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

Title

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

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MEMORANDUM

From: Williams Institute

Date: September 2009

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

I. OVERVIEW

Indiana's state anti-discrimination law does not prohibit employment discrimination based on gender identity or sexual orientation ¹ although a Governor's Executive Order does protect state employees from those two forms of discrimination.² There is also no state law that prohibits sexual orientation or gender identity discrimination in education, and one county school board adopted a resolution denouncing activities such as ... gay and lesbian behavior.

Documented examples of discrimination by state and local government employers based on sexual orientation or gender identity include:

- A gay special education aid in the Clark County Schools was hounded out of his job after teenage boys who crashed his Halloween party alleged that he tried to molest them. The aid sued the school district and various named defendants on various constitutional and tort theories, including defamation per se and intentional infliction of emotional distress. Ruling on various pretrial defense motions, the court rejected his per se defamation claim but allowed the rest of his claims to proceed.³
- The State of Indiana denied employee Jana Cornell's request for bereavement leave so she could attend the funeral of her partner's father. Cornell sued the state arguing that the exclusion of same-sex partners from the bereavement leave policy violated the state constitution's protection of equality. Her claim was rejected on the ground that the discrimination was based on marriage rather than sexual orientation. Cornell v. Hamilton, 791 N.E.2d 214 (Ind. App. 2003).
- In 2000, an openly lesbian probation officer was not promoted by her employers, two Carroll County Judges, because of her sexual orientation. The judges together decided against promoting her to chief probation officer. The officer requested the job and the superior court judge told her that they would not promote her because she was a lesbian. Further, the superior court judge told her

¹Ind. Code, Tit. 22, Art. 9, Chptr. 1(1994), available at <http://www.in.gov/legislative/ic/code/title22/ar9/ch1.html>; see Human Rights Campaign, State Law Listings, Indiana Non-Discrimination Law, www.hrc.org/4176.htm (last visited Sept. 3, 2009).

²See *infra* Section II.C.1.

³ *Badger v. Greater Clark County Schools*, 2005 WL 645152 (S.D. Indiana Feb 15, 2005).

that she was embarrassing the court by dating a woman, and that he had asked other court employees about her sexual orientation and personal life. A man with no prior probation experience was promoted to the position.⁴

- From 1997 through 2000, a gay public school principal and a gay public school teacher were subjected to a hostile work environment on account of their sexual orientation.⁵

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.

⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 179 (2000 ed.).

⁵ 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).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Indiana has not enacted laws to protect persons from employment discrimination on the ground of sexual orientation and gender identity.⁶

B. Attempts to Enact State Legislation

House Bill 1250, introduced in January 2009, “would extend antidiscrimination and civil rights statutes to include prohibiting discrimination based on sexual orientation, gender identity, national origin, age, disability, and ancestry.”⁷ It has not been enacted.

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

1. Executive Orders

Current Governor Mitchell Daniels signed an Executive Order, covering all state employees, that prohibits discrimination based on sexual orientation and gender identity.⁸ Governor Daniels also included employment protection for sexual orientation and gender identity in his April 2005 Affirmative Action statement.⁹ Previous Governor Kernan signed an Executive Order in 2005 prohibiting consideration of sexual orientation or gender identity in decisions concerning hiring, development, advancement, and termination of civilian employees.¹⁰

2. State Government Personnel Regulations

The Workplace Harassment statement of the Indiana State Personnel Department lists sexual orientation and gender identity as protected classes.¹¹

3. Attorney General Opinions

None.

D. Local Legislation

⁶ Ind. Code, Tit. 22, Art. 9, Chptr. 1(1994), *available at* <http://www.in.gov/legislative/ic/code/title22/ar9/ch1.html>.

⁷ Indiana Equality, Indiana Equality Issues Center, [http:// www.indianaequality.org/View/Issues.aspx](http://www.indianaequality.org/View/Issues.aspx) (last visited Sept. 3, 2009).

⁸ Indiana Transgender Rights Advocacy Project, State Law Employment Policies Webpage, <http://www.intraa.org/civilrights> (last visited Feb. 11, 2009).

⁹ See *Indiana Equality Update: Summer Advocacy Wrap-Up*, INTRAA CONNECTIONS (Ind. Transgender Rts. Advoc. Proj., Carmel, Ind.) Sept.-Oct. 2004, at 3, *available at* <http://intraa-edfund.org/intraaconnections-pdf/200409connections.pdf>.

