MEMORANDUM

From: Williams Institute

Date: September 2009

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

I. OVERVIEW

Florida's anti-discrimination law, the Florida Civil Rights Act, does not cover employment discrimination on the basis of sexual orientation or gender identity. In addition, there has never been an executive order to prohibit these forms of discrimination against state employees. Recent efforts to enact statutory protection have all failed.[1] Florida Representative D. Alan Hays has been quoted as saying that he believes gays and lesbians "need psychological treatment" and on a different occasion stated: "I had a cousin who died of AIDS; he was queer as a three-dollar bill. He had that homosexual lifestyle and deserved what he got."[2]

In 1994, a state-wide ballot measure was proposed that would have banned enactment of gay rights laws and repealed protective local ordinances that existed at the time. The Attorney General petitioned the Supreme Court of Florida for an advisory opinion on the validity of the proposed amendment. The Supreme Court held that the measure should be stricken from the ballot because it encompassed more than one subject and matter, in violation of the Florida Constitution.[3]

Despite these attitudes, some progress has been made on a local level (primarily in larger cities) with twenty municipalities adopting statutes prohibiting discrimination in employment, housing and public accommodations based on sexual orientation and/or gender identity.[4]

Because Florida has no statute prohibiting employment discrimination based on sexual orientation or gender identity, state courts rarely have addressed the issue, except to reiterate the lack of legal protection.

Nonetheless, documented examples of employment discrimination by state and local governments based on sexual orientation or gender identity include:

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[1] See *infra* Section II.B.

[2] Michael Emanuel Rajner, *Florida Lawmaker's Latest Round of Bigoted Statements on Gays and AIDS*, BLOG TO END AIDS, June 15, 2007, http://bit.ly/3t26r8.

[3] The amendment violated the single-subject requirement because it enumerated ten classifications of people that would be entitled to protection (excluding sexual orientation and gender identity), and it covered both civil rights and the powers of the state and local governments. The court also found that the amendment was ambiguously worded and confusing to voters. *In re Advisory Op. to the Att'y Gen.: Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020-21 (Fla. 1994).

[4] *See infra* Part II.D.

- In 2009, two years after she started working at a college, a transgender woman was forced to resign because of her gender identity. She received praise for her work and was given a letter stating that she was dependable, able to work independently, and a skilled technician. Approximately two months before she was fired, she notified her boss that she would be transitioning from male to female. In March 2009, she was called in on her day off to attend a staff meeting. She did not have a clean uniform to wear and told her boss that she would wear women's clothes, which she wore in her day-to-day life but not on the job, and he said it was fine. When she arrived on campus, members of the faculty and staff gave her hostile looks and she felt unsafe. She called a co-worker friend to ask for support, but he hung up on her. Her boss then accused her of harassing her co-worker because she had called him after he hung up and moved her to an unfavorable shift that her friend did not work. The new shift interfered with her medical appointments, which were crucial to her transition, and she was forced to resign.[5]

- In 2007, after she notified her supervisors that she planned to transition, a city manager in Largo was fired because of her gender identity. News of her decision to transition leaked to the local media shortly after she discussed it with her supervisors. When the City Commission heard the news, it voted 5-2 to suspend her. During the suspension meeting, one of the Commissioners who voted in favor of the suspension stated: "His [sic] brain is the same today as it was last week. He [sic] may be even able to be a better city manager. But I sense that he's [sic] lost his [sic] standing as a leader among the employees of the city."[6] She declined to sue the city after she was terminated, saying that bringing suit against it would be "like suing my mother".[7]

- In 2007, a sheriff's department applicant was offered positions at two sheriff's offices which were then rescinded because they found out he was living with a man whom they assumed was his partner.[8]

- In 2007, a lesbian social worker at a county agency suddenly had problems at work upon disclosing her sexual orientation following ten years of employment without issue. When she disclosed her sexual orientation, her supervisor started giving her bad reviews, and stood in the bathroom with her while she urinated for a drug test which was not standard procedure at the agency.[9]

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[5] Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).
[6] Lorri Helfand, *Commission Moves to Fire Stanton*, ST. PETERSBURG TIMES, Feb. 27, 2007.
[7] *Id.*; *see also* Jillian Todd Weiss, *The Law Covering Steve (Susan) Stanton, City Manager Dismissed In Largo, Florida*, GENDERTREE.COM, Mar. , 2007, *available at* http://bit.ly/18613m.
[8] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[9] *Id.*

- An employee of the Escambia County Utilities Authority brought a claim under Title VII for the workplace harassment he endured because co-workers presumed him to be gay. The court granted summary judgment to the defendant because none of the scenarios established in *Oncale v. Sundowner Offshore Services, Inc.*[10] were present. In rejecting the claim, the court stated that "[the employee's] characteristics [that were targeted in the harassment] may reflect stereotypes associated with a homosexual lifestyle, but they are not stereotypes associated with a feminine gender." Mowery v. Escambia County Util. Auth., 2006 U.S. Dist. LEXIS 5304 (N.D. Fla. Feb. 10, 2006).

- In 2006, an employee of the Department of Children and Family Services was terminated after she was seen hugging a female on the premises. Her supervisor stated before she was terminated that there was a "rumor" that the two women were in a relationship.[11]

- In 2006, an applicant to the police department was accused of being "dishonest" when she informed them of her transgender status after completing her application.[12]

- In 2005, eight years after he had been hired by the Hillsborough County School District, a teacher protested the dismantling of a gay pride book on display at the local public library. He was quoted in the local paper for saying that, as a gay man and a school librarian, he was upset that the book display had been taken down prematurely. The school superintendent saw that he was quoted in the paper and proceeded to have his behavior reviewed by the school district's Professional Standards Office. Though the teacher was not disciplined for discussing the book display with the paper, he was told that he was not to bring "the issue" into the workplace. This censorship has caused him a great deal of distress and he worries that his professionalism will be called into question repeatedly because he is gay.[13]

- In 2005, a gay employee of the Pinellas County Water Quality Department reported that he was terminated after the employee's neighbor disclosed his sexual orientation to his supervisor.[14]

- In 2004, an administrative hearing officer held that a post-operative transsexual had no claim based on sex or disability, but, on appeal, the Commission reversed as to the claim of sex discrimination. The administrative law judge concluded that transsexuality was not a disability

[10] 523 U.S. 75 (1998) (claim of same-sex sexual harassment actionable under Title VII).
[11] *Sampson v. Dep't of Children and Family Servs.*, 2006 Fla. Div. Adm. Hear. Lexis 466 (Sept. 29, 2006).
[12] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[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] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

under the Florida Civil Rights Act because it is not within the purview of the ADA or the Rehabilitation Act. The judge limited the holding in *Smith v. Jacksonville Correctional Institution*,[15] defining "disability" according to whether or not the employee had undergone sex reassignment surgery (Smith had not, while Fishbaugh had). As to the sex discrimination claim, the administrative law judge found that she was unable to claim sex discrimination because the employee had been discriminated against because she was transsexual, not because she was a woman, and that gender identity receives no protection under the Florida Civil Rights Act. On appeal, the Commission panel held that the employee could bring a claim for sex discrimination because she was "perceived not to conform to sex stereotypes or because [she] has changed sex".[16]

- In 2004, a gay officer with the Tampa Police Department experienced harassment and was terminated when he disclosed his sexual orientation to his supervisors. He was also arrested for lewd and lascivious conduct for informing street youth about "safer sex."[17]

- In 2004, a Sarasota public school teacher who had agreed to let students use her classroom for "Gay-Straight Alliance" meetings was harassed by other teachers to such an extent that she felt she had to leave. After she resigned, the school refused to give her a positive recommendation.[18]

- In 2004, a Department of Corrections employee was compelled to resign by his supervisors when they discovered that he occasionally wore women's clothes outside the office.[19]

- In 2003, a transgender employee of the Pasco County Sheriff's Department reported instances of harassment to her supervisors, who allegedly forced her to resign. Co-workers intentionally used the "wrong" pronoun when she was out on patrol, hence outing her to officers on the receiving end of police calls. She complained to superiors, but the conduct continued. When co-workers started a rumor that she had posed topless online, she resigned.[20]

- In 2002, an applicant for a Florida nursing license was denied because of his sexual orientation. The applicant had already procured a nursing license in Indiana.[21]

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[15] *See Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991) (described *infra*).
[16] *Fishbaugh v. Brevard County Sheriff's Dep't*, Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).
[17] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

- In 2002, a transgender public school employee experienced harassment by co-workers and superiors; she was called a "thing," and was taunted about which bathroom she should be permitted to use.[22]

- In 2002, an openly lesbian firefighter was repeated passed over for promotion in favor of less-qualified employees. She was eventually fired for "low test scores," even though her scores were consistently superior to those of other officers.[23]

- In 2002, a gay firefighter reported that he had been harassed when colleagues found his personal ad online and circulated it around the office. The firefighter's supervisor "wrote him up" for infractions which he later admitted were frivolous.[24]

- In 2002, a gay firefighter reported that he was discriminated against after disclosing his sexual orientation at work. Before he had disclosed his sexual orientation, the firefighter received excellent assessments and was, in fact, promoted. After he revealed his sexual orientation, however, he was told to either resign or accept a demotion. The firefighter accepted the demotion in an effort to retain his retirement benefits.[25]

- In 2001, an employee of the Florida Department of Agriculture reported that he had been the target of virulently anti-gay comments from a colleague. When he complained, he was reprimanded and told to drop the complaint. The employee refused and was terminated shortly thereafter.[26]

- In 2001, a supervisor at the Florida Department of Health said he would try to "rid" the department of gays. When an employee complained, the employee was reprimanded and eventually terminated after enduring an extended period of workplace harassment.[27]

- In 2001, employees in two separate state agencies – the Department of Agriculture and the Department of Health – were fired after complaining of anti-gay harassment.[28]

- In 2001, a transgender city public works department supervisor was fired on account of her gender identity.[29]

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] 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).

