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

Title

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

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MEMORANDUM

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

I. OVERVIEW

No Virginia statute prohibits employment discrimination based on sexual orientation or gender identity. State employees cannot enroll their partners in their workplace insurance plans. In fact, Virginia is the only state to forbid even private companies, unless self-insured, from extending health insurance benefits to unmarried couples.

Although two governors have issued Executive Orders protecting state employees from discrimination based on sexual orientation, the Attorney General issued a formal opinion in the month following the most recent Order stating that the Governor had exceeded his powers and that the protection against sexual orientation discrimination was invalid. To date, attempts to enact state legislation to override the Attorney General's Opinion have failed. As such, the current status of the only source of protection against job discrimination in state government is uncertain at best.

In debates in the state legislature on unsuccessful bills that would have prohibited discrimination on the basis of sexual orientation in state employment, one Virginia delegate stated in 2006, "sexual orientation is a broad term There are eight different sexual orientations, including pedophilia and bestiality. I think we'd be opening up Pandora's box and allowing judges to interpret what that means."¹ Another delegate stated in 2009 that such protection "may not be in the best interest of our society."²

A similar struggle is going on between localities and the state Attorney General, as the Attorney General has left the validity of non-discrimination laws promulgated by local governments in doubt. The Attorney General of Virginia has issued opinions that Fairfax County School Board and Fairfax County as a whole could not enact policies prohibiting sexual orientation discrimination, indicating that no local governing body in the state had such authority without authorization by the Virginia legislature.³ So far, the

¹ Rosalind S. Helderman, *Virginia Senate to Weigh Gay Workers' Protections*, WASH. POST, Feb. 6, 2006, at B5.

² Va. Assembly Access Website, <http://assemblyaccess.wordpress.com> (last visited Sept. 4, 2009).

³ Virginia Attorney General Op. No. 02-089 (Nov. 8, 2002) (Absent enabling legislation, the Fairfax County School Board has no authority to include sexual orientation in its nondiscrimination policy); Virginia Attorney General Op. No. 02-029 (Apr. 30, 2002) (General Assembly would need to enact legislation authorizing Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation).

legislature has repeatedly refused to grant authority to localities that wish to adopt anti-discrimination protections for LGBT Virginians to do so.

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

- A 2009 case in which an employee of the Virginia Museum of Natural History, a state agency, was forced to resign because of his sexual orientation shortly after receiving a positive evaluation that otherwise would have resulted in a raise. The Executive Director of the Museum expressed concerns that the employee's sexual orientation would jeopardize donations to the museum. A Virginia appellate court dismissed his sexual orientation employment discrimination claim because of the Virginia Attorney General's Opinion that the governor's executive order prohibiting such discrimination order did not create a private right of action.⁴
- A police officer who reported in 2008 that she was harassed by her captain and made to work long shifts without breaks because of her sexual orientation. When she tried to leave and apply for another job, the captain accosted her future employer in a restaurant and announced that she was a lesbian.⁵
- In 2009, a lesbian public school teacher was subjected to a hostile work environment on account of her sexual orientation.⁶
- In 2008, a Virginia state corrections psychologist, who was a lesbian, was subjected to a hostile work environment because of her sexual orientation.⁷
- In 2008, an athletic trainer at a Virginia state military academy was subjected to a hostile work environment on account of her association with lesbians.⁸
- In 2007, a gay public school teacher was subjected to a hostile work environment on account of his sexual orientation.⁹
- In 2006, a transgender scientist was not hired by a Virginia state agency on account of her gender identity.¹⁰ An administrator of the City of Petersburg's

⁴ Va. Dept. of Hum. Res. Mgmt. O.E.E.S, Priv. Ltr. Rul. 0107-038 (Jan. 7, 2009); Final Order, *Moore v. Virginia Museum of Natural History*, No. 690CL09000035-00 (Va. Cir, June 15, 2009).