¹⁰ *Gov. Kernan Protects Transgender State Employees*, INTRAA CONNECTIONS (Ind. Transgender Rts. Advoc. Proj., Carmel, Ind.) Sept.-Oct. 2004, at 1, *available at* <http://intraa-edfund.org/intraaconnections-pdf/200409connections.pdf>.

¹¹ IND. STATE PERS. DEP’T, WORKPLACE HARASSMENT PREVENTION (2005).

1. **Marion County**

Marion County, which includes Indianapolis, revised their Human Rights Ordinance in 2006 to include sexual orientation and gender identity among a list of classes to be protected from discrimination in employment.¹²

2. **Bloomington County**

Bloomington County also includes sexual orientation and gender identity among a list of classes to be protected from discrimination in employment.¹³

3. **Tippecanoe County**

Tippecanoe County prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.¹⁴

4. **City of Bloomington**

The City of Bloomington prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.¹⁵

5. **City of Fort Wayne**

The City of Fort Wayne prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.¹⁶

6. **City of Lafayette**

The City of Lafayette prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.¹⁷

7. **Michigan City**

Michigan City prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.¹⁸

¹²Marion County Code, Chptr. 581 (rev. Jan. 11, 2006) (Human Relations, Equal Opportunity).

¹³Indiana Equality, Civil Rights, Hoosiers Believe in Fairness, http://www.indianaequality.org/forward.aspx?c=HTK&u=/view/civil_rights_fact_sheet.aspx#employers (last visited Sept. 3, 2009).

¹⁴*Id.*

¹⁵*Id.*

¹⁶ *Id.*

¹⁷ *Id.*

8. City of Terre Haute

The City of Terre Haute prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.¹⁹

9. City of West Lafayette

The City of West Lafayette prohibits sexual orientation discrimination in private and public employment, but does not protect against employment discrimination on the basis of gender identity.²⁰

10. City of South Bend

A mayor's executive order signed in June 2009 bans discrimination on the basis of sexual orientation or gender identity, only for city government employees in South Bend.²¹

E. Occupational Licensing Requirements

None.²²

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ BNA Daily Labor Report, 130 DLR A-16 (July 10, 2009).

²² Many licensing boards, especially for gaming, require applicants to have good moral character, but there is no indication that sexual orientation or gender identity could be used as a disqualifier. *See, e.g.,* Ind. Code, Tit. 4, Art. 33, Chptr. 3, § 4-33-3-10 (1993).

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

A. Case Law

1. State & Local Government Employees

Badger v. Greater Clark County Schools, 2005 WL 645152 (S.D. Indiana Feb 15, 2005).

Robert Badger, a gay man employed as a special education aid in the Clark County Schools, was hounded out of his job based on what he claims to be unfounded accusations that he and his gay friends tried to molest some teenage boys who crashed a Halloween party he was giving. Badger sued the school district and various named defendants on various constitutional and tort theories, including defamation per se and intentional infliction of emotional distress. Ruling on various pretrial defense motions, the court rejected Badger's per se defamation claim but allowed the rest of his claims to proceed.²³

2. Private Employees

Creed v. Family Express Corp., 2009 WL 35237, No. 3:06-CV-465RM (N.D. Ind. Jan. 5, 2009).

The U.S. District Court in Indiana refused to find a cause of action under Title VII for discrimination against a transgendered employee, but nevertheless found that an employee going through the process of gender transition from male to female could proceed with claims that she was terminated for not meeting male gender stereotypes.²⁴ The court granted summary judgment to defendant, however, because the court found that the plaintiff had not presented sufficient evidence that her firing was based on sex stereotypes rather than on "what is, under today's law, a legitimate discriminatory purpose - because Ms. Creed was transgender."²⁵

B. Administrative Complaints

None obtainable.

C. Other Documented Examples of Discrimination

Indiana State Department

The State of Indiana denied employee Jana Cornell's request for bereavement leave so she could attend the funeral of her partner's father. Cornell sued the state,

²³ *Badger v. Greater Clark County Schools*, 2005 WL 645152 (S.D. Indiana Feb 15, 2005).

²⁴ *Creed v. Family Express Corp.*, 2007 WL 2265630, No. 3:06-CV-465RM (N.D. Ind. Aug. 3, 2007).

