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

Title

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

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MEMORANDUM

From: Williams Institute

Date: September 2009

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

I. OVERVIEW

Utah has no state-wide statutes, administrative regulations or executive orders that protect its residents – including employees of state government – from discrimination based on sexual orientation or gender identity. A 1993 executive order that addressed sexual harassment in state government workplaces was worded in such a way that it covered same-sex harassment, but that order was rescinded in 2006 and replaced by an executive order that does not address the issue. Local ordinances in Salt Lake County and Salt Lake City protect municipal government workers in those locations from sexual orientation or gender identity discrimination.¹

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

- A bus driver employee of the Utah Transit Authority who was terminated for being transsexual. Despite her spotless employment record, the bus driver was fired after she began living as a woman and using women's restrooms while on the job. The Transit Authority claimed that they terminated her because they were concerned that her continued employment could expose them to liability from other employees based on Plaintiff's restroom usage; however, no complaints had been made regarding Plaintiff's restroom usage. The transit authority told her that she would be eligible for rehire only after undergoing sex reassignment surgery. The bus driver filed suit in federal court, but the court rejected her argument that Title VII sex discrimination claims could apply to transsexuals, construing the term "sex" to equate to biological sex at birth "and nothing more."² Etsitty v. Utah Trans. Auth., 502 F.3d 1215 (10th Cir. 2007).
- In 2007, a gay deputy sheriff was subjected to a hostile work environment based on his sexual orientation.³
- A tenured public school teacher and volleyball coach who was removed from her coaching position by the school after she admitted to a player, in response to a direct and unsolicited question, that she was gay. When the player refused to play on the team, claiming discomfort because of the teacher's sexual orientation, the

¹ See *infra* Section III.A. and Section III. B.8.

² Etsitty v. Utah Trans. Auth., 502 F.3d 1215 (10th Cir. 2007).

³ Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

teacher was removed from her coaching position and informed that if she discussed her sexual orientation with anyone else, whether on or off-duty, she would face disciplinary action or termination with regard to her teaching position. The teacher sued, alleging discrimination and violation of her First Amendment rights. The court held that the school district had no rationally related basis for Plaintiff's dismissal, because outdated prejudices and vague claims of disruption without any evidence of actual disruption (aside from one student) did not constitute a rational basis under the Equal Protection Clause. The court ordered the District to rescind its gag order, remove certain letters from the teacher's file, pay her the \$1,500 she would have been paid had she coached the team in the year in question, and appoint her to coach for the 1999-2000 school year. Following the federal court's decision, a local citizen's group calling itself "Citizens for Nebo School District for Moral and Legal Values" filed a lawsuit against the state seeking revocation of her teaching license on grounds of moral unfitness. The plaintiffs alleged, in part, that the teacher violated the state's sodomy law and the certification requirement that teachers and psychologists possess good moral character. The Utah Supreme Court threw the case out of court because the plaintiffs raised no justiciable controversy.⁴ Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998); Miller v. Weaver, 66 P.3d 592 (Apr. 4, 2003).

Outside the realm of employment, although the state has a hate crimes law, the statute does not list protected classes, a drafting decision reportedly made specifically to avoid including sexual orientation. Similarly, an amendment to the state's foster care and adoption law was motivated by a desire to avoid implicitly legitimating same-sex partnerships. And, although in *Lawrence v. Texas*,⁵ the U.S. Supreme Court struck down as unconstitutional the remaining state sodomy laws in the United States,⁶ the Utah legislature rejected an attempt to repeal its sodomy law in 2007.

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 *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Miller v. Weaver*, 66 P.3d 592 (Apr. 4, 2003).

⁵ 539 U.S. 558 (2003).

⁶ *Id.* at 578.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Utah's non-discrimination law, the "Utah Antidiscrimination Act"⁷ (the "Act"), passed in 1969, does not prohibit discrimination on the basis of gender identity and sexual orientation.⁸ The Act states that "race; color; sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion; national origin; or disability" cannot be used as basis for employment discrimination.⁹

Under the Utah State Personnel Management Act,¹⁰ the state, its officers, and employees are governed by the Act with respect to discriminatory and prohibited employment practices;¹¹ hence, it does not prohibit discrimination on the basis of gender identity and sexual orientation against state employees.

B. Attempts to Enact State Legislation

In 2008, Utah legislature considered amendments to the Act to prohibit discrimination based on sexual orientation and gender identity in House Bill 89.¹² The bill would have defined gender identity and sexual orientation, included gender identity and sexual orientation as a prohibited basis for employment discrimination, and prohibited quotas or preferences on the basis of sexual orientation or gender identity.¹³ The bill was defeated.

In 2009, the Utah legislature once again considered amending the Act to prohibit discrimination based on sexual orientation and gender identity. The proposed amendments, outlined in House Bill 267,¹⁴ would have defined sexual orientation and gender identity, and prohibited discrimination based on sexual orientation and gender identity in housing and employment.¹⁵ The bill was defeated.

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

1. Executive Orders

On May 28, 1985, Governor Norman H. Bangerter issued an executive order charging Utah State Division of Personnel Management with the responsibility for

⁷ UTAH CODE ANN. §§ 34A-5-101-108 (2008).

⁸ *Id.*

⁹ *Id.* at § 34A-5-106(1)(a)(i)(A)-(H).

¹⁰ *Id.* at § 67-19-1.

¹¹ *Id.* at § 67-19-4.

¹² Text of proposed bill, H.B. 89 (Utah 2008), available at <http://le.utah.gov/~2008/bills/hbillint/hb0089.pdf>.

¹³ *Id.*

¹⁴ Text of proposed bill, H.B. 267 (Utah 2008), available at <http://le.utah.gov/~2009/bills/hbillint/hb0267.pdf>.