⁵E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

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

⁷ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

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Community Diversion Incentive Program who was fired in 1986 for refusing to answer questions about her sexual orientation as part of a city background check. She had already been in her position for three years when she was asked to complete a questionnaire for the background check. When she initially refused, she was suspended without pay but then reinstated with back pay by the City Manager because he determined that her position did not require a background check. However, at the same time he changed city policy to require her to have a background check. When she again refused to answer the question about whether she had had sex with someone of the same sex, she was terminated. In 1990, analyzing her claim under the United States constitutional right to privacy, with respect to the question about same-sex behavior, the 4th Circuit relied upon *Bowers v. Hardwick* in holding that she had no right to privacy with respect to this information although it did note that the relevance of this information was "uncertain".¹¹ In 2003, the United States Supreme Court held that *Bowers v. Hardwick* was wrong when it was decided in 1986.¹²

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

¹⁰ 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).

¹¹ *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

¹² *Lawrence v. Texas*, 539 U.S. 558 (2003).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

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

B. Attempts to Enact State Legislation (All of the following bills failed)

1. 2009

HB 1933 To allow a county with the urban county executive form of government (Fairfax County) to add the category of “sexual orientation” in ordinances prohibiting discrimination.¹³

HB 2385 To prohibit

discrimination in public employment based on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, or status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974, as amended. The bill defines “sexual orientation” as a person's actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity or expression. The bill expressly provides that “sexual orientation” shall not include any person's attraction towards persons with whom sexual conduct would be illegal due to the age of the parties.¹⁴

In debate on the bill, Delegate Todd Gilbert argued that the measure “may not be in the best interest of our society.”¹⁵ The bill was defeated in a House vote.

SB 1247 To “[a]dd[] sexual orientation to the definition of unlawful discriminatory practice in the Virginia Human Rights Act. The bill also removes the provision limiting private causes of action to where the employers employed more than five but less than 15 persons.”¹⁶

2. 2008

HB 675 To allow

Fairfax County (the only county with such form of government) by ordinance to prohibit discrimination in

¹³ H.B. 1933, 2009 Gen. Assem., Reg. Sess (Va. 2009).

¹⁴ H.B. 2385, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

¹⁵ Va. Assembly Access Website, <http://assemblyaccess.wordpress.com> (last visited Sept. 4, 2009).

¹⁶ S.B. 1247, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

housing, real estate transactions, employment, public accommodations, credit, and education on the basis of sexual orientation. Such authority currently exists with regard to race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability.¹⁷

HB 1493 To add sexual orientation to Virginia's nondiscrimination policy for State employees.¹⁸

3. 2007

HB 2550 Introduced in response to a non-binding opinion by the Attorney General proclaiming that the addition of sexual orientation as a protective employment class under a Gubernatorial Executive Order is “beyond the scope of executive authority and is unconstitutional.” HB 2550 would have prohibited discrimination against state employees on the basis of sexual orientation.¹⁹

HB 2252 To provide

that the City of Richmond may enact an ordinance prohibiting discrimination in housing, employment, public accommodations, credit, and education on the basis of sexual orientation, provided that the scope of the protections provided by such ordinance are not inconsistent with nor more stringent than those of any state law prohibiting discrimination on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability. "Sexual orientation" means having or being perceived as having an orientation toward heterosexuality, bisexuality, or homosexuality. "Sexual orientation" does not include sexual deviant disorders (“paraphilias”) as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).²⁰

HB 2598 To “[a]dd ‘sexual orientation’ as prohibited discrimination in a county with the urban county executive form of government (Fairfax County).”²¹

SB 820 To “[p]rohibit[] discrimination in state employment on the basis of pregnancy, childbirth or related medical conditions, marital status, sexual orientation, or

¹⁷ H.B. 675, 2008 Gen. Assem., Reg. Sess. (Va. 2008).

¹⁸ HB 1493, 2008 Gen. Assem., Reg. Sess. (Va. 2008).