- In 2001, a city government employee was forced to resign when superiors learned the employee enjoyed dressing in women's clothes outside the office and threatened to publicly disclose such discovery.[30]

- In 2000, a lesbian firefighter was subjected to a hostile work environment on account of her sexual orientation.[31]

- In 1996, an employee of a county clerk's office was fired because of his sexual orientation.[32]

- In a book published in 1996, Pete Zecchini, a gay man, described his experience as a Miami Beach police officer as "miserable." When Zecchini inquired as to why his cases had been reassigned and his work schedule had been rearranged, his supervisor told Zecchini it was because of his homosexuality. When Zecchini complained to his chief about this supervisor, the supervisor flatly denied saying any such thing. At shooting practice, Zecchini overheard his coworkers saying, "faggot this," "faggot that," and "Miami Beach is turning into a bunch of faggots." Zecchini alleged that he was the only officer on the force denied a pay raise for using too many sick days.[33]

- In 1994, a U.S. District Court jury in Florida decided that the Sunrise, Florida, Police Department unlawfully discriminated against Darren Lupo, an unmarried lesbian patrolwoman, by requiring that she work a Christmas shift in place of a married policeman with children, but rejected her broader claim of a pattern of discrimination based on her sex and sexual orientation. The jury awarded $56,250 in compensatory damages.[34]

- In 1992, an administrative hearing officer ordered reinstatement and back pay for a second grade teacher who had been fired because he had allegedly committed a crime involving moral turpitude. The teacher had been charged with battery for touching an undercover officer's clothing while flirting with the officer. The school became aware of the incident when an account of the arrest was published in the newspaper. The Hearing Officer noted that "for the most part, the negative comments about Mr. Madison involved not the criminal charge, but the homosexual nature of the event" and concluded that

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[30] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[31] 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).
[32] *Id.*
[33] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 102-106 (Routledge 1996).
[34] Lesbian and Gay L. Notes (Oct. 1994) (citing FT. LAUDERDALE SUN-SENTINEL, Sept. 5 1994).

the school had impermissibly discriminated against him based on his lifestyle.[35]

- A deputy sheriff brought suit in 1992 after he was constructively terminated because of his sexual orientation. In the first portion of a bifurcated trial, the jury found that the sheriff was constructively terminated because he was gay. The court then found that the termination violated his constitutional right to privacy and, applying heightened scrutiny because of the plaintiff's sexual orientation, the Equal Protection Clause. Woodard v. Gallagher, 59 Emp. Prac. Dec. (CCH) ¶ 41, 652, 1992 WL 252279 (Fla. Cir. Ct. 1992).

- In 1991, an administrative judge held that a pre-operative female transsexual, who had been fired from her job as a corrections officer, could bring a claim against her employer, the City of Jacksonville, based on disability discrimination. The plaintiff had found it necessary to conceal her gender identity in order to keep her job and suffered from severe physical reactions as a result. One night, while dressed in women's clothes, she was assisted by a passing patrolman when she stopped to change a tire on the side of the road. The patrolman ran a report on her driver's license and discovered that she was classified as a male. Thereafter, when the incident was relayed to her supervisors, she approached her supervisors to tell them that she planned to transition. When she refused to resign at their insistence, they terminated her. At the administrative hearing, the city asserted a BFOQ defense with the stated qualification being "absence of transsexuality." In rejecting the argument, the hearing officer stated, "Simply put, prejudice cannot be a basis for a BFOQ." Smith v. City of Jacksonville Corr. Inst., 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991).

- A deputy sheriff was fired after her boss learned that she was lesbian. She lost her case challenging the dismissal when the court ruled that "in the context of law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end." Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988).

- A lawyer was denied admission to the Florida Bar after he disclosed that the Military Selective Service assigned him to a classification indicating "physical problem or homosexuality." The Bar pressed the lawyer for details about his past sexual conduct, and though he said he preferred men, he declined to provide more detail. The Florida Supreme Court held that the Florida Board of Bar Examiners should be limited to inquiries which bear a rational relationship to an applicant's fitness to practice law, stating that "private noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law." Fla Bd. of Bar Exam'rs Re N.R.S., 403 So.2d 1315 (Fla. 1981).

[35] *Sch. Bd. of Escambia County v. Madison*, 1992 Fla. Div. Adm. Hear. LEXIS 6879 (1992).

- In 1978, three years before *N.R.S.*, the Florida Bar sought guidance from the Supreme Court as to whether an applicant should be denied admission for "lack of good moral character" because of his "admitted" sexual orientation. The court held that mere self-identification as gay was not rationally connected to one's fitness to practice law, but stated that this holding did not extend to individuals who were evidenced to engage in physical homosexual activity (i.e. who were practicing homosexuals). Fla. Bd. of Bar Exam'rs v. Eimers, 358 So. 2d 7 (Fla. 1978).

- In 1957, a plaintiff attorney was disbarred after being convicted of homosexual sodomy, which the Florida Bar stated was "contrary to the good morals and law of this state." State v. Kimball, 96 So.2d 825 (Fla. 1957).

- A public school teacher who had previously received positive evaluations later received negative evaluations after officials discovered that the teacher had a same-sex domestic partner.[36]

Outside the context of employment, animus and hostility toward LGBT people in Florida has surfaced in the law that has prohibited gay people from adopting since 1977; Florida is one of only two states to do so.[37] In addition, students in Florida public high schools have successfully used federal law to challenge school policies that barred expression of support for gay rights. One state court judge was found to be unqualified to adjudicate a case involving a lesbian mother because of prejudice, and several other trial court judges had their decisions in custody cases reversed because they found that a parent's homosexuality was grounds for denial of custody.

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

[36] 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).
[37] *See infra* Part IV.G.

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

The state of Florida has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[38]

The Florida Commission on Human Relations (the "Commission") states that it

> exists to enforce human and civil rights laws in Florida by investigating and resolving discrimination complaints in areas of employment, housing and certain public accommodations. Such discrimination is based on national origin, color, religion, sex, race, age, disability, marital status and familial status.[39]

The Florida Human Rights Act of 1977 expanded the authority of the Commission from a community relations-based agency to that of an enforcement agency.[40] But because the Commission's mission is to enforce the Florida Civil Rights Act, sexual orientation and gender identity discrimination are beyond the scope of the Commission's authority. The Commission has acted in three trans-related instances when a claim was brought as either sex- or disability-based discrimination.

B. Attempts to Enact State Legislation

1. Proposed bills to add sexual orientation to Florida Civil Rights Act

In 2007, State Senator Ted Deutch and State Representative Kelly Skidmore introduced bills during the legislative session to add sexual orientation to the Florida Civil Rights Act and the Florida Fair Housing Act.[41] Although the bills were assigned to committees and were co-sponsored by numerous legislators, neither bill was received at a public hearing.[42]

SB 572, introduced in the Florida Senate on March 4, 2008, would have effectively amended the Florida Civil Rights Act to include "sexual orientation" as an additional protected class in the employment, public accommodations and real estate

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[38] Florida Civil Rights Act, FLA. STAT § 760 *et seq.*
[39] Florida Comm'n on Human Rel., *Governance Policy*, http://fchr.state.fl.us/fchr/resources/fchr.governance_policy (last visited Sept. 6, 2009).
[40] FLA. STAT. 760.06 (1977).
[41] David Schwartz, *Activist Pushes Anti-Discrimination Bill*, BOCA RATON TIMES, Feb. 14, 2007.
[42] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).

contexts.[43] The bill passed the Senate Commerce Committee, but died in the Committee on Community Affairs on May 5, 2008.

2. Proposed Bill to add sexual orientation and gender identity to Florida Civil Rights Act

HB 191, introduced in the Florida House on March 4, 2008, would have amended the Florida Civil Rights Act to include "sexual orientation" and "gender identity and expression" as impermissible grounds for discrimination.[44] The bill died in the Committee on Constitution and Civil Law on May 2, 2008.

In the 2009 regular session of the Florida Legislature, State Senator Deutch and State Representative Skidmore both introduced bills that would have prohibited discrimination on the basis of sexual orientation and gender identity and expression in employment and housing.[45] No hearings were heard on the bills, but 40 legislators signed on as co-sponsors of the two bills.[46]

Florida Representative D. Alan Hays has been quoted as saying that he believes gays and lesbians "need psychological treatment" and on a different occasion stated: "I had a cousin who died of AIDS; he was queer as a three-dollar bill. He had that homosexual lifestyle and deserved what he got."[47]

3. Proposed Bill to add sexual orientation and gender identity to Florida Educational Equality Act

In 2007, State Senator Ted Deutch and State Representative Shelley Vana introduced bills to add sexual orientation as a protected class in the Florida Educational Equity Act during the legislative session.[48] The amendment would have prohibited discrimination based on sexual orientation against public school employees.[49] While

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[43] S.B. 572, 2008 Leg., Reg. Sess (Fla. 2008). A similar bill was introduced in 2007 but also died in committee. *See* S.B. 2628, 2007 Leg., Reg. Sess. (Fla. 2007). On February 23, 2009, a similar bill was re-introduced in the Senate. Such bill included gender identity/expression as a protected class, in addition to sexual orientation. *See* S.B. 2012, 2009 Leg., Reg. Sess. (Fla. 2009).

[44] H.B. 191, 2008 Leg., Reg. Sess. (Fla. 2008). The proposed bill defined "sexual orientation" as "an individual's actual or perceived heterosexuality, homosexuality, or bisexuality." *Id.* The bill defined "gender identity and expression" as "a gender-related identity, appearance, or expression of an individual, regardless of the individual's assigned sex at birth." *Id.* A similar bill was introduced in 2007 that would have banned discrimination based on sexual orientation only, however, that bill also died. *See* H.B. 639, 2007 Leg., Reg. Sess. (Fla. 2007). On January 15, 2009, a bill similar to H.B. 191 was re-introduced in the House. *See* H.B. 397, 2009 Leg., Reg. Sess. (Fla. 2009).

