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

Title

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

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MEMORANDUM

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

I. OVERVIEW

Efforts to enact a law banning workplace discrimination against gay men and lesbians in Oregon began in 1973, and such legislation was introduced in every one of the 17 regular legislative sessions between 1973 and 2007.¹ In 2005, the Senate passed an omnibus anti-discrimination bill, but the bill died in the House.² Finally, in 2007, a comprehensive anti-discrimination law was enacted. The new law, which defines sexual orientation to include gender identity, took effect January 1, 2008. Oregon Ballot Measure 145, which was meant to overturn the Oregon Equality Act, was withdrawn before November 2008. Its proponents stated they would not have enough time to gather the signatures required by the deadline.³ It was the most recent of dozens of attempts to repeal or prevent anti-discrimination laws to protect LGBT people in Oregon.

Prior to 2008, some state government employees had been protected from discrimination based on sexual orientation for a brief period, but that protection was rescinded. On October 15, 1987, then-Governor Goldschmidt issued Executive Order 87-20, which prohibited discrimination on the basis of sexual orientation in the Executive Branch of state government.⁴ In the 1988 general election, however, Oregon voters adopted Ballot Measure 8, which repealed Executive Order 87-20.⁵ Ballot Measure 8 was codified as ORS 236.380 (effective Dec. 28, 1988), and provided: “No state official shall forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee.” In 1992, the Oregon Court of Appeals ruled that Ballot Measure 8 was unconstitutional.⁶

In 1993, the legislature enacted ORS 659.870 (formerly ORS 659.165, renumbered in 2001), which states that a “political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charter provision, ordinance, resolution or policy that

¹ Basic Rights Oregon, “Our History,” http://www.basicrights.org/?page_id=34 (last visited Sept. 7, 2009) (hereinafter “Basic Rights”).

² S.B. 1000 (Or. 2005), S.B. 1000 (Or. 2005) (legislative history).

³ Press Release, Basic Rights Oregon, Initiatives Filed to Repeal Oregon’s Domestic Partnership and Anti-Discrimination Laws (Mar. 3, 2008), *available at* <http://bit.ly/IHPPZ>.

⁴ *Merrick v. Board of Higher Educ.*, 116 Ore. App. 258, 261 (1992).

⁵ *See Merrick*, 116 Ore. App. at 261.

⁶ *See Merrick*, 116 Ore. App. at 265; OR. REV. STAT. § 236.380 was formally repealed by the Oregon Equality Act, Senate Bill 2 (2007), which has the effect of reinstating the Executive Order, as discrimination on the basis of sexual orientation or gender identity is no longer allowed.

singles out citizens or groups of citizens on account of sexual orientation.”⁷ Limiting the scope of this statute, the Oregon Court of Appeal interpreted “singles out” to mean singling out for discrimination; and it interpreted the “granting special rights” language to mean that preferential treatment was prohibited.⁸ According to Basic Rights Oregon, Oregon has for the past two decades been a testing ground for anti-LGBT policies. Five statewide and more than 25 local anti-LGBT ballot measures have been voted on in Oregon. Since the first ballot measure in 1988, more than \$8 million has been spent on statewide ballot measures alone.⁹

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

- A housing and nuisance inspector for the Bureau of Development Services of Portland whose suit based on sexual orientation and sex stereotyping harassment settled for \$150,000 after her Title VII claim survived summary judgment in a U.S. District Court.¹⁰ The inspector’s co-workers were aware she was a lesbian because she had disclosed that she had a female domestic partner. At work, she did not wear makeup, had short hair and wore men’s clothing. Her supervisors made remarks such as that her shirt looked “like something her father would wear” and “are you tired of people treating you like a bull dyke[?]” On another occasion her supervisor stated: “I’m a man, you are a woman. I’m the man. I don’t have to listen to anything you say. You are a woman. You don’t know anything.” She also alleged her co-workers harassed her, calling her a “bitch,” saying loudly that they were “surrounded by all these fags at work,” that she “just needed to get some dick and she wouldn’t be gay anymore,” and asking her “would a woman wear a man’s shoes?” In holding for the inspector, the court noted that, for the purpose of Title VII analysis, it was irrelevant whether or not the harassers were motivated by Plaintiff’s sexual orientation, as sexual orientation, alone, is not actionable under Title VII. However, the court held that gender stereotyping “constitutes actionable harassment.”¹¹ *Fischer v. City of Portland*, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).
- A firefighter was harassed for incorrectly being presumed to be gay. In 2003, Senator Ted Kennedy, when speaking about ENDA in the Senate, recounted the discrimination and harassment faced by this firefighter because of his perceived sexual orientation: “His co-workers saw him on the local news protesting an antigay initiative, and incorrectly assumed he was gay himself. He began to lose workplace responsibilities and was the victim of harassment, including hate mail. After a long administrative proceeding, the trumped-up charges were removed from his record, and he was transferred to another fire station.”¹²

⁷ OR. REV. STAT § 659.870.

