawsuit named the city police chief, several officers and a former city manager as defendants. The plaintiff alleged that she was discriminated against because of (a) her gender and (b) her employers' alleged belief she was in a lesbian relationship. The plaintiff had been fired in 1992.⁵⁴

2. Private Employees

None.

B. Administrative Complaints

1. Complaints Other than Executive Branch

Complaints of unlawful discrimination under the Human Rights Act must be sent to the executive director of the Commission for Human Rights.⁵⁵ Except when a temporary restraining order is sought or as otherwise required by law, complaints and investigations by the Commission for Human Rights are confidential and are not made available for inspection by the public. As noted, the Human Rights Act does not include prohibitions on discrimination based on sexual orientation or gender identity.⁵⁶

2. Complaints in Executive Branch

Employees of the executive branch of the Alaska state government must go to the director of personnel, who administers the state's equal opportunity program, for complaints based on discrimination.⁵⁷ As specified in Alaska Statute 39.28.060(c), records of employment discrimination complaints in the executive branch are not public.

C. Other Documented Examples of Discrimination

McLaughlin Youth Center and Alaska Psychiatric Institute

⁵³ *State News*, ANCHORAGE DAILY NEWS, Oct. 2, 1995.

⁵⁴ *Id.*

⁵⁵ ALASKA STAT. § 18.80.100 (2008).

⁵⁶ ALASKA STAT. § 18.80.220.

⁵⁷ ALASKA STAT. § 39.28.010 (2008).

At public hearing in Anchorage in June 2009, a letter was submitted by a transgender woman who had been denied multiple state jobs because of her gender identity. She was a former Marine and had been told she was highly qualified for a position at the McLaughlin Youth Center. However, after she transitioned her repeated applications for a position there were rejected. She did get a job as a psychiatric nursing assistant at Alaska Psychiatric Institute, a state-run facility.” However she was fired after three weeks when a problem arose because of her social security number. She explained her name change had caused the issue and then thought everything was fine. However, she was terminated without explanation a few days later with a letter that said her “services were no longer needed.” Later, she also heard that a co-worker had been going around calling her “he/she.” After she was terminated she was unable to find work in any of the fields she had experience in: security, corrections, youth corrections, or mental health counselor. Instead she now works as a cabdriver. She has over \$100,000 in student loans for degrees she cannot use in her employment.”⁵⁸

Spring Creek Correctional Center

An African-American gay male inmate assigned to the Spring Creek Correctional Center worked for a nominal salary as a barber, cutting other inmates’ hair. On August 4, 1997, he received a memo from his supervisor which read:

This memorandum is to inform you that you have been fired as an APS barber/rec worker. You are a lop, lame, sissy, cake-boy, and your girl is a mud-duck. You are in fact a no talented bum...In fact one of the brother’s [sic] told me that you were white, and just had a really good tan. Maybe the kitchen is looking for a new pots and pans man!⁵⁹

After reading the memo as “containing racial and sexual slurs and as being intended to terminate his employment,”⁶⁰ he stopped reporting for work. Although he did not report the incident, he kept the memo, which was discovered when he was transferred to another facility; a departmental investigation resulted in his supervisor’s termination. He subsequently sued the state, alleging intentional infliction of emotional distress and unlawful termination for racial or sexual reasons in violation of the Alaska Human Rights Act. The state made a settlement offer, which he rejected, and the trial jury returned a verdict for him for the unlawful termination.⁶¹

⁵⁸ Letter from Laura E. O’Lacy to Anchorage Assembly, June 2009, *available at* <http://www.bentalaska.com/search/label/Testimony%20AO-64> (last visited Sept.16, 2009) (writing in support of Anchorage Ordinance 64).

⁵⁹ *Jones v. State Dep’t of Corr.*, 125 P.3d 343, 345 (Alaska, 2005). Plaintiff had explained that he understood “sissy” and “cake-boy” to be derogatory terms for homosexual, “mud-duck” as a reference to someone who engaged in anal sex, and that the remainder of the memo’s content was racially offensive – an attack on his African-American cultural identity. *See id.* at 345 n.1.

⁶⁰ *Id.*

⁶¹ *Id.* at 350.

Alaska State Troopers

An applicant for a clerk-typist position with the Alaska State Troopers in 1984 was asked in her interview if she was a lesbian. When she said yes, the interviewer told her that she was well-qualified for the position, and that she would consider her for the it if she agreed, to stop going to any of the gay bars in town. When she did not agree, on the grounds that a gay bar was one of the few places she could publicly socialize with her friends without fear of harassment, she was told she would not be considered further for the position. She says she does not believe the interviewer would even have thought about placing a similar restriction on a non-gay employee who frequented heterosexual bars.”⁶²

Alaska Youth Counseling Department

In 1984, a gay youth counselor for the State of Alaska, who had worked in his position since early 1981, was told he could not take the youth he counseled out on “pass” to go out to movies or to shop, to reward them for their good behavior. The counselor learned that he was considered a risk because had been the leader of a “militant homosexual group” in Fairbanks. The only organization he could think of that might have caused that concern was his position as a discussion group leader for a sexual identity support group composed of young gays and lesbians. His facility director told him there was no way he would be granted a pass for his counselees because he was gay. Eventually he learned that the Anchorage Police Department had reported to his facility that he had been seen in gay bars. After his complaints about the unfairness of the restriction were rejected, he ultimately resigned because the incident, and the denial of what he considered “an important treatment tool,” had undermined his ability to do his job well.”⁶³

Alaska Marine Highway

After she was seen celebrating after a softball tournament by one of her co-workers, a lesbian was terminated by the Alaska Marine Highway in 1981. She had been at a non gay bar, on the weekend, dancing with her friends in a circle when seen by her co-worker, who stared at her throughout the night to such an extent she eventually left. When she came to work the following Monday, her co-workers would not make eye-contact or talk with her. She felt they behaved as if she had “leprosy.” Just after lunch she was given a written note that she had been terminated on the grounds that she was not strong enough for the job. However, her co-workers had given her no previous indication that she was not ‘pulling her weight’ or that her job performance was less than adequate. She has performed much heavy physical work in subsequent jobs, and has never had any

⁶² MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 53 (Identity Inc., 1989).