¹⁹ HB 2550, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

²⁰ HB 2252, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

²¹ HB 2598, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974.”²²

SB 1310 To “prohibit discrimination in state employment on the basis of pregnancy, childbirth or related medical conditions, marital status, sexual orientation, or status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974.”²³

4. 2006

HB1373 To “[a]dd[] ‘sexual orientation’ as prohibited discrimination in a county with the urban county executive form of government (Fairfax County).”²⁴

SB 700 The bill provided:

No state agency, institution, board, bureau, commission, council, or instrumentality of the Commonwealth shall discriminate in employment based on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, or status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974, as amended.²⁵

Delegate Mark L. Cole stated in reference to the bill, “sexual orientation is a broad term...There are eight different sexual orientations, including pedophilia and bestiality. I think we’d be opening up Pandora’s box and allowing judges to interpret what that means.”²⁶

5. 2005

HB 2116 To “[a]dd[] ‘sexual orientation’ as prohibited discrimination and authorize[] action against such discrimination by a human rights commission in a county with the urban county executive form of government (Fairfax County).”²⁷

HB 2894 To “[p]rohibit[] discrimination in state employment on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, disability, or sexual orientation.”²⁸

²² S.B. 820, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

²³ S.B. 1310, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

²⁴ H.B. 1373, 2006 Gen. Assem., Reg. Sess. (Va. 2006).

²⁵ S.B. 700, 2006 Gen. Assem., Reg. Sess. (Va. 2006).

²⁶ Rosalind S. Helderman, *Virginia Senate to Weigh Gay Workers’ Protections*, WASH. POST, Feb. 6, 2006, at B5.

²⁷ H.B. 2116, 2005 Gen. Assem., Reg. Sess. (Va. 2005).

²⁸ H.B. 2894, 2005 Gen. Assem., Reg. Sess. (Va. 2005).

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

1. Executive Orders

On December 16, 2005, Virginia Governor Mark Warner amended a preexisting Executive Order²⁹ banning discrimination by Virginia state agencies by adding provisions that prohibited discrimination on the basis of sexual orientation. When Warner's successor, Timothy Kaine, assumed power in January of 2006, he affirmed Warner's actions in Executive Order 1.³⁰ Kaine's order reads: "By virtue of the authority vested in me as Governor, I hereby declare that it is the firm and unwavering policy of the Commonwealth of Virginia to assure equal opportunity in all facets of state government."³¹

This policy specifically prohibits discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, political affiliation, or against otherwise qualified persons with disabilities.

On February 24, 2006 the Virginia Attorney General issued an Opinion that declared this Order unconstitutional.³² It stated:

It is my opinion that while Executive Order No. 12 is permissible to the extent the Governor is ensuring that the laws are faithfully being executed, the addition of sexual orientation as a protected employment class within state government was intended to, and in fact did, alter the public policy of the Commonwealth. It is further my opinion that changing the public policy of the Commonwealth is within the purview of the General Assembly; therefore, that portion of Executive Order No. 1 is beyond the scope of executive authority and, therefore, unconstitutional.³³

2. State Government Personnel Regulations

Based on research conducted, Virginia has no general public personnel regulations that protect against discrimination based on sexual orientation or gender expression.

All public universities in the state have non-discrimination policies based on sexual orientation, but not gender identity.

²⁹ Va. Exec. Order No. 1 (2002, rev'd Dec. 16, 2005).

³⁰ Va. Exec. Order No.1 (Jan. 14, 2006).

³¹ *Id.*

³² Va. Atty Gen. OP. No. 05-094 (2006).

³³ *Id.*

The following policies apply to the state government of Virginia pursuant to the governor's executive order:³⁴

Dep't of Hum. Res. Mgmt., Policy No.: 2.30 - Workplace Harassment.

“The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability.”

Dep't of Hum. Res. Mgmt., Policy No.: 2.05 - Equal Employment Opportunity.

This policy provides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability in accordance with the Governor's Executive Order on Equal Opportunity and state and federal laws. (For the purpose of this policy “disability” is defined in accordance with the “Americans With Disabilities Act.”)

Dep't of Hum. Res. Mgmt., Policy No.: 2.10 – Hiring.

Each agency must take action consistent with Policy, 2.05, Equal Employment Opportunity, to ensure that its recruiting and hiring procedures are conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability.

3. **Attorney General Opinions**

Op. No. 05-094 (Feb. 24, 2006).