⁸ *DeParrie v. City of Portland*, 138 Ore. App. 105 (1995).

⁹ Basic Rights, *supra* note 1.

¹⁰ LESBIAN & GAY L. NOTES (Dec. 2004), available at <http://www.qrd.org/qrd/usa/legal/lgl/12.04>.

¹¹ *Fischer v. City of Portland*, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).

¹² Statements by U.S. Sen. Ted Kennedy, 149 CONG REC. §§ 12377, 12382 (Oct. 2, 2003).

- From 1980 to 1996, a transgender woman worked for the Josephine County Sheriff's Office in Grant's Pass, Oregon. She received numerous commendations for her work—including praise for rescuing a person from a burning vehicle and delivering a baby on the side of the road. During a leave following an on-duty injury, her storage unit was broken into and several items of women's clothing were stolen. Within a week of the break in, her supervisor called her into the Sheriff's Office for a meeting. She was taken to an interrogation room where she was informed that her stolen clothes, along with identifying photographs, had been discovered alongside the railroad tracks. At that point, her supervisor told her that the sheriff believed she would no longer be able to perform her duties because she dressed as a woman. She was told that it would be “a big mistake to return to work.” When she attempted to return to work, she was forced to undergo a psychiatric examination. She appeared in front of a panel of doctors selected by the Sheriff's Office who determined that she was unfit for duty. She was told that the Office attorney was in the process of putting together a settlement package in exchange for her resignation.¹³
- A police captain who filed a federal lawsuit against the City of Portland, claiming that the mayor and police chief discriminated against him because he was gay. Prior to his demotion, the officer, a 21-year decorated veteran of the Portland police force was put on leave and investigated on charges that he had solicited male prostitutes. In August 1996, a Multnomah County grand jury refused to indict him on the charges. He was then permitted to work, but he was demoted in early 1997. According to the officer, his police chief forbade him to call the chief at home because the officer was gay, and the chief told the officer he was not his ‘special friend.’ He also alleged that during an internal affairs investigation the officer was interrogated, ‘in a manner calculated to greatly embarrass and humiliate’ him, about his sex life, including his sexual positions and the names of his partners. He also alleged that his safety was jeopardized when he was issued a squad car lacking a police radio, emergency lights and a siren, and that he was publicly humiliated by the police chief.¹⁴
- A coordinator of Umatilla County's commission on children and families who was terminated after being asked if he was gay. The coordinator was hired on a temporary basis in January 1993 by the Umatilla County Board of Commissioners to coordinate the county's commission on children and families. In June 1993, after securing additional grant money to fund the commission, the board interviewed him again before granting him the position on a permanent basis. After official questioning had finished, one of the commissioners asked him if he was gay. Presuming the question to be illegal, an attorney interceded to block the coordinator's response. The board rehired him fulltime. Over the next several months, he worked to improve the quality of services and the integrity of the

¹³ 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).

¹⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 194 (1999 ed.).

commission's grant-making process, and won praise from around the state, including from the commission's executive director. In March 1994, he received a pay raise. In May, at the insistence of one of the commissioners, the board ordered an evaluation of his performance. In the review, he received ratings from satisfactory to excellent. In no category was his work rated "unacceptable." Despite this positive review, the board fired him 10 days later.¹⁵

- A high school teacher who was terminated by her school board for being a lesbian pursuant to a state statute that allowed teachers to be terminated for "immorality." The "immorality" was the teacher's identification as a lesbian. A court held that the state statute was unconstitutionally vague because "immorality" was left undefined and could carry a variety of meanings for different people. The court awarded damages but refused to order reinstatement to the teaching position.¹⁶ Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254 (D. Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).

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.

¹⁵ Human Rights Campaign, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), <http://bit.ly/kThbS> (last visited Sept. 6, 2009).