⁶³ MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 50 (Identity Inc., 1989).

problems with it. When she contacted her union representative he told her that the union could provide her with no protection from discrimination on the basis of her sexual orientation. She was told that she could make a complaint of sex discrimination. Because she felt her that she would further out herself if she made a complaint, she decided not to take any further action.”⁶⁴

Alaska State Commission on the Status of Women

When a women applied to be on the Alaska State Commission on the Status of Women in 1981 (now the Alaska Women’s Commission), she became one of two finalists out of 80 applicants. The Commission met and voted that she should get the position, but as they were leaving one of the Commissioners mentioned that she was a lesbian. That night another one of the Commissioners called the chairperson at home to say that she had changed her vote to the other candidate. The woman says the Chair had already left a message for her to call on her answering machine; and had she called back immediately, the job would have been hers. As it happened, she did not return the call until after the chair permitted the vote change. She later learned about the vote alteration through another Commissioner. She went to an attorney, who advised her that she had a strong case and could potentially win both the job and money damages, due to the Commission’s inappropriate handling of the matter after an official adjournment. However, she did not feel up to a court battle. Instead she asked for an apology and a policy statement that the Commission would never again discriminate on the basis of sexual orientation. The Commission agreed to this compromise.”⁶⁵

⁶⁴ Melissa S. Green & Jay K. Brause, Identity Report: Sexual Orientation Bias in Alaska 45 (Identity Inc., 1989).

⁶⁵ MELISSA S. GREEN & JAY K. BRAUSE, IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA 44 (Identity Inc., 1989).

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

1. Sodomy laws

Alaska's sodomy laws were repealed through legislative action in 1980.⁶⁶

B. Housing & Public Accommodations Discrimination

Prohibition on Discrimination Based on Marital Status by Landlords:

Alaska Statute 18.80.240⁶⁷ prohibits landlords from refusing to rent based on marital status.⁶⁸ Sexual orientation and gender identity are not specifically protected classes.⁶⁹

C. Hate Crimes

New Civil Action & Hate Crime: SB 6

Introduced in January 2007, SB 6 would have added a new cause of action for a person to sue another (or the parent or legal guardian of a minor) for discriminatory

⁶⁶ Memorandum from ACLU on History of Sodomy Laws and the Strategy that Led Up to Today's Decision [in *Lawrence v. Texas*] (June 16, 2003), <http://bit.ly/wTF4t> (last visited Sept. 5, 2009).

⁶⁷ ALASKA STAT. §18.80.240 (2008) provides:

"It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property (1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for 'singles' or 'married couples' only; (2) to discriminate against a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of real property; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for 'singles' or 'married couples' only." *Id.*; see also Anchorage Muni. Code §5.20.020 (2008).

⁶⁸ In *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 939 (Alaska 2004), *cert. denied*, 544 U.S. 1060 (2005), the supreme court of Alaska reconfirmed that enforcing a provision prohibiting landlords from refusing to rent property to persons because of marital status did not violate such landlord's right to free exercise of religion. *Id.*

⁶⁹ See also Anchorage Muni. Code § 5.20.020.

harassment that caused physical injury to, or property damage of, that person if the person who caused such injury or property damage acted with the intent to intimidate or harass based on a person's actual or perceived sexual orientation. Any action under that proposed statute, however, may not be against the state, any political subdivision of the state, and any employees and agents of the state.

SB 6 would have also added a new section that would have increased the seriousness of the offense (e.g. from a Class A misdemeanor to a Class C felony) for crimes that were motivated by prejudice, bias or hatred because of a victim's actual or perceived sexual orientation. The bill was referred to, but failed in, the Senate Health, Education and Social Services, Judiciary and Finance Committees.⁷⁰

In 2004, the City of Anchorage unsuccessfully attempted to amend the Municipal Code to add a new section providing for sexual orientation-related hate crimes as an aggravating factor in sentencing.⁷¹

D. Education

The ethics code governing the Education Profession states that members of the teaching profession “may not harass, discriminate against, or grant a discriminatory advantage to a student on the grounds of... sexual orientation; shall make reasonable effort to assure that a student is protected from harassment or discrimination on these grounds; and may not engage in a course of conduct that would encourage a reasonable student to develop a prejudice on these grounds.”⁷² The educator must also make a reasonable effort to protect students from harassment and discrimination on these grounds.⁷³

In 2001, the Anchorage School Board unanimously approved a new policy that banned harassment of students and school employees over their sexual orientation.⁷⁴

E. Health Care

⁷⁰ *SB6 Journal Text*, ALASKA SENATE J. 14 (2007), available at <http://bit.ly/1Buv6j>.

⁷¹ The text would have read:

“It is a factor in aggravation in sentencing if the defendant directed the conduct constituting the offense under this code at a victim because of that person's actual or perceived race, sex, color, religion, sexual orientation, physical or mental disability, national origin or sexual orientation [sic.]” Mun. of Anchorage Cmty. Action Plan, <http://bit.ly/siH88> (last visited Sept. 5, 2009).

In 1993, Police in Anchorage have “begun tracking hate crimes, including a Valentine's Day attack on two men who were struck with a baseball bat and pipe as they left a diner holding hands.” Associated Press, *Opinions in Anchorage Divided as Gay-Rights Measure Goes to Voters*, SEATTLE TIMES, Apr. 12, 1993, available at <http://bit.ly/OQmT>.

