the Williams INSTITUTE

MEMORANDUM

From: Williams Institute

Date: September 2009

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

I. OVERVIEW

Montana currently has no laws that prohibit employment discrimination based on sexual orientation or gender identity. State personnel rules issued by former Governor Marc Racicot in 2000 prohibit discrimination and harassment on the basis of sexual orientation with respect to employment by state government, but the available remedies are limited due to the lack of a statewide statute. Bills have been introduced to add either sexual orientation or gender identity and expression, or both, to Montana's human rights laws in most of the legislative sessions of the past decade, including the current 2009 legislative session. None have passed despite enjoying recent support from the Governor's office.[1]

Opponents in Montana have been very vocal in their opposition to laws protecting LGBT people from employment discrimination. During the 2005 state legislative session, state senator Dan McGee stated "I'll never be able to support bills which try to overturn centuries of moral ideology. . . . Homosexuality is wrong."[2] Other Montana legislators have expressed similar public sentiments, including state senator Al Bishop of Billings, who made a statement on the Montana Senate floor that homosexual sex was "even worse than a violent sexual act." [3]

In 1997, the Montana Supreme Court recognized the combined impact that the state's sodomy law and licensing requirements had on LGBT employees with professional licenses. The issue of employment discrimination came via arguments for standing to challenge the sodomy law statute: "[Respondents] contend that the damage to their self-esteem and dignity and the fear that they will be prosecuted or will lose their livelihood or custody of their children create an emotional injury that gives them standing to challenge the statute. For example, two Respondents are employed or are seeking employment in positions requiring state licenses. Because they engage in conduct classified as a felony, they fear they could lose their professional licenses."[4] The

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[1] *See, e.g.*, Casey Charles, *Just How Gay is Missoula?*, MISSOULA INDEP., July 5, 2007; Matt Gouras, *Bill Outlawing Bias Against Gays Returns, AP Alert - Montana*, A.P., Feb. 2, 2007; Bob Anez, *Bill Outlawing Bias Toward Gays, Lesbians Draws Fire, AP Alert - Montana*, A.P., Jan. 17, 2005; *Who's Out Now? Conservative Uprising in the "Lost City"*, MISSOULA INDEP., May 27, 2004.

[2] *Legislature Votes Down Gay Rights Bills, AP Alert – Political*, A.P., Apr. 18, 2005.

[3] *See, e.g.*, David W. Dunlap, *Montana Cuts Homosexual Acts from List of Registered Crimes*, N.Y. TIMES, Mar. 24, 1995 (quoting state senator Al Bishop of Billings, who made a statement on the Montana Senate floor that homosexual sex was "even worse than a violent sexual act").

[4] *Id.* at 441.

specifics of the respondents' fears were laid out with greater detail in the filings leading up to the opinion. The two respondents who needed to be licensed by the state were a high school history teacher with more than 25 years experience, and a midwife seeking certification. Neither of these respondents could attain licensure if they were convicted of a felony (which sodomy was under then-existing Montana law).[5] Not only would they have been unable to attain licensure were they prosecuted and convicted under the statute, but they could have had their licensure revoked at any time, even without prosecution: "[C]ertification in both professions requires that the individual be 'of good moral and professional character'."[6] "Even if they are never prosecuted, the statute could be used to support a finding that they are engaged in immoral conduct."[7]

A 2008 survey conducted by Lake Research Partners of 600 likely general election voters commissioned by the Montana Human Rights Network suggests that 55% of voters in Montana would favor changing the state's human rights law to include protections based on sexual orientation (with 39% opposed and 6% responding that they did not know).[8] The poll also suggests that 62% of Montana voters are supportive of extending the state's current laws to offer protections based on sexual orientation when it comes to housing, employment and benefits (with 35% opposed and 3% responding that they did not know).[9] The survey findings revealed little variation when the word "transgender" was added to the scope of the questions asked.[10] "What this poll shows is that the vast majority of Montanans support issues of gay and lesbian equality," according to state senator Christine Kaufmann.[11]

Documented examples of employment discrimination by state and local government employers against LGBT people in Montana include:

- A transgender applicant for a position in the Montana state attorney general's office was not hired on account of her gender identity in 2008.[12]

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[5] Br. of Resp't at 7, *Gryczan v. State*, 283 Mont. 433, No. 96-202 (Supreme Court of Montana, 1997).