¹⁵ *Id.*

“instituting and maintaining continued affirmative action for fair employment practices for the employees and perspective employees of the State of Utah.”¹⁶ Among various statutes listed in the executive order as authority is the Utah Fair Employment Practices Act of 1965, as amended in 1975 and 1979, that prohibits “employment discrimination on the basis of race, creed, color, sex, age, religion, ancestry or national origin, [and] handicap.”¹⁷ The executive order does not mention prohibition against discrimination based on gender identity or sexual orientation.

On July 25, 1986, Governor Norman H. Bangerter issued an executive order that established Utah’s Code of Fair Practices as the governing policy for every department of the executive branch of Utah’s government.¹⁸ The Code of Fair Practices consists of Articles I—XI and is outlined in the executive order. It prohibits discrimination when recruiting, promoting and discharging state personnel “on account of race, color, sex, religious creed, national origin, age or handicap.” The articles cover various areas where such discrimination is prohibited, including, but not limited to: (1) prohibiting inquiries on the application forms regarding race, color, sex, religious creed, national origin, age or handicap; (2) requiring training for jobs without regard to race, color, sex, religious creed, national origin, age or handicap; and (3) providing services regardless to individuals’ race, color, sex, religious creed, national origin, age or handicap.¹⁹ The executive order does not mention prohibition against discrimination based on gender identity or sexual orientation.

On March 17, 1993, Governor Michael O. Leavitt issued an executive order prohibiting sexual harassment “which is a form of sex discrimination, in any and every workplace in which state employees and employees of public and higher education are required to conduct business.”²⁰ Sexual harassment was defined, in part, as “unwanted behavior or communication of a sexual nature which adversely affects a person’s employment relationships and/or creates a hostile working environment” and which “may involve intimidation by persons of either sex against persons of the opposite or same sex.”²¹

On December 13, 2006, Governor Jon M. Huntsman, Jr. issued Executive Order 2006-0012 which superseded the 1993 executive order on sexual harassment order. The 2006 executive order prohibits unlawful harassment rather than sexual harassment and defines unlawful harassment, in part, as “a form of discrimination, [that] has been defined to be unwanted behavior or communication of a discriminatory nature which adversely affects a person’s employment relationships and/or creates a hostile working environment.”²² Unlawful harassment is also a “*discriminatory treatment based on race,*

¹⁶ Utah Exec. Order (May 28, 1985).

¹⁷ *Id.*

¹⁸ Utah Exec. Order (July 25, 1986).

¹⁹ *Id.*

²⁰ Division of Administrative Rules, Governors’ Executive Orders, available at <http://bit.ly/1fQgRu> (last visited Sept. 6, 2009)..

²¹ *Id.*(emphasis added).

²² Div. of Admin. Rules, Archive of Exec. Orders, available at <http://bit.ly/6CCj5> (last visited Sept. 6, 2009) (emphasis added).

*religion, national origin, color, sex, age, protected activity or disability.*²³ The new order, thus, eliminated references to same sex sexual harassment and explicitly excluded sexual orientation and gender identity from the list of characteristics upon which discrimination is prohibited.

The State of Utah Office of the Governor issued Domestic Violence Prevention Guidelines for State Employees (the “Guidelines”), updated January 2006, following the issuance on April 28, 2005, of an executive order by Governor Jon M. Huntsman Jr. that prohibits violence against women in the workplace. The Guidelines define domestic violence/abuse as “violent conduct or coercive tactics perpetrated against a cohabitant.”²⁴ Cohabitants include individuals who were “living as if a spouse of the other party” and those who “reside[] or ha[ve] resided in the same residence as the other party.”²⁵ Training, counseling and work adjustments are available to all employees regardless of their sexual orientation.²⁶ See below for more information on executive orders.

2. State Government Personnel Regulations

Utah Administrative Code is Utah’s equivalent to the Code of Federal Regulations. Title R606 addresses antidiscrimination. However, because sexual orientation and gender identity are not protected by Utah’s antidiscrimination statute, they are also not addressed in Utah’s Administrative Code. For example, Rule R606-2 “Pre-Employment Inquiry Guide” states that “Any inquiry is improper which ... is designed to elicit information as to Race, Color, Sex, Age, Religion, National Origin, or Disability. The prime consideration for any job is the ability to perform it.”²⁷

However, Utah Department of Agriculture and Food stated in its Equal Opportunity Employment and Services Plan, revised September 26, 2005, that it “prohibits discrimination in all its programs and activities on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, and marital or family status.”²⁸

²³ *Id.* (emphasis added).

²⁴ UTAH EMPLOYEE HANDBOOK, Domestic Violence Prevention Guidelines for State Employees, <http://bit.ly/tJqFQ> (last visited Sept. 6, 2009)..

²⁵ *Id.*

²⁶ *Id.*

²⁷ UTAH ADMIN. CODE R. 606-2-2 (2008).

²⁸ Utah Dep’t of Agriculture & Food Equal Employment Opportunity Statement, <http://ag.utah.gov/divisions/admin/documents/EEO-UDAF.pdf> (last visited Sept. 6, 2009).

3. **Attorney General Opinions**

None.

D. **Local Legislation**

1. **South Salt Lake City:** A city in Salt Lake County, with the population of 22,038 at the 2000 census.

(a) **Employee Code of Conduct**

“[E]mployees should not use harassing, libelous, threatening, abusive, foul, or offensive or obscene speech, conduct, or otherwise. Among those things which are considered offensive are any verbal or nonverbal communications which contain sexual implications, racial slurs, gender-specific comments, or *any other comment that offensively addresses someone’s age, sexual orientation, religious or political beliefs, national origin, or disability.*”²⁹

2. **Salt Lake City**

In 2005, Salt Lake City enacted an ordinance establishing the Human Rights Commission.³⁰ Among the many duties of the commission is to advise the mayor on various matters regarding discrimination with respect to the commission’s use educational resources on issues of discrimination and equal treatment, review of complaints of discrimination involving city departments or city services, review legislation, gather factual data, conduct research, etc.³¹ Discrimination is defined as

“a practice in employment, immigration, housing, public safety, public transportation or in other city departments or services that unfairly segregates or separates on the grounds of age, ancestry, color, disability, gender, national origin, marital status, medical condition, physical limitation, race, religion, or sexual orientation....”³²

According to the 2009 Discrimination Report (the “Report”) issued by this Salt Lake City Human Rights Commission (the “Commission”), the Utah Antidiscrimination and Labor Division (the “UALD”) no longer keeps data on sexual orientation and gender identity discrimination complaints.³³ When statistics were kept, between June 2007 and September 2008, the data suggested an average of three sexual orientation and gender

²⁹ S. SALT LAKE CITY MUNI. CODE, Ch. 2.60.030(E)(1) (emphasis added), *available at* <http://www.municode.com/Resources/gateway.asp?pid=16602&sid=44>.