¹⁶ Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254 (D. Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

1. Scope of Statute

The Oregon Equality Act is a result of the Governor's Task Force on Equality in Oregon, which was established in February 2006 by Executive Order No. 06-03. The Governor charged the Task Force with studying whether changes to Oregon law were necessary to guarantee that Oregonians are protected from discrimination in employment, housing, public accommodations and other opportunities, regardless of sexual orientation or gender identity. The Task Force held public meetings throughout Oregon and issued a report on December 15, 2006. The report notes, among other things that: (1) courts have determined that homosexuals are a "suspect class" under the Oregon Constitution; (2) discrimination based on sexual orientation exists in Oregon; and (3) laws and ordinances that prohibit discrimination based on sexual orientation have not had a negative impact on businesses. The Task Force recommended several changes to Oregon anti-discrimination law, many of which are part of SB 2.¹⁷

In May 2007, Governor Kulongoski signed into law the Oregon Equality Act, banning discrimination based on sexual orientation and gender identity in employment,¹⁸ housing and public accommodations.¹⁹ The law took effect on January 1, 2008. Opposition groups, who attempted to force a referendum on these two bills, failed to gather the necessary signatures to do so.²⁰ The bill makes the following changes:

(a) Adds Sexual Orientation: Already a protected characteristic under Oregon's hate crime statutes - to several statutes that prohibit discrimination based on religion, age, race, color, sex, national origin, and marital status.

(b) Defines Sexual Orientation: Defined to mean an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.²¹

(c) Establishes Scope of Protection: States that a person may not discriminate based on an individual's sexual orientation with regard to employment, housing, public accommodations, public services, public education, adult foster homes and foster parenting, among other things.

¹⁷ Or. S.B. 2 (2007) (legislative history).

¹⁸ Or. Rev. Stat. §§ 240.306, 659.850, 659A.003, 659A.006, 659A.030, 659A.403, 659A.406, 659A.409, 659A.421, 659A.424, 659A.805, 659A.815, 659A.885, 660.139 are the Labor and Employment/Unlawful Discrimination laws that have been amended by Or. S.B. 2 (2007) to include protection for sexual orientation. There are a number of other Or. Rev. Stat. sections that do not relate to Labor and Employment that are discussed below in Section III.

¹⁹ 2007 OR S.B. 2 (2007); 2007 ORE. ALS 100 (2007).

²⁰ See Press Release, Basic Rights Oregon, Initiatives Filed to Repeal Oregon's Domestic Partnership and Anti-Discrimination Laws (Mar. 3, 2008), available at <http://bit.ly/IHPPZ>.

²¹ OR. REV. STAT. § 174.100.

(d) Establishes Civil Rights: Declares that the opportunity to obtain employment, housing and use public accommodations, free of discrimination based on sexual orientation, religion, age, race, color, sex, national origin, or marital status, is a civil right.

(e) Exempts Some Religious Institutions: Permits churches or other religious institutions to take actions based on sexual orientation with respect to employment, housing or the use of public accommodations if the institution (1) has a “bona fide” religious belief about sexual orientation, and (2) the employment, housing or use of facilities in question is closely connected with, or related to, the primary purposes of the church or institution, and is not connected with a commercial or business activity that has no necessary relationship to the institution or the institution’s primary purpose.

(f) Provides for Dress Codes: Allows employers to enforce valid dress codes and policies if the employer provides reasonable accommodations when necessitated by the health and safety needs of the individual.

(g) Repeals ORS 236.380: This statute prohibited state officials from forbidding the taking of personnel action against any state employee based on sexual orientation.

This legislation had the effect of updating and amending more than 30 provisions in previously existing statutes to make the anti-discrimination laws apply to sexual orientation as well. However, it did not modify Oregon’s disability or affirmative action laws.

ORS 659A.130 provides that “[h]omosexuality and bisexuality are not physical or mental impairments. A person who is homosexual or bisexual is not a person with a disability.” This provision was unaffected by the Oregon Equality Act.

ORS 243.305 is Oregon’s statute regarding the “policy of affirmative action and fair and equal employment opportunities and advancement.” The statute provides that:

“[i]t is declared to be the public policy of Oregon that all branches of state government shall be leaders among employing entities within the state in providing to its citizens and employees, through a program of affirmative action, fair and equal opportunities for employment and advancement in programs and services and in awarding of contracts.

