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

Title

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

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MEMORANDUM

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

I. OVERVIEW

There are no state laws in Texas that prohibit employment discrimination based on sexual orientation or gender identity, although five of Texas's six largest cities have local ordinances partially banning such discrimination in specific contexts.¹ State legislators have repeatedly introduced bills at the state level to add sexual orientation and/or gender identity as protected classes in various contexts, although none of these bills has left the committee stage.

Documented examples of job discrimination based on sexual orientation or gender identity by state or local governments include:

- A federal court ruled that a transgender employee of a state agency could bring an employment discrimination claim alleging a hostile work environment by utilizing sex discrimination law.²
- In 1997, two former employees of the Texas governor's office in Austin filed a lawsuit alleging that their former supervisor used hostile language to describe victims' assistance programs for homosexuals. The women were fired from the governor's Criminal Justice Division after complaining about abusive language and attitudes towards gays and lesbians by the division's executive director.³
- In 2009, a lesbian public school teacher was subjected to a hostile work environment because of her sexual orientation.⁴
- In 2009, a public school teacher was censored for expressing pro-LGBT viewpoints.⁵

¹ See *infra* Part II.B, D.

² *Trevino v. Center for Health Care Services*, 2008 WL 4449939 (W.D.Tex., Sept. 29, 2008).

³ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 100-101 (1997 ed.).

⁴ E-mail 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).

⁵ E-mail 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 2009, a lesbian public school guidance counselor was subjected to a hostile work environment because of her sexual orientation and was censored for expressing pro-LGBT viewpoints.⁶
- In April 2008, the head of the Collin County's teen court program resigned under pressure after it was revealed that he was gay during his campaign for Plano City Council.⁷
- Since 2007, a teacher at Keller Learning Center has been experiencing harassment based on his sexual orientation at his workplace. Approximately one year after he began teaching at Keller in 2006, a student asked him if he was gay. He truthfully answered "yes." The assistant principal, having heard about the conversation between him and the student, implored him to keep his sexual orientation a secret because his job would be in danger if he were "out" at work and he might also be in physical danger. In response, he wrote a letter stating that he felt it would be disingenuous and would work a disservice to the students if he acted like there was something shameful about being gay. Thereafter, three students were allowed to transfer out of his class and his request to conduct a diversity training was denied. The discrimination makes him feel isolated at work and unable to interact with his colleagues.⁸
- In 2007, a code compliance inspector reported that after she designated her same-sex partner as a beneficiary for certain employment benefits, the officer administrator told everyone that she was a lesbian, after which she became a target for harassment and other negative treatment on the job.⁹
- In December 2004, the women's high school basketball coach in Bloomburg, who been named both "Teacher of the Year" in 2004 and "Coach of the Year" was placed on administrative leave and later dismissed after rumors started spreading around the town regarding her sexual orientation.¹⁰
- In 1994, In August, the Dallas County Sheriff's Department suspended a bailiff after he was heard making derogatory remarks about a lesbian rape victim. The bailiff joked to the rapist's attorney that "if it was me [on the jury], I'd only give him 30 days for raping a lesbian." A review board suspended the bailiff for 10

⁶ E-mail 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).

⁷ Justin Nichols lost his race for City Council. Although he does not believe this loss was a result of his sexual orientation, the campaign against him and his supporters did at times focus on this fact. See John Wright, *Attack E-mail Implies Gay Candidate is Child Molester*, DALLAS VOICE, Mar. 28, 2008, available at http://www.dallasvoice.com/artman/publish/article_8481.php.

⁸ E-mail 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).

⁹ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, The Williams Institute (Feb. 11, 2009) (on file with The Williams Institute).

¹⁰ NCLR, Employment Case Docket: Stephens v. Bloomburg School District, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_stephens.

working days and ordered him to undergo sensitivity training and apologize in writing to the woman.¹¹

- Dallas police officers have twice sued the department alleging anti-gay discrimination. In both instances, in 1981¹² and 1993,¹³ the police department asserted that state's sodomy law permitted it to discriminate based on sexual orientation.

Anti-gay hostility and animus is obvious in non-employment contexts as well. Texas criminalized homosexual sexual behavior until the United States Supreme Court declared its statute unconstitutional in *Lawrence v. Texas*.¹⁴ In 2005, Texas Representative Robert Talton introduced a measure to prohibit gay, lesbian and bisexual individuals from being foster parents in Texas. While heavily promoting this bill, which ultimately did not pass, Representative Talton stated, "We do not believe that homosexuals or bisexuals should be raising our children. Some of us believe they would be better off in orphanages than in homosexual or bisexual households because that's a learned behavior."¹⁵ Another state representative opposed adding sexual orientation to the definition of what constitutes a hate crime on the ground that gay people bring violence upon themselves by their behavior. Representative Warren Chisum stated that they "put themselves in harm's way. They go to parks and pick up men, and they don't know if someone is gay or not."¹⁶

In the late 1990's, the state's Republican Party platform stated, "The Republican Party of Texas believes that the practice of sodomy, which is illegal in Texas, tears at the fabric of society, contributes to the breakdown of the family unit, and leads to the spread of dangerous, communicable diseases. Homosexual behavior is contrary to the fundamental, unchanging truths that have been ordained by God, recognized by our country's founders, and shared by the majority of Texans. Accordingly, homosexuality should not be presented as an acceptable 'alternative' lifestyle in our public policy. We are opposed to any granting of special legal entitlements, recognition, or privileges including, but not limited to, marriage between persons of the same sex, custody or adoption of children, spousal (partner) insurance or retirement benefits."¹⁷

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment

¹¹ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY* 70 (1994 ed.).

¹² *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981).

¹³ *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993).

¹⁴ 539 U.S. 558 (2003).