²⁵ *Creed v. Family Express Corp.*, 2009 WL 35237, No. 3:06-CV-465RM (N.D. Ind. Jan. 5, 2009).

represented by the Indiana Civil Liberties Union. Cornell argued that the exclusion of same-sex partners from the bereavement leave policy violated the state constitution's protection of equality. Her claim was rejected on the ground that the discrimination was based on marriage rather than sexual orientation. *Cornell v. Hamilton*, 791 N.E.2d 214 (Ind. App. 2003).

Carroll County Court System

In 2000, the Indiana Civil Liberties Union brought suit on behalf of an openly lesbian probation officer against two Carroll County judges in federal court for allegedly failing to promote the plaintiff because of her sexual orientation. Sheri Moore claimed that a circuit court judge and a superior court judge together decided against promoting her to chief probation officer. Moore said she requested the job and that the superior court judge told her that they would not promote her because she was a lesbian. Moore asserted, "[the judges] acted out of personal bias and their actions constitute a conspiracy to deprive [me] of equal protection." Moore also claimed that the superior court judge told her that she was embarrassing the court by dating a woman, and that he had asked other court employees about her sexual orientation and personal life. According to Moore, a man with no prior probation experience was promoted to the position.²⁶

An Indiana Public School

From 1997 through 2000, a gay public school principal and a gay public school teacher were subjected to a hostile work environment on account of their sexual orientation.²⁷

²⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 179 (2000 ed.).

²⁷ 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).

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

The Indiana sodomy law was repealed in 1977.²⁸

B. Housing & Public Accommodations Discrimination

The Indiana Fair Housing Act does not protect against discrimination based on sexual orientation or gender identity.²⁹ The city of Bloomington, however, does protect against discrimination in housing based on sexual orientation and gender identity in its Human Rights Ordinance.³⁰

C. Hate Crimes

In 2005, there were 11 reported hate crimes based on sexual orientation or gender identity in Indiana.³¹ The Indiana law against bias crimes includes sexual orientation motivated crimes but not crimes motivated by the victims gender identity.³² This legislation was passed in 2000 after several years of legislative resistance to establishing a hate crimes law within Indiana that included specific protection based on sexual identity.³³

The bill, when it finally passed, did not include a penalty enhancement for hate crimes.³⁴ Consequently, the effect of the bill is fairly superficial. During the legislature's consideration of the bill, one evangelical church expressed outrage at the thought of tougher penalties, describing it as "an attempt to give special protection to homosexuals and cross-dressers by stating that a crime against them is to be treated more seriously than a crime against a senior citizen, child, or mother."³⁵ Legislative history suggests

²⁸ See Ind. Code Ann § 35-42-4-2 (2004).

²⁹ Ind. Code Tit. 22, Art. 9.5.

³⁰ Bloomington Mun. Code Tit. 2, Chptr. 2.21 §2.21.020 (1983), available at http://bloomington.in.gov/code/_DATA/TITLE02/Chapter_2_21_DEPARTMENT_OF_LAW/2_21_020_Public_policy_and_pur.html.

³¹ Associated Press, *A look at Hate Crimes in Indiana*, AP ALERT, Mar. 23, 2007.

³² Ind. Code Ann § 10-13-3-1 (2004).

³³ Paul Becker et. al, *Hate Crime Legislation in Three Border States: Experiences in Indiana, Kentucky and Ohio*, 44 CRIM LAW BULL 4 (2008).

³⁴ *Id.*

³⁵ Editorial, *Indiana Behind on Hate Crimes Legislation*, UNIV. WIRE, Oct. 22, 2008.

that “the inclusion of sexual orientation [in the bill], given that there was no request for a sentencing enhancement,” made the inclusion “palatable to legislators.”³⁶ The provision including “sexual orientation” was not in the bill as it was introduced in the Indiana house, and was added later by the House Judiciary Committee.³⁷

Indiana is one of only nine states without a hate crime law that includes enhanced penalties for perpetrators of such crimes.³⁸

Senate Bill 91 was introduced in 2009, and would “provide for sentencing enhancements for those convicted of violent bigotry against a person based upon their color, creed, disability, national origin, race, religion, sexual orientation, gender identity, or sex.”³⁹ Press reports suggest that the inclusion of sexual orientation may make it difficult for the bill to pass.⁴⁰ It has not been adopted to date.