The statute defines “Affirmative Action” to mean “a method of eliminating the effects of past and present discrimination, intended or unintended, on the basis of race, religion, national origin, age, sex, marital status or physical and mental disabilities.” Affirmative action law was one area that was not amended by the Oregon Equality Act,

and Oregon’s policy of affirmative action does not apply to discrimination on the basis of sexual orientation or gender identity.²²

2. Enforcement and Remedies

Under the Oregon Equality Act, an aggrieved employee is not required to exhaust administrative procedures before filing a civil action—he or she may choose to file either with the Bureau of Labor and Industries (“the Bureau”) or directly in court.²³ If the employee chooses to file an administrative complaint, he or she must do so within one year of the alleged unlawful practice.²⁴

The Bureau has the power to receive complaints and conduct investigations where a violation of the Oregon Equality Act is alleged.²⁵ If the Attorney General or the Commissioner of the Bureau has reason to believe that an unlawful practice was committed in violation of the Oregon Equality Act, he or she may file a complaint with the Bureau.²⁶ The Bureau may attempt to resolve the matter through conciliation, and if conciliation is unsuccessful, may hold a hearing on the matter.²⁷ If the Attorney General or the Commissioner has filed the complaint, he or she may elect to have the matter heard in circuit court.²⁸

A successful complainant in an administrative hearing under the Oregon Equality Act is limited to recovery of actual damages and equitable relief, but a successful plaintiff in a civil action can be awarded compensatory damages, punitive damages, and attorney’s fees.²⁹ There are no caps on damages under the Oregon Equality Act.³⁰

B. Attempts to Enact State Legislation

The campaign to pass a law comprehensively banning discrimination against gays and lesbians began in 1973. Similar legislation has been introduced in every one of the 17 regular legislative sessions over the past 34 years.³¹ In 2005, with the support of the Governor, the Senate passed an omnibus anti-discrimination and relationship rights bill, which a procedural maneuver by opponents in the House derailed.³² The Oregon Equality Act was finally passed in 2007.

Oregon Ballot Measure 145 (Removes Sexual Orientation From Statutes Listing Impermissible Discrimination Grounds; Deletes Other Sexual-Orientation-Related Provisions), which was meant to overturn the Oregon Equality act, was withdrawn before

²² OR. REV. STAT. § 243.305.

²³ OR. REV. STAT. § 659A.820.

²⁴ OR. REV. STAT. § 659A.820.

²⁵ OR. REV. STAT. §§ 659A.820(1), 659A.830(1).

²⁶ OR. REV. STAT. § 659A.825(1).

²⁷ OR. REV. STAT. § 659A.845(1).

²⁸ OR. REV. STAT. § 659A.870(4)(c).

²⁹ OR. REV. STAT. §§ 659A.850, 659A.885(1), (3)(a), (7).

³⁰ *Id.*

³¹ Basic Rights, *supra* note 1.

³² S.B. 1000 (Or. 2005) (legislative history).

November 2008. The proposed initiative would have removed sexual orientation as a protected characteristic from a long list of anti-discrimination statutes in which sexual orientation was added in 2007, including a number of statutes relating to nondiscrimination in employment. Its proponents stated they would not have enough time to gather the signatures required by the deadline.³³ A number of such initiatives have been introduced in Oregon designed to limit LGBT rights.³⁴

In *Boytono v Fritz*, 1995 WL 505431 (Or. Aug. 24, 1995), the Oregon Supreme Court held that neither the state's constitution nor ORS 659.165(1) prevented the people of Klamath Falls City from voting on an antigay initiative. The plaintiff sought to enjoin the City from placing on the ballot an initiative to amend its charter, contending that Oregon law removed the issue from the initiative process. The proposed amendment would forbid the City or its officials from passing or enforcing "any ordinance, rule, regulation, policy or resolution that extends minority status, affirmative action, quotas, special class status, or any similar concepts based on homosexuality or which establishes any categorical provision such as 'sexual orientation,' 'sexual preference,' or any similar provision." Expressly excepted from the initiative's scope was the adoption of "provisions prohibiting employment decisions based on factors not directly related to employment." One of those factors is an individual's "lawful private sexual behavior," knowledge of it, or an individual's expression of it. The initiative would also prevent the City from spending any money "promot[ing] homosexuality." The Plaintiff contended that by voting on the measure, the people would be enacting it in violation of ORS 659.165(1). The statute provides, in part, that "[a] political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charter provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation." The Court conceded in a footnote that the initiative did indeed "single out" people on the basis of sexual orientation. ORS 659.165(1)'s use of the word "enact," however, saved a place on the ballot for the initiative.³⁵

In *DeParrie v. City of Portland*, 138 Ore. App. 105 (1995), an appellate court interpreted "singles out" in ORS § 659.165 (now 659.870) to mean singling out for discrimination. Therefore, the statute requires even-handed treatment of gays and lesbians, and does not allow for either preferential or discriminatory treatment. Plaintiff had claimed that a political subdivision of the state was taking "pro-homosexual" actions, based on ORS § 659.165.