¹⁵ See Press Release, Lambda Legal, Proposed Antigay Texas Law is Unconstitutional and Harmful to Children in Foster Care, Lambda Legal Says, <http://www.lambdalegal.org/news/pr/proposed-antigay-texas-law-is.html> (last visited Sept. 3, 2009).

¹⁶ See Louisa C. Brinsmade, *Bloody Murders: Gay Rights Lobby's Quiet Fight for Hate Crimes Bill*, AUSTIN CHRON., Jan. 23, 1997, available at <http://www.austinchronicle.com/gyrobase/Issue/column?oid=oid%3A527262> (last visited, Sept. 3, 2009).

¹⁷ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY* 100-101 (1997 ed.).

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.

II. SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Texas has not enacted laws to protect sexual orientation and gender identity from employment discrimination.¹⁸

B. Attempts to Enact State Legislation

Numerous bills have been introduced in the Texas House of Representatives since 1988 to prohibit employment discrimination, both generally and specifically by state agencies, on the basis of sexual orientation and/or gender identity. A review of the legislative history of all bills introduced after 2001 shows that none of these bills have made it past the committee stage.¹⁹

On January 12, 2009 Representative Villarreal introduced H.B. No. 538 which would amend various sections of Texas' Labor Code to prohibit employment discrimination on the basis of either sexual orientation or gender identity or expression.²⁰ It has not been adopted.

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

1. Executive Orders

None.²¹

2. State Government Personnel Regulations

None.

3. Attorney General Opinions

None.

D. Local Legislation

Although Texas's nondiscrimination law does not explicitly address sexual orientation or gender identity, at least four Texas cities have nondiscrimination

¹⁸ See TEX. LAB. CODE §§ 21.001-.556.

¹⁹ House bills introduced after 2001 relating to the prohibition of employment discrimination on the basis of sexual orientation and/or gender identity include HB 1136, HB 810, HB 574, HB 3463 and HB 1524 in 2003; HB 1515, HB 1526, HB 143, HB 2519 and HB 1206 in 2005; and HB 900 and HB 307 in 2007. Some of these bills were considered in public hearings, but no information regarding those hearings was found. All of these bills died in Committee.

²⁰ See HB 538.

²¹ Only executive orders issued by the current governor, Rick Perry, were reviewed. Governor Perry has been in office since December 21, 2000.

ordinances in place that prevent employment discrimination on the basis of sexual orientation and/or gender identity: Austin, Fort Worth, Houston and Dallas.²²

1. **City of Austin**

Austin’s City Code regarding employment discrimination covers both sexual orientation and gender identity. Gender identity is defined as “a person’s various individual attributes, actual or perceived, that may be in accord with or sometimes opposed to, one’s physical anatomy, chromosomal sex, genitalia, or sex assigned at birth.” Sexual orientation is not specifically defined.²³

The code makes it unlawful for an employer²⁴ to fail or refuse to hire, or discharge, any person on the basis of sexual orientation or gender identity. It also makes it unlawful for an employer to discriminate against any person with respect to compensation or other terms of employment or to limit, segregate or classify employees or applicants in any way that deprives a person of employment or employment opportunities, on the basis of sexual orientation or gender identity. The unlawful employment practices covered by the ordinance also include actions by employment agencies and labor organizations.²⁵

Charges of unlawful discriminatory practices may be filed with Austin’s Equal Employment/Fair Housing Office²⁶ (the “EEO”) within 180 days of the date the violation occurred. The EEO conducts a preliminary review before accepting a charge. Once a charge is accepted, an investigation is initiated and if the EEO determines there is reasonable cause to believe a violation occurred, an attempt will be made to resolve the alleged violation through a conciliation agreement. If this attempt is unsuccessful, the EEO may refer a case to the city attorney for civil prosecution.²⁷

2. **City of Fort Worth**

Fort Worth’s City Code protects against employment discrimination on the basis of sexual orientation. Sexual orientation is defined as “heterosexuality, homosexuality or

²² There are approximately 465 cities in Texas and an exhaustive search was not performed to determine if any additional cities may have nondiscrimination ordinances in place that cover sexual orientation and/or gender identity. According to the Equality Texas website, the only Texas cities with nondiscrimination policies addressing sexual orientation and/or gender identity are the four listed and El Paso, which has a local ordinance prohibiting such discrimination only in the context of public accommodations.

²³ See Austin City Code, Chapter 5-3.

²⁴ “Employer” is defined in the Austin City Code as “a person who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and the person’s agent. The term does not include the United States, or a corporation wholly owned by the government of the United States; a bona fide private membership club (other than a labor organization) which is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1954; or the state, a state agency, or political subdivision.” *Id.* at § 5-3-2.

²⁵ *Id.* at § 5-3-4.

²⁶ “Equal Employment/Fair Housing Office” is defined in Section 5-3-2 of the Austin City Code as “the office in the Human Resources Department responsible for receiving, investigating, conciliating, making determinations, and taking other action related to charges received under this chapter.”

²⁷ *Id.* at § 5-3-6 through 5-3-12.

bisexuality or being identified with such orientation.” Gender identity is not covered by the Fort Worth City Code.²⁸

The code makes it unlawful for an employer,²⁹ employment agency, labor organization or joint labor-management committee to discriminate against any individual because of sexual orientation in any manner involving employment, including hiring, firing and recruitment of individuals.³⁰ Discriminate is defined broadly to capture various forms of indirect discrimination as well.³¹

Charges of employment discrimination may be filed with the Enforcement Division of the Fort Worth Community Relations Department (“CRD”). The CRD may require an individual alleging discrimination to participate in settlement discussions. If these efforts are unsuccessful, the CRD may investigate the charge, determine its merits and issue a Letter of Determination regarding the merits of the charge.³² Violations are punishable by a fine not to exceed \$500.³³

3. City of Houston

In July 2001, Houston amended its Code of Ordinances to prohibit discrimination on the basis of sexual orientation and gender identity in connection with city employment and employment opportunities, the awarding of city contracts, the use of city facilities and the delivery of city services. Sexual orientation and gender identity is defined as “having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having a self-image or identity not traditionally associated with one’s biological maleness or femaleness. Sexual orientation and gender identity does not include pedophilia, exhibitionism, voyeurism or any unlawful conduct.”³⁴

An employee or officer found to be in violation of the ordinance shall be subject to disciplinary action up to and including indefinite suspension/termination or removal from office pursuant to applicable city ordinances, city charter provisions, executive orders, administrative procedures, laws and policies.³⁵

²⁸ See Fort Worth City Code, art. III, §§ 17-66 through 17-71.