⁷² *Id.* at § 10.020(b).

⁷³ 20 ALASKA ADMIN. CODE § 10.020.

⁷⁴ Associated Press, *Anchorage Schools Ban Harassment Based on Sexual Orientation*, STATE & LOCAL WIRE, June 12, 2001.

In 1996, SB 282 was introduced in the Senate. SB 282 would have prohibited a managed care plan from discriminating against an individual on the basis of sexual orientation. Further, the managed care plan may not discriminate in the selection of members of the provider network or in establishing the terms of membership for that network on the basis of sexual orientation.⁷⁵ The bill failed before it made it to any of the Senate committees.⁷⁶

Anti-discrimination provisions referencing sexual orientation exist in particular professional guidelines that are included in a variety of state statutes:

Chiropractor to Patient: A chiropractic licensee may not engage in lewd or immoral conduct in connection with the delivery of professional services to a patient. Lewd or immoral conduct includes, among other things, demeaning or degrading comments to the patient about the patient's sexual orientation, regardless of whether the patient is homosexual, heterosexual, or bisexual.⁷⁷

Sex Offender Treatment Provider to Sex Offender: An approved provider of treatment to a sex offender may not discriminate on the basis of sexual orientation.⁷⁸

Medical Board Licensees to Patient: Those licensed by the state medical board may not make a demeaning or degrading comment regarding a patient's sexual orientation, regardless of whether the patient is homosexual, heterosexual, or bisexual.⁷⁹

Viatical Settlement Transactions: A person may not commit or participate in an unfair trade practice, which includes discrimination on the basis of sexual orientation, involving a viatical settlement transaction.⁸⁰

F. Parenting

Alaska courts generally do not consider a parent's sexual orientation in custody and visitation determinations unless it is shown that it will adversely affect or harm the child(ren).⁸¹ For example, in *S.N.E. v. R.L.B.*, the Alaska Supreme Court held that the

⁷⁵ALASKA S.B. 282 (1996), available at <http://www.legis.state.ak.us/PDF/19/Bills/SB0282A.PDF>.

⁷⁶Archive of Alaska Senate Bill Leg. Histories, S.B. 282 (1996), <http://bit.ly/r10UJ> (last visited Sept. 5, 2009).

⁷⁷12 ALASKA ADMIN. CODE § 16.930 (2008).

⁷⁸22 ALASKA ADMIN. CODE § 30.200(b)(2) (2008).

⁷⁹12 ALASKA ADMIN. CODE § 40.990 (2008).

⁸⁰3 ALASKA ADMIN. CODE § 31.405 (2008).

⁸¹ALASKA STAT. § 25.20.090 (2008) states:

"In determining whether to award shared custody of a child the court shall consider (1) the child's preference if the child is of sufficient age and capacity to form a preference; (2) the needs of the child; (3) the stability of the home environment likely to be offered by each parent; (4) the education of the child; (5) the advantages of keeping the child in the community where the child presently resides; (6) the optimal time for the child to spend with each parent...(7) any findings and recommendations of a neutral mediator; (8)

superior court improperly relied on a “real or imagined social stigma attaching to Mother's status as a lesbian.”⁸² Further, “[c]onsideration of a parent's conduct is appropriate only when the evidence supports a finding that a parent's conduct has or reasonably will have an adverse impact on the child and his best interests.”⁸³ The Alaska Supreme Court reasoned that the record indicated that parental neglect was absent, the child's development was superb, and there was no increased probability that the child would become homosexual.⁸⁴

G. Recognition of Same-Sex Couples

1. Marriage, Civil Union & Domestic Partnership

Same-Sex Marriage Case: *Brause v. Bureau of Vital Statistics*.⁸⁵ In August 1994, the plaintiffs, a same-sex couple, applied for marriage under the then gender-neutral marriage statute, but was rejected. The plaintiffs sued the state seeking to have the interpretation of the marriage statute denying same-sex marriage declared unconstitutional, and to have the state permanently enjoined from denying marriage licenses to same-sex couples. The superior court found that under the equal protection clause of Alaska’s constitution, choosing one’s life partner was a fundamental right, whether that partner was the same or opposite sex, and ordered a trial requiring the state to show a compelling state interest for the ban on same-sex marriages.⁸⁶

Attorney General Opinion: On March 31, 1995, the Attorney General of the State of Alaska issued its informal opinion on whether a bill that would amend the Alaska marriage code to specify that only a man and a woman can marry would change the law that was in place at that time. The opinion stated that the bill would not change the law because the original Alaska marriage code that was enacted in 1963 specifically restricted marriage to a man and a woman.⁸⁷

After voter approval of the state’s constitutional amendment to limit marriage to one man and one woman, the legislature moved for the *Brause v. Bureau of Vital Statistics* case to be dismissed as moot. The plaintiff’s arguments evolved to challenge the prohibition against same-sex couples from receiving the same legal benefits and protections of married couples. On September 22, 1999, the superior court judge dismissed the case. The case was appealed and the dismissal was affirmed by the Alaska

any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents; (9) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child; (10) other factors the court considers pertinent.” *Id.*

⁸² *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 3AN-95-6562 CI (Super. Court of Alaska, Feb. 27, 1998).

⁸⁶ *Id.*

⁸⁷ Alaska Att. Gen. Op. 663-95-0451 (1995), available at <http://bit.ly/2Kerco>.