³³ Press Release, Basic Rights Oregon, Initiatives Filed to Repeal Oregon's Domestic Partnership AND Anti-Discrimination Laws (Mar. 3, 2008), available at <http://bit.ly/IHPPZ>.

³⁴ See *Frazzini v. Myers*, 344 Ore. 662 (2008); *ACLU of Oregon v. Roberts*, 305 Ore. 522 (1988); *Lewis v. Keisling*, 320 Ore. 13 (1994); *Boytono v. Fritz*, 131 Ore. App. 466 (1994); *Lowe v. Keisling*, 130 Ore. App. 1 (1994).

³⁵ *Boytono v Fritz*, 1995 WL 505431 (Aug. 24, 1995).

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

1. Executive Orders

On October 15, 1987, then-Governor Goldschmidt issued Executive Order 87-20, which prohibited discrimination on the basis of sexual orientation in the Executive Branch of state government.³⁶ In the 1988 general election, Oregon voters adopted Ballot Measure 8, which repealed Executive Order 87-20.³⁷ Ballot Measure 8 was codified as ORS 236.380 (effective on Dec. 28, 1988), and provides: “No state official shall forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee.” In other words, the statute enacted by the ballot measure allowed state officials to take personnel actions based on sexual orientation. This statute was held to be unconstitutional by the court of appeals in 1992 because it violated constitutional free speech rights. The court reasoned that sexual orientation is something that will seldom become known unless an employee has chosen to express it. Because speech and sexual orientation are “inextricably intertwined,” the statute violated the freedom of speech and expression guaranteed in the Oregon Constitution.³⁸

2. State Government Personnel Regulations

None.

3. Attorney General Opinions

None.

D. Local Legislation

More localities in Oregon have passed laws preventing anti-discrimination ordinances to protect LGBT people than have passed laws to protect them from employment discrimination. Voters in a number of Oregon cities and counties have approved ballot measures forbidding the municipalities from enacting protective ordinances. Notably, in 1994 alone voters in 10 cities and counties approved such measures to join 10 other municipalities that had previously passed similar measures.³⁹ The localities passed these laws in 1994 despite the fact that in 1993, the legislature enacted ORS 659.870 (formerly ORS 659.165, renumbered in 2001), which states that a “political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any

³⁶ *Merrick*, 116 Ore. App. at 261.

³⁷ *id.*

³⁸ *id.* at 265; OR. REV. STAT. § 236.380 was formally repealed by the Oregon Equality Act, Senate Bill 2 (2007), which has the effect of reinstating the Executive Order, as discrimination on the basis of sexual orientation or gender identity is no longer allowed.

³⁹ LESBIAN & GAY L. NOTES (Apr. 1994), available at <http://www.qrd.org/qrd/usa/legal/lgln/1994/04.94> (Albany, Junction City, Marion County, Turner, Cottage Grove, Oakridge, Venetta, Roseburg). LESBIAN & GAY L. NOTES (Dec. 1994), available at <http://www.qrd.org/qrd/usa/legal/lgln/1994/12.94> (two rural southern Oregon counties).

citizen or group of citizens on account of sexual orientation, or enact or enforce any charter provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation.”⁴⁰

The Oregon Court of Appeal interprets “singles out” to mean singling out for discrimination; and it interpreted the “granting special rights” language to mean that preferential treatment was prohibited.⁴¹ When the Jackson County measure was challenged legally in 1993, the court issued an injunction blocking its effectuation on the grounds that it violated a state statute.⁴²

On the other hand, there have been at least 13 anti-discrimination ordinances passed in municipalities around the state.⁴³ Two noteworthy local ordinances are Portland’s ordinance, which was enacted on Jan. 15, 2001,⁴⁴ and Multnomah County’s ordinance, which was adopted on Dec. 20, 1984.⁴⁵ In *Sims v. Besaw’s Café*, 165 Ore. App. 180 (2000), an appellate court held that Portland did not exceed its authority by prohibiting discrimination by Portland employers on the basis of sexual orientation and by giving individuals harmed by the prohibited conduct a claim for relief. PCC § 23.01.080E was therefore held valid.