²⁹ “Employer” is defined in the Fort Worth City Code as “a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of such person.” The definition states that the term “employer” does not include “[t]he United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or [a] bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.” *Id.* at § 17-66. The definition of “employer” does not specifically exclude employees of the state government.

³⁰ *Id.* at § 17-67(a).

³¹ *Id.* at § 17-67(c).

³² *Id.* at § 17-69; see also City of Fort Worth, Employment Discrimination Homepage, <http://www.fortworthgov.org/crd/info/default.aspx?id=5104> (last visited Sept. 3, 2009).

³³ *Id.* at § 17-71.

³⁴ See Houston Code of Ord., art. IV, §§ 2-451 through 2-454.

³⁵ *Id.* at § 2-455.

Prior to Houston's amendment of its Code of Ordinances, its mayor, Lee Brown, signed an executive order in 1998 prohibiting discrimination on the basis of sexual orientation in connection with city employment and other city programs. In response to this executive order, City Councilman Rob Todd sued the mayor and the city, asking that the court declare the order invalid and enjoin its enforcement. Todd claimed that this executive order bypassed the citizens of Houston, who had voted against a similar referendum 13 years earlier, and usurped a power allocated to the city council and the civil service commission. After multiple appeals, the Supreme Court of Texas determined that neither Todd nor a citizen co-plaintiff had standing to bring the case, and the claims were dismissed.³⁶

4. City of Dallas

In May 2002, the Dallas City Council amended its City Code to prohibit employment discrimination on the basis of sexual orientation or gender identity.³⁷ While the code uses only the term "sexual orientation" throughout, it defines such term to mean "an individual's real or perceived orientation as heterosexual, homosexual, or bisexual *or an individual's real or perceived gender identity.*"³⁸ The ordinance does not apply to religious organizations or the United States or Texas governments.³⁹

The ordinance makes it unlawful for an employer⁴⁰ to fail or refuse to hire, or discharge, any person on the basis of sexual orientation. It also makes it unlawful for an employer to discriminate against any person with respect to compensation or other terms of employment or to limit, segregate or classify employees or applicants in any way that deprives a person of employment or employment opportunities, on the basis of sexual orientation. The unlawful employment practices covered by the ordinance also include actions by employment agencies and labor organizations.⁴¹

Complaints of unlawful discriminatory practices may be filed by any person with the administrator, who shall commence an investigation of the alleged discrimination. During the investigation, if it appears that an unlawful practice has occurred, the administrator shall attempt to conciliate the complaint. If this is not successful, and the administrator determines that an unlawful practice has occurred, the administrator shall refer the case to the city attorney for prosecution in municipal court.⁴² A person who knowingly or intentionally violates a provision of the ordinance, or knowingly or

³⁶ See *Brown v. Todd*, 53 S.W.3d 297 (Tex. 2001).

³⁷ See Dallas City Code, Chptr. 46.

³⁸ *Id.* at § 46-4(18).

³⁹ *Id.* at § 46-5.

⁴⁰ "Employer" is defined in the Dallas City Code as: "any person who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and includes any agent of such a person. The term does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1954, as amended." *Id.* at § 46-4.

⁴¹ *Id.* at § 46-6.

⁴² *Id.* at §§ 46-9 through 46-12.

intentionally obstructs or prevents compliance with the ordinance, can be fined between \$200 and \$500.⁴³

E. Occupational Licensing Requirements

The Texas Department of Licensing and Regulation is the state's umbrella occupational regulatory agency, responsible for the licensing and regulation of over 20 occupations and industries.⁴⁴ Within these industries, the Texas Occupations Code provides for specific licensing requirements for various types of professionals - i.e., Title 3 of the Occupations Code covers Health Professionals, but there are specific licensing requirements for chiropractors, podiatrists, midwives and various other titles. The general provisions relating to licensing do not include a “moral turpitude” or similar clause and only allow licensing authorities to restrict licenses from being granted to individuals who have been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the licensed occupations.⁴⁵

However, a sampling of the specific licensing requirements for various occupations indicates that many of the licensing requirements do include moral character clauses. For example, individuals applying for a Real Estate Broker and Salesperson license must have a moral character that complies with the commission’s moral character requirements.⁴⁶ Applicants for a license to practice dentistry or dental surgery must be of “good moral character,”⁴⁷ electrician applicants must demonstrate “honesty, trustworthiness, and integrity”⁴⁸ and engineers must be “of good character and reputation.”⁴⁹ A non-exhaustive search of cases, news articles and websites did not uncover any examples of these standards being applied to LGBT applicants.

In the pre-*Lawrence* landscape in Texas, “individuals *convicted* of violating consensual sodomy statutes can find their ability to pursue their careers sharply curtailed by state licensing laws that deny individuals with criminal convictions, even convictions for misdemeanors like § 21.06, the right to practice certain professions. For example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d).”⁵⁰

In *Lawrence v. Texas*, both the majority opinion of the U.S. Supreme Court and Justice O’Connor’s concurring opinion relied on the impact of Texas’ sodomy statute on employment as one reason that *Bowers* should be overturned. In particular, □ Justice

⁴³ *Id.* at § 46-13.