[45] *LGBT Rights Bills Filed in Florida*, 365 GAY NEWS, Jan. 22, 2009.

[46] Dmitry Rashnitsov, *State GLBT Bill Fails*, SOUTH FLORIDA BLADE, Apr. 30, 2009; *Record Number Sponsor Florida Gay Rights Legislation*, OUT IN AMERICA, May 24, 2009.

[47] Michael Emanuel Rajner, *Florida Lawmaker's Latest Round of Bigoted Statements on Gays and AIDS*, BLOG TO END AIDS, June 15, 2007, http://bit.ly/3t26r8.

[48] Paul Harris, *An End to Discrimination? Two Bills Submitted to Prohibit Discrimination in Public Schools*, THE INDEPENDENT, Feb. 8, 2007.

[49] *See* FL. STAT. ANN. § 1000.05 (2009).

there was no hearing in the Senate, a House subcommittee discussed the bill. However, no action was taken.[50]

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

1. Executive Orders

Florida does not have any executive orders related to sexual orientation or gender identity discrimination in the context of employment.[51] In 2007, the Palm Beach County Human Rights Council urged Governor Crist to issue an executive order prohibiting discrimination based on sexual orientation in state employment.[52] Governor Crist declined to issue such order.

2. State Government Personnel Regulations

The University of Florida, Florida International University, the University of South Florida and Florida State University all have policies prohibiting discrimination with respect to sexual orientation.[53]

The proposal to add sexual orientation protection to the employment anti-discrimination policy at the University of Florida encountered strong opposition. In 1999, during a faculty meeting debate described as "hostile" by the chair of the UF Committee for Gay, Lesbian, and Bisexual Concerns, "some of the speakers associated gay people with pedophiles."[54]

3. Attorney General Opinions

In response to an inquiry from the Broward County Legislative Delegation, the Florida Attorney General released an opinion which concluded that a county "has the authority to adopt an ordinance prohibiting discrimination, including discrimination on the basis of 'sexual orientation" so long as the county does not amend or alter the provisions of any acts passed by the Florida Legislature.[55] The Attorney General also concluded that the county may award damages and nonmonetary relief for violations of the ordinance. Broward County has since adopted an ordinance prohibiting

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[50] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).

[51] *See* Fla. Archive of Exec. Orders, http://www.flgov.com/orders_search (last visited Sept. 6, 2009); Fla. Archive of Exec. Orders in PDF version, http://bit.ly/CHBqJ (last visited Sept. 5, 2009).

[52] *Governor Crist Does Not Issue Executive Order Requested by Homosexual Group,* FLA. FAMILY ASSOC. NEWS, (Florda Family Assoc., Florida), Feb. 2007, at 1, *available at* http://bit.ly/Chvrj.

[53] FLA. ASSOC. OF COLL. POLICY §§ 6C-1.006, 6C8-1.009, 6C4-10.100.

[54] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 109-110 (1999 ed.).

[55] Fla. Att'y Gen. Op. No. 1993 Fla. AG LEXIS 5 (1993).

discrimination based on sexual orientation and gender identity/expression in the areas of employment, housing, and public accommodations.[56]

D. Local Legislation

According to the National Center for Lesbian Rights, fourteen cities and six counties in Florida offer various kinds of protection from discrimination on the basis of sexual orientation.[57] According to the survey, twelve of these municipalities also offer protection from gender identity discrimination.[58] Eight cities and counties in Florida have separate human rights agencies authorized to investigate and resolve discrimination complaints.[59]

1. City of Orlando

In recommending an amendment of Chapter 57 of the Code of the City of Orlando, the City of Orlando's Human Relations Board undertook a review of the issue of whether "sexual orientation" should be added as a protected class.[60] The Orlando Human Relations Board, in collaboration with the Orlando City Council, produced a report documenting discrimination by Orlando-area businesses. The report showed that homosexual and bisexual individuals had, indeed, been the victims of discrimination.[61]

2. Miami-Dade County

In January 1998, the Miami Shores City Council rejected Vice-Mayor Mike Broyle's proposal to urge Miami-Dade County to add sexual orientation to the county's Human Rights Ordinance. Cesar Sastre, who voted against the measure, compared homosexuality to alcoholism and said, "Why should gay people be treated different than me? What is sexual orientation? Where do we draw the line?" Sastre defended his comments by claiming that he is a recovering alcoholic who wants gay men and lesbians to "recover" from their sexual orientation.[62]

3. Palm Beach County

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[56] Fla. L. § 83-380 (Broward County Human Rights Act).
[57] NAT'L CENTER FOR LESBIAN RTS., HUMAN RIGHTS ORDINANCES IN FLORIDA MUNICIPALITIES (2008), http://bit.ly/PKRmQ (last visited Sept. 5, 2009). The municipalities with such legislation are Broward County, Gulfport County, Gainesville, Juno Beach, Key West, Lake Worth, Leon County, City of Miami, Miami Beach, Miami-Dade County, Monroe County, Orange County, Orlando, Oakland Park, Palm Beach County, Sarasota, St. Petersburg, Tampa, Tequestra, West Palm Beach and Wilton Manors. *Id.*
[58] *Id.* The municipalities with such legislation are Broward County, Gulfport County, Gainesville, Key West, Lake Worth, City of Miami, Monroe County, Oakland Park, Palm Beach County, Tequestra, West Palm Beach and Wilton Manors. *Id.*
[59] Broward County Civil Rts. Div., Orlando Office of Hum. Rel., St. Petersburg Cmty. Aff. Dep't, Tampa Office of Hum. Rts., Miami-Dade County Equal Opp. Bd., Hillsborough County Equal Opp. Admin., Jacksonville Hum. Rts. Comm'n, Lee County Office of Equal Opp., Palm Beach County Office of Equal Opp., Pinellas County Office of Hum. Rts. and Greater Palm Beaches Fair Housing Center. *Id.*
[60] Orlando City Council Minutes (2007) (discussing an ordinance amending Ch. 57, 2002).
[61] *Id.*
[62] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 116 (1999 ed.).

In 1990, the Palm Beach County Board of Commissioners became Florida's first public employer to prohibit workplace discrimination based on sexual orientation by unanimously voting to amend the county's Affirmative Action Plan to include sexual orientation.[63]

In 1995, Palm Beach county commissioners voted 4-3 against including sexual orientation in a proposed countywide anti-discrimination ordinance, but then voted 5-2 to pass the proposed ordinance covering the other categories already contained in federal law.[64]

In 2002, the Palm Beach County Board of County Commissioners adopted an amendment including sexual orientation in its Equal Employment ordinance by unanimous consent.[65]

In 2007, the Palm Beach County Board of County Commissioners amended both the Fair Housing and Equal Opportunity ordinances to prohibit discrimination based on gender identity or expression.[66]

Cities in Palm Beach County not specifically named below that have enacted policies prohibiting discrimination based on sexual orientation for city employees include: Atlantis, Belle Glade, Boynton Beach, Greenacres, Haverhill, Lake Park, Manalapan, Pahokee, Palm Beach, Palm Beach Shores, and South Bay.[67]

4. Alachua County

In 2006, a bill was introduced in the House during a session in which it was codifying laws relating to the Gainesville-Alachua County Regional Airport Authority. The bill's original draft included a discrimination provision that would have prohibited the Gainesville-Alachua County Regional Airport Authority from discriminating against a person on the basis of sexual orientation in the employment context. However, when the bill was ultimately codified, it omitted any mention of sexual orientation. [68]

In 1995, a complaint was filed in Alachua County challenging the constitutionality of Amendment 1, a charter amendment passed by voter initiative that prohibited the board of county commissioners from adopting "any ordinance that creates classifications based upon sexual orientation or sexual preference except as necessary to

[63] Meg James, *County First in State to Protect Gay Employees*, PALM BEACH POST, Feb. 7, 1990.
[64] Lesbian & Gay L. Notes (Sept. 1995), *available at* http://www.qrd.org/qrd/usa/legal/lgln/1995/09.95.
[65] J. Christopher Hain, *County Quietly OK'd Law against Gay Bias on Job*, PALM BEACH POST, Dec. 4, 2002.
[66] Jennifer Sorentrue, *Palm Beach County Prohibits Gender Identity Discrimination*, PALM BEACH POST, Nov. 20, 2007.
[67] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[68] 2006 FL H.B.1629 (2006).

conform to county ordinances, federal or state law."[69] A Circuit Court in Gainesville held that Amendment 1 was unconstitutional and "indistinguishable from the Amendment struck down in [*Romer v. Evans*[70]]."[71]

5. City of West Palm Beach

In 1991, the West Palm Beach City Commission enacted a resolution adding sexual orientation to the city's equal opportunity policy and affirmative action plan.[72]

In 1994, the City of West Palm Beach enacted an Equal Opportunity Ordinance prohibiting discrimination based on sexual orientation in employment, housing, and public accommodation. The ordinance also ensured that gay men and lesbians would be represented on city boards and commissions. Shortly after the ordinance went into effect, a referendum was introduced seeking to repeal the ordinance by citywide vote. In January, 1995, 56% of voters refused to repeal the ordinance.[73]

In 2007, West Palm Beach amended the Equal Opportunity Ordinance to prohibit discrimination based on gender identity or expression.[74]

6. City of Lake Worth

In 2003, the Lake Worth City Commission amended the city's Civil Rights Act to prohibit discrimination based on sexual orientation. In 2007, the city commission unanimously voted to amend the act to include gender identity and expression.[75]

7. City of Delray Beach

In 2006, the Delray Beach City Commission voted 3-2 to ban discrimination based on sexual orientation in city government and to provide domestic partner benefits.[76]

8. Town of Juno Beach

In 2007, the Town of Juno Beach revised its non-discrimination and harassment awareness policies to include sexual orientation.[77]

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[69] Lambda Legal, *Lambda Defeats Antigay Amendment in Florida County* (Nov. 25, 1996), http://www.lambdalegal.org/news/pr/lambda-defeats-anti-gay.html.
[70] 517 U.S. 620 (1996).
[71] Lambda Legal, *Lambda Defeats Antigay Amendment in Florida County* (Nov. 25, 1996), http://www.lambdalegal.org/news/pr/lambda-defeats-anti-gay.html.
[72] Angela Bradbery, *West Palm's Gay Workers Added to Equal Opportunity Policy*, PALM BEACH POST, May 20, 1991.
[73] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[74] *West Palm Enacts Transgender Protections*, THE WATERMARK, May 9, 2007.
[75] Nicole Janok, *Lake Worth Opts to Expand Civil Rights Laws*, PALM BEACH POST, July 6, 2007.
[76] Erica Life, *Group Lobbies Delray Commission Approves Gay Rights Measures*, SOUTH FLORIDA SUN-SENTINEL, July 19, 2006.