D. Education

A case is currently pending in federal court in Indiana against a school that refused to let a transgender (male to female) student, who had worn girls’ clothing throughout the school year, to wear a dress to the prom.⁴¹ The student argues that the school’s policy barring clothing that advertises sexual orientation, or indicates that a student’s gender is different from the student’s sex, violates the first amendment, the fourteenth amendment, and constitutes discrimination on the basis of gender in violation of Title IX.⁴²

There are no state statutes that protect against discrimination or harassment on the basis of sexual orientation or gender identity in education. Additionally, Representative Jeff Thompson of the Indiana House of Representatives had proposed an amendment in February of 2009 to House Bill 1187 (calling for cultural competency standards for teachers) to forbid the teaching of “harmful behaviors” including homosexuality.⁴³

A state senator has led efforts to prevent Indiana University from founding a support office for gay and lesbian students, stating that homosexuals are not a recognized minority in the state, and suggesting the University’s funding be cut by \$500,000 (the

³⁶ *Id.*

³⁷ IND. H.R. COMM. REP. H.B. 1011 (Reg. Sess. 2000).

³⁸ Associated Press, *State Urged to Act to Halt Hate Crime*, J. GAZETTE, Aug. 16, 2008, at 7C.

³⁹ Indiana Equality, Indiana Equality Issues Center, <http://www.indianaequality.org/View/Issues.aspx> (last visited Sept. 4, 2009).

⁴⁰ See Becker, *supra* note 34 at 4.

⁴¹ See *Logan v. Gary Cmty. Sch. Corp.*, 2008 WL 4411518, No. 2:07-CV-431-JVB (N.D. Ind. Sept. 25, 2008) (denying defendant’s motion to dismiss).

⁴² See *Judge Rebukes School in Trans Student Suit*, 365GAY, Feb. 2, 2009, <http://www.365gay.com/news/judge-rebukes-school-in-trans-student-suit>.

⁴³ See Press Release, Indiana Equality, *Call Your Representative Immediately and Urge Them to Reject Thompson Amendment* (Feb. 5, 2009), http://indianaequality.typepad.com/indiana_equality_blog/2009/02/call-your-representative-immediately-and-urge-them-to-reject-thompson-amendment.html (last visited Sept. 4, 2009).

budget for the office) unless plans were discontinued.⁴⁴ He has not been successful to date.⁴⁵

In 1997, the East Allen County School Board passed a resolution that stated, “This is a denunciation of activities such as drug use, premarital sex, violence, or gay and lesbian behavior, or the support of such activities.” The resolution was made in response to a statement by the National Education Association that encouraged training educators to deal with the issues of gay and lesbian students. The board member who raised the issue commented, “I think . . . this type of behavior in our classroom is contrary to our values in our community and that we should say we don’t approve of that. Homosexuality is contrary to the laws of nature, it’s morally unacceptable to our community, and we should teach our children as such.”⁴⁶

E. Health Care

In the absence of an express advance directive, Indiana law does not explicitly authorize one partner to provide medical consent on behalf of an incapacitated same sex partner.⁴⁷ An advance grant to a partner to make medical decisions may be set up through a living will that is signed by the declarant, dated, and witnessed by two other individuals.⁴⁸

F. Parenting

Indiana law permits any individual resident of the state or married couple to adopt, without mention of sexual orientation or gender.⁴⁹ In 2004, the Indiana Court of Appeals also held that a same-sex partner could petition to adopt his or her partner’s biological child.⁵⁰ Additionally, the Indiana Court of Appeals ruled in 2006 that an unmarried couple, of the same or opposite sex, may file a joint petition to adopt a child.⁵¹ Some jurisdictions go further and also allow a person to adopt the children that his or her same-sex partner has already adopted.⁵²

One member of the state legislature has repeatedly tried to prevent adoption by same-sex couples, invoking the “myth that they are more likely to molest children.”⁵³ Thus far, he has been unsuccessful.

⁴⁴Tribune Wires, *Legislator Opposes IU Office for Gays*, CHICAGO TRIBUNE, Oct. 7, 1994, at 3; Tribune Wires, *Student Groups Oppose Funds for Gay’s Office*, CHICAGO TRIBUNE, Sept. 22, 1994.