³⁰ SALT LAKE CITY CODE § 2.78.030, *available at* <http://www.slcgov.com/HRcomm/ordinance.htm>.

³¹ SALT LAKE CITY CODE § 2.78.110.

³² SALT LAKE CITY CODE § 2.78.020(E).

³³ SALT LAKE CITY HUM. RTS. COMM’N DISCRIMINATION REP. 1 (2009).

identity employment discrimination complaints per month.³⁴ The Report also found that the forms of discrimination currently experienced by Salt Lake City's residents includes heterosexism.³⁵ Individuals present at the focus groups conducted by the Commission reported facing discrimination in both housing and employment, including eight people who believed they were terminated from their jobs when their sexual orientation was discovered.³⁶

On April 5, 2000, Mayor Ross C. "Rocky" Anderson adopted an executive order regarding non-discrimination in Salt Lake City employment that also prohibited discrimination based on sexual orientation. The executive order has since been amended, but has retained the prohibition to discriminate in City employment based on sexual orientation. The current language reads as follows, " Salt Lake City Corporation employees shall not discriminate against an otherwise qualified employee or applicant based on race, color, national origin, sex, religion, age, honorable or general service in the United States uniformed services, sexual orientation, or disability."³⁷ The City also extends certain benefits to the City's employees' domestic partners.³⁸

3. **County of Salt Lake:** County seat in Salt Lake City. As of 2007, the population in Salt Lake County was estimated at 1,009,518.

(a) **Administrative organization**

*"Discrimination in Salt Lake County government services based on age, marital status, color, disability, national origin, sex, sexual orientation, race or religion is prohibited. Individuals shall be assured of equal access, opportunity and protection in all areas of Salt Lake County government services. This section is not intended to expand the services of county government beyond those required by state or federal law."*³⁹

(b) **Personnel Management**

"Discrimination in Salt Lake County government employment based on age, marital status, color, disability, national origin, sex, sexual orientation, race or religion is prohibited. Individuals shall be assured of equal access, opportunity and protection in all areas of Salt Lake County government employment opportunities. Nothing in this section is intended to require additional employee benefits,

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 32.

³⁷ SALT LAKE CITY CODE § 2.53.035(A).

³⁸ SALT LAKE CITY CODE § 2.52.100.

³⁹ SALT LAKE COUNTY CODE OF ORD. § 2.08.110 (emphasis added), available at <http://www.municode.com/Resources/gateway.asp?pid=16602&sid=44>.

including benefits related to family, marital, cohabitant or dependent status unless provided for by state or federal law or contract.”⁴⁰

E. Occupational Licensing Requirements

1. Title 58 (“Occupations and Professions”)

Within its Department of Commerce, Utah created the Division of Occupational and Professional Licensing (the “Division”) that administers and enforces all licensing laws of Utah Code Title 58 “Occupations and Professions.”⁴¹ Currently, the Division issues licenses in approximately 60 categories of licensure, with most categories including several individual license classifications.⁴² The Division is assisted by approximately 60 professional boards and commissions that advise the Division by recommending, assisting and supporting the Division in taking appropriate action in licensure and investigative matters.⁴³ Title R156 of the Utah Administrative Code contains the corresponding to Utah Code Title 58 licensing act rules. The Division may “refuse to issue a license ... renew or ... revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee [when] ... the applicant or licensee has engaged in unprofessional conduct.”⁴⁴ The Division may also issue cease and desist orders to those who may be disciplined for unlawful or unprofessional conduct.⁴⁵ Of relevance is the umbrella definition of “unprofessional conduct” which references “probation[s] with respect to a crime of moral

⁴⁰ SALT LAKE COUNTY CODE OF ORD. § 2.80.140 (emphasis added), *available at* <http://www.municode.com/Resources/gateway.asp?pid=16602&sid=44>.

⁴¹ UTAH CODE ANN. § 58-1-103 (2008).

⁴² The Division issues licenses for the following occupations and professions promulgated by the appropriate acts under Title 58: Architects Licensing Act; Podiatric Physician Licensing Act; Funeral Services Licensing Act; Barber, Cosmetologist/Barber, Esthetician, Electrologist, and Nail Technician Licensing Act; Health Care Providers Immunity from Liability Act; Health Facility Administrator Act; Utah Optometry Practice Act; Pharmacy Practice Act; Environmental Health Scientist Act; Professional Engineers and Professional Land Surveyors Licensing Act; Physical Therapist Practice Act; Certified Public Accountant Licensing Act; Veterinary Practice Act; Nurse Practice Act; Nurse Licensure Compact; Advanced Practice Registered Nurse Compact; Utah Controlled Substances Act; Utah Drug Paraphernalia Act; Imitation Controlled Substances Act; Utah Controlled Substance Precursor Act; Clandestine Drug Lab Act; Drug Dealer's Liability Act; Alternative Dispute Resolution Providers Certification Act; Recreational Therapy Practice Act; Athletic Trainer Licensing Act; Speech-language Pathology and Audiology Licensing Act; Occupational Therapy Practice Act; Nurse Midwife Practice Act; Hearing Instrument Specialist Licensing Act; Massage Therapy Practice Act; Dietitian Certification Act; Private Probation Provider Licensing Act; Landscape Architects Licensing Act; Radiology Technologist and Radiology Practical Technician Licensing Act; Utah Construction Trades Licensing Act; Utah Uniform Building Standards Act; Respiratory Care Practices Act; Mental Health Professional Practice Act; Psychologist Licensing Act; Security Personnel Licensing Act; Deception Detection Examiners Licensing Act; Utah Medical Practice Act; Physicians Education Fund; Utah Osteopathic Medical Practice Act; Dentist and Dental Hygienist Practice Act; Physician Assistant Act; Naturopathic Physician Practice Act; Acupuncture Licensing Act; Chiropractic Physician Practice Act; Certified Court Reporters Licensing Act; Genetic Counselors Licensing Act; Professional Geologist Licensing Act; Direct-entry Midwife Act.