⁴⁴ See Texas Dep’t of Licensing and Reg. “About Us” Page, <http://www.tdlr.state.tx.us/about.htm> (last visited Sept. 3, 2009).

⁴⁵ See TEX. OCCUPATIONS CODE, § 53.021.

⁴⁶ See TEX. OCCUPATIONS CODE, § 1101.353.

⁴⁷ *Id.* at § 256.002.

⁴⁸ *Id.* at § 1305.152.

⁴⁹ *Id.* at § 1001.302.

⁵⁰ See Texas Dep’t of Licensing and Reg. “About Us” Page, <http://www.tdlr.state.tx.us/about.htm> (last visited Sept. 3, 2009).

O'Connor's concurrence noted the impact on employment, with the restrictions that would keep a homosexual from joining a variety of professions.⁵¹

⁵¹ *Id.* at 581, O'Connor, concurring ("It appears that petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. *See, e.g.*, Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer).")

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

A. Case Law

1. State and Local Government Employees

Trevino v. Center for Health Care Services, 2008 WL 4449939 (W.D.Tex., Sept. 29, 2008).

U.S. Magistrate Judge Nancy Stein Nowak refused to dismiss a Title VII sex and race discrimination claim brought by Ramsey Trevino, a transgender person, against Center for Health Care Services, a state agency. The court found that “Trevino has met her burden to plead enough facts to state a claim for relief that is plausible on its face. Assuming the allegations in the complaint are true, Trevino's factual allegations - that she has been subjected to inappropriate comments, jokes, and a hostile work environment because of her race and gender - are enough to raise a right to relief above the speculative level.”⁵²

In 2009, the court denied the defendant’s motion for summary judgment. As to Trevino’s Title VII hostile environment claim, defendant’s sought to dismiss because Trevino’s allegations did not show that the harassment was severe or pervasive. The court disagreed, stating, “Trevino presented summary-judgment evidence showing that she experienced harassment for years. Her evidence indicates that her coworkers and supervisors referred to Trevino as a ‘he-she,’ ‘cross-dresser,’ ‘transsexual,’ and ‘cross-gender,’ and made such comments as ‘you’re not a woman,’ ‘why are you dressing like a woman,’ ‘you look like man,’ ‘you look like a drag queen,’ ‘did the doctor cut off your penis,’ ‘can you have sex,’ ‘you cannot be married,’ ‘you’re a man,’ and ‘what parts do you have?’” The court further mentioned that despite Trevino’s internal complaints about the insults and comments, the Center did not investigate the complaints or take remedial action. The court concluded that the statements and internal inaction were sufficient to support a claim of severe and pervasive harassment, conveying the message that Trevino is incompetent because of her sex.⁵³

Gonzalez v. Kleberg County, 2008 WL 194370 (S.D. Texas, Jan. 22, 2008).

A man who was employed as a Dispatcher by the Kleberg County Sheriff’s Department can maintain a retaliation action under Title VII but not a sex discrimination sexual harassment action, ruled U.S. District Judge John D. Rainey.

Soon after being hired, Plaintiff was subjected to harassing comments by his supervisor, Ms. Barbour, and her supervisor, Mr. Vera. Evidently they perceived Mr. Gonzalez to be gay, because they taunted him with such expressions as “queer bait,” “fruit loop sucker,” and “fruitcake.” Gonzalez stated his objections to these comments,

⁵² Lesbian & Gay L. Notes (Nov. 2008).

⁵³ *Trevino v. Center for Health Care Services*, 2009 WL 2406196 *3 (W.D. Tex. Aug. 3, 2009).

but no action was taken on his complaints. When Gonzalez had been working at the department about three months, he was called into a meeting with these individuals and a Captain and confronted with a letter claiming that he had falsely represented himself as an officer of the sheriff's department to obtain information about a friend who had been arrested by the Bishop Police Department, that he was living with the friend and that he was involved in selling drugs. County officials also claimed to have a recording of a telephone call where Gonzalez identified himself as an officer. He was told he could quit or be fired. He protested that the allegations were false, but he quit and filed his discrimination charges, alleging a hostile environment and retaliation for his complaints.

The court dismissed the discrimination claim because the harassment was aimed at his perceived sexual orientation, not his sex, and was thus not actionable under Title VII. However, the court found that the retaliation claim could proceed, as "Plaintiff has sufficiently stated a cause of action for retaliation to survive a motion to dismiss because he reasonably believed that he was opposing an unlawful employment practice under Title VII."⁵⁴

Hotze v. Brown, 1999 WL 418363 (Tex.App., 14th Dist., June 24, 1999).

In *Hotze v. Brown*, a Texas appellate court affirmed a temporary injunction halting enforcement of an executive order issued by Houston Mayor Lee Brown that would have banned discrimination based on sexual orientation in connection with the activities of the Houston municipal government.

In 1985, after the city council passed a gay rights bill, there was a referendum which repealed the bill. In 1998, newly-elected Mayor Brown signed an executive order prohibiting discrimination based on sexual orientation that applied only to activities and employees of the City of Houston. Richard Hotze, an organizer of the referendum repeal drive, and Councilman Rob Todd sought a temporary injunction to halt enforcement of the executive order, arguing that, under the Houston City Charter, only the civil service commission, with the City Council's approval, may make rules and regulations pertaining to civil service employees. In their motion, Hotze and Todd argued that, by issuing an executive order applicable to civil service employees, Brown usurped the powers granted to the City Council and civil service commission and thereby exceeded his legal authority. The trial court granted the motion, while holding that Hotze did not have standing to participate in the litigation as a plaintiff.