9. **Town of Hypoluxo**

In 2007, the town of Hypoluxo amended its non-discrimination policy to include sexual orientation.[78]

10. **Town of Jupiter**

In 2007, the town of Jupiter voted to amend its non-discrimination policies include sexual orientation and to provide domestic partner benefits.[79]

11. **Village of Tequesta**

In 2007, the village of Tequesta's city council voted to amend four policies to protect Tequesta employees from discrimination and harassment based on sexual orientation and gender identity and expression.[80]

12. **Royal Palm Beach**

In 2007, the Village of Royal Palm Beach amended its Equal Employment Opportunity policy and its Anti-Harassment and Anti-Discrimination Policy to prohibit discrimination based on sexual orientation.[81]

13. **Palm Beach Gardens**

In 2007, Palm Beach Gardens City Council amended its Equal Employment Opportunity Policy to prohibit discrimination based on sexual orientation.[82]

14. **Palm Beach County School District**

In 1991, the Palm Beach County School district considered amending its policies to prohibit discrimination on the basis of sexual orientation. However, when the amendment came up for a vote, the school board declined to add sexual orientation as a protected group and instead adopted a generic policy prohibiting discrimination that did not enumerate any protected classes.[83]

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[77] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[78] *Hypoluxo to Prohibit Discrimination*, OUT IN AMERICA, Feb. 24, 2007.
[79] *Jupiter Implements Domestic Partner Policy*, WEEKDAY, Mar. 16-22, 2007.
[80] *Village Updates Policy*, NORTHERN PALM BEACH COUNTY HOMETOWN NEWS, May 18, 2007.
[81] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[82] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).
[83] Lynette Holloway, *Schools Consider Homosexual Rights*, PALM BEACH POST, Aug. 19, 1991; Susan Bellido and Jeffrey Kleinman, *Gay Rights: Board Skirts Issue*, PALM BEACH POST, Aug. 22, 1991.

In 2002, the school board again considered amending its anti-discrimination and anti-harassment policies to include sexual orientation, but ultimately declined to do so.[84]

On May 30, 2006, the School Board of Palm Beach County unanimously adopted a Commercial Nondiscrimination Policy, which prohibits the School Board from accepting bids or proposals from, or engaging business with, "any business firm that has discriminated on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, disability, or any other form of unlawful discrimination in its solicitation, selection, hiring, or treatment of another business."[85] In July, 2009, the policy was amended to prohibit discrimination on the basis of gender identity or expression.[86]

E. Occupational Licensing Requirements

There are several state licensing requirements mandating that one must retain "good moral character" and forebear from committing crimes involving acts of "moral turpitude."[87] "Good moral character" and "moral turpitude" are not defined by Florida statute.

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[84] Scott Travis, *Gay Rights Activists Push for Final Vote*, SOUTH FLORIDA SUN-SENTINEL, Jan. 30, 2003; Kimberly Mitchell, *School Board Postpones Gay Anti-Discrimination Vote*, PALM BEACH POST, Dec. 3, 2002.

[85] Donald Cavanaugh, *Nondiscrimination Policy Adopted by School Board*, THE INDEPENDENT, June 8, 2006.

[86] Email from Rand Hoch, President and Founder, Palm Beach County Human Rights Council, to Brad Sears, Executive Director, the Williams Institute (Nov. 27, 2009 12:59:00 PST) (on file with the Williams Institute).

[87] Examples include license requirements for home health agency personnel, criminal justice officers, health care professionals, day care personnel, home contractors and teachers.

III. Documented Examples of Employment Discrimination Against LGBT People By State & Local Governments

A. Case Law

1. State & Local Government Employees

Mowery v. Escambia County Util. Auth., 2006 U.S. Dist. LEXIS 5304 (N.D. Fla. Feb. 10, 2006).

In *Mowery v. Escambia County Utilities Authority*,[88] a white heterosexual male who was harassed by co-workers suggesting that he was gay, brought an action under Title VII of the Civil Rights Act of 1964 (hereinafter, "Title VII") against his employer, the Escambia County Utilities Authority (the "Authority"). Mowery, the plaintiff, did not assert any claims under Florida law. The court granted the Authority's Motion for Summary Judgment on the ground that none of the scenarios established by *Oncale v. Sundowner Offshore Services, Inc.*[89] had been established. The court found that the stereotypes experienced by Mowery were not based on his failure to conform to his expected gender role. The court stated that "being forty years old, owning a home and truck, living alone, and not discussing one's sexual partners are not feminine gender traits. These characteristics may reflect stereotypes associated with a homosexual lifestyle, but they are not stereotypes associated with a feminine gender."[90]

Woodard v. Gallagher, 59 Emp. Prac. Dec. (CCH) ¶. 41, 652, 1992 WL 252279 (Fla.Cir.Ct. 1992).

Thomas Woodard, a deputy sheriff, filed a seven count complaint against Walt Gallagher, as Sheriff of Orange County, alleging a violation of his constitutional rights to privacy, Equal Protection, free speech, free association and a denial of Due Process under the Florida Constitution. The Court found that the constructive termination violated Woodard's constitutional rights to privacy and Equal Protection. The Free Speech and Free Association counts remained in the case, but were not specifically argued as being applicable to the facts.

The Plaintiff alleged the Defendant violated his constitutional rights by forcing him to resign his position as deputy sheriff because he was homosexual. The Sheriff claimed his leaving was voluntary and not unduly forced and therefore the homosexual issue was not relevant. The Court bifurcated the trial to allow a jury to determine the factual issues of whether or not Plaintiff was constructively fired by the Sheriff and if so whether or not the discharge was based on Plaintiff's homosexual orientation and conduct. The jury found the Plaintiff was constructively fired and such firing was based on Plaintiff's homosexual orientation and conduct.

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[88] 2006 U.S. Dist. LEXIS 5304 (N.D. Fla. Feb. 10, 2006).
[89] 523 U.S. 75 (1998) (claim of same-sex sexual harassment actionable under Title VII).
[90] *Mowery*, 2006 U.S. Dist. LEXIS 5304 at *19.

The second portion of the trial was conducted before the Court to allow the presentation of further evidence and argument on the constitutional issues. The Court found that the action of the Sheriff in constructively firing the Plaintiff was unconstitutional as applied to the Plaintiff.

> [the homosexual conduct] occurred away from and unrelated to his job and was within his personal private life. There was no evidence that his job or public life was affected in any respect by such conduct. Such conduct was not unlawful and there was no public rumor as to his involvement in any sexual conduct. Also, he stated that he had not been involved in any homosexual conduct since he became a deputy and would even abstain from any personal homosexual relationships if that was required to keep his job. He was not being an advocate for homosexual rights which could have embarrassed the Sheriff or make it appear that the Sheriff was giving tacit approval to homosexual activity.[91]

The Court held that the Sheriff's use of plaintiff's sexual conduct and preference as a basis to discharge him violated his right to privacy. The Court also held that gay people are entitled to heightened scrutiny under equal protection analysis, stating:

> After extensive review of case law in the equal protection area, it is the conclusion of this Court that known homosexual persons are included in a class of persons who are inherently treated with prejudice by a large number of people in our society. *Jantz v. Muci,* [56 EPD ¶ 40,766] 759 F.Supp. 1543 (D.Kan.1991). It appears that the only reason they have not been granted heightened equal protection rights is because the difference in them touches most peoples' deeply ingrained heterosexual orientation both personally and culturally. The majority's heterosexual orientation is biologically, psychologically and morally ingrained in our culture to the extent that most persons don't want to even try and understand, much less accept, the homosexuals [sic] outlook. Even though they recognize that most of a person's life and relationships do take place outside the sexual sphere, their uncomfortableness and aversion to being confronted with the intimacies of persons who are attracted to the same sex

[91] *Woodard v. Gallagher*, 59 Emp. Prac. Dec. (CCH) ¶ 41,652, 1992 WL 252279 at *1 (Fla. Cir. Ct. 1992).

> often results in depreciating jokes, put downs, derisions, and prejudice.[92]

Smith v. City of Jacksonville Corr. Inst.,1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991).

In *Smith*, a hearing officer held that an individual with gender dysphoria is within the disability coverage of the Florida Human Rights Act, as well as the portions of the Act prohibiting discrimination based on perceived disability. Smith had been employed as a correctional officer but was terminated upon discovery that Smith was transsexual, and the hearing officer recommended that the Human Relations Commission enter a Final Order reinstating Petitioner, awarding back pay and attorneys' fees and costs and reserving jurisdiction should the parties fail to agree on appropriate reinstatement, back pay and attorney's fees and costs.

Smith was biologically male and during the entire time she was employed at the Institution (1972-1985), she functioned as a male and was known as William H. Smith. Smith had previously been diagnosed as transsexual (male-to-female) while serving in the Navy.

While serving as a corrections officer, Smith advanced rapidly. Smith was a floor officer at a time floor officers had broad responsibilities, and then became the youngest officer ever to be put in charge of road crews. Smith was made a provisional sergeant by administrative appointment six months prior to being able to take the sergeants exam. Upon passing the sergeants exam, Smith was made a permanent sergeant. While a sergeant, she was promoted to relief watch commander at the City Jail. Smith was the only sergeant permitted to function as a relief watch commander. Eventually, Smith was made a provisional lieutenant by administrative appointment. Again, the appointment was prior to taking the requisite examination. When she took the examination, she had the highest score of those tested and was promoted to permanent lieutenant. She regularly received excellent performance evaluations. These evaluations included outstanding ratings for interactions with other people due to her knack for relating well with both coemployees and inmates.

