

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

This report addresses whether there has been a widespread and persistent pattern of unconstitutional discrimination by state governments on the basis of sexual orientation and gender identity. This finding will support Congress in exercising its authority under Section 5 of the 14th amendment to provide a private right of action for damages under H.R. 3017, the Employment Non-Discrimination Act of 2009 (“ENDA”), to state government employees who have suffered discrimination.

This report is the result of research conducted during 2008 and 2009 by the Williams Institute.¹ In addition, ten different law firms assisted with the project, with offices and attorneys from across the country.² Also making contributions were scholars and experts from a number of academic disciplines, including history, political science, economics, sociology, and demography. The research resulted in a set of reports on employment law and discrimination on the basis of sexual orientation and gender identity for each of the fifty states, which are included as Appendices to this report. Based on these fifty state reports, plus additional studies conducted by the William Institute, literature reviews, and research projects conducted by the firms, we drafted and reviewed the following papers, presented here as a series of chapters summarizing the research findings. Based on this analysis, we conclude that:

- There is a widespread and persistent pattern of unconstitutional discrimination on the basis of sexual orientation and gender identity against state government employees;
- There is no meaningful difference in the pattern and scope of employment discrimination against LGBT people by state governments compared to the private sector and other public sector employers; and
- The list of documented examples that we have compiled far under-represents the actual prevalence of employment discrimination against LGBT people by state and local governments.

These conclusions are based on the following findings:

¹ The principal co-investigators were Brad Sears, Executive Director of the Nan Hunter, Georgetown Law Center, and Christy Mallory, Williams Institute.
² Alston & Bird LLP, Bryan Cave LLP, Dewey & LeBeouff LLP, DLA Piper, Kirkland & Ellis LLP, Latham & Watkins LLP, Manatt, Phelps & Phillips, O'Melveny & Myers LLP.

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State governments are the largest in employer in every state. There are over 400,000 LGBT state employees.

- According to data from the 2007 American Community Survey, over 6.2 million Americans are state employees. In every state, the state government is the largest employer.
- Using data from the 2000 Census and the 2002 National Survey of Family Growth, in September 2009, the Williams Institute estimates that there are approximately 418,000 LGBT state government employees in the United States.
- There are also an estimated 585,000 local government employees, for a total of slightly more than 1 million state and local LGBT employees. There are just under 7 million LGBT private employees and just over 200,000 LGBT people working for the federal government.

Courts and legal scholars have concluded that sexual orientation is not related to an individual's ability to contribute to society or perform in the workplace.

- We document 15 federal and state courts and a number of legal scholars that have concluded that sexual orientation is not related to an individual's ability to contribute to society or perform in the workplace. Every court that has considered this criteria when determining whether sexual orientation is a suspect class has reached the same conclusion.
- For example, in 2008, the Connecticut Supreme Court found that “the characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.”³
- Similarly, in 2004, a justice on the Montana Supreme Court, found that “there is no evidence that gays and lesbians do not function as effectively in the workplace or that they contribute any less to society than do their heterosexual counterparts.”⁴

When state employers discriminate against LGBT people in the workplace, a cluster of constitutional rights are implicated, including those protected by the Equal Protection Clause, the First Amendment, and the Due Process Clause.

- **Courts have found that discrimination by state employers on the basis of sexual orientation violates the Equal Protection Clause. For example,**

³ *Id.* at 432.

⁴ *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 455-456 (Mont. 2004) (concurring opinion).