The appeals court agreed with the trial court that Hotze, a private citizen, did not suffer a "special" injury and therefore did not have standing. However, the court also agreed that Todd could establish standing based on his allegation that his power as a City Councilman was usurped, and therefore considered the request for an injunction. The appeals court found that an injunction was warranted because enforcement of the order would usurp Todd's authority as a legislator instantly, and if the order were enforced, City employees would be limited in their ability to act. Because the City Council had not failed to enact a rule similar to the Mayor's executive order, the Council had affirmed a

⁵⁴ *Gonzalez v. Kleberg County*, 2008 WL 194370 (S.D. Texas, Jan. 22, 2008).

"hands off" policy with regard to those types of discriminatory actions, which conflicted with the Mayor's executive order.⁵⁵

City of Dallas v. England, 846 S.W.2d 957 (Tex. App. 1993).

*City of Dallas and Mack Vines v. England*⁵⁶ involves a lesbian, Mica England, who was denied a job as a Dallas Police Officer in 1989 because she admitted to being a lesbian during her job interview. At the time, the Texas Penal Code criminalized consensual sexual relations between same-sex adults, so the Dallas Police Department had a policy of refusing to hire gay and lesbian applicants because they violated this criminal statute. Ms. England challenged the constitutionality of the Texas statute criminalizing private sexual relations between consenting same-sex adults and the police department's related hiring policy, and sought to enjoin the Dallas Police Department from refusing to hire lesbians and gay men because they violate this criminal statute.⁵⁷

The Texas appellate court held that the statute was unconstitutional and that the City of Dallas and its police chief were enjoined from denying lesbians or gay men employment in the police department solely because they violate this statute. The court also found that the State of Texas was immune from the suit without its consent due to sovereign immunity.⁵⁸

Childers v. Dallas Police Dep't, 513 F. Supp. 134 (N.D. Tex. 1981).

Plaintiff, a Dallas City Employee, was disqualified for a promotion to employment with the Property Division of the Dallas Police Department, despite exceptional performance on the requisite civil service exam, on the basis that he was a practicing homosexual and thus a "habitual lawbreaker" (homosexual conduct was prohibited by Texas penal statutes). The police department believed the plaintiff would be a security risk "because of the kind of contraband that the property room controls, and because Childers might warn other homosexuals of impending police raids." The police department also suggested that Plaintiff, by virtue of his homosexuality, was likely to be emotionally unstable and unable to endure the harassment he was likely to encounter from police officers.

The court upheld the police department's refusal to hire Plaintiff, basing its decision on its findings that many people openly despise and fear homosexuals, that Plaintiff had publicly "flaunted" his homosexuality by his involvement with a gay church, which would "discredit" on the police department, that Plaintiff's homosexual activities "undermine the legitimate needs for obedience and discipline within the police department," and because "[t]here [were] also legitimate doubts about a homosexual's ability to gain the trust and respect of the personnel with whom he works."⁵⁹

⁵⁵ *Hotze v. Brown*, 1999 WL 418363 (Tex.App.,14th Dist., June 24).

⁵⁶ 846 S.W.2d 957 (Tex. App. 1993).

⁵⁷ *Id.* at 958.

⁵⁸ *Id.*

⁵⁹ *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981).

Van Ooteghen v. Gray, 628 F.2d 488, 490 (5th Cir. 1980), aff'd en banc, 654 F.2d 304 (1981).

Plaintiff, the Assistant County Treasurer for Harris County, Texas, was fired after he told his employer that he was gay and that he intended to speak at the Commissioner's Court about gay rights. Plaintiff's employer attempted to prevent Plaintiff from making the public speech, and Plaintiff was fired after he refused. The district court rendered judgment in favor of Plaintiff, finding that Plaintiff's First Amendment rights had been violated and awarding reinstatement and back pay. The Fifth Circuit affirmed, and remanded the District Court's award of \$7,500 for attorney's fees because the District Court did not explain how it reached this amount. On a second appeal for award of attorney's fees, the Fifth Circuit upheld the reduced amount awarded by the District Court.⁶⁰

2. Private Employees

Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008).

In 2005, Izza (Raul) Lopez, a transgender woman, applied for the position of Scheduler with River Oaks Imaging & Diagnostic, a Houston medical clinic. After being offered the job, Ms. Lopez was told that her offer was being rescinded because of her "misrepresentation" of herself as a woman. Ms. Lopez sued in federal court in the Southern District of Texas, charging that River Oaks violated her rights under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment.⁶¹

The court found that while transgendered persons are not a protected class under Title VII *per se*, such persons are protected under the *Price Waterhouse* theory if they can demonstrate that they were subject to discrimination, not because they are transgendered, but because their appearance and conduct does not conform to traditional male or female stereotypes. The court found that Ms. Lopez had a legally viable claim because she developed facts in support of a claim that "River Oaks discriminated against her, not because she is transgendered, but because she failed to comport with certain River Oaks employees' notions of how a male should look."⁶² The court further found that Ms. Lopez had presented ample evidence to disprove River Oaks' misrepresentation claim and that there was a genuine fact issue about whether River Oaks' stated reasons for rescinding its job offer were pretexts for unlawful discrimination.⁶³ For these reasons, the court denied motions for summary judgment from both sides and mediation was set

⁶⁰ *Van Ooteghen v. Gray*, 628 F.2d 488, 490 (5th Cir. 1980), aff'd en banc, 654 F.2d 304 (1981).

⁶¹ 542 F. Supp. 2d 653 (S.D. Tex. 2008).

⁶² *Id.* at 660.