⁴³ General Information About the Utah Division of Occupational and Professional Licensing, <http://www.dopl.utah.gov/info.html> (last visited Sept. 3, 2009).

⁴⁴ UTAH CODE ANN. § 58-1-401(2)(a) (2008).

⁴⁵ § 58-1-401(4)(a).

turpitude.”⁴⁶ Moreover, most of the occupations and professions that must be licensed under Title 58 also contain language in their appropriate acts requiring that the applicant must “be of good moral character,” “show evidence of good moral character,” “be of good moral character in that the applicant has not been convicted of ... a misdemeanor involving moral turpitude,” “provide satisfactory evidence of good moral character.”

2. Private Investigators

Title 53 governs licensure of private investigators by the Private Investigator Hearing and Licensure Board. Qualified individuals must be of “good moral character” and “may not have been ... convicted of an act involving moral turpitude.”⁴⁷

3. Educators

Title 53A governs licensure of the educators by the Educator Licensing and Professional Practices Act. The Utah State Board of Education may refuse to issue a license to an individual who “has been found ... to have exhibited behavior ... which would, had the person been an educator, have been considered to be immoral....”⁴⁸ To avoid licensing discipline, an educator who receives a license must be role models of civic and societal responsibility. This duty requires them to “be forthcoming with accurate and complete information to appropriate authorities regarding known educator misconduct which could adversely impact performance of professional responsibilities, *including role model responsibilities*, by himself or others;” they also cannot “be convicted of *any illegal sexual conduct*, including offenses that are plea bargained to lesser offenses from an initial sexual offense.”⁴⁹ However, educators may be disciplined for “exclud[ing] a student from participating in any program, or deny or grant any benefit to any student on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, physical or mental conditions, family, social, or cultural background, or *sexual orientation*,” and cannot “engage in conduct that would encourage a student(s) to develop a prejudice on these grounds or any other, consistent with the law.”⁵⁰

4. Attorneys

Utah State Bar oversees admissions to the practice law. Utah’s rules governing admission to the bar require that applicants be of “good moral character”⁵¹ and “conduct should conform to the requirements of the law, both in professional service to clients and in the attorney’s business *and personal affairs*.”⁵²

⁴⁶ § 58-1-501(2)(c).

⁴⁷ § 53-9-108(1)(a); (b)(v).

⁴⁸ § 53A-6-405(1).

⁴⁹ UTAH ADMIN. CODE § 277-515-3(C) (2008)(emphasis added).

⁵⁰ § 277-515-3(D)(1).

⁵¹ UTAH S. CT. RULES OF PROF’L PRACTICE, Rule 14-703(a)(4).

⁵² Rule 14-708(a).

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

A. State & Local Government Employees

Etsitty v. Utah Trans. Auth., 502 F.3d 1215 (10th Cir. 2007).

In *Etsitty v. Utah Transit Authority*, the Court of Appeals for the Tenth Circuit held that Krystal Etsitty, a transsexual bus driver, did not suffer unlawful discrimination when she was fired for using the women's restroom.

Despite her spotless employment record, Plaintiff, an employee of the Utah Transit Authority and a male-to-female transsexual, was fired after she began living as a woman and using women's restrooms while on the job. The Transit Authority claimed that they terminated her because they were concerned that her continued employment could expose them to liability from other employees based on Plaintiff's restroom usage; however, no complaints had been made regarding Plaintiff's restroom usage. The transit authority told her that she would be eligible for rehire only after undergoing sex reassignment surgery.

Etsitty filed suit in federal court, claiming that she was protected by Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, including nonconformity to sex stereotypes. On its motion for summary judgment, the UTA argued that transsexuality is not a protected classification under Title VII, that a sexual-stereotyping argument is not available to transsexuals, and in the alternative, that Etsitty had failed to raise a genuine issue of material fact as to whether supervisors had terminated her employment for failing to conform to male behavior. The court rejected Plaintiff's argument that Title VII sex discrimination claims could apply to transsexuals, construing the term "sex" in Title VII to equate to biological sex at birth "and nothing more" and dismissed her action, finding there was no evidence that the Transit Authority had discharged her for any reason other than the stated concerns regarding restroom usage.⁵³

Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998); Miller v. Weaver, 66 P.3d 592 (Apr. 4, 2003).

Plaintiff, a tenured public school teacher and volleyball coach, was removed from her coaching position by the school after she admitted to a player, in response to a direct and unsolicited question, that she was gay.⁵⁴ When the player refused to play on the team, claiming discomfort because of Plaintiff's sexual orientation, Plaintiff was removed from her coaching position and informed that if she discussed her sexual orientation with anyone else, whether on or off-duty, she would face disciplinary action or termination with regard to her teaching position.⁵⁵

⁵³ *Etsitty*, 502 F.3d at 1215.

⁵⁴ *Weaver*, 29 F. Supp. 2d at 1279.