- A railroad ticket agent sued the Long Island Railroad, a state employer, for failing to address sexual orientation harassment in the workplace. In 2006, a U.S. District Court, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans*,⁵ denied the Railroad's summary judgment motion and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.⁶ The ticket agent alleged that he was referred to by several people in the office as a "f***** faggot" and "a queer."
- In 2001, a lesbian brought an action against her former employer, a hospital district, for wrongful termination based on sexual orientation alleging state and federal equal protection clause violations. She and her immediate supervisor, Nan Miguel, were both terminated for opposing the hospital's discriminatory treatment of her. The director of the radiology department made several derogatory comments, including calling her a "f***** faggot" a "f***** dyke" and a "queer." The Washington Court of Appeals held that she had raised material issues of fact with respect to whether the hospital and the doctor were "state actors" for her federal claims and remanded the case for trial.⁷ The hospital eventually settled with Davis for \$75,000.⁸
- In 1995, Justice Sotomayor, then a judge for the Southern District of New York, denied a motion to dismiss a case where the plaintiff had been fired from his job as a prison kitchen worker because he was gay. Criticizing the defendants' argument that removing the plaintiff was rationally related to preserving mess hall security, Sotomayor stated that a "person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security." She also rejected the defendants' qualified immunity defense, stating that "the constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law."⁹
- **Courts have also found that discrimination against LGBT people violates the Equal Protection Clause when employers engage in impermissible discrimination on the basis of sex and sex stereotyping. For example,**
 - A Legislative Editor for the Georgia General Assembly's Office of Legislative Counsel was fired after she was diagnosed with gender identity disorder and began appearing (upon a doctor's orders) at work as a woman prior to undergoing gender reassignment surgery. Since 2005, she had

⁵ 517 U.S. 620 (1996).

⁶ *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (Sept. 29, 2006 E.D.N.Y.).

⁷ *Miguel v. Guess*, 112 Wn. App. 536, (Wash. Ct. App. 2002); *Miguel v. Guess*, 51 P.3d 89 (Wash. Ct. App. 2002).

⁸ ACLU, *Following ACLU Lawsuit, Lesbian Illegally Fired from Washington Hospital Received Generous Settlement* (Oct. 8, 2003), <http://www.aclu.org/lgbt/discrim/12359prs20031008.html>.

⁹ *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995).

been responsible for editing proposed legislation and resolutions for the Georgia Assembly. In 2009, in rejecting the state's motion to dismiss, a U.S. District Court ruled that the editor's complaint "clearly states a claim for denial of equal protection" under the 14th Amendment on alternative theories of discrimination on the basis of sex and a medical condition.¹⁰ The court summarized the grounds for termination as, "In the view of Glenn's employers, gender transition surgery and presentation as a woman in the workplace would be seen as immoral... and would make other employees uncomfortable."¹¹ The court the held that "Unequal treatment fails even the most deferential equal protection review when the disadvantage imposed is born of animosity toward the class of persons affected," quoting the Supreme Court's opinion in *Romer v. Evans*^{12,13}.

- Two 16-year-old twin brothers who were subject to "a relentless campaign of harassment by their male co-workers," sued the city they were working for, alleging intentional sex discrimination.¹⁴ The plaintiffs alleged that their harassment included being called "queer" and "fag," comments such as, "[a]re you a boy or a girl?" and talk of "being taken „out to the woods”" for sexual purposes. One plaintiff wore an earring and was subject to more ridicule than his brother, and was once asked whether his brother had passed a case of poison ivy to him through intercourse. The verbal taunting turned physical when a co-worker grabbed one of the plaintiff's genitals to determine "if he was a girl or a boy." When the plaintiffs failed to return to work, supervisors terminated their employment. The Seventh Circuit noted that "a homophobic epithet like 'fag,' ...may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation." The court found that a "because of" nexus between the allegedly proscribed conduct and the victim's gender could be inferred "from the harassers' evident belief that in wearing an earring, [the brother] did not conform to male standards."¹⁵
- A housing and nuisance inspector for the Bureau of Development Services of Portland settled her lawsuit based on sexual orientation and sex stereotyping harassment for \$150,000 after her Title VII claim survived summary judgment in a U.S. District Court.¹⁶ At work, she did not wear makeup, had short hair and wore men's clothing. Her supervisors made

¹⁰ *Glenn v. Brumby*, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009).

¹¹ *Id.*

¹² *Romer v. Evans*, 517 U.S. 620 (1996).