Supreme Court for lack of standing (the plaintiffs had not yet sought the benefits for which they claimed they would be denied).⁸⁸

Constitutional Amendment: In response to the *Tumeo v. University of Alaska* and *Brause v. Bureau of Vital Statistics* decisions, the state legislature proposed to change Alaska's constitution regarding marriage. In 1998, Alaska became one of the first states to constitutionally limit the definition of marriage as that between a man and a woman.⁸⁹

Statute: Having realized that the gender-neutral marriage statute could be interpreted to allow same-sex marriage (as suggested by the superior court in *Tumeo*), the legislature changed the marriage statute in 1996 to accomplish two goals: "(1) to clearly provide that for purposes of legal recognition and status, marriage in Alaska could exist only between one man and one woman; and (2) to clearly prevent any same-sex marriage, validly performed in another State, from being recognized in Alaska."⁹⁰

2. Benefits

Tumeo v. Univ. of Alaska: The possibility of extending equal benefits to domestic partners of public employees was first raised in early 1995 in *Tumeo v. Univ. of Alaska*.⁹¹ The superior court held that the University of Alaska-Fairbanks could not legally limit spousal benefits to husbands and wives.⁹² The Alaska Human Rights Act's bar against marital status discrimination⁹³ precluded the University of Alaska from giving family

⁸⁸ See *Brause v. Dep't of Health & Soc. Servs.*, 21 P.3d 357 (Alaska 2001). For their part in decisions favorable to the gay and lesbian community, conservative groups attempted to oust those judges in the *Tumeo* and *Brause* cases. Rachel D'Oro, *Alaskans Cast Votes on Judges in Controversial Campaigns*, THE ASSOCIATED PRESS, Nov. 8, 2000.

⁸⁹ ALASKA. CONST. Art. I §25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.")

⁹⁰ Kevin Clarkson et. al, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 AK. L. REV. 213 (Dec.1999).

⁹¹ No. 4 FA-94-43, 1995 WL 238359 (AK. Super. Ct. Jan. 11, 1995), *aff'd*, *Univ. of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

⁹² In an email remark, Mark Tumeo wrote:

"In 1993 I and Kate Wattum applied to the University for benefits for our same-sex domestic partners. We were denied. We went to Superior Court because Alaska has a law against discrimination based on marital status, and the University clearly stated their decision was based on the fact we were not married. We argued that our financial interdependency was the same as marriage and to deny benefits merely because we didn't have a marriage licence [sic.] was illegal. The Superior court agreed. The university then asked for the Superior Court to reconsider. The judge not only denied it, but basically told the university they were out of line to ask." Email from Mark A. Tumeo to The Network (Feb. 18, 1995 09:59:10), <http://bit.ly/uwFU1> (last visited Sept. 5, 2009).

⁹³ ALASKA STAT. §18.80.220(a) (1995) (stating that:

"(a) [i]t is unlawful for (1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable

benefits to married employees while denying those benefits to similarly situated employees who had permanent domestic partners, but were not legally married. Though not central to her decision, the superior court judge's decision suggested that the gender-neutral marriage statute might allow for same-sex marriage.

In response to the superior court's ruling in *Tumeo*, Alaska's legislature began circulating an amendment to the Human Rights Act in 1995 (eventually becoming effective in 1996) that overturned the ruling in *Tumeo*.⁹⁴

Despite the amendment to the Human Rights Act permitting benefit discrimination, the University of Alaska adopted regulations and eligibility requirements to provide benefits to partners of same-sex employees.⁹⁵ These regulations were ratified by the court.⁹⁶ Other branches of Alaska's government, however, did not follow the regulations adopted by the University of Alaska.

Alaska Civil Liberties Union v. Alaska: In 1999, the Alaska Civil Liberties Union filed suit on behalf of nine same-sex couples (one member of each couple was an employee or retiree of the State of Alaska or the Municipality of Anchorage), claiming that health insurance and other employment benefits programs that were only offered to "spouses" of public employees and retirees violated their right to equal protection under the Alaska constitution.⁹⁷ In a unanimous decision in October 2005, the Alaska Supreme Court ruled that it was unconstitutional for the state to continue to deny domestic same-sex partners of state and municipal employees and retirees to the same benefits offered to spouses of state and municipal employees and retirees.⁹⁸ Despite Alaska's statutory and constitutional provisions that define marriage as an institution limited to a man and a woman, the Alaska Supreme Court extended the state constitution's equal protection clause to include nondiscrimination of same-sex couples.⁹⁹

demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood." *Id.*)

⁹⁴ ALASKA STAT. §18.80.220 was amended to add, "(c) Notwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a)... (1) an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees." ALASKA STAT. §18.80.220.

⁹⁵ Alaska Leg. Comm. Minutes on H.B. No. 4002 (Nov. 15, 2006), <http://bit.ly/c3IeW> (last visited Sept. 5, 2009).

⁹⁶ *Id.*

⁹⁷ *Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 122 P.3d 781 (Alaska 2005). In 2001, the superior court ruled in favor of Alaska, finding that the state had not violated the equal protection clause of the Alaska constitution by failing to extend health and retirement benefits to same-sex partners of state employees. See Alaska Leg. Comm. Minutes (Nov. 15, 2006), <http://bit.ly/17LyaH> (last visited Sept. 5, 2009).

⁹⁸ 122 P.3d at 783-84.

⁹⁹ The Alaska Legislature began providing state benefits to same sex partners beginning January 1, 2007. Governor Palin stated that "[t]he [Alaska] Supreme Court has ordered adoption of the regulations by the State of Alaska to begin providing benefits January 1. We have no more judicial options. We may disagree with the rationale behind the ruling, but our responsibility is to proceed forward with the law and follow the Constitution." Press Release 06-012, Alaska Governor's Office, *Same Sex*, Dec 20, 2006.