⁶³ *Id.* at 665.

for April 30, 2008.⁶⁴ According to the attorney at Lambda Legal who handled this case, it was settled to the parties' mutual satisfaction in April 2008.⁶⁵

B. Administrative Complaints

The Texas Workforce Commission Civil Rights Division ("TWC-CRD") enforces the Texas Commission on Human Rights Act ("CHRA"), codified in the Labor Code, which applies to both public and private entities.⁶⁶ The CHRA aims to assure equal employment opportunity without discrimination on the basis of race, color, religion, national origin, sex (includes sexual harassment and pregnancy), age, disability or retaliation, and the TWC-CRD has the authority to investigate claims brought under the CHRA. The CHRA also details procedures for administrative review of claims, alternative dispute resolution and exhaustion of administrative remedies which are designed to favor conciliation over litigation.⁶⁷ The Supreme Court of Texas has stated that "the CHRA provides the exclusive state statutory remedy for public employees alleging retaliation arising from activities protected under the CHRA."⁶⁸

When an employee feels he or she has been treated in a discriminatory manner, they may file a complaint with the TWC-CRD in person, over the phone or by completing an online form and sending a notarized copy to the TWC-CRD.⁶⁹ After a charge has been filed, the TWC-CRD will conduct an investigation if it believes that a violation may have occurred and may offer mediation to the parties involved, or contact the employer for more information. An employee may file a lawsuit in state or federal court if their charge is dismissed at any stage. Copies of filed complaints were not found on the Texas Workforce website and it is unlikely that complaints would be filed alleging discrimination on the basis of sexual orientation or gender identity since those are not protected classes.⁷⁰

Texas also has a State Office of Administrative Hearings ("SOAH"), which is an independent agency created to manage contested cases and conduct hearings in contested cases for other state agencies.⁷¹ One of the functions of the SOAH is to provide alternative dispute resolution ("ADR") services to state agencies. These services range from publishing model guidelines for ADR to conducting mediations. The SOAH website indicates that state agencies frequently use ADR for employee grievances and the

⁶⁴ *Id.* at 668.

⁶⁵ See e-mail from Cole Thaler of Lambda Legal, Lead Counsel for Ms. Lopez (Jan. 23, 2009) (on file with author).

⁶⁶ See TEX. ADMIN. CODE, Chapter 819 and TEX. LAB. CODE §§ 21.001-.556. Note that the definition of "employer" in the Labor Code includes "a county, municipality, state agency or state instrumentality."

⁶⁷ See TEX. LAB. CODE §§ 21.201-.211.

⁶⁸ See *City of Waco v. Lopez*, 259 S.W.3d 147 (Tex. 2008).

⁶⁹ See TEXAS WORKFORCE, HOW TO FILE AN EMPLOYMENT DISCRIMINATION COMPLAINT (2008), available at http://www.twc.state.tx.us/crd/file_emp.html.

⁷⁰ The Texas Workforce website includes links to numerous reports and publications, but does not provide copies of discrimination charges. See Texas Workforce: Reports, Publications and Internet Systems Homepage, <http://www.twc.state.tx.us/customers/rpm/rpmsub4.html> (last visited Sept. 3, 2009).

⁷¹ See STATE OFFICE OF ADMINISTRATIVE HEARINGS, SOAH PROCEDURAL RULE CHANGES (2009), available at <http://www.soah.state.tx.us>.

Texas Government Code directs state agencies to develop and use ADR as appropriate to resolve disputes as quickly and fairly as possible.⁷²

While the SOAH provides guidance on establishing ADR procedures to state agencies, each individual agency is responsible for developing its own policy, as well as for developing a policy regarding how to handle employee grievances before ADR is needed. For example, the Texas Department of Criminal Justice has issued an Executive Directive describing how complaints of discrimination in the workplace should be handled and detailing the various options available to the complainant.⁷³ Each school district in Texas is also required to have a grievance policy outlining its internal dispute resolution system.⁷⁴ Complaints handled by the SOAH or individual state agencies were not found on state websites.

C. Other Documented Examples of Discrimination

A Texas Public School

In 2009, a lesbian public school teacher was subjected to a hostile work environment because of her sexual orientation.⁷⁵

A Texas Public School

In 2009, a public school teacher was censored for expressing pro-LGBT viewpoints.⁷⁶

A Texas Public School

In 2009, a lesbian public school guidance counselor was subjected to a hostile work environment because of her sexual orientation and was censored for expressing pro-LGBT viewpoints.⁷⁷

Collin County Teen Court Program

In April 2008, the head of the Collin County's teen court program resigned under pressure after it was revealed that he was gay during his campaign for Plano City Council.⁷⁸ Although the Commissioner later withdrew this proposal amid media scrutiny

⁷² See TEX. GOV'T CODE §§ 2009.002 and 2009.051.

⁷³ See TEXAS DEPARTMENT OF CRIMINAL JUSTICE, DISCRIMINATION IN THE WORKPLACE 31 (rev. 5), available at <http://www.tdcj.state.tx.us/vacancy/hr-policy/pd-31.pdf>.

⁷⁴ See ASSOCIATION OF TEXAS PROFESSIONAL EDUCATORS, THE GRIEVANCE PROCESS, available at <http://www.atpe.org/protection/EmploymentRights/grievanceprocess.asp>.

⁷⁵ E-mail 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).

⁷⁶ E-mail 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).

⁷⁷ E-mail 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).