[6] *Id.* at 8.

[7] *Id.*

[8] Montana Human Rights Network, Findings from a Statewide Survey of Likely Voters, at 8, Mar. 2008, *available at* http://bit.ly/6WhP6 (last visited Sept. 13, 2009) [hereinafter MHRN Poll Analysis].

[9] Montana Human Rights Network, A Statewide Survey of 600 Likely General Election Voters in Montana, at question 27, Mar. 2008, *available at* http://bit.ly/rVyEW (last visited Sept. 13, 2009).

[10] *See id.* at question 26 (suggesting that 58% of Montana voters are supportive, with 36% of Montana voters opposed and 6% responding that they did not know, to extending state law in the areas of housing, employment and benefits to gay, lesbian and transgender Montanans); *see also* MHRN Poll Analysis, *supra* note 4, at 13.

[11] *See* Editorial, *Poll Shows Montanans Oppose Anti-Gay Discrimination*, Q NEWS, June 18, 2008, http://bit.ly/16iKiL (last visited Sept. 13, 2009). A conservative political group, led by former state representative Jeff Laszloffy, disputed the poll results. *See* Jeff Laszloffy, *A Rebuttal to Cooney Piece on Equality in the Workplace*, MONT. STD., July 15, 2008, *available at* http://bit.ly/3e4SPP (last visited Sept. 13, 2009).

[12] E-mail from Ken Choe, Senior Staff Attorney, ACLU, to Brad Sears, Executive Director, the Williams Institute (Sept. 22, 2009 11:08:00 PST).

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

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

Currently, the state of Montana has not enacted laws to protect sexual orientation and gender identity from employment discrimination.[13] In providing that "[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas," the Montana Constitution also fails to prohibit discrimination based on sexual orientation or gender identity in its Declaration of Rights.[14]

B. Attempts to Enact State Legislation

Numerous unsuccessful attempts have been made to enact statewide legislation. Bills have been introduced in a series of legislative sessions since at least 1999 to prohibit discrimination based on "sexual orientation" (and in some cases, "gender identity or expression") in employment.[15] New legislation was introduced in the 2009 Montana legislative session by state representative Margarett Campbell to amend the current employment discrimination provision of the Montana human rights law to provide that:

> It is an unlawful discriminatory practice for: (a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, *gender identity or expression, sexual orientation,* or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, *gender identity or expression, sexual orientation,* or sex distinction.[16]

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[13] *See* MONT. CODE. ANN. § 49-2-303(1)(a) (2007) ("It is a discriminatory or unfair employment practice for . . . an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction."); s*ee also id.* § 49-1-102 (right to be free from discrimination based on the same enumerated classes as a civil right); § 49-2-303(1)(b)-(c) (unlawful discriminatory practices based on the same enumerated classes committed by labor organizations, through employment agencies and advertisements, or through referrals for employment).

[14] MONT. CONST. Art. II, § 4.

[15] S.B. 371, 60th Leg. Sess. (Mont. 2007); S.B. 199, 59th Leg. Sess. (Mont. 2005); H.B. 438, 57th Leg. Sess. (Mont. 2001); H.B. 328, 56th Leg. Sess. (Mont. 1999). Senate Bill 266, introduced in the 2001 session, would have also provided recourse by allowing a claim for wrongful discharge if the action was based on the employee's "sexual orientation." S.B. 266, 57th Leg. Sess. (Mont. 2001).