Some state political leaders were outraged by the ruling. Governor Frank Murkowski called it "shameful," and by February 2006 (less than four months after the Supreme Court's decision), resolutions were filed in Alaska's House and Senate with the aim of trumping the decision.¹⁰⁰

These legislative attempts to delay resulted in a special election for a non-binding advisory vote that cost the state taxpayers over \$1.2 million. Approximately 53% of the voters in that special election voted in favor of a legislative pursuit of a constitutional amendment to prohibit benefits to same-sex public employees and retirees.

Disparate Employment Benefits to Same-Sex Couples: The state of Alaska, however, enacted an exception to its nondiscrimination statute in 1996, which permits employers to provide preferential health and retirement benefits to family members only of legally married employees.¹⁰¹

Employment-Related Benefits to Same-Sex Couples: As described in "II.E.1(b)", the Alaska Supreme Court unanimously ruled in *Alaska Civil Liberties Union ex rel. Carter v. Alaska* that denying certain benefits to same-sex couples that were enjoyed by married straight couples was unconstitutional. Because the court ordered the state to comply with the ruling by January 1, 2007,¹⁰² there was a flurry of legislative activity in 2006, the results of which are described in detail below.

Benefits Limited to Marriage: Conservative Alaskan politicians vowed to overturn the ruling in *Alaska Civil Liberties Union ex rel. Carter v. Alaska*. As expected, legislative resolutions targeted health care benefits to same-sex couples. Conservatives proposed a constitutional amendment in February 2006 that would have allowed the voters to overturn the Alaska Supreme Court ruling. The proposed joint resolutions of the House and Senate¹⁰³ would have added a sentence to the Alaska constitutional marriage

¹⁰⁰ Anne Sutton, *Measure Denying Benefits to Gay Couples Sputters in Legislature*, A.P., Apr. 7, 2006.

¹⁰¹ ALASKA STAT. §18.80.220. Introduced in 1995 as HB 226, ALASKA STAT. §18.80.220 was amended (effective July 18, 1996) to provide that an employer may not:

"refuse employment... [or] discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion,... [or] marital status... when the reasonable demands of the position do not require distinction on [that] basis... [except] an employer may refuse to provide benefits to a person because the person is not legally married to an employee of the employer." ALASKA STAT. §18.80.220.

¹⁰² Alaska Leg. Comm. Minutes (Nov. 15, 2006), <http://bit.ly/17LyaH> (last visited Sept. 5, 2009).

¹⁰³ Senate Joint Resolution Number 20 proposed:

"Section 25. Marriage and related limitations. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No other union is similarly situated to a marriage between a man and a woman and, therefore, a marriage between a man and a woman is the only union that shall be valid or recognized in this State and to which the rights, benefits, obligations, qualities, or effects of marriage shall be extended or assigned." ALASKA SEN. J.R. (24th Leg.), available at <http://bit.ly/9mkBM>.

amendment to restrict the "rights, benefits, obligations, qualities or effects of marriage" only to married couples.¹⁰⁴

SJR 20 made it to the Senate Finance Committee but never arrived on the floors of the House and Senate for a vote. A constitutional amendment would have required a two-thirds vote of the legislature to pass. The representative sponsoring the House version said the requirement was too high of a hurdle.¹⁰⁵

Special 2006 November Session: With the January 1, 2007 deadline looming and no resolution having been passed by the House and Senate on benefits,¹⁰⁶ in November 2006, Governor Frank Murkowski called the legislature back into a special one week session to grant the state Commissioner of Administration the authority to adopt the new benefits plan.¹⁰⁷ The extension of the health benefits to the same-sex partners of public employees and retirees also required legislative approval for additional appropriations.¹⁰⁸

But instead, in unenforceable resolutions, the legislature declared that the Alaska Supreme Court was improperly exercising judicial power and that the issue would be better resolved if the deadline were postponed so that the next legislative session may thoroughly consider the issues with adequate public participation. The legislature stated that the incoming Senate and House will consider alternatives to remedy the "constitutional defect" that had been identified by the Alaska Supreme Court. Specific alternatives included: (1) withdrawal of spousal benefits for all newly hired married state employees; (2) focusing on granting benefits to dependents instead of same-sex partners; and (3) adoption of legislation that authorizes regulations along the lines proposed by the Department of Administration."¹⁰⁹

The special November session also resulted in the following bills:

i. Prohibiting Commissioner of Administration from Granting Benefits:

¹⁰⁴ Anne Sutton, *Measure Denying Benefits to Gay Couples Sputters in Legislature*, A.P.: STATE & LOCAL WIRE, Apr. 7, 2006.

¹⁰⁵ Anne Sutton, *70 Percent of Bills, Even Hot-Button Issues, Die Early Deaths*, A.P.: STATE & LOCAL WIRE, May 10, 2006. In February 2007, Republicans attempted again to enact a proposal that, if approved by two-thirds of the legislature and a majority of voters, would revise Alaska's constitution dealing with marriage. HJR 9 (and the parallel Senate Bill, SJR 9) contained identical language as the 2006 proposals, SJR 20 (and HJR 32). Prior to the House vote, one of the House representatives released an opinion from Legislative Legal Services stating that even if HJR 9 cleared the legislature, the court would likely strike down the law as unconstitutional. HJR 9 failed to receive the two-thirds vote of the House necessary to pass. The vote was 22 for, 14 against, with 4 absent. 27 "yes" votes were needed to pass HJR 9. Reconsideration of this bill was not taken up. See legislative history of HJR 9 at Alaska Leg., Bill History/Action for 25th Leg., HJR 9, <http://bit.ly/AX8UJ> (last visited Sept. 5, 2009).

¹⁰⁶ The legislature was not in session in June 2006 when the Supreme Court ordered the January 1, 2007 compliance deadline.