⁴⁰ OR. REV. STAT § 659.870.

⁴¹ *DeParrie v. City of Portland*, 138 Ore. App. 105 (1995).

⁴² LESBIAN & GAY L. NOTES (Jan. 1994), available at <http://www.qrd.org/qrd/usa/legal/lgln/1994/01.94>.

⁴³ Basic Rights, About Basic Rights Oregon, Building a Movement, Creating Real Change, http://www.basicrights.org/?page_id=6 (last visited Sept. 6, 2009).

⁴⁴ PORTLAND CODE 23.01.050-080.

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

A. Case Law

1. State & Local Government Employees

Fischer v. City of Portland, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).

In *Fischer*, the Plaintiff, a housing and nuisance inspector for the Bureau of Development Services of Portland, Oregon, brought suit under Title VII based on harassment due to her gender non-conformity. The court ruled that the City was not entitled to summary judgment based upon Plaintiff's claim of sex discrimination. Co-workers were aware that the inspector was a lesbian because she had disclosed that she had a female domestic partner. At work, she wore "men's clothing..., d[id] not wear makeup, and ha[d] a short masculine hairstyle." On one occasion, her supervisor made kissing and humping motions. Other supervisors also made remarks such as that her shirt looked "like something her father would wear" and "are you tired of people treating you like a bull dyke[?]" On one occasion her superior stated: "I'm a man, you are a woman. I'm the man. I don't have to listen to anything you say. You are a woman. You don't know anything." Plaintiff also alleged that co-workers participated in the harassment. She heard a co-worker saying loudly over the phone that she was "surrounded by all these fags at work." One employee employee referred to her as a "bitch." Another remarked that she "just needed to get some dick and she wouldn't be gay anymore." Another raised his arm in a Nazi salute when Plaintiff spoke. Another commented in a negative way about Plaintiff's work boots, stating: "Would a woman wear a man's shoes?" In holding for the Plaintiff, the court noted that, for the purpose of Title VII analysis, it was irrelevant whether or not the harassers were motivated by Plaintiff's sexual orientation, as sexual orientation, alone, is not actionable under Title VII. However, the court held that gender stereotyping "constitutes actionable harassment."⁴⁶ The case later settled for \$150,000.⁴⁷

Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254 (D. Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).

In *Burton*, Plaintiff, a high school teacher, brought suit under section 1983 after the school board terminated her pursuant to a state statute permitting dismissal of teachers for immorality. The "immorality" cited by the school board was Burton's identification as a lesbian. The court held that the statute was unconstitutionally vague because "immorality" was left undefined and could carry a variety of meanings for different people. The court awarded damages but refused to order reinstatement to the teaching position.⁴⁸

⁴⁶ *Fischer v. City of Portland*, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).

⁴⁷ LESBIAN & GAY L. NOTES (Dec. 2004), *available at* <http://www.qrd.org/qrd/usa/legal/lgl/12.04>.

⁴⁸ *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 353 F. Supp. 254 (D. Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).

2. Private Employers

Wilmoth v. Ann Sacks Tile & Stone, Inc., 2008 Ore. App. LEXIS 1736 (2008).

In *Wilmoth*, an employee claimed that a former employer discriminated against plaintiff on the basis of her sexual orientation and terminated plaintiff's employment in retaliation for her complaints about unlawful discrimination against plaintiff's co-worker. Trial and appellate courts ruled in favor of plaintiff, and agreed that plaintiff was singled out for termination as a result of her complaints about the discriminatory treatment toward plaintiff's co-worker.

Harris v. Pameco Corp., 170 Ore. App. 164 (2000).

A male heterosexual employee sued a gay employer for making sexual advances, remarks and propositions. The appellate court reversed the trial court's directed verdicts for the defendant, finding colorable claims for battery and emotional distress and sexual harassment, which may occur between two males.

Wheeler v. Marathon Printing, 157 Ore. App. 290 (1998).

An employee sued his former employer after enduring severe harassment from a co-worker that caused depression and eventually caused him to leave his job. He was called a "zit nosed faggot" and "a crazy lunatic faggot" and was repeatedly "flipped off." He was also asked to give co-worker a "blow-job." Because of plaintiff's history of sexual abuse as a child, and the malicious behavior of the co-worker, punitive damages were warranted.⁴⁹

Whelan v. Albertsons, 129 Ore. App. 501 (1994).