⁵⁵ *Id.*

Plaintiff sued, alleging discrimination and violation of her First Amendment rights. The district court entered judgment for Plaintiff and ordered monetary damages and reinstatement. The court held that the school district had no rationally related basis for Plaintiff's dismissal, because outdated prejudices and vague claims of disruption without any evidence of actual disruption (aside from one student) did not constitute a rational basis under the Equal Protection Clause. The court ordered the District to rescind its gag order, remove certain letters from Weaver's file, pay her the \$1,500 she would have been paid had she coached the team in the year in question, and appoint her to coach for the 1999-2000 school year.

Following the federal court's decision, a local citizen's group calling itself "Citizens for Nebo School District for Moral and Legal Values" filed a lawsuit against the state seeking revocation of Weaver's teaching license on grounds of moral unfitness.

The plaintiffs alleged, in part, that the teacher violated the state's sodomy law and the certification requirement that teachers and psychologists possess good moral character. The suit alleged that the education department and other state agencies acted illegally by failing to suspend her certification and require the school district to discharge her. The Utah Supreme Court threw the case out of court because the plaintiffs raised no justiciable controversy.⁵⁶

B. Private Employees

Johnson v. Cmty. Nursing Serv., 932 F. Supp. 269 (D. Utah 1996).

In *Johnson v. Community Nursing Services*,⁵⁷ a female former employee brought action against former employer and female supervisor on the basis of sex discrimination and sexual harassment in violation of Title VII, as well as constructive discharge and defamation.⁵⁸ Plaintiff alleged that the former supervisor, who is a female and openly homosexual, became increasingly hostile after plaintiff ended her relationship with a woman and started dating a man.⁵⁹ The District Court ruled that a cause of action exists under Title VII for victims of sexual harassment by a member of the same sex.⁶⁰

C. Other Documented Examples of Discrimination

Municipal Sheriff's Department

In 2007, a gay deputy sheriff was subjected to a hostile work environment based on his sexual orientation.⁶¹

⁵⁶ *Id.*

⁵⁷ 932 F. Supp. 269 (D. Utah 1996).

⁵⁸ *Id.* at 271.

⁵⁹ *Id.* at 270.

⁶⁰ *Id.* at 274.

⁶¹ 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 Utah sodomy law⁶² was rendered unconstitutional under the U. S. Supreme Court's decision in *Lawrence v. Texas*.⁶³ Nevertheless, the sodomy law has never been repealed by the Utah legislature.

In 1997, an amendment to the sodomy law was proposed, decriminalizing sodomy between consenting married persons, but it failed.⁶⁴ In 2007, another attempt to decriminalize consensual sodomy, this time as just between adults or "persons at least 14 years of age, but younger than 18 years of age," also failed.⁶⁵ The 2007 amendment was sponsored by Senator Scott McCoy, who said it was "bad form when we have unconstitutional laws on the books," which may be misused by prosecutors and judges.⁶⁶ However, according to Senate Majority Leader Curt Bramble, "The Senate caucus unanimously decided that sodomy should not be legal in the state of Utah."⁶⁷

B. Housing & Public Accommodations Discrimination

Utah Fair Housing Act⁶⁸ does not prohibit discriminatory housing practice based on sexual orientation and gender identity, excluding such from the list of protected classes.⁶⁹ The Antidiscrimination & Labor Division's Fair Housing administers and enforces Utah's Fair Housing Act. Fair Housing receives, mediates (for early resolution), investigates, and resolves charges of housing discrimination. Utah Fair Housing Administrative Rules are outlined in Rule R608-1 "Utah Fair Housing Rules" in Utah Administrative Code.⁷⁰ They do not, however, provide any information on discrimination based on sexual orientation and gender identity.

⁶² *Id.* at. § 76-5-403.

⁶³ 539 U.S. 558 (2003).

⁶⁴ Text of the proposed bill, H.B. 134 (Utah 1997), available at <http://www.le.state.ut.us/asp/billsintro/SubResults.asp?Listbox4=02126u>; see SODOMY LAWS, Nov. 2007, available at <http://www.glapn.org/sodomylaws/usa/utah/utah.htm>.

⁶⁵ Text of the proposed bill, S.B. 169 (Utah 2007), available at <http://le.utah.gov/~2007/bills/sbillint/sb0169.pdf>.

⁶⁶ Arthur S. Leonard, LESBIAN & GAY L. NOTES (Mar. 2007).

⁶⁷ *Id.*

⁶⁸ UTAH CODE ANN. § 57-21-1 (2008).

⁶⁹ § 57-21-5(1).

⁷⁰ UTAH ADMIN. CODE REG. § 608-1-1, *et seq.* (2008).

Utah Housing Corporation, a continuation of the Utah Housing Finance Agency, assists low or moderate income persons to with receiving housing.⁷¹ The agency does not list classes of protected persons against whom it cannot discriminate but its policy is to “make every effort to make housing available in rural, inner city, and other areas experiencing difficulty in securing construction and mortgage loans, and to make decent, safe, and sanitary housing available to low income persons and families.”⁷²

C. Hate Crimes

The Utah hate crime law⁷³ does not enumerate classes of victims that it is designed to protect, and, as such, it does not specifically address gender identity or sexual orientation.⁷⁴ Rather, the Utah hate crime law punishes an offender for violating a victim’s constitutional or civil right.⁷⁵ A review of the legislative history indicates that the law does not list the protected classes because of the legislature’s opposition to include sexual orientation on that list of protected classes.⁷⁶ A recent decision by the Tenth Circuit Court of Appeals upheld the constitutionality of the Utah hate crime law.⁷⁷ Since the passage of the hate crime bill in 1992, there have been several amendments, but none introduced the language regarding sexual orientation. In 1999, an attempt to introduce sexual orientation and gender to a statute on criminal identification and crime reporting and the Utah hate crime law, failed.⁷⁸ In 2001, attempts to repeal and reenact the Utah hate crime law to punish an offender who selects the victim primarily because of bias or prejudice against a group have also failed.⁷⁹

In 2006, the Utah hate crime law was amended to add Section 76-3-203.4. This provision mandates that sentencing judges consider any public harm caused by offenses as an aggravating factor,

“including the degree to which the offense is likely to incite community unrest or cause members of the community to reasonably fear for their physical safety or to freely exercise or enjoy any right secured by the [Utah] Constitution or laws ... or by the [U.S.] Constitution or laws....”⁸⁰

D. Education

⁷¹ UTAH CODE ANN. § 9-4-910.