¹³ *Glenn*, 2009 U.S. Dist. LEXIS 54768.

¹⁴ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998). The U.S. Supreme Court vacated and remanded to the Seventh Circuit for further consideration in light of *Oncale v.*

Sundowner Offshore Services Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

¹⁵ *Id.*

¹⁶ LESBIAN & GAY L. NOTES (Dec. 2004), *available at* <http://www.qrd.org/qrd/usa/legal/lgl/12.04>.

remarks such as that her shirt looked “like something her father would wear” and “are you tired of people treating you like a bull dyke[?]” She also alleged her co-workers harassed her, calling her a “bitch,” saying loudly that they were “surrounded by all these fags at work,” and asking her “would a woman wear a man’s shoes?” In holding for the inspector, the court noted that, for the purpose of Title VII analysis, it was irrelevant whether or not the harassers were motivated by plaintiff’s sexual orientation, as sexual orientation, alone, is not actionable under Title VII. However, the court held that gender stereotyping “constitutes actionable harassment.”¹⁷

- **Courts have held in a number of cases that discrimination against LGBT public employees has also infringed on the First Amendment rights of expression and association. For example,**
 - In 2007, a volleyball coach was awarded \$5.85 million in damages in her discrimination suit against Fresno State University after the University refused to renew her contract. The coach had alleged that this was a result of her advocacy of gender equity in the funding of women’s sports as well as her perceived sexual orientation.¹⁸
 - Paul Scarbrough, a director/superintendent of schools for the Morgan County School Board, was not selected to continue in his position because of the public outrage that resulted after he was invited to speak at a convention hosted by a church with predominantly gay and lesbian members. At the time, Scarbrough was unaware that the church had a predominately gay and lesbian congregation. He was ultimately unable to accept the invitation, however, approximately a month later, a newspaper published an article announcing—incorrectly—that he would be a speaker at the convention. After this article ran, school board members began receiving criticisms regarding him. In response, he provided written statements to two newspapers explaining the inaccuracies of the article and noting that he did not endorse homosexuality, but he would not refuse to associate with LGBT people. When Scarbrough was then not selected by the school board to continue as Superintendent/Director, he sued and won a judgment from the U.S. Court of Appeals for the Sixth Circuit.¹⁹
- **In addition, some of the examples of discrimination include cases where employees Due Process Rights are violated, both their right to adequate procedures prior to being terminated, and substantive due process rights of liberty in intimate association and privacy recognized by the Supreme Court in *Lawrence v. Texas*.**

¹⁷ *Fischer v. City of Portland*, 2004 U.S. Dist. LEXIS 20453 (D. Or. 2004).

¹⁸ LESBIAN & GAY L. NOTES (Summer 2007).

¹⁹ *Scarbrough v. Morgan County Bd of Educ.*, 470 F.3d 250 (6th Cir. 2007).

- A state employee of a community college in Delaware was fired on the basis of a same-sex sexual harassment claim. He filed suit alleging he was denied a proper pre-termination hearing on the charges. A jury awarded that he be reinstated to his teaching position and \$134,081 in back pay.²⁰
- In 1995, an applicant for police department job filed a right to privacy action against a police official. She alleged that during her application for a job as a police officer, she was asked, "What exactly are your sexual practices and preferences?" The District Court held that such inquiries had, indeed, violated her right to privacy, but that the police official was entitled to qualified immunity. On appeal, the Second Circuit reasoned that since the conduct had occurred in 1995, a reasonable official would not have known the conduct was constitutionally proscribed.²¹
- An administrator of the City of Petersburg's Community Diversion Incentive Program was fired in 1986 for refusing to answer questions about her sexual orientation as part of a city background check. She had already been in her position for three years when asked to complete the questionnaire. When she refused, she was suspended but then reinstated because the City Manager determined that her position did not require a background check. However, at the same time he changed city policy to require her to have one. When she again refused, she was terminated. In 1990, the 4th Circuit relied upon *Bowers v. Hardwick* in holding that she had no right to privacy with respect to this information although it did note that the relevance of this information was "uncertain".^[9] In 2003, the United States Supreme Court held that *Bowers v. Hardwick* was wrong when it was decided in 1986.²²

Beginning with purges of thousands of LGBT employees from public employment in the 1950s and 60s, LGBT people have experienced a long history of explicit and pervasive discrimination by federal, state, and local government employers. Moreover, state laws, including sodomy laws and morality requirements for state-issued occupational licenses, provided the basis for extensive discrimination against LGBT employees in the public and private sectors.