In *Whelan v. Albertsons*, the employee was repeatedly referred to as "queer" and by other vulgar labels (e.g. "fucking queer asshole") by a manager and another employee. He sued for intentional infliction of emotional distress, among other claims. The appellate court reversed the lower court's dismissal of the IIED claim, and one other claim, based on the repeated verbal harassment.

B. Administrative Complaints

None.

C. Other Documented Examples of Discrimination

Municipal Fire Department

⁴⁹ According to the law in Oregon, the employer is liable if he or she "knew or should have known that plaintiff's work environment was hostile and failed to take appropriate corrective action to end the harassment." *Wheeler v. Marathon Printing*, 157 Ore. App. 290, 304 (1998).

In 2003, Senator Ted Kennedy recounted the discrimination and harassment faced by Steve Morrison, a firefighter in Oregon, because of his perceived sexual orientation:

“Steve Morrison is a firefighter in Oregon. His co-workers saw him on the local news protesting an anti-gay initiative, and incorrectly assumed he was gay himself. He began to lose workplace responsibilities and was the victim of harassment, including hate mail. After a long administrative proceeding, the trumped-up charges were removed from his record, and he was transferred to another fire station.”⁵⁰

Josephine County Sheriff’s Office

From 1980 to 1996, a transgender woman worked for the Josephine County Sheriff’s Office in Grant’s Pass, Oregon. She received numerous commendations for her work—including praise for rescuing a person from a burning vehicle and delivering a baby on the side of the road. During a leave following an on-duty injury, her storage unit was broken into and several items of women’s clothing were stolen. Within a week of the break in, her supervisor called her into the Sheriff’s Office for a meeting. She was taken to an interrogation room where she was informed that her stolen clothes, along with identifying photographs, had been discovered alongside the railroad tracks. At that point, her supervisor told her that the sheriff believed she would no longer be able to perform her duties because she dressed as a woman. She was told that it would be “a big mistake to return to work.” When she attempted to return to work, she was forced to undergo a psychiatric examination. She appeared in front of a panel of doctors selected by the Sheriff’s Office who determined that she was unfit for duty. She was told that the Office attorney was in the process of putting together a settlement package in exchange for her resignation.⁵¹

Portland Police Department

In 1999, police captain Mike Garvey filed a federal lawsuit against the City of Portland, claiming that the mayor and police chief discriminated against him because he was gay. Prior to his demotion, Garvey, a 21-year decorated veteran of the Portland force was put on leave and investigated on charges that he had solicited male prostitutes. In August 1996, a Multnomah County grand jury refused to indict Garvey on the charges. He was then permitted to work, but he was demoted in early 1997. According to Garvey, Police Chief Moose allegedly forbade him to call him at home because Garvey was gay, and told Garvey he was not his ‘special friend.’ The suit also charges that during an internal affairs investigation Garvey was interrogated, ‘in a manner calculated to greatly embarrass and humiliate’ him, about his sex life, including his sexual positions and the names of his partners. Garvey also charges that his safety was jeopardized when he was

⁵⁰ Statements by U.S. Sen. Ted Kennedy, 149 CONG REC. §§ 12377, 12382 (Oct. 2, 2003).

⁵¹ 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).

issued a squad car lacking a police radio, emergency lights and a siren, and that he was publicly humiliated by Moose.⁵²

Umatilla County Board of Commissioners

“K.L.” was hired on a temporary basis in January 1993 by the Umatilla County Board of Commissioners to coordinate the county’s commission on children and families. In June 1993, after securing additional grant money to fund the commission, the board interviewed K.L. again before granting him the position on a permanent basis. After official questioning had finished, one of the commissioners asked him if he was gay. Presuming the question to be illegal, an attorney interceded to block K.L.’s response. The board rehired K.L. fulltime. Over the next several months, K.L. worked to improve the quality of services and the integrity of the commission’s grant-making process, and won praise from around the state, including from the commission’s executive director. In March 1994, K.L. received a pay raise. In May, at the insistence of one of the commissioners, the board ordered an evaluation of K.L.’s performance. In the review, K.L. received ratings from satisfactory to excellent. In no category was his work rated “unacceptable.” Despite this positive review, the board fired K.L. 10 days later.⁵³

⁵² PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 194 (1999 ed.).

⁵³ Human Rights Campaign, *DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES* (2001), <http://bit.ly/kThbS> (last visited Sept. 6, 2009).