However, with the passage of years and the enforced male living, Smith found it increasingly difficult to deny her femaleness. She developed a severe bleeding ulcer. She fell into a major depression and even began to consider suicide. The court found that the impairment was directly due to her handicap of transsexuality. On July 8, 1985 while on vacation, she went out in the middle of the night to a very private, unpopulated, nearby beach wearing women's clothing. While out, Smith had a flat tire. A passing patrolman stopped to help with the tire. Initially, Smith identified herself as Barbara Joe Smith. The officer who stopped to assist Smith ran Smith's tag and discovered that Smith's true name was William, not Barbara Joe. The officer filed a general offense report of the encounter with the City. Once the report was filed, copies of this report

[92] *Id.* at *3.

were immediately circulated throughout the jail in sufficient quantity to "paper the walls."

On July 12, 1985, Smith reported to the Directors' office to discuss the July 8 incident. Smith explained that she was transsexual and that the event had been a manifestation of her transsexuality. The Directors asked Smith if she would be willing to accept counseling, but Smith explained to them that counseling would not "cure" her and that the only effective treatment would be sex reassignment. Smith told her superior that she was going to go ahead and pursue a sex change operation and would live as a female. The Directors thereupon decided that Smith could not be retained and the City's course of action would be to terminate her. They tried to persuade Smith to resign. The City's testimony was that Smith in fact agreed to resign because of concerns about the way other people would react to her. Smith denied agreeing to resign. Smith was then terminated.

The hearing officer found that,

> [i]mportantly, at the time of Smith's termination in 1985, nothing had changed in Smith's abilities to perform her job. This was the same transsexual person who had rendered exemplary service for the past 14 years. No reasonable accommodation of Petitioner's handicap was explored or attempted by the City. Given, the Sheriff's testimony regarding his ability to accept Petitioner, the screening undergone by correctional officers, the fact that co-employees stepped forward on behalf of Smith and Smith's experience in other jobs after her termination demonstrate that the City's apprehensions were unjustified and were not concerns which could not be reasonably accommodated as was done with female correctional officers and black correctional officers when those groups entered the correctional work force.[93]

The City's main line of defense for terminating Smith was that an absence of transsexuality was a bona fide occupational qualification (BFOQ) for her position. The hearing officer rejected this argument, finding that "the City provided virtually no evidence to discharge its burden of proving a BFOQ. Its entire case consisted of the opinions of the Sheriff and his surmise and assumption about the responses of Petitioner's coemployees and inmates."[94] The hearing officer continued,

> Simply put, prejudice cannot be a basis for a BFOQ. Permitting negative third party reactions - whether malignant bigotry or unthinking narrowmindedness and ignorance - to be elevated to a BFOQ would be to turn the

[93] *Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882, at *8 (Fla. Div. Admin. Hrgs. 1991).
[94] *Id.* at *13.

> Human Rights Act inside out and upside down. Not every adverse reaction can be honored, regardless of merit or worth. Third party reactions must be deserving of deference to receive it. Otherwise, bigotry and prejudice would need only to be entrenched to be upheld. Obviously that cannot be the law. In order for an handicap to be considered a BFOQ some amount of evidence beyond mere speculation must be ascertained by the employer which would justify its conclusion of unemployability and that the handicap cannot be reasonably accommodated . . . .
>
> In this case, the City has failed to show, either directly or indirectly, the existence of sufficient loss of respect to constitute a BFOQ defense. The evidence, to the contrary, tends to negate a BFOQ. Further, the City has not shown any attempts to accommodate Smith and has made no showing that she could not have been accommodated. Perhaps most important, the City's asserted BFOQ would contravene the purposes of the Human Rights Act and even if proved could not on this record be recognized as a legitimate BFOQ. Therefore, Respondent committed an unlawful employment practice against Petitioner when it fired her because of her handicap of transsexualism and Petitioner is entitled to reinstatement to a position similar in nature to the one she was terminated from or to a position employees in positions similar to Petitioners in 1985 were transferred to when the institution reorganized its employment classes, back pay through the date of reinstatement and attorney's fees and costs.[95]

Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988).

Plaintiff, a deputy for the sheriff's department, was fired after the sheriff's department discovered she was a lesbian when two of her former lovers (also employees of the sheriff's department) told the sheriff's department about Plaintiff's sexual orientation. Plaintiff alleged she was terminated because of her sexual orientation; the sheriff's department claimed she was terminated because of excessive absenteeism, failure to perform, and alleged instances of misconduct involving Plaintiff's former lovers. The court granted the sheriff's department's motion for summary judgment, assuming for its analysis that Plaintiff was terminated based on her sexual orientation, and holding that "[i]n the context of both military and law enforcement personnel, dismissal for homosexuality has been found rationally related to a permissible end."[96]

Florida Bd. of Bar Exam'rs Re N.R.S., 403 So.2d 1315 (Fla. 1981).

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[95] *Id.* at *14 (internal citations omitted).
[96] *Todd v. Navarro*, 698 F. Supp. 871, 875 (S.D. Fla. 1988).

In a lawyer's application to the Florida Bar, he disclosed that the Military Selective Service classified him in Class 4-F, which was due to a physical problem or homosexuality. The lawyer refused to answer questions about his sexual conduct and the board refused to certify him for admission to practice. In an informal hearing the Board inquired into lawyer's sexual conduct. Lawyer admitted a continued preference for men but refused to answer questions about his past sexual conduct. The Board requested that he return to answer additional questions and he declined. He petitioned the Court to order the Board to certify him for admission to practice.

The Florida Supreme Court held that the investigation performed by the Florida Board of Bar Examiners should be limited to inquiries which bear a rational relationship to an applicant's fitness to practice law. "

> Private noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law. This might not be true of commercial or nonconsensual sex or sex involving minors . . . . In the instant case the board may ask the petitioner to respond to further questioning if, in good faith, it finds a need to assure itself that the petitioner's sexual conduct is other than noncommercial, private, and between consenting adults. Otherwise, the board shall certify his admission.[97]

Fla. Bd. of Bar Exam'rs v. Eimers, 358 So.2d 7 (Fla. 1978).

In 1978, the Florida State Bar sought guidance from Florida Supreme Court as to whether applicant should be denied admission for lack of "good moral character" because of his admitted orientation as homosexual per se. The court held that a "rational connection" to fitness was required to deny bar admission, and held that mere self-identification as homosexual was not adequate to meet this rational connection. However, the court severely limited its holding, specifying that it did not extend to individuals who were evidenced to engage in physical homosexual activity (i.e. who were practicing homosexuals).[98]

State v. Kimball, 96 So.2d 825 (Fla. 1957).

In *State v. Kimball*, the plaintiff attorney was disbarred after being convicted of homosexual sodomy, which the Florida Bar stated was "contrary to the good morals and law of this state." The Florida Supreme Court upheld Plaintiff's disbarment with minimal discussion.[99]

2. **Private Employees**

Cox v. Denny's, Inc., 1999 U.S. Dist. LEXIS 23333 (M.D. Fla. Dec. 22, 1999).

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[97] *Fla. Bd. of Bar Exam'rs Re N.R.S.*, 403 So.2d 1315 (Fla. 1981).
[98] *Fla. Bd. of Bar Exam'rs v. Eimers*, 358 So.2d 7 (Fla. 1978).
[99] *State v. Kimball*, 96 So.2d 825 (Fla. 1957).

In *Cox v. Denny's, Inc.*,[100] a male pre-operative transsexual, claimed he was harassed by a fellow cook at a Denny's restaurant. In a lawsuit filed in the U.S. District Court for the Middle District of Florida, Mark Cox alleged that the male co-worker made sexual advances towards him, groped Cox, stated "I [*sic*] gonna get me some of that," and called him derogatory names such as "fag," "whore bitch," and "freak mother fucker."[101] Cox alleged that he notified management; no action was taken. After exhausting his administrative remedies, Cox filed a *pro se* lawsuit against Denny's, contending that he was verbally and physically assaulted "because of" sex, in violation of Title VII. The court acknowledged that a transsexual may establish an actionable Title VII claim so long as the harassment occurred "because of" the individual's sex "under the traditional meaning of that term."[102] However, the court held that the harassment was not severe enough to give rise to an actionable hostile work environment claim because the co-worker had only groped Cox *once* in a seven month period. Notably, in so holding, the court explained that the co-worker's offensive utterances and derogatory names "were related to Cox's transsexual status and sexual orientation, which [could] support a hostile work environment claim based on sex."[103]

De La Campa v. Grifols America, Inc., 819 So.2d 940 (Fla. Dist. Ct. App. 2002).

In *De La Campa v. Grifols America, Inc.*,[104] a lesbian filed a charge of discrimination with the Miami-Dade County Equal Opportunity Board against Grifols America, Inc. alleging employment discrimination on the basis of sexual orientation in violation of Chapter 11A of the Code of Miami-Dade County (the "Code"), which prohibits employment discrimination on the basis of sexual orientation.[105] In her charge, Aindry De La Campa alleged that her supervisors repeatedly advised her that she would be terminated because of her sexual orientation and that she was intentionally excluded from corporate-sponsored social functions because of her sexual orientation. The trial court found that the Code does not create a private cause of action for alleged violations. On appeal, the appellate court affirmed the trial court's ruling that the Code does not provide a private cause of action but instead provides for an administrative relief scheme.