- The “Lavender Scare” was a part of the anti-communist campaigns during the 1950s and 60s, during which the federal government fired thousands of LGBT federal employees and denied jobs to tens of thousands of more. For example, the State Department dismissed over twice as many employees for being suspected homosexuals as being suspected communists. During this period, the “loyalty oaths” required by the federal government of all employees and contractors, which included questions about homosexuality, spread to state,

²⁰ *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

²¹ *Eglise v. Culpin*, 2000 WL 232798, at *1 (2d Cir. Feb. 28, 2000).

²² *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

local, and private employers, eventually impacting as much as 20% of the U.S. workforce.

- Federal agencies could deny LGBT people employment until 1975, when the Civil Service Commission issued guidelines prohibiting sexual orientation, but not gender identity, discrimination. Federal agencies still had policies of denying security clearance to LGBT people until the 1990s. The Department of Defense, the Secret Service, and the FBI still had discriminatory security clearance policies until 1995, when President Clinton issued an Executive Order barring the federal government from denying security clearance simply on the basis of sexual orientation.
- Purges of state and local public employees during the 1950s and 1960s, similar to the Lavender Scare, have been documented across the country, including in California, Florida, Idaho, Iowa, Oklahoma, Massachusetts, North Carolina, and Texas. For example, beginning in 1958, a Florida legislative investigation committee known as the “Johns Committee,” interrogated 320 suspected gay men and lesbians over a five year period. Countless state employees, teachers, hospital workers, and others lost their jobs as a result. Near the end of its tenure, the Johns Committee announced that it had revoked seventy-one teachers’ certificates with sixty-three more cases pending; fourteen professors had been removed from state universities with nineteen cases pending; and thirty-seven federal employees had lost their jobs, while fourteen state employees faced removal in pending cases. State laws and policies explicitly prohibiting LGBT people from public employment continued in some states until the 1990s, including in Oklahoma, New York, South Carolina, and West Virginia.
- State sodomy laws were also used to deny jobs to LGBT employees in the public and private sector. The mere potential that an applicant or employee could violate a state sodomy statute was sufficient grounds to deny employment. The substantial obstacle that state sodomy laws created for LGBT people in obtaining employment was recognized by the Supreme Court in *Lawrence v. Texas*, when it overturned the remaining sodomy laws in the United States. This direct burden that state sodomy laws placed on employment opportunities for LGBT people was also recognized by the highest courts in Arkansas, Maryland, Massachusetts, Minnesota, Montana, and Tennessee when they overturned state sodomy laws.
- One of the areas where sodomy laws presented almost insurmountable barriers to openly LGBT people in public employment was law enforcement. Federal, state and local law enforcement agencies adopted policies stating that it was incompatible for LGBT people, as actual or potential felons, to serve in law enforcement. Explicit discriminatory policies ranged from those in Dallas, Texas successfully challenged in the 1980s and 90s to a policy prohibiting employment of officers in Puerto Rico who even associated with homosexuals

that was not overturned until 2001. The legacy of this history of discrimination is clearly demonstrated in Chapter 12 of this report. Over 40% of the almost 400 examples of discrimination against state and local employees presented in Chapter 12 involve law enforcement and corrections officers.