Executive Order is permissible to extent Governor is ensuring that laws are faithfully being executed, addition of sexual orientation as protected employment class within state government was intended to, and in fact did, alter public policy of Commonwealth. Changing public policy of Commonwealth is within purview of General Assembly and, therefore, beyond scope of executive authority and is unconstitutional.³⁵

Op. No. 02-089 (Nov. 8, 2002).

³⁴ *But See supra*, Part II.C.1.

³⁵ Op. No. 05-094 (Feb. 24, 2006).

“Fairfax County School Board has no authority to include sexual orientation as category in its nondiscrimination policy, absent enabling legislation.”³⁶

Op. No. 02-029 (Apr. 30, 2002).

“General Assembly would need to enact legislation authorizing Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation.”³⁷

1997 Op. Va. Att’y Gen. (Oct. 20, 1997).

No express or implied statutory authorization for locality to provide health insurance benefits to persons other than government employees or to such employees’ family or dependents; no legislative intent to extend insurance coverage to “eligible domestic partner” of employees. County lacks power to extend health insurance coverage provided its employees to persons other than spouse, children or dependents of county employees, in absence of statutory authority indicating intent to permit such coverage.³⁸

D. Local Legislation

Virginia law requires local governments to have express authority from the state legislature or implied power derived from expressly granted authority in order to enact local laws.³⁹ In *Arlington County v. White*, the Virginia Supreme Court struck down a local law granting health care benefits to domestic partners of county employees. No Virginia court has yet confirmed the authority of local governments to include sexual orientation as a class protected from discrimination in any context. Thus the ability of local government to enforce its laws barring discrimination based on sexual orientation is uncertain. In addition to Arlington, Alexandria and Charlottesville, other Virginia localities with non-discrimination policies on the basis of sexual orientation for city or county employment include Williamsburg,⁴⁰ Fairfax County,⁴¹ Virginia Beach⁴² and Roanoke.⁴³

³⁶ Op. No. 02-089 (Nov. 8, 2002).

³⁷ Op. No. 02-029 (Apr. 30, 2002).

³⁸ 1997 Op. Va. Att’y Gen. (Oct. 20, 1997).

³⁹ See *Arlington County v. White*, 528 S.E.2d 706 (Va. Sup. Ct. 2000); *Bono Film and Video, Inc. v. Arlington County Human Rts. Comm’n.*, 2006 WL 3334994 (Va. Cir. Ct. Nov. 16, 2006). In *Bono Film and Video*, a Virginia court refused to answer the question of “whether Arlington County may authorize their Human Rights Commission to investigate complaints of discrimination based upon sexual orientation through their enabling legislation, VA. CODE § 15.2-725 (2006), which does not specifically list the categories of discrimination to be covered by Arlington’s Human Rights Ordinance.” 2006 WL 3334994.

⁴⁰ See City of Williamsburg, Application for Employment, available at <http://www.ci.williamsburg.va.us/Index.aspx?page=34> (last visited Sept. 15, 2009) (“The City of Williamsburg does not discriminate on the basis of race, color, national origin, sex, religion, age, sexual orientation, or disability in employment or the provision of services.”)

1. City of Alexandria

The City of Alexandria Code states:

[I]t is and shall be the policy of the city generally, except as hereinafter provided, to prohibit discrimination because of race, color, sex, religion, ancestry, national origin, marital status, familial status, age, sexual orientation or disability with respect to housing, public accommodations, employment, health and social services, credit, education and city contracts.⁴⁴

2. City of Charlottesville

The City of Charlottesville prohibits employment discrimination by the city on the basis of sexual orientation. Furthermore, the city requires that any city contractors with a contract over \$10,000 agree not to discriminate against an employee or applicant for employment on the basis of sexual orientation in the performance of the contract.⁴⁵

3. County of Arlington

In Arlington County, it is unlawful to discriminate because of Race, National Origin, Color, Marital Status, Sex, Religion, Age, Disability, Sexual Orientation, or Familial Status in housing, the provision of brokerage services, public accommodation, credit lending, education, employment and appointment to the Arlington Human Rights Commission.⁴⁶

E. Occupational Licensing Requirements

Based on research conducted, Virginia has no licensing requirements that protect against discrimination based on sexual orientation or gender expression.