[16] H.B. 252, 61st Leg. Sess. (Mont. 2009) (emphasis in original). The bill would have also, with respect to gender identity or expression or sexual orientation, (1) made the right to be free from discrimination on either basis a civil right, (2) prohibited discrimination on either basis by a labor organization or joint labor

A hearing on the bill was held on February 16, 2009, before the Montana House of Representatives Committee on the Judiciary. Testimony and exhibits from this hearing include anecdotal evidence of discrimination. One woman recounted the story of a close friend who was fired after her employer heard a rumor that she was a lesbian. Prior to the rumor her work ethic and dependability had been praised and her employer had told her that he wished he had 10 employees just like her. Once the rumor surfaced, her employer took her aside and explained that he felt uncomfortable and that her "attitude and lifestyle [were] not conducive to [the work] environment," and then immediately fired her. A gay man living in Montana expressed a sense of dread over the possibility that he or one of his friends would lose a job because of their sexual orientation.[17] The bill failed a committee vote on a 9-9 split the next day, and having missed the deadline for transmittal to the state house floor, appears dead.

Hearings from earlier, unsuccessful bills also included testimony and exhibits regarding incidents of violence, harassment, and discrimination. In 2005, a social worker testifying in support of Senate Bill 199 told of a young man at Carroll College who was beaten and had the term 'faggot' spray painted on his body.[18] In 2001, a student recounted dropping out of school because she faced constant harassment, including people slamming her into lockers, threatening, and yelling at her. She supported House Bill 438 because she was scared that she would not be able to find a job.[19]

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

1. Executive Orders

In a proceeding held under the Montana Administrative Procedure Act, after a two-year study, the administration of former Governor Marc Racicot issued comprehensive revisions to Montana's state employment anti-discrimination rules in late

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management committee controlling apprenticeship, by an employer or employment agency in employment advertisements or applications, or by an employment agency in making employment referrals, (3) prohibited discrimination on either basis in public accommodations, housing, financing and credit transactions, education, counseling and training programs, and licensing, (4) prohibited discrimination on either basis by the state of Montana or any of its political subdivisions against any person in the use of goods or performance of services or in the distribution of funds, facilities or privileges, and in all public contracting, and (5) prohibited discrimination on either basis by state and local government officials in the employment of state and local government personnel.

[17] *Hearing on House Bill 252*, 61st Leg. Sess. (Mont. 2009) (Exhibit 6), at 1-2, *available at* http://data.opi.mt.gov/legbills/2009/Minutes/House/Exhibits/juh36a06.pdf.

[18] *Hearing on Senate Bill 199*, 59th Leg. Sess. (Mont. 2005) (Exhibit 11), at 1, *available at* http://data.opi.state.mt.us/legbills/2005/Minutes/House/Exhibits/juh58a110.PDF. That same year, a mother testifying in support of Senate Bill 202, which would have added sexual orientation to the state's malicious intimidation law, described threatening instant messages her sixteen year old son received from an anonymous source, who claimed to be "doing others justice," and stated "we know where you live." *Hearing on Senate Bill 202*, 59th Leg. Sess. (Mont. 2005) (Exhibit 2), at 2, *available at* http://data.opi.state.mt.us/legbills/2005/Minutes/Senate/Exhibits/jus16a020.PDF.

[19] *Hearing on House Bill 438*, 57th Leg. Sess. (Mont. 2001), at 4, *available at* http://data.opi.mt.gov/legbills/2001/minutesPDF/010212STH_Hm1.pdf.