¹⁰⁷ Anne Sutton, *Legislature Defies Supreme Court*, A.P.: STATE & LOCAL WIRE, November 21, 2006. See Alaska Leg. Comm. Minutes (Nov. 16, 2006), <http://bit.ly/3LNgat> (last visited Sept. 5, 2009).

¹⁰⁸ Alaska State Leg., Bill Text 24th Leg. SCR 401, <http://bit.ly/3e9cPd> (last visited Sept. 5, 2009).

¹⁰⁹ *Id.*

The house proposed House Bill (“HB”) 4001, which would have prohibited “the commissioner of administration from adopting, allowing to become law, or implementing regulations that grant or extend employment-related benefits to same-sex partners of state employees and members of the state retirement systems.”¹¹⁰

The House representative sponsoring the bill explained that HB 4001 was an “attempt to reserve the right of the legislature to make policy decisions regarding the State's retirement and benefit regulations. [There is a] ‘disagreement’ between the legislative and judicial branches of State government, illustrated by the legislature's passage in 1996 of a statute prohibiting recognition of same-sex relationships as an entitlement to marriage benefits, which the court has effectively “overruled” with the current mandate.”¹¹¹

The bill moved swiftly through the House and Senate and by early December, the final version of the bill was transmitted to the governor. On December 28, 2006, Governor Sarah Palin, who had just assumed office on December, 4, 2006, vetoed the bill.¹¹² In a release from the governor’s office, the governor stated that she was advised that the bill would be unconstitutional given the court order mandating compliance on same-sex benefits by January 1, 2007.¹¹³ By signing the bill, she would be in direct violation of her oath of office.¹¹⁴ The Alaska Attorney General had advised the governor that the bill would have “effectively eliminated the regulatory process as a way to comply with the [Alaska Supreme Court’s] order to provide same-sex domestic partner benefits” for state employees and members of the retirement system.¹¹⁵

ii. Providing for Same-Sex Partner Survivor and Medical Benefits:

Also in November 2006, Governor Frank Murkowski transmitted a bill to the legislature for consideration. Because the state had a duty to comply with the Supreme Court order in connection with *Alaska Civil Liberties Union ex. re. Carter v. Alaska*, the governor was duty bound to propose the bill despite his opposition to equal benefits for same-sex partners. Specifically, Governor Frank Murkowski wrote, “While Alaskans may differ in their views on the wisdom of the [Alaska Supreme Court] order, the state has a duty to comply with the court’s order.”¹¹⁶

HB 4003 (and the parallel bill, Senate Bill (“SB”) 4001) would permit same-sex couples access to employment-related insurance and survivor benefits and would have codified the open enrollment regulations adopted by the Commissioner of Administration.¹¹⁷ The proposal would have also set out affidavit and documentation

¹¹⁰ Alaska Leg., Bill Text 24th Leg., <http://bit.ly/DMqzq> (last visited Sept. 5, 2009).

¹¹¹ Alaska Leg. Comm. Minutes (Nov. 15, 2006), <http://bit.ly/17LyaH> (last visited Sept. 5, 2009).

¹¹² *Id.*

¹¹³ Press Release 06-016, Alaska Governor’s Office, Governor Palin Vetoes HB4001 (Dec 28, 2006).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Alaska Leg. Journal Text for SB4001 in the 24th Leg., <http://bit.ly/16Mvlf> (last visited Sept. 5, 2009).

¹¹⁷ ALASKA S.B. 4001 (24th Leg. 2006), available at <http://bit.ly/m6kZs>.

requirements that a state employee or retiree must meet to enroll a same-sex partner.¹¹⁸ HB 4003 and SB 4001 each failed in the Finance committees of the House and Senate.

iii. Advisory Vote to Prohibit Benefits to Same-Sex Couples:

The legislature proposed and passed HB 4002 in November 2006, which was then signed by Governor Palin that December. HB 4002 provided for an advisory vote at a special election on the subject of employment benefits for same-sex partners of public employees and retirees. The “purpose of the bill was to reassert the constitutional authority of the legislature as the voice of the people... [The] Judiciary had overstepped its bounds in areas that speak to public policy... [There are] changing attitudes in the country regarding the issue and [the special election will advise the legislature] if Alaska was ready to follow this trend or maintain the constitutionally adopted definition of marriage.”¹¹⁹ The advisory election would ask voters at the municipal election in April 2007 whether lawmakers should pursue a constitutional amendment to prohibit benefits from same-sex partners of public employees and retirees.¹²⁰ Governor Sarah Palin, signed the bill stating that, “I disagree with the recent court decision because I feel as though Alaskans spoke on [the] issue with its overwhelming support for a Constitutional Amendment in 1998 which defined marriage as between a man and woman. But the Supreme Court has spoken and the state will abide.”¹²¹

As a non-binding initiative, the measure had no influence on Alaska law and because it was the only question on the ballot for the special election, the state spent over \$1.2 million just for the advisory initiative.¹²² In the resulting advisory election, 53% of those who voted said the legislature should pursue a constitutional amendment to prohibit benefits to same-sex public employees and retirees.¹²³

H. Other

1. Veteran & Small Business Loans

¹¹⁸ *Id.*

¹¹⁹ Quote from Representative Norman Rokeberg at the special November session. Alaska Leg., *supra* note 87.

¹²⁰ The question that appeared on the ballot asked:

“Shall the legislature adopt a proposed amendment to the state constitution to be considered by voters at the 2008 general election that would prohibit the state, or a municipality or other subdivision of the state, from providing employment benefits to same-sex partners of public employees and to same-sex partners of public employee retirees?” ALASKA H.B. 4002 (2007), available at <http://bit.ly/m6kZs>.