⁴¹ Fairfax County Standards of Conduct, Ch. 16, Addendum 1 (2007), *available at* http://www.fairfaxcounty.gov/jobs/regs_pdf/chap16.pdf (last visited Sept. 14, 2009).

⁴² See City of Virginia Beach, *Diversity Management*, <http://www.vbgov.com> (enter “Diversity Management” in Search field; click on first link entitled “Diversity Management”) (last visited Sept. 14, 2009).

⁴³ City of Roanoke, Application for Employment, *available at* <http://www.roanokeva.gov/DeptApps/jobpost.nsf/CityJobAppl.pdf?OpenFileResource> (last visited Sept. 14, 2009).

⁴⁴ ALEXANDRIA CODE- § 12-4-2.

⁴⁵ CHARLOTTESVILLE CODE §§ 19-7, 22-10.

⁴⁶ ARLINGTON COUNTY CODE § 31-3 (Human Rights).

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

A. Case Law

1. State & Local Government Employees

Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990).

In *Walls v. City of Petersburg*, the court held that an employee of the City's Bureau of Police had no right to privacy with respect to information about her sexual orientation.

Walls was hired as the administrator of the City of Petersburg's "Community Diversion Incentive Program" ("CDI") in December 1985. This program provides alternative sentencing for non-violent criminals. In her position, Walls had financial responsibility for the CDI program, oversaw restitution payments, had regular contact with convicted criminals, and was in a position to make recommendations concerning sentencing.

In July 1986, the administration of the program was transferred from the City Manager's Office to the City's Bureau of Police. After the transfer took place, the police department required all CDI employees to undergo the same background check as its other employees. The City had never required background checks of employees working with the CDI program when it was administered by the City Manager's Office. At the time of the transfer, Walls did not complete a background questionnaire. Upon discovering this in March 1988, her supervisors notified her that she would be required to fill out the questionnaire. Walls refused to do so, objecting specifically to four questions. One question was whether the employee had ever had sexual relations with a person of the same sex.

Because of her refusal to fill out the questionnaire, Walls was suspended without pay and her supervisor recommended to the City Manager that Walls be terminated. After determining that the current administrative policy concerning background checks did not apply to Walls, the City Manager ordered Walls to be reinstated with backpay. At the same time, however, he promulgated a new policy requiring all current employees in Walls' position to fill out the questionnaire. Walls still refused to comply, and was terminated for failure to complete the background questionnaire.

The Court primarily analyzed plaintiff's claim asserting that the questions violated her constitutional right to privacy. With respect to the question about homosexual activity, citing *Bowers*, the Court held that plaintiff had no right to privacy with respect to this information (although it did note that the relevance of this information was "uncertain").⁴⁷

2. Private Employees

⁴⁷ *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

Evans v. Virginia Employ. Comm'n, 1995 WL 110099 (Va. App.).

Plaintiff was discharged from the Navy because he was homosexual. When he applied for unemployment compensation benefits due to ex-military servicemen his request was denied. The VA Court of Appeals upheld this decision.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

Virginia Museum of Natural History

Michael Moore, a Martinsville, Virginia resident and former employee of the Virginia Museum of Natural History, filed suit against the museum in 2006 after he was forced out based on his sexual orientation. Shortly after gossip began to circulate about Moore's sexual orientation, the museum's Executive Director arranged a meeting with the Human Resources Manager. During the meeting, the Executive Director, fearing that Moore's known sexual orientation would jeopardize expected donations, asked the Human Resources Manager if Moore could be terminated. The Human Resources Manager explained that Moore could be terminated for a "valid and good reason," but explicitly stated that he could not be terminated just because he was gay. Shortly thereafter, the Executive Director questioned Moore about his sexual orientation during a performance evaluation meeting; Moore truthfully answered that he was gay. The meeting resulted in an unfavorable review and Moore was forced to resign. Following an investigation, the Office of Equal Employment Services concluded that there was "sufficient evidence to support that there was improper consideration of [Moore's] sexual orientation." Moore filed suit in a Virginia circuit court based on protection afforded to state employees by a gubernatorial executive order, because Virginia does not statutorily prohibit employment discrimination based on sexual orientation. The court dismissed the suit for lack of subject matter jurisdiction, stating that the executive order does not provide for a private right of action.⁴⁸