- Morality requirements for state-issued occupational licenses also provided a substantial barrier to LGBT people in public and private employment. Under these requirements, set by state law, LGBT people in dozens of professions, ranging from lawyers, teachers, and doctors to pilots, realtors, and hairdressers, were considered immoral and had their licenses either denied or revoked. This form of discrimination had a disproportionate impact on public employees: a 2006 survey revealed that over 40% of public employees in the United States are in professions requiring professional licenses.
- One sector where discrimination in state-issued occupational licenses has had the biggest impact is education. Explicit state laws or policy statements that LGBT people could not receive state teaching credentials date from those of California and Florida in the 1950s to a West Virginia Attorney General Opinion in 1983 stating that that homosexual teachers were “immoral” and an Oklahoma law barring LGBT people from teaching that was not repealed until 1989. The legacy of this form of discrimination is also clearly demonstrated in Chapter 12: over 27% of the almost 400 documented examples of discrimination involve employees of public schools and universities.

Courts have unanimously found that LGBT people have experienced a long history of discrimination.

- Every state and federal court that has substantively considered whether sexual orientation is a suspect class has held that LGBT people have faced a long history of discrimination. In addition, dozens of legal scholars have reached the same conclusion. In making these determinations, many of these courts and scholars have explicitly considered employment discrimination by public employers, including state, local, and federal government employers.
- Judicial opinions from appellate courts in seven states - including six of those states’ highest courts - have all agreed that LGBT people have faced a long history of discrimination, no matter how they ultimately ruled on whether sexual orientation is a suspect classification.
- For example, in 2008, Maryland’s highest court found that “[h]omosexual persons have been the object of societal prejudice by private actors as well as by the judicial and legislative branches of federal and state governments”²³

²³ *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007).

and that “homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society.”²⁴

- Similarly, in 1995, the Sixth Circuit concluded, “Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.”²⁵

Based on their own research, many state and local government officials have also concluded that LGBT people have faced widespread discrimination in public employment.

- A number of state and local elected officials, legislative bodies, and special commissions have issued findings of widespread discrimination against LGBT people in their jurisdictions, including discrimination in public employment. We document 29 examples of such findings from 17 different states.
- For example, in May 2007 when the governor of Ohio issued an executive order prohibiting discrimination in state employment based on sexual orientation and/or gender identity,²⁶ the order included the finding that the “[i]nformation compiled by the Ohio Civil Rights Commission documents ongoing and past discrimination on the basis of sexual orientation and/or gender identity in employment-related decisions by personnel at Ohio agencies, boards and commissions.”
- Similarly, when the governor of Alaska issued an administrative order in 2002 prohibiting sexual orientation discrimination in state employment,²⁷ the order stated that it was “in recognition of the findings concerning perceived institutional intolerance in state agencies set out in the final report of the Governor’s Commission on Tolerance.”²⁸
- And when the governor of Oregon issued an executive order in 1988 prohibiting sexual orientation discrimination, it was accompanied by a statement that, “Although existing law may require equality in state employment or services, some homosexual employees or applicants for state services are afraid to assert their rights because they fear discrimination if they make their sexual orientation public. This order is intended to reduce that fear

²⁴ *Id.* at 610.

²⁵ *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261, 264 n.1 (6th Cir. 1995) (quoting trial court findings), *rev’d and vacated* by 54 F.3d 261 (6th Cir. 1995), *cert. granted, judgment vacated*, 518 U.S. 1001 (1996).

²⁶ Ohio Exec. Order No. 2007-10S (May 17, 2007), *available at* <http://www.wright.edu/admin/affirm/ExecutiveOrder2007-10S.html> (last visited Feb. 1, 2009).

²⁷ Alaska Admin. Order No. 195 (Mar. 5, 2002), *available at* <http://gov.state.ak.us/admin-orders/195.html> (last visited Sept. 21, 2009).

²⁸ *Id.*

by making it clear that the Governor expects state officials and agencies not to discriminate.”²⁹

For the past fifteen years, Congress has consistently reviewed evidence of employment discrimination by public employers when considering ENDA.