¹²¹ Press release 06-012, Alaska Governor’s Office *Same Sex*, Dec 20, 2006.

¹²² Bent Alaska, STONEWALL DEMOCRATS RESPOND TO PALIN ACCUSATIONS ON SEXUAL ORIENTATION, <http://www.bentalaska.com/2008/10/stonewall-democrats-respond-to-palin.html>.

¹²³ Associated Press, *Lawmaker Questions Use of Electronic Voting Machines*, STATE & LOCAL WIRE, June 15, 2007.

Certain loans are not available to persons not of good character.¹²⁴

2. **Right to Privacy**

In 2001, the legislature proposed SB 210, which would have provided that the right to privacy does not extend to a right to receive public money, a public benefit, or a public service. This would have included state benefits based on a partnership other than marriage.¹²⁵ The bill failed in the Senate Rules Committee.

3. **Judges, Court Staff & Others**

In the performance of judicial duties, a judge must not manifest, by words or conduct, bias or prejudice based upon, among other characteristics, sexual orientation. Further, a judge must not permit court staff and others subject to the judge's direction and control to deviate from such standards in their duties.¹²⁶

4. **Ban on Bus Advertising**

In 1995, two members of the Anchorage Municipal Assembly proposed a broad ordinance proscribing advertisement for “any political candidate, political or public issue, religious issue or subject, or any sex or sexual orientation” and defined “sexual orientation” as including “any human or animal sexual orientation including asexual, heterosexual, homosexual and bisexual orientations.”¹²⁷ When asked for an example of animal sexual orientation, Assemblyman Bob Bell said, “Well, what's the definition of sexual orientation? You can interpret sexual orientation as anything -- sex with animals, sex with children, sex with dead people.”¹²⁸ No such ordinance is in existence today. Research on the outcome of the proposal does not address whether the ordinance was passed and later repealed or whether the proposal failed by an assembly vote.

5. **City of Fairbanks**

Intimidation based on a perception as to a person's sexual orientation is considered a “nuisance activity” under the City of Fairbank's local ordinance.¹²⁹

In 1995, Sarah Palin, who was mayor of Wasilla at the time, allegedly tried to remove the book, “Pastor, I Am Gay,” from the public library.¹³⁰

¹²⁴ See ALASKA STAT. §§26.15.040; 45.81.260 (2008).

¹²⁵ ALASKA S.B. 210 (2001), *available at* <http://bit.ly/b4fE6>.

¹²⁶ ALASKA RULES OF JUD. CONDUCT, CANON 3.

¹²⁷ Robert Meyerowitz, *Proposal Strips Sex, Politics from Bus Ads*, ANCHORAGE DAILY NEWS, Mar. 28, 1995.

¹²⁸ *Id.* The other Assemblyman who proposed the ordinance stated that he had received various phone calls on homosexual issues, pro and con, which prompted the proposal. Advertisements had been run by EQUAL, a gay and lesbian organization, with messages such as “Gay Pride Week in Alaska... It's 52 weeks a year!” Kerusso Ministries, prompted by the EQUAL advertisements, ran messages stating that homosexuals could change their orientation. *Id.*

¹²⁹ See Fairbanks Code of Ordi. §46-211 (2008) (definition of “intimidation”), *available at* <http://bit.ly/16xGrq>.

In June 2001, the mayor of Anchorage removed a gay pride exhibit, meant to "encourage discussion and dispel myths about gay, lesbian, bisexual and transgendered persons," at the Z.J. Loussac Public Library in Anchorage, Alaska the morning after it was first opened.¹³¹ The exhibit included t-shirts that were tacked to walls above the library elevators to give library patrons the feeling they were walking in and out of closets. There accompanying sign read "closets are for clothes not people."¹³² The mayor then personally reviewed the display and refused to allow it back in the library after deciding it was "promotional and church-sponsored, offending the separation of church and state." A federal judge overruled the city's attempt to censor the educational collection.¹³³

6. Cancellation of Funding & Prohibition on Advertising on Municipal Buses

In 1993, Out North Contemporary Art House ("Out North Theater"), having invited Pomo Afro Homos¹³⁴ to perform "Fierce Love: Stories From Black Gay Life" for two nights at the theater, submitted advertising to Anchorage's Transit Department, which administers an advertising program in conjunction with the bus system.

The Transit Department's advertising policy seeks to "ensure good taste in advertising" and prohibits the display of advertising relating to "tobacco products, alcoholic beverages, any use of obscenities, and any reference to sexual or adults-only material." The Transit Department director requested additional information about the performance from Out North Theater after being alerted to the ads by the advertising agency handling those ads. The ads for "Fierce Love," a series of 13 vignettes about the lives of gay black men, featured only the Pomo Afro Homos' name, the show's title, the theatre's name and phone number, and a picture of a bespectacled man's eyes.¹³⁵

The advertising agency claimed that advertising Pomo Afro Homos' performance may counter the Transit Department's content restrictions. Though three positive reviews of the performance were sent to the Transit Department, the Transit Director rejected the ad, claiming that it promoted "adults-only material," a decision that was publicly supported by the mayor and the Anchorage Municipal Assembly.¹³⁶ As a result, the ads

¹³⁰ David Talbot, *The Pastor Who Clashed with Palin*, SALON, <http://www.salon.com/news/feature/2008/09/15/bess>.

¹³¹ Gay Pride Library Exhibit Archive, <http://www.thefileroom.org/html/340.html> (last visited Sept. 5, 2009). The exhibit was installed as part of Gay Pride Month and PrideFest activities and was supposed to be open for 30 days. It was sponsored by Metropolitan Community Church and Parents, Families and Friends of Lesbians and Gays.