B. Administrative Complaints

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[100] 1999 U.S. Dist. LEXIS 23333 (M.D. Fla. Dec. 22, 1999).
[101] *Id.* at *2.
[102] *Id.* at *5-*6.
[103] *Id.* at *10.
[104] 819 So.2d 940 (Fla. Dist. Ct. App. 2002).
[105] See 1 FLA. CODE Chptr. 11A § 11A-1, which states:

> [i]t is hereby declared to be the policy of Dade County, in the exercise of its police power for the public safety, health and general welfare, to eliminate and prevent discrimination in employment... because of race, color, religion, ancestry, national origin, sex, pregnancy, age, disability, marital status, familial status or sexual orientation... All violations shall be prosecuted in the court of appropriate jurisdiction of Dade County, Florida.

Id.

Sampson v. Dep't of Children and Family Serv., 2006 Fla. Div. Adm. Hear. Lexis 466 (F.D.A.H. Sept. 29, 2006).

In *Sampson v. Department of Children and Family Services*,[106] Sampson filed a discrimination claim with the Commission alleging that the Department of Children and Family Services (the "Department") discriminated against her on the basis of race and sex in violation of the Florida Civil Rights Act. Sampson is an African-American lesbian who worked for the Department for two years before she was terminated, allegedly for poor performance. Sampson's claim of sex discrimination was based on the allegation that after she was seen hugging another female employee in her office in a "romantic way," her supervisor informed Sampson that "there was a rumor that Sampson was having a relationship with another female employee, that her conduct needed to be professional, and that she should keep her door open when that employee was in her office."[107] The administrative law judge ruled that Sampson's sex discrimination allegations were not actionable under Florida law and that discrimination on account of sexual orientation is not actionable. The court found that Sampson was terminated because of documented poor performance rather than race or sex. The Commission adopted the recommended order of the administrative law judge and dismissed the complaint.

Fishbaugh v. Brevard County Sheriff's Dep't, Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).

In *Fishbaugh v. Brevard County Sheriff's Department*,[108] Connie Fishbaugh, a post-operative transsexual, filed a complaint of discrimination with the Commission after being terminated allegedly based on disability because of her transsexuality and sex in violation of the Florida Civil Rights Act. (The Final Order from the Commission does not provide any details regarding the circumstances of Fishbaugh's termination.) The administrative law judge concluded that transsexuality is not a disability under the Florida Civil Rights Act because the Americans with Disabilities Act and the Rehabilitation Act exclude transsexuality as a disability. The administrative law judge also limited the application of the *Smith*[109] case because it involved a pre-operative transsexual with medical disabilities, as opposed to Fishbaugh, who was a post-operative transsexual, and because the *Smith* case occurred prior to the American Disabilities Act and the amendments to the Rehabilitation Act. As to the sex discrimination claim, the administrative law judge concluded that Fishbaugh was discriminated against because she is a transsexual and not because she is a woman, and transsexuals are not a protected class under the Florida Civil Rights Act. The Commission panel agreed with the administrative law judge's findings on the disability claim noting that, in this case, Fishbaugh was not disabled because Fishbaugh was not currently suffering from a

[106] 2006 Fla. Div. Adm. Hear. Lexis 466 (F.D.A.H. Sept. 29, 2006).
[107] *Id.* at 21.
[108] Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).
[109] *Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991) (discussed *supra*).

disability, since Fishbaugh had completed sex-reassignment.[110] Based on the U.S. Supreme Court's holding in *Price Waterhouse v. Hopkins*,[111] the Commission held that Fishbaugh may bring a claim of sex discrimination as a woman "where the complainant is perceived not to conform to sex stereotypes or because the complainant has changed sex."[112]

Sch. Bd. of Escambia County v. Madison, 1992 Fla. Div. Adm. Hear. LEXIS 6879 (F.D.A.H. 1992).

In *School Board of Escambia County v. Madison*,[113] David Madison received a letter from the Superintendent for the Escambia County School Board (the "School Board") stating that his employment as a second grade teacher was terminated because Madison had allegedly committed a crime involving moral turpitude. Madison was arrested after attempting to interact with the undercover police officer in an area that is allegedly known for illegal sexual transactions, mostly involving gay males. According to the police report, Madison ceased his sexual advances as soon as the undercover officer's consent was withdrawn. Nevertheless, he was arrested for simple battery for touching the officer's clothing. Parents at Madison's school became aware of the situation when the arrest was picked up by the newspapers. Some parents were supportive, while others made statements such as "we don't want those type of people teaching our children" and "homosexuals are child molesters."[114] Madison was fired and sought administrative review. The Hearing Officer of the Division of Administrative Hearings noted that "for the most part, the negative comments about Mr. Madison involved not the criminal charge, but the homosexual nature of the event."[115] The Hearing Officer ruled that Madison was entitled to reinstatement with back pay because there was "no credible evidence to suggest that Mr. Madison's ability to teach had been impaired or that the students in Mr. Madison's class had in any way had their academic potential affected. . . . Additionally, discipline based on a person's lifestyle is clearly prohibited by the master contract."[116] The master contract between the School Board and the Escambia Education Association stated that the "School Board shall not discriminate against any member because of . . . lifestyle."[117]

C. Other Documented Examples of Discrimination

Broward College

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[110] *See* Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004). The Panel distinguished this case from the *Smith* case because *Smith* involved a pre-operative transsexual with significant medical disabilities, and the *Smith* case occurred prior to the enactment of Americans with Disabilities Act and the Florida Civil Rights Act of 1992.

[111] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a "claim of discrimination could be found where a perception that a person failed to conform to stereotyped expectations of how a "woman" should look and behave").

[112] Fla. Comm'n on Human Rel. Order # 04-103 (F.C.H.R. Aug. 20, 2004).

[113] 1992 Fla. Div. Adm. Hear. LEXIS 6879 (F.D.A.H. 1992).

[114] *Id.* at *12.

[115] *Id.*

[116] *Id.* at *14.

[117] *Id.*

In 2009, two years after she started working at the college, a transgender woman was forced to resign because of her gender identity. She received praise for her work and was given a letter stating that she was dependable, able to work independently, and a skilled technician. Approximately two months before she was fired, she notified her boss that she would be transitioning from male to female. In March 2009, she was called in on her day off to attend a staff meeting. She did not have a clean uniform to wear and told her boss that she would wear women's clothes, which she wore in her day-to-day life but not on the job, and he said it was fine. When she arrived to campus, faculty and staff gave her hostile looks and she felt unsafe. She called a co-worker friend to ask for support, but he hung up on her. Her boss then accused her of harassing her co-worker because she had called him after he hung up and moved her to an unfavorable shift that her friend did not work. The new shift interfered with her medical appointments which were crucial to her transition and she was forced to resign.[118]

City of Largo Management

Susan (Steve) Stanton worked for the City of Largo as an assistant city manager and city manager for a combined 17 years.[119] In early 2007, Stanton informed her superiors that she planned to begin living as a woman in preparation for sex reassignment surgery. News of Stanton's decision was leaked to the local media, leading the City Commissioners to vote 5-2 to suspend Stanton pending their final vote. During the suspension meeting, one of the Commissioners who voted in favor of the suspension stated: "His [sic] brain is the same today as it was last week. He [sic] may be even able to be a better city manager. But I sense that he's [sic] lost his [sic] standing as a leader among the employees of the city."[120] The Mayor, who voted against the suspension stated: "I'm going to be embarrassed if we throw this man [sic] out on the trash heap after he's [sic] worked so hard for the city. We have a choice to make: We can go back to intolerance, or we can be the city of progress." During the suspension meeting a citizen expressed her sentiments stating: "I don't want that man [sic] in office. I don't think we should be paying him $150,000 a year when he's [sic] not been truthful. We have to speak up. Of course, we don't believe in sex changes or lesbianism. They have their rights, but we do, too." Ultimately, Stanton was fired, but said that she would not sue the city, stating that a potential suit against the city would be "like suing my mother."[121]

Municipal Sheriff's Department

[118] 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).
[119] Jillian Todd Weiss, *The Law Covering Steve (Susan) Stanton, City Manager Dismissed In Largo, Florida*, GENDERTREE.COM, Mar. 1, 2007, http://bit.ly/18613m.
[120] Lorri Helfand, *Commission Moves to Fire Stanton*, ST. PETERSBURG TIMES, Feb. 27, 2007.
[121] *Id.*

In 2007, a sheriff's department applicant was offered positions at two sheriff's offices which were then rescinded because they found out he was living with a man whom they assumed was his partner.[122]

Miami-Dade County Agency

In 2007, a lesbian social worker at a county agency suddenly had problems at work upon disclosing her sexual orientation following ten years of employment without issue. When she disclosed her sexual orientation, her supervisor started giving her bad reviews, and stood in the bathroom with her while she urinated for a drug test which was not standard procedure at the agency.[123]

Municipal Police Department

In 2006, an applicant to the police department was accused of being "dishonest" and when she informed them of her transgender status after completing her application.[124]

Hillsborough County School District

In 2005, eight years after he had been hired by the Hillsborough County School District, a teacher protested the dismantling of a gay pride book on display at the local public library. He was quoted in the local paper for saying that, as a gay man and a school librarian, he was upset that the book display had been taken down prematurely. The school superintendent saw that he was quoted in the paper and proceeded to have his behavior reviewed by the school district's Professional Standards Office. Though the teacher was not disciplined for discussing the book display with the paper, he was told that he was not to bring "the issue" into the workplace. This censorship has caused him a great deal of distress and he worries that his professionalism will be called into question repeatedly because he is gay.[125]

Pinellas County Water Quality Department

In 2005, a gay employee of the Pinellas County Water Quality Department reported that he was terminated after the employee's neighbor disclosed his sexual orientation to his supervisor.[126]

Tampa Police Department

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[122] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[123] *Id.*
[124] *Id.*
[125] 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).
[126] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

In 2004, a gay officer with the Tampa Police Department experienced harassment and was terminated when he disclosed his sexual orientation to supervisors. He was also arrested for lewd and lascivious conduct for informing street youth about "safer sex."[127]