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. Housing & Public Accommodations Discrimination

The Oregon Equality Act, passed in 2007, dealt with sexual orientation and gender identity discrimination in both employment, and non-employment contexts. It establishes that a person may not discriminate based on an individual's sexual orientation with regard to housing and public accommodations.⁵⁴

B. Education

The Oregon Equality Act, passed in 2007, dealt with sexual orientation and gender identity discrimination in both employment, and non-employment contexts. It establishes that a person may not discriminate based on an individual's sexual orientation with regard to public education.⁵⁵

C. Parenting

The Oregon Equality Act, passed in 2007, dealt with sexual orientation and gender identity discrimination in both employment, and non-employment contexts. It establishes that a person may not discriminate based on an individual's sexual orientation with regard to adult foster homes and foster parenting.⁵⁶

In 2002, in one Oregon case involving a custody battle following a divorce, the father disapproved of mother's gay lifestyle and same-sex companion. The court held

⁵⁴ OR. REV. STAT. §§ 10.030, 20.107, 30.860, 93.270, 109.035, 166.155, 166.165, 174.100, 179.750, 192.630, 338.125, 353.100, 418.648, 418.925, 421.352, 430.550, 443.739, 458.505, 744.353 are the non-employment related laws that have been amended by Senate Bill 2 (2007) to include protection for sexual orientation. These laws pertain to areas including public health and safety, public accommodation, insurance, and civil procedure.

⁵⁵ OR. REV. STAT. §§ 10.030, 20.107, 30.860, 93.270, 109.035, 166.155, 166.165, 174.100, 179.750, 192.630, 338.125, 353.100, 418.648, 418.925, 421.352, 430.550, 443.739, 458.505, 744.353 are the non-employment related laws that have been amended by Senate Bill 2 (2007) to include protection for sexual orientation. These laws pertain to areas including public health and safety, public accommodation, insurance, and civil procedure.

⁵⁶ OR. REV. STAT. §§ 10.030, 20.107, 30.860, 93.270, 109.035, 166.155, 166.165, 174.100, 179.750, 192.630, 338.125, 353.100, 418.648, 418.925, 421.352, 430.550, 443.739, 458.505, 744.353 are the non-employment related laws that have been amended by Senate Bill 2 (2007) to include protection for sexual orientation. These laws pertain to areas including public health and safety, public accommodation, insurance, and civil procedure.

that that factor was not and could not be considered by the appellate court to be significant.⁵⁷

D. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 2002, Measure 36 amended the Oregon Constitution to define marriage as between one man and one woman.⁵⁸

In 2007, the Oregon state legislature passed a domestic partnership law called the Oregon Family Fairness Act in 2007. The Oregon Family Fairness Act grants a limited set of rights, responsibilities, and protections to same-sex couples.⁵⁹

Oregon Ballot Measure 144, which was meant to overturn the domestic partnership statute passed in 2007, was withdrawn for not gathering enough valid signatures before the November 2008 election.⁶⁰

2. Benefits

In *Tanner v. Oregon Health Sciences Univ.*,⁶¹ the trial court determined that an Oregon university violated Or. Rev. Stat. 659.030(1)(b) and Oregon Constitution Article I, Section 20 by not providing insurance benefits to same-sex partners of employees. The Oregon Court of Appeals determined that the university remained a governmental entity subject to the prohibitions of the Oregon constitution, and that its denial of insurance benefits to the unmarried domestic partners of its gay and lesbian employees was in violation of the state constitution. The court expressly found that gay men and lesbians are a “suspect class” under the Oregon Constitution.

E. Law Enforcement

In 1991, during an investigation regarding an “unauthorized use of a motor vehicle” the District Attorney discovered that Plaintiff was gay. He then alerted the media that Plaintiff was gay, had AIDS, and had recklessly endangered others by inducing sex without protection while concealing he had AIDS. Aside from Plaintiff’s homosexuality, all statements made by the district attorney were false. The appellate court reversed the lower court’s dismissal of infliction of emotional distress and other claims.⁶²

⁵⁷ *Collins v. Collins*, 183 Ore. App. 354 (2002).

⁵⁸ Or. Const. Art. XV § 5a (2007).

⁵⁹ Basic Rights, *supra* note 1; Or. Family Fairness Act (2007).

⁶⁰ Basic Rights, *supra* note 1.

⁶¹ 157 Ore. App. 502 (1998).

⁶² *Beason v. Hacerload*, 105 Ore. App. 376 (1991).