⁷² § 9-4-902(4)(b).

⁷³ UTAH CODE ANN. §§ 76-3-203.3 and 53-10-202 (2008).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, UTAH L. REV. 209 (1994).

⁷⁷ See *Ward v. Utah*, 398 F.3d 1239 (10th Cir. 2005).

⁷⁸ Text of proposed bill, S.B. 34 (Utah 1999), available at <http://www.le.state.ut.us/~1999/bills/sbillint/SB0034S1.pdf>.

⁷⁹ Text of the proposed bill, S.B. 37 (Utah 2001), available at <http://www.le.state.ut.us/~2001/bills/sbillamd/SB0037.pdf>; text of proposed bill, H.B. 50 (Utah 2001), available at <http://www.le.state.ut.us/~2001/bills/hbillint/HB0050.pdf>.

⁸⁰ UTAH CODE ANN. § 76-3-203.4 (2008).

Utah's safe schools law does not specifically address gender identity and sexual orientation.⁸¹ The law simply states that every student in the public schools should be afforded an opportunity to learn in a safe environment, conducive to the learning process and free from unnecessary disruptions.⁸²

Utah Administrative Code provides interpretations of the Utah Code in various areas. For example, it contains Rule R277-112 "Prohibiting Discrimination in the Public Schools." The Administrative Code, however, does not broaden the scope of the Code's protected classes against discrimination and, as such, does not include sexual orientation and gender identity as a protected class in its rules.⁸³

In 2007, Utah legislature enacted a House Bill 236 titled the "Student Clubs Amendments,"⁸⁴ pursuant to which students are required to obtain written parental or guardian consent to join clubs.⁸⁵ Under that law, a school administration may limit or deny authorization to clubs for several reasons, including to "maintain the boundaries of socially appropriate behavior."⁸⁶ The State Board of Education and local boards of education are charged with adopting rules establishing procedures for implementing the Student Clubs Act in a way that "ensure protection of individual rights against excessive and unreasonable intrusion."⁸⁷ Under the current law, gay-straight alliances remain an option for Utah students, although the original version of the bill sought to bar such clubs.

In 2007, Equality Utah drafted a bill to amend Utah's school safety law.⁸⁸ The proposed legislature included gender identity and sexual orientation among the motivating factors for harassment or intimidation and required schools to report instances of harassment and intimidation, including the reason for the incident and alleged statements made by the alleged perpetrator, as well as the steps the school had taken following the incident.⁸⁹ The bill was defeated.

In 2006, House Bill 393 was introduced that would have prevented organizations of gay clubs within Utah's public education system.⁹⁰ The bill strove to deny authorization or school building use to a club whose activities "would as a substantial, material, or significant part of their conduct or means of expression ... involve human

⁸¹ See UTAH CODE ANN. § 53A-11-901 (2008).

⁸² § 53A-11-901(1).

⁸³ UTAH ADMIN. CODE REG. 277-112-3 (2008).

⁸⁴ Text of the bill, H.B. 236 (Utah 2007), <http://le.utah.gov/~2007/bills/hbillenr/hb0236.pdf>; see also UTAH CODE ANN. § 53A-11-1201 (2008).

⁸⁵ UTAH CODE ANN. § 53A-11-1210(1) (2008).

⁸⁶ § 53A-11-1206(1)(a)(v).

⁸⁷ § 53A-11-1305.

⁸⁸ Text of the proposed bill, H.B. 186 (Utah 2007), available at <http://le.utah.gov/~2007/bills/hbillamd/hb0186.pdf>.

⁸⁹ *Id.*

⁹⁰ Text of the proposed bill, H.B. 393 (Utah 2006), available at <http://le.utah.gov/~2007/bills/hbillenr/hb0236.pdf>.

sexuality.”⁹¹ “Involve human sexuality” was partly defined as “advocating or engaging in sexual activity outside of legally recognized marriage or forbidden by state law.”⁹² The bill was defeated but was reintroduced the following year in altered form, in 2007, as H.B. 236 (“Student Clubs Amendments”), which was signed into law.

E. Health Care

Under the Advance Health Care Directive Act, an individual can appoint a health care agent who will make health care decisions on behalf of the individual when that individual loses the capacity to make own decisions.⁹³ The law allows same-sex partners to be designated as health care agents and doctors must follow their decisions. Further, if there is no official appointment of a health care agent and no family members are available to act as surrogate decision makers, a same-sex partner can make health care decisions.⁹⁴

F. Gender Identity

Utah amends birth certificates for people who have a sex change.⁹⁵ A person undergoing a sex change approved by an order of a Utah district court or a court of competent jurisdiction of another state or a Canadian province may file a certified copy of the order with the Utah state registrar along with an application and the required fee.⁹⁶ The state registrar registers a complete application and notes the fact of the amendment on the original birth certificate.⁹⁷ The amendment is then registered with and becomes a part of the original birth certificate.⁹⁸

G. Parenting

1. Custody & Visitation

Utah law lists several factors the court will consider to make its decision on what is in the best interests of a child whose parents are divorcing, including “the past conduct and demonstrated moral standards of each of the parties.”⁹⁹ Utah courts have considered a parent’s sexual orientation to deny custody and visitation to render gay and lesbian parents.

In 2007, a bill was introduced to define the common law doctrine of in loco parentis and to allow a court of competent jurisdiction under certain circumstances to

⁹¹*Id.*

⁹²*Id.*

⁹³ Text of bill, S.B. 75 (Utah 2007), available at <http://le.utah.gov/~2007/bills/sbillenr/sb0075.pdf>; see also UTAH CODE ANN. § 75-2a-107.