Municipal Police Department

In 2008, a lesbian police officer reported that she was harassed by her captain and made to work long shifts without breaks. When she applied to another job, the captain accosted her future employer in a restaurant and announced that she was a lesbian.⁴⁹

⁴⁸ Va. Dept. of Hum. Res. Mgmt. O.E.E.S, Priv. Ltr. Rul. 0107-038 (Jan. 7, 2009); Final Order, *Moore v. Virginia Museum of Natural History*, No. 690CL09000035-00 (Va. Cir, June 15, 2009).

⁴⁹E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

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. Virginia Human Rights Act

Virginia's Human Rights Act makes no reference to sexual orientation or gender expression. The stated purpose of the Human Rights Act is to:

Safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; preserve the public safety, health and general welfare; and further the interests, rights and privileges of individuals within the Commonwealth.⁵⁰

B. Criminalization of Same-Sex Sexual Behavior

Although Virginia's sodomy law was invalidated by the U.S. Supreme Court on June 26, 2003 as a result of the Court's decision in *Lawrence v. Texas*, Virginia has not yet amended its statute that outlaws sodomy.⁵¹

C. Health Care

Domestic partners are not listed among those who may give consent for an incapacitated partner in Virginia.⁵² An adult may however, specifically designate their domestic partner as having the authority to make medical decisions on their behalf. A written advance directive shall be signed by the declarant in the presence of two subscribing witnesses. An oral advance directive shall be made in the presence of the attending physician and two witnesses.⁵³

⁵⁰ VA CODE § 2.2-3900.

⁵¹ VA. CODE § 18.2-361. See also *Doe v. City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975) which upheld Virginia's sodomy law. The case was summarily affirmed by the U.S. Supreme Court. For a second time, the court in *DePriest v. Virginia*, upheld the Virginia sodomy law as constitutional. *DePriest v. Virginia*, 537 S.E.2d 1 (2000). In *DePriest*, the court held that specific cases of individuals charged with solicitation to commit sodomy did not establish a presumption of privacy by seeking to commit sodomy in a public park.

⁵²VA. CODE § 54.1-2986.

⁵³VA. CODE § 54.1-2983.

Virginia law requires licensed hospitals to permit adult patients to receive visits from any individual, including a same-sex partner.⁵⁴

D. Parenting

1. Adoption

Virginia permits any person or married couple residing in the state to petition to adopt.⁵⁵ There is no explicit prohibition on same-sex adoption, but the law is unclear on whether same-sex couples may jointly petition to adopt. In 2005, the Virginia Anti-Gay Adoption bill was passed by the Virginia House of Delegates 71-24. It was then rejected by a Senate committee. The law would have required social workers to determine the sexual orientation of prospective adoptive parents to prevent members of the LGBT community from adopting children in the state.

Kaufman v. Va. Dep't of Soc. Serv.

Virginia resident Linda Kaufman, a lesbian Episcopal minister, sought to adopt a child from Washington, D.C. Citing Virginia's sodomy law, the State barred the adoption. The Virginia Department of Social Services settled the case and agreed to allow Kaufman to adopt a child from D.C. The settlement also required a directive from the Department stating that "there are no absolute barriers," including the potential adoptive parents' sexual orientation, to Virginia's consent to interstate adoption.⁵⁶

Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822 (Va. 2008).

Janet and Lisa Miller-Jenkins lived in Virginia, and traveled to Vermont to enter into a civil union. Back in Virginia, Lisa was artificially inseminated and gave birth to Isabella in April 2002. In 2003, the couple split up. Lisa then filed a petition for dissolution of the civil union in Vermont family court. As part of the civil union dissolution, Lisa conceded that Janet had parental rights to Isabella and in light of that fact asked the Vermont court to determine custody of Isabella.