- Direct victims of such discrimination have testified at Congressional hearings; legal scholars have presented specific cases and scholarship on the history of such discrimination; social scientists have presented survey data documenting such discrimination; LGBT rights organizations have submitted reports and expert testimony documenting such discrimination; and members of Congress have shared specific examples and spoken more generally about such discrimination.
- In total, over 67 specific examples of employment discrimination on the basis of sexual orientation or gender identity by public employers have been presented to Congress from 1994 to 2007, including discrimination involving 13 state employees, 28 local employees, and 26 federal employees.

On surveys, LGBT public employees consistently report high rates of discrimination and harassment in the workplace.

- We reviewed studies documenting over 80 surveys of LGBT employees about their experiences of discrimination that either were conducted with just public employees, or where a substantial portion of those surveyed were public employees. The majority of these surveys were conducted with just LGBT employees of state governments.
- These surveys provide compelling evidence that discrimination against LGBT state government employees, as well as other public sector workers, is serious, pervasive and continuing. They also indicate that the patterns and level of employment discrimination based on sexual orientation and gender identity by state employers is similar to that of private employers. Examples include:
 - One in five LGB public sector employees in the 2008 General Social Survey reported being discriminated against on the basis of their sexual orientation.
 - A 2009 survey of over 640 transgender employees, 11% of whom were public employees, found that 70% reported experiencing workplace discrimination on the basis of gender identity.

²⁹ Or. Exec. Order No. EO-87-20 (Feb. 12, 1988), *available at* <http://extension.oregonstate.edu/internal/sites/default/files/documents/civil-rights/EO-87-20.pdf> (last visited Sept. 21, 2009).

- A 2009 survey of more than 1,900 LGBT employees of state university systems nationwide found that more than 13% had experienced discriminatory treatment or harassment *during the past year alone*.
- In a 2009 survey of LGBT public safety officers published in *Police Quarterly*, 22% reported experiencing discrimination in promotions, 13% in hiring, and 2% reported being fired because of their sexual orientation or gender identity.
- A 2008 Out & Equal survey reported that 36% of lesbians and gay men were closeted at work.

Analysis of the wages of LGB employees compared with heterosexual employees provides further evidence of discrimination in the public sector.

- If, after controlling for factors significant for determining wages such as education, a wage gap exists between people who have different personal characteristics, such as sexual orientation, economists typically conclude that the most likely reason for the wage gap is discrimination. More than twelve studies have shown a significant wage gap, ranging from 10% to 32%, for gay men when compared to heterosexual men.
- Two recent studies have found similar wage gaps when looking just at public employees. Together, the studies find that LGB government employees earn 8% to 29% less than their heterosexual counterparts.
- One of these studies finds that men in same-sex couples who are state employees earn 8% to 10% less than their married heterosexual counterparts.
- These studies of wages suggest that sexual orientation discrimination in state government is similar to that in the private sector and other public employment.

Complaints filed with administrative agencies also document a widespread and persistent pattern of discrimination against LGBT people by state and local government employers.

- During 2009, the Williams Institute collected data about complaints from state and local administrative agencies charged with enforcing prohibitions against sexual orientation and gender identity discrimination. Although we requested data from 20 state and 203 local agencies, many did not respond, even after repeated requests.

- The agencies that did respond provided us with 430 administrative complaints of sexual orientation and gender identity discrimination by state and local employers between 1999 and 2007 from 18 different states.
- Although not all states could provide us with data distinguishing between state and local government defendants, at least 265 of these were filed by employees of state government agencies.
- Five states provided us information about the dispositions of the claims made by state employees. For four of these states, the combined rate of positive administrative outcomes for the complaints, such as findings of probable cause of discrimination or settlements, averaged 30%. For the fifth state, California, 61% of complainants sought an immediate right to sue letter, which often indicates they have already found counsel to take their cases to court. A review of the dispositions of complaints made to local enforcement agencies found a similar rate of favorable outcomes (23%).
- Scholarship shows that the number of administrative filings most likely significantly under-represents the frequency of employment discrimination experienced by LGBT state and local workers. Several academic studies demonstrate that state and local administrative agencies often lack the resources, knowledge, enforcement mechanisms and willingness to accept sexual orientation and/or gender identity discrimination complaints.
- Supporting this scholarship, of the 36 city and county agencies that responded to the 2009 Williams Institute study with data, two incorrectly referred such complainants to the United States Equal Employment Opportunity Commission even though no federal law prohibits sexual orientation discrimination, one incorrectly said the city did not prohibit such discrimination, one incorrectly said there was no administrative enforcement mechanism for such complaints, five said they did not have the resources to enforce such claims and referred callers to their state administrative agency, and three said they lacked the resources to provide the requested data.