⁹⁴ UTAH CODE ANN. § 75-2a-108(2) (2008).

⁹⁵ § 26-2-11.

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹ § 30-3-10(1)(a)(i).

prevent termination of an in loco parentis relationship by a parent.¹⁰⁰ However, the bill was abandoned following the Utah Supreme Court decision in *Jones v. Barlow*¹⁰¹.

In 1996, the Utah Supreme Court reversed an appellate court's ruling that awarded custody of a minor child to a lesbian mother.¹⁰² The Supreme Court agreed with the district court that analyzed several factors, including parental bonding, religious compatibility and the amount of time that each parent could devote to the child, that it would be in the best interests of the child to award the physical custody to the straight father.¹⁰³ The district court found that the mere fact that the mother is a lesbian does not make her an unfit parent but questioned the morality of the lesbian mother who while still married to her husband had cohabited with a (female) partner.¹⁰⁴

In *Jones v. Barlow*,¹⁰⁵ the Supreme Court denied standing to a former same-sex partner of the child's biological mother to seek visitation because in loco parentis doctrine did not apply to the former domestic partner.¹⁰⁶ In this case, a same-sex female couple decided to have a child and one of the women was artificially inseminated.¹⁰⁷ For several years the couple jointly raised the child until they ended their relationship and the biological mother and the child moved out.¹⁰⁸ In *Jones*, the Utah Supreme Court denied same-sex partners parental status.

2. Foster Placement & Adoption

Under Utah law, a minor child may be adopted only by a legally married couple or a single adult who is not "cohabiting in a relationship that is not legally valid and binding marriage under ... [Utah] laws..."¹⁰⁹ Prior to the enactment of the current law, adoption was permitted by any adult person.¹¹⁰ Current law also states that "it is not in a child's best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."¹¹¹

Same-sex couples, as well as unmarried heterosexual couples, are also ineligible to foster children in Utah's state custody pursuant to the Board of Child and Family

¹⁰⁰ Text of the proposed bill, S.B. 248 (Utah 2007), available at <http://le.utah.gov/~2007/bills/sbillamd/sb0248s01.pdf>.

¹⁰¹ 154 P.3d 808 (2007).

¹⁰² *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996).

¹⁰³ *Id.* at 1212-13.

¹⁰⁴ *Id.* at 1213; 1217-18.

¹⁰⁵ *Jones*, 154 P.3d at 808.

¹⁰⁶ *Id.* at 815.

¹⁰⁷ *Id.* at 810.

¹⁰⁸ *Id.*

¹⁰⁹ UTAH CODE ANN. § 78B-6-117(2)-(3) (2008).

¹¹⁰ *Id.*

¹¹¹ *Id.*

Services rules and policies.¹¹² As with adoptions, only single individuals and legally married couples are eligible to serve as foster parents.¹¹³

One of the reasons that Utah amended its law on foster care and adoption was the concern that “permitting gay and lesbian ‘partnership’ adoptions would open the door for legalizing same-sex marriage”¹¹⁴ One legislator stated that “‘we’ve got to make it clear we do not approve of homosexual marriage in this state.’” during consideration of the bill.¹¹⁵

Same-sex couples cannot become parties to a gestational agreement with a prospective gestational mother to become parents because the prospective parents must be married.¹¹⁶

In 2008, the Utah legislature introduced a House Bill 318,¹¹⁷ which would have lifted the state’s ban on adoption of children by individuals who are cohabiting in a sexual relationship but are not married under Utah’s laws.¹¹⁸ The bill was defeated.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

Utah prohibits and voids marriages between persons of the same sex.¹¹⁹ Utah also does not recognize marriages of the same sex persons obtained in other jurisdictions¹²⁰ In 2004, Utah amended its state constitution to define marriage as “the legal union between a man and a woman. [] No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”¹²¹

By Salt Lake City Ordinance No. 16 of 2008, Salt Lake City offers its residents who share a primary residence and rely on one another as dependents, including same-sex couples, to register with the mutual commitment registry.¹²² The mutual commitment registry is a tool that local employers can use to decide whether they want to offer company benefits. Registration provides Salt Lake City residents visitation rights to Salt

¹¹² See Utah Dep’t of Human Services Website FAQ, available at <http://www.hsdcfs.utah.gov/faq.asp> (last visited Sept. 3, 2009).

¹¹³ UTAH CODE ANN. § 62A-4a-602(5)(b) (2008).

¹¹⁴ Scott H. Clark, *Married Persons Favored as Adoptive Parents: The Utah Perspective*, 5 J.L. & FAM. STUD. 203, 219 (2003).

¹¹⁵ *Id.* at 219n.74.

¹¹⁶ UTAH CODE ANN. § 78B-15-801(3) (2008).

¹¹⁷ Text of the proposed bill, H.B. 318 (Utah 2008), available at <http://le.utah.gov/~2008/bills/hbillint/hb0318.pdf>.

¹¹⁸ *Id.*

¹¹⁹ UTAH CODE ANN. § 30-1-2(5) (2008).

¹²⁰ § 30-1-4.1.

¹²¹ UTAH CONST. Art. I, § 29 (2008).

¹²² SALT LAKE CITY CODE, Chapter 10.03, available at

http://www.slccgov.com/recorder/MCregistry/MC_ordinance.pdf; see also Salt Lake City Recorder’s Office Homepage, <http://www.slccgov.com/Recorder/MCregistry.htm> (last visited Sept. 3, 2009).