Sarasota Public School

In 2004, a Sarasota public school teacher who had agreed to let students use her classroom for "Gay-Straight Alliance" meetings was harassed by other teachers to such an extent that she felt she had to leave. After she resigned, the school refused to give her a positive recommendation.[128]

Department of Corrections

In 2004, a Department of Corrections employee was compelled to resign by superiors when his supervisors discovered that he occasionally wore women's clothes outside the office.[129]

Pasco County Sheriff's Department

In 2003, a transgender employee of the Pasco County Sheriff's Department reported instances of harassment to her supervisors, who allegedly forced her to resign. Co-workers intentionally used the inappropriate gender pronoun when she was out on patrol, thus outing her to officers on the receiving end of police calls. She complained to superiors, but the conduct continued. When co-workers started a rumor that she had posed topless online, she resigned.[130]

Florida State Board of Nursing

In 2002, an applicant for a Florida nursing license was denied because of his sexual orientation. The applicant had already procured a nursing license in Indiana.[131]

Tampa Public School

In 2002, a transgender public school employee experienced harassment by co-workers and superiors; she was called a "thing," and was taunted about which bathroom she should be permitted to use.[132]

Jacksonville Fire Department

In 2002, an openly lesbian firefighter was repeated passed over for promotion in favor of less-qualified employees. She was eventually fired for "low test scores," even though her scores were consistently superior to those of other employees.[133]

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[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*

Newton Fire Department

In 2002, a gay firefighter reported that he had been harassed when colleagues found his personal ad online and circulated it around the office. The firefighter's supervisor "wrote him up" for infractions which the supervisor later admitted were frivolous.[134]

Fort Lauderdale Fire Department

In 2002, a gay firefighter reported that he was discriminated against after disclosing his sexual orientation at work. Before he had disclosed his sexual orientation, the firefighter received excellent assessments and was, in fact, promoted. After he revealed his sexual orientation, however, he was told to either resign or accept a demotion. The firefighter accepted the demotion in an effort to retain his retirement benefits.[135]

Florida State Department of Agriculture

In 2001, an employee of the Florida Department of Agriculture reported that he had been the target of virulently anti-gay comments from a colleague. When he complained, he was reprimanded and told to drop the complaint. The employee refused and was terminated shortly thereafter.[136]

Florida State Department of Health

In 2001, a supervisor at the Florida Department of Health said he would try to "rid" the department of gays. When an employee complained, the employee was reprimanded and eventually terminated after enduring an extended period of workplace harassment.[137]

City Public Works Department

In 2001, a transgender city public works department supervisor was fired on account of her gender identity.[138]

Florida Public School

A public school teacher who had previously received positive evaluations later received negative evaluations after officials discovered that the teacher had a same-sex domestic partner.[139]

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] 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).

City Government Department

In 2001, a city government employee was forced to resign when superiors learned that the employee enjoyed dressing in women's clothes outside the office and threatened to publicly disclose the discovery.[140]

Municipal Fire Department

In 2000, a lesbian firefighter was subjected to a hostile work environment on account of her sexual orientation.[141]

County Clerk's Office

In 1996, an employee of a county clerk's office was fired because of his sexual orientation.[142]

Miami Beach Police Department

In a book published in 1996, Pete Zecchini, a gay man, described his experience as a Miami Beach police officer as "miserable." When Zecchini inquired as to why his cases had been reassigned and his work schedule rearranged, his supervisor told Zecchini that it was because of his homosexuality. When Zecchini complained to his chief about this supervisor, the supervisor flatly denied saying any such thing. At shooting practice, Zecchini overheard his coworkers saying, "faggot this," "faggot that," and "Miami Beach is turning into a bunch of faggots." Zecchini alleged that he was the only officer on the force denied a pay raise for using too many sick days.[143]

Sunrise Police Department

In 1994, a U.S. District Court jury in Florida decided that the Sunrise, Florida, Police Department unlawfully discriminated against Darren Lupo, an unmarried lesbian patrolwoman, by requiring that she work a Christmas shift in place of a married policeman with children, but rejected her broader claim of a pattern of discrimination based on her sex and sexual orientation. The jury awarded $56,250 in compensatory damages.[144]

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[139] E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).
[140] *Id.*
[141] 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).
[142] *Id.*
[143] ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 102-106 (Routledge 1996).
[144] Lesbian and Gay L. Notes (Oct. 1994) (citing FT. LAUDERDALE SUN-SENTINEL, Sept. 5 1994).

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

Florida's "unnatural and lascivious acts" law[145] was rendered unenforceable by the U.S. Supreme Court's ruling in *Lawrence v. Texas*.[146] The Legislature has not repealed the statute.

B. HIV/AIDS Discrimination

In 1997, a state transportation official responded to a request for a donation to the Florida AIDS ride by expressing the view that AIDS "was created as a punishment to the gay and lesbian communities across the world." The official, a planner in the Department of Transportation's state safety office, wrote that she was sorry that "innocent [heterosexual] people have also had to suffer." But, she added, "[a]s far as the gay[s] and lesbians of this world . . . let them suffer their consequences!" The letter was composed on official state stationery.[147]

C. Education

The Florida Department of Education has issued a Code of Ethics that prohibits teachers from harassing and discriminating against any student on the basis of their sexual orientation.[148]

On June 10, 2008, Florida enacted the "Jeffrey Johnston Stand Up for All Students Act," which prohibits bullying or harassment in public schools.[149] The bill defines bullying as "sexual, religious or racial harassment" but does not specifically use the terms "sexual orientation" or "gender identity." However, according to the bill's sponsor, Representative Nick Thompson, there was no need for inclusion of specific protections for LGBT students because the bill is broad enough to cover all forms of harassment.[150] One attempt to amend the bill sought to include an enumerated list of

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[145] FLA. STAT. § 800.02 (2001).
[146] 539 U.S. 558 (2003).
[147] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 52 (1997 ed.).
[148] FLA. ADMIN. CODE § 6B-1.006 (2008).
[149] FLA. STAT. § 1006.147 (2008).
[150] Kevin Jennings, *What the Hays? Florida Legislator Proves Need for a Real Safe Schools Bill*, HUFFINGTON POST, Jan. 15, 2009, http://bit.ly/31czGR.

categories, including sexual orientation. Similar bills introduced in the House, in 2005 and 2007, failed.[151]

In *Gonzalez v. School Board of Okeechobee County*,[152] the U.S. District Court for the Southern District of Florida ruled that the Equal Access Act[153] obligated a school board to officially recognize the Gay-Straight Alliance of Okeechobee High School (the "GSA") and to grant the GSA the benefits afforded to other student groups, including permission to meet on campus. The school board had argued that it denied access to GSA because it was a "sex-based" club that would be harmful to the students and would violate the school's abstinence-only education policy. The court ruled that the GSA did not interfere with abstinence-only education[154] and that the school board was "obligated to take into account the well-being of its non-heterosexual students."[155]

In *Gillman v. Holmes County School District*,[156] a student claimed that school officials violated her First Amendment rights to free expression by barring students from wearing clothes with slogans or symbols advocating acceptance of homosexuality and that such prohibition also constituted viewpoint-based discrimination, in violation of her First and Fourth Amendment rights. The high school had banned all students from wearing t-shirts, armbands, stickers or buttons containing slogans and symbols which advocate the acceptance of gays and lesbians (including rainbows, pink triangles and a list of slogans). This triggered a series of events which led the principal to inquire as to the sexual orientation of eleven students, who were later suspended for their expressive activities. The District Court held that the school had violated Gillman's First Amendment rights. The court ruled that "it was not the students who imposed their views about homosexuality on [the principal] or other students; rather, it was [the principal] who [had] silenced and suspended students for expressing their views."[157]

E. Health Care

The State of Florida requires that Hospice Programs be available to all terminally ill persons and their families without regard to, *inter alia*, sexual orientation.[158]

F. Gender Identity

In 2005, the Florida House attempted to amend the definition of disability to specifically exclude "homosexuality, bisexuality, transvestism, transsexualism, [and]

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[151] H.B. 1303, 2005 Leg., Reg. Sess. (Fla. 2005) (legislative history); H.B. 575, 2007 Leg., Reg. Sess. (Fla. 2007) (legislative history).
[152] 571 F.Supp. 2d 1257 (S.D. Fla. 2008)
[153] 20 U.S.C. § 4071.
[154] The judge stated that the Supreme Court has ruled that "non-curricular student groups do not constitute an act of the school, which is the primary reason why religious non-curricular student groups do not run afoul of the Establishment Clause." *Gonzalez*, 571 F. Supp. 2d at 1267.
[155] *Id.* at 1267.
[156] 567 F.Supp 2d 1359 (N.D. Fla. July 24, 2008).
[157] *Id.* at 1377.
[158] FLA. ADMIN. CODE § 59c-1.0355(f).

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gender-identity disorder." However, the final language of the bill did not specifically exclude these categories.[159]

G. Parenting

Florida is the only state with a law specifically barring homosexuals from adopting.[160] Florida Statute Chapter 63.042(3), states that "no person eligible to adopt under this statute may adopt if that person is a homosexual."[161] In November 2008, a Florida judge declared the law unconstitutional stating that the state law has "no rational basis" in the case of *In re Adoption of Doe*.[162] The court found that moral preference against homosexuality has no bearing on whether gay or lesbian individuals can adopt because in Florida many LGBT individuals serve as foster parents to abused children. The court stated: "Based on the evidence presented from experts from all over this country and abroad, it is clear that sexual orientation is not a predictor of a person's ability to parent."[163] Florida appealed the decision, and that appeal is now pending before Florida's Third District Court of Appeal.[164] In 2005, the Eleventh Circuit upheld the adoption ban in *Lofton v. Sec. of the Dep't of Children and Family Serv.* [165]

Similar bills were introduced in the House and the Senate on March 4, 2008 that would have provided that a "homosexual is eligible to adopt a child under certain enumerated circumstances."[166] The bills died in committee. The Senate also tried to pass a similar bill in 2006, which also died in committee.[167]

In the custody context, Florida's appellate courts have reversed several lower court decisions in which judges considered a parent's sexual orientation in evaluating fitness to parent.