⁷⁸ Justin Nichols lost his race for City Council. Although he does not believe this loss was a result of his sexual orientation, the campaign against him and his supporters did at times focus on this fact. See John

of the matter, Justin Nichols entered into a severance agreement with the county in June 2008 and agreed to leave his position in exchange for the equivalent of \$38,500, more than his \$35,500 annual salary. The severance agreement does not specify that Mr. Nichols was asked to leave because he is gay, but the clear implication is that this was the case, and the county could have fired him solely because of his sexual orientation since neither Texas nor Collin County law protects against such discrimination.⁷⁹

Keller Learning Center

Since 2007, a teacher at Keller Learning Center, an alternative public high school in Keller, Texas, has been experiencing harassment based on his sexual orientation at his workplace. Approximately one year after he began teaching at Keller Learning Center in 2006, a student asked him if he was gay. He truthfully answered “yes.” The assistant principal, having heard about the conversation between him and the student, implored him to keep his sexual orientation a secret because his job would be in danger if he were “out” at work and he might also be in physical danger. In response, he wrote a letter stating that he felt it would be disingenuous and would work a disservice to the students if he acted like there was something shameful about being gay. Thereafter, three students were allowed to transfer out of his class and his request to conduct a diversity training was denied. The discrimination makes him feel isolated at work and unable to interact with his colleagues.⁸⁰

Municipal Department

In 2007, a code compliance inspector reported that after she designated her same-sex partner as a beneficiary for certain employment benefits, the officer administrator told everyone that she was a lesbian. Co-workers made repeated derogatory comments about “faggots” and one female religious employee told the compliance inspector that, because she did not have a boyfriend, she “wasn’t whole ... that’s your problem.” A picture of Janet Jackson’s breast was placed on the compliance inspector’s computer. Her complaints to her manager were rejected. When a new supervisor was hired, he would ignore the compliance inspector and avoid eye contact with her at meetings. He also required her to train three replacements for a management position that she was qualified for and that she had been told she would receive prior to his arrival, but to which she was never promoted.⁸¹

Bloomburg Public School

Wright, *Attack E-mail Implies Gay Candidate is Child Molester*, DALLAS VOICE, Mar. 28, 2008, available at http://www.dallasvoice.com/artman/publish/article_8481.php.

⁷⁹ See Theodore Kim & Ed Housewright, *Collin County Employee Gets a Year’s Salary in Exchange for Resignation*, DALLAS MORNING NEWS, June 26, 2008; *Editorial: Collin County Wrong to Run Off Gay Workers*, DALLAS MORNING NEWS, June 29, 2008.

⁸⁰ E-mail 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).

⁸¹ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, The Williams Institute (Feb. 11, 2009) (on file with the Williams Institute).

In 2005, Merry Stephens, an award-winning teacher and basketball coach, settled her sexual orientation discrimination claim against Bloomburg Independent School District. Coach Stephens was honored as a "Teacher of the Year" in 2004 and named "Coach of the Year" in three of her five years as head coach of the Lady Wildcats basketball team. In December 2004, the School Board initiated proceedings to terminate Coach Stephens. The school board president testified under oath that the board's decision to terminate Coach Stephens was based on the personal anti-gay animosity of several school board members. In exchange for Coach Stephens' agreement not to pursue further legal action, the district agreed to pay Coach Stephens a monetary settlement.⁸²

Dallas County Sheriff's Department

In 1994, In August, the Dallas County Sheriff's Department suspended a bailiff after he was heard making derogatory remarks about a lesbian rape victim. The bailiff joked to the rapist's attorney that "if it was me [on the jury], I'd only give him 30 days for raping a lesbian." A review board suspended the bailiff for 10 working days and ordered him to undergo sensitivity training and apologize in writing to the woman.⁸³

Texas Governor's Office

In 1997, two former employees of the Texas governor's office filed a lawsuit in Austin alleging that their former supervisor used hostile language to describe victims' assistance programs for homosexuals. The women were fired from the governor's Criminal Justice Division after complaining about abusive language and attitudes towards gays and lesbians by the division's executive director. They claimed the director had described victims' assistance programs as "homo projects." The suit further alleged that the director wanted to track the number of crime victims who were gay and threatened to retaliate against grant applicants who complained about budget cuts. The governor's office denied the allegations.⁸⁴

⁸² NCLR, Employment Case Docket: *Stephens v. Bloomburg School District*, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_stephens.

⁸³ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 70* (1994 ed.).

⁸⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 100-101* (1997 ed.).

IV. NON-EMPLOYMENT SEXUAL ORIENTATION AND 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

Until the law was struck down by the U.S. Supreme Court in *Lawrence v. Texas*⁸⁵ in 2003, Texas prohibited “deviate sexual intercourse” with another individual of the same sex, regardless of whether the sexual intercourse was consensual.⁸⁶ Based on the sodomy law, the Dallas Police Department had a hiring policy that prohibited applicants who admitted to or engaged in deviate sexual intercourse, or any sexual contact, with a member of the same sex since age 15.⁸⁷

B. Housing and Public Accommodations Discrimination

Similar to the situation involving employment, Texas does not have a state law prohibiting discrimination on the basis of sexual orientation or gender identity in connection with housing or public accommodations, although there have been attempts to enact such legislation.⁸⁸ However, the nondiscrimination laws in the cities of Austin⁸⁹ (sexual orientation and gender identity), Fort Worth⁹⁰ (sexual orientation only) and Dallas⁹¹ (sexual orientation and gender identity) all prohibit discrimination in both the housing and public accommodations contexts, in addition to employment.

Additionally, in 2003 El Paso’s City Council unanimously voted to expand its anti-discrimination ordinance covering public accommodations to ban discrimination on the basis of sexual orientation or gender identity. Violating the ordinance is a misdemeanor punishable by a fine of up to \$200.⁹² El Paso does not protect against employment discrimination on the basis of sexual orientation or gender identity.

⁸⁵ 539 U.S. 558 (2003).

⁸⁶ TEX. PENAL CODE § 21.06. This section remains a part of Texas’s Penal Code, although there is a notation that it was declared unconstitutional by *Lawrence v. Texas*.

⁸⁷ See *Dallas v. England*, 846 S.W.2d 957 at 958 (Tex. App. 1993), and discussion *supra* Part II.D.4.

⁸⁸ Several of the house bills introduced to prevent employment discrimination on the basis of sexual orientation and/or gender identity included provisions relating to housing and public accommodations as well. See, e.g., HB 1136 (2003); HB 1515 (2005); HB 900 (2007).

⁸⁹ See Austin City Code, Chptrs. 5-1 and 5-2.