Lake City health care facilities and access to all facilities owned and operated by the city in the same way as if the same-sex couple were spouses.¹²³

Same-sex cohabitation terminates alimony rights. In 2002, in *Garcia v. Garcia*,¹²⁴ the Utah Court of Appeals ruled that a divorced woman's right to alimony terminated when she began living with another woman in a sexual relationship.¹²⁵ According to Utah divorce law, a party that pays alimony can stop doing so after the payor establishes that the "former spouse is cohabiting with another person."¹²⁶ The appellate court reasoned that because the statute does not require that the cohabitant be of the opposite sex and merely states "with another person," it did not matter that the payee cohabited with a member of the same sex.¹²⁷

2. Benefits

(a) Wrongful Death

Currently, under Utah law, domestic partners have no standing to sue when their partner dies due to malpractice or negligence.¹²⁸

In 2008, SB 73¹²⁹ attempted to introduce amendments to the definition of heirs once again to include among the individuals able to sue those who are designated by the decedent as the sole wrongful death heir and had a "mutual supportive and dependent relationship with the decedent."¹³⁰ The bill outlined several requirements a person would have to meet to be considered a wrongful death designee, one of which was "cohabiting with the decedent ... for a period of at least five years."¹³¹ The bill was defeated.

In 2007, SB 58 introduced amendments to the definition of heirs who are eligible to sue including individuals who, at the time of the decedent's death, resided with him or her in a "mutually dependent relationship" and "is designated as a wrongful death heir in decedent's will, trust, or other notarized written directive."¹³² The bill died in the Senate Rules Committee.

(a) Domestic Violence

¹²³ *Id.*

¹²⁴ 60 P.3d 1174 (Utah Ct. App. 2002).

¹²⁵ *Id.* at 1176.

¹²⁶ UTAH CODE ANN. § 30-3-5(10) (2008).

¹²⁷ *Garcia*, 60 P.3d at 1174, 1176.

¹²⁸ UTAH CODE ANN. § 78B-3-105 (2008).

¹²⁹ Text of proposed bill, S.B. 73 (Utah 2008), available at <http://le.utah.gov/~2008/bills/sbillint/sb0073.pdf>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Text of proposed bill, S.B. 58 (Utah 2007), available at <http://le.utah.gov/~2007/bills/sbillint/sb0058.pdf>.

Currently, the Utah law allows cohabitants who have been subjected to abuse or domestic violence to file restraining orders regardless of the gender.¹³³ The definition of cohabitant includes individuals who reside or have resided in the same residence.¹³⁴

In 2007, House Bill 28 was introduced to add dating partners as individuals who can file restraining orders regardless of the gender.¹³⁵ The bill was defeated.

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

The 2009 General Session considered several important issues to the LGBT community, which are outlined in five bills known as the Common Ground Initiative.¹³⁶ The issues included protection against discrimination in housing and employment related to sexual orientation and gender identity,¹³⁷ extension of the right to sue to financially dependent members of non-nuclear families in the event of a wrongful death,¹³⁸ coverage for domestic partners in health insurance plans, statewide domestic partnership registry that will help determine insurance eligibility, rights of inheritance and hospital visitation rights, as well as a bill that would allow voters to amend Utah's Constitution to allow for the proposed legislation listed above.¹³⁹ The Utah Legislature rejected all five bills.¹⁴⁰ Substitute bills were proposed for SB 32¹⁴¹ and HB 267¹⁴².

In 2008, SB 299¹⁴³ was signed into law by the governor authorizing municipalities and counties to enact ordinances making benefits generally available to all municipal and county employees to their dependents, and "an unmarried employee's financially dependent or interdependent adult designee."¹⁴⁴ Municipalities and counties may create registries for adult relationships of financial dependence and interdependence but may not call them registries of domestic partnerships.¹⁴⁵ However, the municipal and county registries are prohibited from "giv[ing] legal status or effect to a domestic

¹³³UTAH CODE ANN. at § 78B-7-103(1).

¹³⁴§ 78B-7-102(2)(f).

¹³⁵ Text of proposed bill, H.B. 28 (Utah 2007), *available at* <http://le.utah.gov/~2007/bills/hbillint/hb0028.pdf>.

¹³⁶ Equality Utah, Fact Sheets, Mar. 24, 2009, *available at* <http://www.equalityutah.org/informed/facts.html>; *Human Rights: Common Ground Initiative Only Fair*, SALT LAKE TRIB., Jan. 22, 2009, *available at* http://www.sltrib.com/opinion/ci_11530336.

¹³⁷ H.B. 267 (Utah 2009).

¹³⁸ S.B. 32 (Utah 2009).

¹³⁹ *Id.*

¹⁴⁰ Equality Utah, Legislative Score Card, Mar. 24, 2009, <http://www.equalityutah.org/informed/facts.html>; <http://www.equalityutah.org/informed/card.html>.

¹⁴¹ Utah State Legislature, S.B. 32 Substitute, Mar. 24, 2009, *available at* <http://le.utah.gov/~2009/htmldoc/sbillhtm/SB0032S01.htm>.

¹⁴² Utah State Legislature, H.B. 267 Substitute, Mar. 24, 2009, *available at* <http://le.utah.gov/~2009/htmldoc/hbillhtm/HB0267S01.htm>.

¹⁴³ Text of bill, S.B. 299 (Utah 2008), *available at* <http://le.utah.gov/~2008/bills/sbillenr/sb0299.pdf>.

¹⁴⁴ *Id.*; see UTAH CODE ANN. §§ 10-8-1.5(1) and 17-50-325(1).

¹⁴⁵ UTAH CODE ANN. at §§ 10-8-1.5(2)(a) and 17-50-325(2)(a); see also *Anti-Registry Bill Passes House Without Amendment*, Q SALT LAKE, Mar. 5, 2008, *available at* <http://bit.ly/nMZrN>.

partnership, civil union, or domestic cohabitation relationship other than marriage.”¹⁴⁶
Further, nothing a municipality or county does “may ... be treated the same as or substantially equivalent to marriage.”¹⁴⁷

¹⁴⁶ UTAH CODE ANN. §§ 10-8-1.5(2)(b) and 17-50-325(2)(b) (2008).

¹⁴⁷ §§ 10-8-1.5(3) and 17-50-325(3).