1999.[20] The 1999 rules for the first time prohibited discrimination on the basis of sexual orientation against state employees.[21] As codified in the state personnel rules, "[i]t is the policy of the state of Montana that state government . . . does not discriminate in employment based upon . . . *sexual orientation*."[22] Although during the 2001 state legislative session, then-House Speaker Dan McGee of Laurel "fought tooth-and-nail to get the Racicot administration rules reversed,"[23] this repeal effort was unsuccessful.[24]

Last year, Governor Brian Schweitzer issued Executive Order No. 41-2008, broadening state government's equal employment opportunity, non-discrimination and harassment-prevention mandate relative to "*sexual orientation*" and other categories.[25] The findings accompanying the order rested the Governor's action upon the fact that the Montana Constitution "affirms Montanans basic human rights, wherein it declares: 'the dignity of the human being is inviolable.'" Further, the Governor found in his order that "denial of equal opportunity, discrimination, and harassment based on . . . sexual orientation" both violates the principles of equal dignity and respect as well as "results in costs to society and state government, both human and financial."[26]

The Governor's new order requires the state Department of Administration (1) to make "good faith efforts to ensure that all persons employed or served by state government are afforded equal opportunity, without discrimination, based on" any of the enumerated categories, (2) to "[t]ake steps necessary to prevent and stop discrimination, sexual harassment, or harassment based on membership" in any of such categories, and (3) to prepare a non-discrimination policy including specific language to implement the above, applicable to all agencies under the Governor's jurisdiction, including an "internal complaint procedure" and provisions that make conduct in violation of the policy "a form of misconduct . . . subject to discipline, up to and including termination of employment."[27]

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[20] Although cast in most contemporary accounts as an action issuing from the Governor's office, the executive action was not implemented in the form of an executive order of the Governor. *See* E-mail from Susan Lupton, Reference Librarian, State Law Library of Mont., to Tim McAllister, Research Specialist, Kirkland & Ellis LLP (Feb. 11, 2009, 03:29 EST) (on file with authors).

[21] *See In the Matter of the Adoption of Rules Pertaining to Nondiscrimination- Equal Employment Opportunity, the repeal ARM 2.21.1301 through 2.21.1307 and 2.21.1311 in the Sexual Harassment Prevention policy, and the repeal of ARM 2.21.8106 through 2.21.8109 in the Equal Opportunity Policy*, MONT. ADMIN. REG., Dec. 21, 2000, at 3515; *see also* Kathleen McLaughlin, *McGee Uses Trickery to Push Anti-Gays Bill*, BILLINGS GAZ., Mar. 21, 2001, *available at* http://bit.ly/JpkMA (last visited Sept. 6, 2009).

[22] MONT. ADMIN. R. 2.21.4002(b)(1) (2008) (emphasis added); *see also* MONT. ADMIN. R. 2.21.4005, 2.21.4006, 2.21.4012, and 2.21.4013 (2008).

[23] *Anti-Bias Directive Supported*, BILLINGS GAZ., May 9, 2001, *available at* http://bit.ly/7ES8w (last visited Sept. 6, 2009).

[24] H.B. 511, 57th Leg. Sess. (Mont. 2001).

[25] Mont. Exec. Order No. 41-2008 (emphasis added).

[26] *Id.*

[27] *Id.*

2. State Government Personnel Regulations

Many state agencies and state-affiliated entities have issued regulations and other policies prohibiting sexual orientation-based discrimination in the workplace. These regulations and guidelines are generally consistent with and appear to be modeled on the state personnel rules that were revised as of late 1999.[28]

The Montana Governor's office has issued guidance on the state of Montana's equal employment opportunity policies, which reminds all state employees and managers that the "State of Montana's policy is [that] . . . [h]arassment of employees, clients, customers, and any other person doing business with state government because of a person's . . . *sexual orientation* . . . is prohibited."[29] The state government has also issued an equal employment opportunity guide, which includes sexual orientation-based workplace discrimination as a category of sex-based discrimination. The guide contains a review of attempts to enact the Employment Non-Discrimination Act into federal law, and concludes that in the same spirit, the state of Montana's equal employment opportunity policy is premised on the view that "to continue to discriminate against a particular group of people with no reference to workplace skills and abilities is wrong."[30] The guide states the following about sexual orientation discrimination:

> Sexual orientation is emerging as a critical diversity issue in the workplace. As greater social acceptance of gays and lesbians emerges, greater numbers of employees are revealing their sexual orientation. Many advocacy groups have identified the workplace as one of the best avenues for a campaign to achieve tolerance and acceptance (IPMA conference). It must be understood that EEO and non-discrimination policies are designed as an issue of fairness. All employees deserve to be judged by their job performance, not their personal choices. Sexual orientation is just like any other protected group; it has no basis in employment decisions and is unlikely to justify discriminatory treatment by employers. Employment discrimination based on sexual orientation, whether such orientation is real or perceived, effectively denies qualified individuals equality and opportunity in the workplace. Those who experience this form of discrimination have no recourse under current federal law or under the constitution as the courts have interpreted it. Employment discrimination strikes at a fundamental value—the right of

[28] *See supra* Section II.C.1.

[29] GOV. BRIAN SCHWEITZER, A GUIDE FOR STATE OF MONTANA EMPLOYERS AND MANAGERS, HARASSMENT IS AGAINST THE LAW 3 (2009) *available at* http://bit.ly/4o84tU (emphasis added).

[30] STATE OF MONTANA NONDISCRIMINATION-EQUAL EMPLOYMENT OPPORTUNITY GUIDE 32 (Mont. State Pers.Div., Dep't of Admin. 2004) *available at* http://mt.gov/Statejobs/ReasonableAccommodationandEEO.asp (last visited Sept. 13, 2009).

> each individual to do his or her job and contribute to society, without facing unfair discrimination.[31]

The Montana Judicial Branch has issued a non-discrimination policy that declares that the Judicial Branch "[d]oes not discriminate in employment based upon . . . sexual orientation."[32] But the policy contains a caveat on jurisdiction to hear complaints based on sexual orientation, similar to that found in the Montana state personnel rules.[33] The policy provides that an individual who has been subjected to prohibited discrimination may contact the Judicial Branch's office of Human Resources, the Montana Human Rights Bureau or the U.S. Equal Employment Opportunity Commission ("EEOC").[34] But the policy notes that jurisdiction to hear certain complaints varies, as "[f]or example, neither the EEOC nor the Montana Human Rights Bureau can consider discrimination complaints based on sexual orientation."[35] As noted throughout this memorandum, state employees uniformly appear to have little legal recourse to enforce state agency non-discrimination policies if they are subjected to sexual-orientation based discrimination in violation of those same policies and regulations.[36]

The Montana Department of Corrections has issued a non-discrimination policy, effective for all Department divisions, facilities and programs, declaring that the Department of Corrections "is an equal employment opportunity employer" and "does not tolerate discrimination in employment or in provisions of services based on . . . *sexual orientation* . . . ."[37] As with the above, the available remedies for sexual orientation discrimination appear limited.

The Montana State Library Commission has issued a similar non-discrimination policy, stating that it is the policy of the Montana State Library Commission "to provide equal employment opportunity and the services of the agency to all persons regardless of *sexual orientation* . . . with the exception of special programs established by law."[38] As with the above, the available remedies for sexual orientation discrimination appear limited.

The University of Montana ("UM"), a publicly-funded state university with its primary campus in Missoula, has a non-discrimination/equal opportunity policy that provides that UM "is committed to a program of equal opportunity for education,