There are over 380 documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local employers, 1980 to the present.

- We compiled a set of documented examples of discrimination based on sexual orientation and gender identity from court opinions, administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books.
- This record demonstrates that discrimination is widespread in terms of quantity, geography, and occupations. The quantity compares favorably to

that of past records of public employment discrimination supporting civil rights legislation, particularly so in light of the size of the LGBT workforce.

- Geographically, the examples reach into every state except North Dakota, which has a small state population and state government workforce. The LGBT public employees discriminated against work for every branch of state government: legislatures, judiciaries, and the executive branch.
- In many of these cases, courts have found violations of rights to equal protection, free expression, and privacy, as well as the impermissible use of sex stereotypes. There are also cases where plaintiffs lose because judges rule that, in the absence a law like ENDA, state and federal law do not provide a remedy.
- In none of these cases do employers assert that sexual orientation or gender identity impacts an employee's performance in the workplace. To the contrary, among the examples are many public servants have received awards, commendations, and excellent work evaluations.
- The irrationality of this discrimination is vividly indicated by the harassment that many of these workers have been subjected to. Here is a very limited sense of what they are called in the workplace: an officer at a state correctional facility in New York, "pervert" and "homo;" a lab technician at a state hospital in Washington, a "dyke;" an employee of New Mexico's Juvenile Justice System, a "queer." There are countless examples of the use of the words "fag" and "faggot" in the report.
- The examples of workplace harassment also frequently include physical violence. For example, a gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her that said God wanted her to die. Frequently, when employees complain about this kind of harassment, they are often told that it is of their own making, and no action is taken.
- These 380-plus documented examples should in no way be taken as a complete record of discrimination against LGBT people by state and local governments. Based on our research, and on other scholarship, we have concluded that these examples represent just a fraction of the actual discrimination.
 - First, our record does not even completely capture all of the documented instances. For example, of the twenty state enforcement agencies we contacted, only six made available redacted complaints

for us to review. Moreover, 117 of the local agencies never provided any type of response to our requests.

- Second, as noted above, several academic studies have shown that state and local administrative agencies often lack the resources, knowledge and willingness to consider sexual orientation and gender identity discrimination complaints. Similarly, legal scholars have noted that courts and judges have often been unreceptive to LGBT plaintiffs and reluctant to write published opinions about them, reducing the number of court opinions and administrative complaints that we would expect to find.
- Third, many cases settle before an administrative complaint or court case is filed. Unless the parties want the settlement to be public, and the settlement is for a large amount, it is likely to go unreported in the media or academic journals.
- Fourth, LGBT employees are often reluctant to pursue claims for fear of retaliation or of outing themselves further in their workplace. For example, in a study published this month by the Transgender Law Center, only 15% of those who reported that they had experienced some form of discrimination had filed a complaint.
- Finally, and perhaps most important, numerous studies have documented that as many one-third of LGBT people are not out in the workplace. They try to avoid discrimination by hiding who they are.

Statements by some state and local government officials provide further evidence of animus towards LGBT people.