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[159] H.B. 153, 2005 Leg., Reg. Sess. (Fla. 2005); FLA. STAT. 4.13.08 states:

> "Individual with a disability" means a person who is deaf, hard of hearing, blind, visually impaired, or otherwise physically disabled. As used in this paragraph, the term: 'Hard of hearing' means an individual who has suffered a permanent hearing impairment that is severe enough to necessitate the use of amplification devices to discriminate speech sounds in verbal communication. 'Physically disabled' means any person who has a physical impairment that substantially limits one or more major life activities.

[160] Yolanne Almanza, *Florida Gay Adoption Ban is Ruled Unconstitutional*, N.Y. TIMES, Nov. 26, 2008. See *infra* Section IV.H. At least one other state (Arkansas) has passed a law that would have a similar effect. In November 2008, Arkansas voters passed a law that prohibits adoption by an individual "cohabitating with a sexual partner outside of marriage." NAT'L GAY & LESBIAN TASK FORCE, ADOPTION LAWS IN THE U.S. (2008).

[161] FLA. STAT. § 63.042(3) (1977).

[162] *In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008).

[163] *Id.* at *20.

[164] *Florida Dep't of Children & Families v. In re Matter of Adoption of X.X.G. & N.R.G.*, Appellate Case No. 3d08-3044.

[165] *Lofton v. Sec. of the Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 869 (2005).

[166] H.B. 45, 2008 Leg., Reg. Sess. (Fla. 2008); S.B. 200, 2008 Leg., Reg. Sess. (Fla. 2008).

[167] S.B. 172, 2008 Leg., Reg. Sess. (Fla. 2008).

In *Jacoby v. Jacoby,*[168] the Court of Appeal reversed a trial court ruling granting sole custody of children to their father, writing that the trial court had inappropriately "succumbed to the father's attacks on the mother's sexual orientation."[169] The Court of Appeal found that the decision to grant custody to the father "penalized the mother for her sexual orientation without evidence that it harmed the children."[170]

In *Maradie v. Maradie,*[171] Valerie Maradie sought review of the decision from a Florida trial court awarding primary residential custody of her daughter to her ex-husband (the father of the child). Mrs. Maradie, a lesbian, argued that the lower court erred in awarding custody to the father based on the lower court's taking judicial notice that "a homosexual environment is not a traditional home environment, and can adversely affect a child."[172] The court continued, "To say that this cannot be considered until there is actual proof that it has occurred is asking the Court to abdicate its common sense and responsible decision-making endeavors."[173] The Court of Appeal reversed the trial court, stating that "a connection be tween the actions of the parent and harm to the child requires an evidentiary basis and cannot be assumed. In addition, the mere possibility of negative impact on the child is not enough."[174] Notably, however, the court left open the door for the trial court to make findings that Mrs. Maradie's sexual orientation could provide a basis for awarding the child to her ex-husband: "By reversing here, we do not mean to suggest that trial courts may not consider the parent's sexual conduct in judging that parent's moral fitness under section 61.13(3)(f) or that trial courts are required to have expert evidence of actual harm to the child."[175]

In *Packard v. Packard,*[176] a lesbian mother challenged a final judgment of dissolution of marriage proceeding in which the trial court granted primary residential custody of the parties' two daughters to the father because "the Petitioner/Husband [would] provide a more traditional family environment for the children."[177] At the time of the trial court proceeding, the mother was living with her same-sex partner. The Court of Appeals reversed the trial court decision, holding that the trial court had not defined "traditional family environment" and, thus, it was not at liberty to speculate as to its meaning.

Courts in Florida have refused to grant custody or visitation rights to the non-biological parent of a child:

In *Wakeman v. Dixon,*[178] two women involved in a relationship conceived two children through artificial insemination. The two women entered into carefully crafted

[168] 763 So.2d 410 (Fla. Dist. Ct. App. 2000).
[169] *Id.* at 413.
[170] *Id.* at 415.
[171] 680 So.2d 538 (Fla. Dist. Ct. App. 1996).
[172] *Id.* at 541.
[173] *Id.*
[174] *Id.* at 543.
[175] *Id.* at 542.
[176] 697 So.2d 1292 (Fla. Dist. Ct. App. 1997).
[177] *Id.* at 1293.
[178] 921 So.2d 669 (Fla. Dist. Ct. App. 2006).

co-parenting agreements regarding the children that provided the non-biological parent parental rights and obligations with respect to the children. After the relationship ended, the biological mother denied visitation rights to the non-biological mother. The court ruled that co-parenting agreements providing visitation by a non-parent are unenforceable and dismissed the action.

In *D.E. v. R.D.B.*,[179] a biological mother and "D.E." (also a female) had a relationship and lived together for over eleven years. The biological mother conceived a child by artificial insemination during their relationship. The couple separated, and the biological mother denied visitation rights to D.E. D.E. sought visitation rights through a dependency action, arguing that the denial of contact between the child and D.E. constituted the level of abuse needed to support a finding of dependency. The Court rejected the petition.

In *Kazmierazak v. Query*,[180] two women involved in a relationship had a child using artificial insemination. The non-biological mother was the child's primary caregiver. The couple later separated, and the biological mother refused visitation rights to the non-biological mother, who then filed a petition for custody and visitation. The appellate court held that a non-biological mother does not have the right to seek visitation or custody once a couple has ended their relationship.

In *Music v. Rachford*,[181] two women in a domestic partnership fostered a child via artificial insemination. The couple later separated, and the biological mother refused visitation rights to the non-biological mother, who then filed a petition for custody and visitation. The appellate court held that a non-biological mother does not have the right to seek visitation or custody once a couple has ended their relationship.

H. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The Florida Defense of Marriage Act states that marriage is a "union between one man and one woman."[182] On November 4, 2008, Florida voters passed an amendment to

[179] 929 So. 2d 1164 (Fla. Dist. Ct. App. 2006)
[180] 736 So.2d 106 (Fla. Dist. Ct. App. 1999).
[181] 654 So.2d 1234 (Fla. Dist. Ct. App. 1995).
[182] FLA. STAT. § 741.212 (1997). The statute reads as follows:

> (1) Marriages between persons of the same sex entered into in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.
>
> (2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or

the state constitution that provides: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."[183]

The Florida Companion Registry Act, introduced in both the House and the Senate on March 4, 2008, would have allowed same-sex and opposite sex couples to register with the state as companions, and equalized the benefits inuring to married couples and companions (such as permitting unmarried partners to make health decisions).[184] The bill died in committee.

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

Judicial Conduct

Florida Code of Judicial Conduct provides that a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . sexual orientation . . ."[185]

In *Rucks v. State of Florida*,[186] the Court of Appeal of Florida (Second District) found that Robbyn Rucks, who was charged with misdemeanor battery while on probation for dealing in stolen property, was able to demonstrate that she would not be able to receive a fair trial at the hands of the respondent judge based on his prejudicial comments. Rucks argued that she feared that the judge presiding over her matter was prejudiced against her because she was a lesbian who lived with her female partner and her partner's 17 year-old daughter. According to the transcript of the probation violation proceeding, the trial judge stated: "This is a sick situation. I've seen a lot of sick situations since I've been in this court. I've been in this profession for 27 years and this ranks at the top."[187] The trial judge repeated this comment again and also stated "[i]f this is the family of 1997, heaven help us."[188] Following testimony at the contested hearing, the court found Rucks to be in violation of her probation, revoked her probation, and sentenced her to confinement in the county jail. The Court of Appeal granted the petition for writ of prohibition but withheld issuing the writ on the assumption that the trial judge would voluntarily remove himself.[189]

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location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.
(3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

Id.

[183] FLA. CONST., Art. 1, §27.
[184] H.B. 361, 2008 Leg., Reg. Sess. (Fla. 2008); S.B. 2550, 2008 Leg., Reg. Sess. (Fla. 2008).
[185] FLA. CODE OF JUD. CONDUCT Canon 3 (2008).
[186] 692 So. 2d 976 (Fla. Dist. Ct. App. 1997).
[187] *Id.* at 977.
[188] *Id.*
[189] *Id.* at 978.

Attorney Conduct

The Florida Bar's Rules of Professional Conduct provide that

> a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of . . . sexual orientation.[190]

In *The Florida Bar Re: Amendments to Rules Regulating the Florida Bar*,[191] the Florida State Bar and sixty individual members petitioned the Florida Supreme Court to amend the Rules Regulating the Florida Bar to (i) amend the rule regarding conduct that is prejudicial to the administration of justice to prohibit attorneys from "engag[ing] in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic" and (ii) create a rule addressing discriminatory employment practices, which rule would have prohibited lawyers from discriminating "in employment, partnership, or compensation decisions on the basis of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation or age."[192] While the court adopted the amendment to the administration of justice rule, it declined to adopt the new rule regarding employment discrimination on the ground that its "constitutional authority over the courts of Florida and attorney admission and discipline does not extend to the employment practices of lawyers."[193]

Law Enforcement

The Florida Department of Law Enforcement sets forth ethical standards of conduct that a law enforcement officer must abide by whether on duty or off duty. "Principle 3" of the ethical standards provides that officers "shall perform their duties and apply the law impartially and without prejudice or discrimination" and that "[p]olice officers must refrain from fostering disharmony in their communities based upon diversity, and perform their duties without regard to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, *sexual orientation* or age."[194]

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[190] FLA. BAR REG. Rule 4-8.4(2008).
[191] 624 So.2d 720 (Fla. 1993).
[192] *Id.* at 722.
[193] *Id.*
[194] Fla. Dep't of L. Enf., Crim. Just. Prof'l Program, http://bit.ly/20khLp (last visited Sept. 6, 2009) (emphasis added).

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The Department of Juvenile Justice mandates that employee screeners those who determine whether juvenile detention is warranted may not discriminate based upon sexual orientation.[195]

[195] 32 FLA. ADMIN. WKLY. 5593.