⁴⁵*Id.*

⁴⁶ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 62 (1997 ed.).

⁴⁷Ind. Code Ann § 16-36-1-5 (2004).

⁴⁸Ind. Code Ann § 16-36-4-10 (2004).

⁴⁹Ind. Code Ann § 31-19-2-3 (2004).

⁵⁰*In re K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004).

⁵¹*In re Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006).

⁵²*See In re M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003).

⁵³ Steve Sanders, *Hate Speech Can Stir Up Hateful Acts*, BALTIMORE SUN, Oct. 18, 1998 at 1C.

In custody disputes, Indiana courts do not typically consider the sexual orientation of a parent, unless it is actually shown to adversely harm the child. For instance, in *Downey v. Muffley*, the Court of Appeals held that there was no rational basis for prohibiting a mother from cohabitating with her same-sex partner while living with her children.⁵⁴ The court specifically stated that “[w]ithout evidence of behavior having an adverse effect upon the children, we find the trial court had no basis upon which to condition Mother’s custody of her sons. We therefore find the trial court abused its discretion, and reverse that portion of the custody order which imposes conditions upon the award of custody to Mother. ... Visitation and custody determinations must be determined with respect to the best interests of the children, not the sexual preferences of the parents.”⁵⁵

However, in *Marlow v. Marlow*, a father was granted visitation only under the condition that during periods of overnight visitation he could not have any non-related person in the house overnight and that he could not include the children in “any social, religious, or educational functions sponsored by or which otherwise promote the homosexual lifestyle.”⁵⁶ This holding was distinguished by *Muffley*, which justified *Marlow*’s holding with the argument that restricting the father’s activities was acceptable because there was documented adverse emotional harm his children suffered through being exposed to their father’s sexuality.⁵⁷

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Indiana law defines marriage as the union of a man and a woman.⁵⁸

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

1. Legal Profession

Through the beginning of 2009, the official Commentary to Canon 3 of the Code of Judicial Conduct required that “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors, and shall not permit staff, court officials and others subject to the judges discretion to do so.”⁵⁹ Effective January 1, 2009, Canon 3 was updated, and now more specifically prohibits a judge from discriminatory action toward someone based on their sexual orientation,⁶⁰ or holding membership in an organization that discriminates on the

⁵⁴*Downey v. Muffley*, 767 N.E.2d 1014 (Ind. Ct. Ap.. 2002).

⁵⁵*Id.* at 1018, 1020.

⁵⁶ *Marlow v. Marlow*, 702 N.E.2d 733, 735 (Ind. Ct. App. 1998).

⁵⁷ *Muffley*, 767 N.E.2d at 1019.

⁵⁸ Ind. Code Ann § 31-11-1-1.

⁵⁹ IND. CODE OF JUD. CONDUCT, Canon 3 (Commentary) (effective Jan. 1, 2009).

⁶⁰ IND. CODE OF JUD. CONDUCT, Canon 3 (Commentary to Rule 3.1) (effective Jan. 1, 2009).

basis of sexual orientation.⁶¹ It is also misconduct, under the Indiana Rules of Professional Conduct, for a lawyer to engage in conduct that manifests bias or prejudice based upon sexual orientation.⁶²

2. Insurance

In the insurance context, the Indiana Administrative Code prevents Multiple Employer Welfare Arrangement insurers from asking an individual about their sexual orientation when making a decision on whether to grant an individual coverage, and also prohibits viatical settlement providers from making settlements based on sexual orientation.⁶³ Furthermore, some insurers are prevented from using an individual's marital status, living arrangements, medical history, or any other classification to determine an applicant's sexual orientation, and also may not use an outside agency to do so.⁶⁴ For example, sexual orientation may not be used (or investigated by an insurer or insurance support organization) in the underwriting process or when determining coverage for AIDS.⁶⁵

⁶¹ IND. CODE OF JUD. CONDUCT, Canon 3 (Rule 3.6) (effective Jan. 1, 2009).

⁶² IND. RULES OF PROF'L CONDUCT, Rule 8.4: Misconduct (2003).

⁶³ 760 Ind. Admin. Code § 1-68-5 (Applications); § 1-61-10 (Misc.).

⁶⁴ See 760 Ind. Admin Code § 1-68-5 (Applications).

⁶⁵ 760 Ind. Admin. Code § 1-39-6 (Underwriting & Rating Determinations).