In June 2004, the Vermont court issued a temporary custody order providing that Janet have visitation and contact with Isabella. Lisa, however, refused to obey the order and instead filed a new custody proceeding in Frederick County Circuit Court on July 1, 2004. The Virginia judge held that he had jurisdiction over the case. He relied on the recently enacted "Marriage Affirmation Act," which declares civil unions and other agreements "purporting to bestow the privileges and obligations of marriage" between persons of the same sex to be unenforceable. While awaiting the Virginia Court of Appeals' ruling, the Vermont Supreme Court on August 4, 2006 held that Vermont has jurisdiction over the case, and that Lisa was in contempt of court order for refusing to

⁵⁴ VA. CODE ANN. §§ 54.1-2981 to 54.1-2993 (Health Care Decisions Act).

⁵⁵ VA. CODE ANN. § 63.2-1225.

⁵⁶ Lambda Legal, *Linda Kaufman v. Virginia Department of Social Services* (Aug. 14, 2002), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/kaufman-facts.html>.

allow visitation. On November 28, 2006 the Virginia Court of Appeals concurred with the Vermont Supreme Court's ruling.

The Court of Appeals denied Lisa's request for a hearing before the full court, and she asked the Virginia Supreme Court to hear the case. On May 7, 2007, the Virginia Supreme Court of Appeals dismissed her appeal because she failed to file a notice of appeal. In a related ruling, the Virginia Court of Appeals held in April 2007 that the Frederick County Circuit Court must give full faith and credit to Vermont's orders. On June 6, 2008, the Virginia Supreme Court upheld the Court of Appeals decision giving Vermont jurisdiction. The Court declined to overrule the 2006 Court of Appeals ruling that Vermont had custody over the case under the federal Parental Kidnapping Prevention Act and held that the 2006 opinion was the final word on all of the relevant legal issues.

Lisa Miller then initiated a new action, which asked the Frederick County Circuit Court not to enforce Vermont's orders because of Virginia's constitutional marriage amendment banning same-sex marriage. On August 15, 2008, Judge John Prosser dismissed Lisa's claims and remanded the case to the county juvenile and domestic relations court for enforcement of the Vermont order.

J.R.V. v. A.O.V., 2007 WL 581871 (Va. App. Feb. 27, 2007).

When A.O.V. and J.R.V. divorced in 2004, J.R.V. came out as a gay man. He also made it known that he was in an exclusive relationship with a man and that they lived together. In the divorce proceedings, a circuit court judge awarded primary physical custody of the couples' three children to A.O.V., with joint custody and liberal visitation to J.R.V, including allowing his partner to be present during the day when the children were visiting. A.O.V. appealed the judge's decision to not grant her sole custody of the children and his refusal of more draconian restrictions, arguing that J.R.V.'s homosexuality had negative effects on the children. The Court of Appeals affirmed the joint custody and ruled that no further visitation restrictions on J.R.V. were necessary. It also affirmed the trial court's restrictions prohibiting J.R.V. from having his partner spend the night when the children were visiting or engaging in public displays of affection in front of the children.

Davenport v. Little-Bowser, 269 Va. 546 (Va. 2005).

Three same-sex couples, two living in Washington, D.C., and one in New York City, adopted children who had been born in Virginia. The adoptions were approved by the couples' home states, but Virginia authorities refused the couples' applications for new birth certificates listing both adoptive parents, claiming that this would violate Virginia's rules concerning birth certificates as well as the state's policy against same-sex marriage. The Virginia Supreme Court ruled that Virginia must indeed issue birth certificates listing the names of both same-sex adoptive parents.⁵⁷

⁵⁷ After the verdict, the Virginia Department of Vital Records refused to comply with the ruling claiming that the state's form only allowed for one mother and one father to be listed and thus could not accommodate two mothers or two fathers. In January of 2006, the Department amended its issuance of

Piatt v. Piatt, 499 S.E.2d 567 (Va. App. 1998).

Court acknowledges that the sexual behavior, namely a homosexual relationship, can be a consideration in deciding which parent offers a more stable home environment. Consequently, in *Piatt*, a mother who engaged in two homosexual “experimental” relationships was denied her request for primary physical placement of her child.

Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995).

The maternal grandmother of a child petitioned for custody of the child in preference of the mother. While the court noted numerous factors in its decision to grant the grandmother custody, it also acknowledged that the mother’s lesbianism was an “important consideration” in determining custody.