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[31] *Id*.
[32] MONT. JUD.BRANCH, PERS. POLICIES & PROC. (2002), Policy No. § 200, *available at* http://bit.ly/2oyIV.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *See supra* Section II.A.5.
[37] MONT. DEP'T OF CORR. POLICY DIRECTIVE (1996) Policy No. DOC 1.3.20 (Nondiscrimination and Sexual Harassment), *available at* http://bit.ly/utsbB (last visited Feb. 10, 2009) (emphasis added).
[38] Mont. State Library Comm'n Nondiscrimination Policy (2003), *available at* http://bit.ly/3rE0j (last visited Sept. 13, 2009) (emphasis added). Additional state agencies to issue substantially similar nondiscrimination policies include the Montana Chemical Dependency Center (*available at* http://bit.ly/PdtQT (last visited Sept. 13, 2009)), and the State Auditor's Office (*available at* http://bit.ly/P0hrV (last visited Sept. 13, 2009))

employment and participation in University activities without regard to . . . *sexual orientation*"[39] and that UM "will protect against retaliation any individual who participates in any way in any proceeding concerning alleged violations of laws, orders, or regulations requiring equal education and/or employment opportunity."[40]

Consistent with the UM policy, the UM School of Law further "expects each employer utilizing its facilities or assistance for interview/hiring functions to abide by the principles of equal opportunity."[41]

Montana State University ("MSU"), a publicly-funded state university with its primary campus in Billings, has a similar non-discrimination/equal opportunity policy. Pursuant to this policy, MSU states that it "does not discriminate on the basis of . . . *sexual preference* . . . in admission, access to, or conduct of its education programs and activities nor in its employment policies and practices," and that MSU provides "an academic and work environment" free from discrimination and harassment based on "*sexual orientation or preference*."[42] MSU affords any student, employee, applicant for employment or admission, participant in University activities, or other person who believes he or she was discriminated against by the University the right to file a grievance.[43] As a condition of their employment and enrollment, employees and students of MSU are expected to cooperate with investigations of complaints of discrimination, or else face disciplinary action.[44]

After former Governor Marc Racicot changed the Montana state government's personnel rules to prohibit discrimination in state employment based on sexual orientation, the state of Montana's internal personnel rules were officially amended in conformance with this action.[45] The Montana Department of Administration's regulations now provide that:

> [t]he state of Montana is an equal employment opportunity employer and prohibits discrimination based on …*sexual orientation* … unless based on a bona fide occupational qualification (BFOQ). The state of Montana's prohibition

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[39] *See* Univ. of Mont., Equal Opportunity & Affirmative Action Office, http://www.umt.edu/president/eeo (last visited Sept. 13, 2009) (emphasis added).

[40] *See* UNIVERSITY OF MONT., HUM. RESOURCE SERV., PERS. POLICIES & PROC. (2002) Non-Discrimination/Equal Opportunity Policy No. 406.4, *available at* http://bit.ly/AmttM (last visited Sept. 6, 2009).

[41] *See* Univ. of Mont. L. Sch. Career Serv., Equal Opportunity Statement, http://bit.ly/phfjM (last visited Sept. 13, 2009).

[42] *See* MONT. STATE UNIV., POLICY & PROCEDURES (2002), Nondiscrimination Policy & Proc. 200.00 Policy *available at* http://bit.ly/4yhxvE (last visited Sept. 13, 2009) (emphasis added).

[43] *Id.*

[44] *Id*.

[45] *See* MONT. ADMIN. R. 2.21.4005(1) (2007); *see also* MONT. ADMIN. R. 2.21.4002(1)(b) (2007) (setting forth the policy of the state of Montana that state government "does not discriminate in employment based upon . . . sexual orientation"); *see also* MONT. ADMIN. R. 2.21.3702(1)(a) (2007) (setting forth policy of the state of Montana to recruit and select employment on the basis of merit and qualifications and without regard to impermissible characteristics, including sexual orientation).

> of discrimination includes discrimination in hiring, firing, promotions, compensation, job assignments and other terms, conditions or privileges of employment.[46]

The administrative rules provide that an employee or applicant for employment with the state who believes he or she has suffered prohibited discrimination based on any of the enumerated factors may contact the relevant department EEO officer or the EEOC.[47] Nonetheless, the regulations caveat:

> Jurisdiction to address any one of the above types of discrimination complaints varies. For example, neither the EEOC nor the Montana human rights bureau considers discrimination complaints based on sexual orientation.[48]

It thus appears that state employees who have been subjected to sexual orientation-based discrimination in violation of the state's personnel regulations would have no legal recourse, but would rather be limited in remedies to pursuing any available human resources grievances with their department's EEO officer.