¹³² Gay Pride Library Exhibit Archive, <http://www.thefileroom.org/html/340.html> (last visited Sept. 5, 2009).

¹³³ Mary Pemberton, *ACLU Files Lawsuit Challenging Removal of Gay Pride Exhibit*, A.P.: STATE & LOCAL WIRE, June 13, 2001.

¹³⁴ Pomo Afro Homos is short for "Postmodern Afro-American Homosexuals."

¹³⁵ Encyclopedia, *Tom Fink*, NATION MASTER, <http://www.nationmaster.com/encyclopedia>.

¹³⁶ Gay Pride Library Exhibit Archive, <http://bit.ly/Ri0Zr> (last visited Sept. 1, 2009).

were banned. Out North Theater sued the city for censorship and the judge ordered the city to run the ads.¹³⁷

Months later, the mayor sent a veto memo to the Anchorage Municipal Assembly proposing to cancel Out North Theater's municipal grant of \$19,000. Mayor Fink said, "[I don't] think there's any question that the public does not approve of spending money for a theater which encompasses homosexual themes."¹³⁸ The Anchorage Municipal Assembly voted unanimously to reject the mayor's proposal to cut the grant.¹³⁹

¹³⁷ Robert Meyerowitz, *Proposal Strips Sex, Politics from Bus Ads*, ANCHORAGE DAILY NEWS, Mar. 28, 1995.

¹³⁸ Gay Pride Library Exhibit Archive, <http://bit.ly/Ri0Zr> (last visited Sept. 1, 2009).

¹³⁹ Sara Dover, *Sarah Palin and Gay Rights, The Tom Fink Connection*, VILLAGE VOICE, Oct. 17, 2008, <http://bit.ly/OHC6e>.

Annex A

Timeline of Certain Key Events in Alaska

1993

January – Anchorage Municipal Assembly passes an ordinance to add sexual orientation to its public employer and municipal contractor nondiscrimination law.

Repeal of Anchorage Ordinance by newly elected Anchorage Municipal Assembly.

1994

August – *Brause v. Bureau of Vital Statistics* filed.

1995

January – *Tumeo v. University of Alaska* decided. The superior court held that the University of Alaska could not limit spousal benefits to husbands and wives.

March

HB 226 introduced (proposal that would permit the provision of different retirement and health benefits to employees to those with a spouse or children); statute enacted as Alaska Stat. 18.80.220(c)(1) in July 1996.

HB 227 introduced (proposal to amend Alaska Stat. 25.05.011 to read that a marriage is between one man and one woman); fails in committee.

1996

February - SB 282 (proposal to prohibit discrimination by managed care plans) is introduced in the Senate; fails before reaching any committee.

March

SB 308 is introduced and contains two important proposals:

(Alaska Stat. 25.05.011 is amended to read that a marriage is between one man and one woman); enacted (Effective May 1996).

(Alaska Stat. 25.05.013 is added, which denies recognition of same-sex marriage if performed in another jurisdiction); enacted (Effective May 1996).

1998

February – *Brause v. Bureau of Vital Statistics* decided. The right to marry was a fundamental right and the state must show a compelling interest why same-sex marriages are prohibited.

March – SJR 42 is introduced (proposal to amend state’s constitution to limit marriage to one man and one woman); passed House and Senate (becomes Proposition 2 on the November 1998 ballot).

November – Alaskans vote in favor of Proposition 2 by a margin of 68% to 32%. Alaska’s constitution is amended to limit marriage to one man and one woman.

1999

Alaska Civil Liberties Union ex rel. Carter v. Alaska is filed.

September – *Brause v. Bureau of Vital Statistics* was dismissed.

2001

April – SB 210 introduced (proposal stating that right to privacy does not extend to right to receive state benefits based on partnership other than marriage); failed in committee.

2002

March – Governor Tony Knowles executes executive order, making it a goal of the executive branch to prohibit and prevent workplace discrimination by the state based on sexual orientation.

2005

October – Alaska Supreme Court rules in *Alaska Civil Liberties Union ex rel. Carter v. Alaska* that denying benefits to same-sex couples that were enjoyed by married couples was unconstitutional because it violated the equal protection clause of Alaska’s constitution.

2006

February – SJR 20 and HJR 32 (proposal to amend Alaska constitution to restrict “rights, benefits, obligations, qualities or effects of marriage” only to straight married couples) are proposed; both fail in committee.

June 1 – Alaska Supreme Court Order requires that the state provide benefits to eligible same-sex couples by January 1, 2007 to the extent required by *Alaska Civil Liberties Union ex rel. Carter v. Alaska*.

November Special Sessions of the House and Senate

HB 4001 (proposal to prohibit the Commissioner of Administration from granting benefits to state employees and retirees) passes House and Senate; vetoed by Governor Palin.

HB 4002 (proposal for an advisory vote at a special election in April 2007 on whether the legislature should pursue a constitutional amendment to prohibit benefits to partners of same-sex employees and retirees); passes House and Senate.

HB 4003/SB 4001 (Governor Murkowski’s request to comply with the Supreme Court order in *Alaska Civil Liberties Union ex rel. Carter v. Alaska*); failed.

2007

January – SB 6 (proposal to add new civil action and hate crime sentence enhancements); failed in committee.

February – HJR 9 is introduced (proposal to amend Alaska constitution to restrict “rights, benefits, obligations, qualities or effects of marriage” only to straight married couples); HJR 9 fails to receive 2/3 of House vote.

April –

Advisory vote results in 53% of the voters in favor of the legislature pursuing a constitutional amendment to prohibit benefits to partners of same-sex employees and retirees.

SJR 9 (Senate proposal to amend Alaska constitution to restrict “rights, benefits, obligations, qualities or effects of marriage” only to straight married couples) is introduced; fails in committee.