2. Surrogacy

Virginia law appears to prohibit same-sex couples from participation in uncompensated surrogacy agreements. (Compensated surrogacy is prohibited for all couples in Virginia.) As the Virginia Code establishes:

a surrogate ... and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child.⁵⁸

The term “intended parents” is limited to “a man and a woman, married to each other.”

E. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Virginia law prohibits a civil union or partnership arrangement that would accord the incidents of marriages to couples of the same sex. Civil unions from other jurisdictions are not recognized in Virginia.⁵⁹

Virginia does not license marriage between couples of the same sex. The state does not honor marriages between same-sex couples obtained in an outside jurisdiction. Moreover, under Virginia law, , “any contractual rights created by such marriage shall be void and unenforceable.”⁶⁰

2. Benefits

birth certificates so that they now have listings for “Parent 1” and “Parent 2.” Press Release, ACLU of Va., Department of Vital Records Finally Changes Birth Certificates to Accurately Reflect Same-Sex Parents (Jan. 26, 2006), <http://www.acluva.org/newsreleases2006/Jan26.html> (last visited Sept. 4, 2009).

⁵⁸ VA. CODE ANN. § 20-159.

⁵⁹ VA. CODE ANN. § 20-45.3.

⁶⁰ VA. CODE ANN. § 20-45.2

Arlington County v. White, 528 S.E.2d 706 (Va. Sup. Ct. 2000).

Taxpayers brought action against county challenging the extension of health care coverage to unmarried “domestic partners” of the county’s employees. The Virginia Supreme Court ruled that the act of extending health care coverage to domestic partners is an *ultra vires* act outside of the county’s implied authority under the statutes. Under the so-called Dillon’s Rule, local governments:

have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable. Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable.⁶¹

The Court found that in allowing local governments to adopt their own definitions of “dependent” with regard to self-funded health insurance benefit plans, the General Assembly of Virginia did not contemplate the type of financial interdependence that the County of Arlington’s definition of “domestic partners” suggests.

Bono Film and Video, Inc. v. Arlington County Human Rts. Comm’n, 2006 WL 3334994 (Va. Cir. Ct. Nov. 16, 2006).

After the Arlington County Human Rights Commission dismissed its case against the Plaintiffs, the circuit court ruled that the plaintiffs had no standing to contest the Arlington County Human Rights Ordinance. Consequently, the court refused to answer the question of “whether Arlington County may authorize their Human Rights Commission to investigate complaints of discrimination based upon sexual orientation through their enabling legislation, Va. Code § 15.2-725 (2006), which does not specifically list the categories of discrimination to be covered by Arlington’s Human Rights Ordinance.”

F. Other Non-Employment Sexual Orientation & Gender Identity Related Laws

Mainstream Loudoun v. Bd. of Tr., 24 F.Supp.2d 552 (E.D. Va. 1998).

Several nonprofit organizations sued the Loudon County Library for banning access to “sexually explicit” internet sites. Some of these banned websites simply contained information on gay and transgender organizations. The district court declared the policy unconstitutional because it was not narrowly tailored to serve a compelling government interest and therefore an unconstitutional prior restraint on free speech.

⁶¹ Arlington County v. White, 528 S.E.2d 706 (Va. Sup. Ct. 2000) (citing City of Virginia Beach v. Hay, 258 VA. 217, 221, 518 S.E.2d 314, 316 (1999)).

Veney v. Wyche, 293 F.3d 726 (4th Cir. 2002).

In this case, the court upheld the segregation and gender related disparate treatment of homosexual inmates finding the division was rationally related to legitimate governmental interests.

Portsmouth Public High School

Following a warning letter from the ACLU, school officials at a Portsmouth, VA high school allows a student to wear her lesbian pride t-shirt to school. Before intervention by the ACLU, the school threatened to suspend the student if she wore her t-shirt to school.⁶²

⁶² ACLU, *ACLU Demands Virginia High School Stop Censoring Gay Student* (Dec. 20, 2007), <http://www.aclu.org/lgbt/youth/33321prs20071220.html>.