⁹⁰ See Fort Worth City Code, art. III, §§ 17-46-17-51; 17-86-17-106.

⁹¹ See Dallas City Code, Chptr. 46.

⁹² See Charles K. Wilson, *City Amends Ordinance on Discrimination*, EL PASO TIMES, Apr. 9, 2003, available at <http://www.genderadvocates.org/News/El%20Paso.html>.

C. Hate Crimes

The Texas hate crimes law includes “sexual preference” but does not explicitly cover gender identity. Disability and gender are included, but neither has been used to provide a cause of action for violence motivated by the victim’s gender identity as of March 27, 2007.⁹³

In 1995, legislators in the Texas House of Representatives killed a bill that clarified the definition of a hate crime, including sexual orientation as a category of victim selection, and stiffened penalties for hate crimes.⁹⁴ The legislature enacted a hate crimes law in 1993 that covers offenses based on ‘bias or prejudice’ without specifying any categories; it has rarely been enforced.⁹⁵ The proposed bill was attacked by Religious Right groups, but was passed overwhelmingly in the Senate.⁹⁶ Democratic State Rep. Warren Chisum led a coalition of conservatives to defeat it, 70-68, in the House.⁹⁷ According to Chisum, gay people “put themselves in harm’s way. They go to parks and pick up men, and they don’t know if that someone’s gay or not.”⁹⁸ He has also stated, “[I]t sets precedent in the law to give special consideration to the gay and lesbian community just as if they were the same stature as all minorities.”⁹⁹

D. Health Care

Texas law does not permit a partner to make a medical decision on behalf of an incapacitated same-sex partner in the absence of an advance directive,¹⁰⁰ but an adult may designate his or her same-sex partner as a health care agent through an advance health care directive.¹⁰¹ A bill has been introduced in the current session of the Texas House of Representatives that would treat domestic partners the same as spouses and allow them to make medical decisions on behalf of their partners.¹⁰²

In 1995, three Dallas County Commissioners, Jim Jackson, Kenneth Mayfield and Mike Cantrell, sent a letter to local doctors urging them to support the county’s ban on condom distribution because homosexuality, like prostitution and drug abuse, is unacceptable. Their letter stated that “[w]e don’t want anyone, especially anyone in authority, telling our children or future grandchildren that it’s an approved or acceptable lifestyle to be a homosexual, a prostitute or a drug user.”¹⁰³ Jim Jackson is currently a

⁹³ See TEX. CODE CRIM. PROC. art. 42.014; TEX. PENAL CODE § 12.47. See also HUM. RTS. CAMPAIGN STATE LAW LISTINGS: TEXAS HATE CRIMES LAW (2007), <http://www.hrc.org/1770.htm> (last visited Sept. 3, 2009).

⁹⁴ PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: A STATE BY STATE REPORT ON ANTI-GAY ACTIVITY 98 (1995 ed.).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See TEX. HEALTH AND SAFETY CODE, § 313.004.

¹⁰¹ See TEX. HEALTH AND SAFETY CODE Chptr. 166.

¹⁰² See HB 353.

¹⁰³ See John Wright, *Dallas County Overturns Condom Ban*, DALLAS VOICE, Jan. 13, 2009, available at <http://www.dallasvoice.com/instant-tea/2009/01/13/commissioners-court-overturns-condom-ban/>.

member of the Texas House of Representatives and Ken Mayfield and Mike Cantrell remain Dallas County Commissioners. The condom ban remained in force until January 2009. In each of the last two years, Dallas County had the highest rate of new HIV infections in the state and the rate of new HIV infections among people aged 13 to 24 has nearly tripled in the last five years.¹⁰⁴

E. Parenting

Texas does allow adoption by single gay individuals¹⁰⁵ and there is no explicit prohibition against same-sex couples jointly adopting a child. Lower courts have allowed such adoptions and the Texas Court of Appeals has held that a district court had the power to grant an adoption to a same-sex couple.¹⁰⁶

F. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The Texas state constitution bans same-sex marriage¹⁰⁷ and recognition of other legal status protections for same-sex couples. Texas' Family Code states that a license may not be issued for the marriage of persons of the same sex¹⁰⁸ and that marriages and civil unions between persons of the same sex is "contrary to the public policy of this state" and void.¹⁰⁹

2. Benefits

Bailey v. City of Austin, 972 S.W.2d 180 (Tex. App. 1998).

This case was originally brought by gay employees of the City of Austin to challenge the constitutionality of an amendment to the city charter which effectively discontinued the extension of health benefits to domestic partners of city employees. Although this amendment affected all domestic partners - heterosexual and homosexual - the heterosexual couples could choose to marry and obtain the benefits, while the homosexual couples do not have that right in Texas. The court held that there was insufficient evidence to prove that the intent of the amendment was to discriminate against homosexuals as a class, so the city only had to prove that the classification be rationally related to a legitimate state interest. The court also found that the government has a legitimate interest in recognizing and favoring the legal relationship of marriage

¹⁰⁴ *Id.*

¹⁰⁵ TEX. FAM. CODE ANN. § 162.001.

¹⁰⁶ *See Goodson v. Castellanos*, 214 S.W.3d 741, 746-752 (Tex. App. 2007).

¹⁰⁷ TEX. CONST. art. I, § 32.

¹⁰⁸ TEX. FAM. CODE ANN. § 2.001.

¹⁰⁹ TEX. FAM. CODE ANN. § 6.204.

and, therefore, concluded that the amendment was constitutional and did not violate the equal protection clauses of the Texas Constitution.¹¹⁰

¹¹⁰ *Bailey v. City of Austin*, 972 S.W.2d 180 (Tex. App. 1998). The court did hold that there was a genuine issue of material fact regarding whether the employees acted in detrimental reliance on the benefits that had been granted and were later taken away, but this was separate from the equal protection issue.