- The Supreme Court has recognized that irrational discrimination is often signaled by indicators of bias, and bias is unacceptable as a substitute for legitimate governmental interests.³⁰ As Justice O’Connor stated in her concurring opinion in *Lawrence v. Texas*, 539 U.S. 558, 580-82 (2003): “We have consistently held...that some objectives, such as “a bare...desire to harm a politically unpopular group,” are not legitimate state interests. ... Moral disapproval of this group [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”
- Drawing from the 50 state reports attached, we document comments made by state legislators, governors, judges, and other state and local policy makers and officials which reflect animus towards LGBT people.

³⁰ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001).

- These include statements that LGBT people are mentally ill, pedophiles, wealthy, terrorists, Nazis, condemned by God, immoral, and unhealthy. Often, these statements are made while the speakers are opposing state or local laws that would prohibit discrimination on the bases of sexual orientation and gender identity or endorsing laws to repeal or prevent the enactment of such protections.
- Such statements are likely to both deter LGBT people from seeking state and local government employment, and cause them to be closeted if they are employed by public agencies. In addition, these statements often serve as indicia of why laws extending legal protections to LGBT people are opposed or repealed.

Over 120 ballot measures have sought to repeal or prevent laws prohibiting discrimination on the basis of sexual orientation or gender identity.

- One marker of the animus directed towards LGBT Americans is the proliferation of attempts to use state and local ballot measures to repeal or preclude protection against employment discrimination based on sexual orientation or gender identity. In this analysis we do not include ballot measures to repeal or prevent the extension of marriage to same-sex couples.
- Ballot initiatives aimed at preventing the LGBT population from gaining legal protection from discrimination in the workplace began as attempts to repeal specific legislation or executive orders. Over time, an increasing number of these campaigns have attempted to block future laws to prohibit discrimination.
- Updating prior scholarship, we documented 120 such ballot measures from 1974 to 2009. Most of these, 92, were at the local level, with 28 at the state level. While the ballot measures were proposed in eighteen different states, most were in Oregon, Michigan, Maine, Washington, Florida, and California.
- One hundred and fifteen of these measures sought to repeal prohibitions of discrimination against LGBT people, prevent or inhibit such prohibitions from being passed, or even mandate discriminatory or stigmatizing treatment of LGBT people. Of these ballot measures, 50% passed.
- In 1996, the United States Supreme Court declared unconstitutional Colorado's Amendment 2, which would have repealed several local anti-discrimination laws in the state and two statewide protections and made the passage of such protections in the future require another amendment to the Colorado constitution. Writing for the Court in *Romer v. Evans*, Justice Kennedy stated that the amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to

legitimate state interests.”³¹ He concluded that it was “a denial of equal protection of the laws in the most literal sense.”³² Thus, in the Court's opinion, Amendment 2's scope was too expansive to rationally relate to any acceptable state purpose.³³

- Since the Supreme Court decision in 1996, there have been nearly two dozen such initiatives introduced around the country, with the latest occurring in Gainesville, Florida, in February 2009.

State statutes and executive orders do not adequately address employment discrimination against state employees on the basis of sexual orientation and gender identity.

- Twenty-nine states do not have anti-discrimination statutes that prohibit sexual orientation discrimination, and 35 do not have statutes that prohibit gender identity discrimination.
- Of the states that do have anti-discrimination statutes that prohibit discrimination on these bases:
 - Three do not prohibit discrimination on the basis of *perceived* sexual orientation;
 - Five either do not provide for compensatory damages or subject such damages to caps that are lower than ENDA's; and
 - Five do not provide for attorney's fee's, and another five only provide for them if the employee files a court action as opposed to an administrative action.
- In 11 other states that do not offer statutory protection for sexual orientation or gender identity, gubernatorial executive orders prohibit discrimination on either or both bases against state employees. However, these orders provide little enforcement opportunities and lack permanency:
 - None of these orders provide for a private right of action;
 - Only 6 confer any power to actually investigate complaints; and
 - Executive orders in Kentucky, Louisiana, Iowa, and Ohio have been in flux during the last 15 years and the constitutionality of Virginia's is currently in dispute.

³¹ *Id.* at 632.

³² *Romer v. Evans*, 517 U.S. 620, 633 (1996).

³³ *Id.*