To implement its non-discrimination policy, UM has instituted a grievance procedure for employees, students, and applicants for employment or admission who claim to have been unlawfully discriminated against because of any UM regulation, policy, practice, or official action of any University employee in violation of this policy. Comprised of both an "informal" and a "formal" procedure for initiating a complaint, the UM discrimination grievance procedure provides that information about the complaint and witness statements are kept confidential, with the final report and conclusions disclosed only to the complainant, respondant, and UM officials as necessary.[49]

3. **Attorney General Opinions**

None.[50]

D. **Local Legislation**

No local government in Montana has issued legislation prohibiting employment discrimination based on sexual orientation or gender identity.[51] However, certain local governments have incorporated such a policy into their internal personnel rules.

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[46] MONT. ADMIN. R. 2.21.4005(1) (emphasis added).
[47] MONT. ADMIN. R. 2.21.4005(2) (2007).
[48] *Id.*
[49] *See* UNIV. OF MONT., HUM. RESOURCE SERV., PERS. POLICIES & PROCEDURES (2002), Discrimination Grievance Procedure, *available at* http://bit.ly/2G4tir (last visited Sept. 13, 2009).
[50] *See* Archive of Mont. Dep't of Justice, Att'y Gen. Opinions & Letters of Advice, http://www.doj.mt.gov/resources/opinions.asp (last visited Sept. 13, 2009).
[51] Jennifer McKee, *Human Rights Network Takes on Cause of Gays*, BILLINGS GAZ., Mar. 29, 2008 ("Next year, [Linda Gryczan, of the Montana Human Rights Network] said, she hopes at least one Montana city will outlaw discrimination based on sexual orientation or identity within that city."), *available at*

1. **County of Missoula**

Missoula County's personnel regulations provide that the county "will not refuse employment or discriminate in compensation, benefits, or the other terms, conditions, and privileges of employment based upon . . . *sexual orientation*."[52] A county employee who is subjected to discrimination based on protected characteristics is directed by the county policy to contact the Missoula County Human Resources Department or the Montana Human Rights Commission (as applicable).[53] To the extent any county employees may have filed grievances on the basis of sexual orientation discrimination, the complaints are not publicly available.

E. **Occupational Licensing Requirements**

Many Montana professional commissioning boards may deny and revoke occupational licenses for issues involving "moral turpitude" after providing the subject a fair hearing.[54] Legislation which was introduced, but died, in the 2009 session of the Montana Legislature would have amended Montana law to prohibit discrimination based on "gender identity or expression" or "sexual orientation" in licensing by state and local government agencies.

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http://bit.ly/1qX2qx (last visited Sept. 6, 2009); *see also* E-mail from Travis McAdam, Interim Director, Montana Human Rights Network, to Michael A. Woods, Kirkland & Ellis LLP (Jan. 26, 2009, 05:26 EST) (on file with author).

[52] MISSOULA COUNTY PERS. POLICIES (2007) 301.00, *available at* http://bit.ly/phUep (last visited Sept. 13, 2009) (emphasis added).

[53] *Id.*

[54] *See, e.g.*, MONT. ADMIN. R. § 24.156.1307(1) (forms of unprofessional conduct for licensing of nutritionists), and *id.* § 24.156.1005(1) (forms of unprofessional conduct for licensing of podiatrists) (2007). Most of these statutes require a criminal conviction involving "moral turpitude" or include definitions of "moral turpitude" that could not be reasonably interpreted to include sexual orientation or gender identity. *See, e.g.*, MONT. CODE ANN. § 20-4-110(e) (2007) (issuance of reprimand or suspension, revocation or denial of teacher's certificate for "conviction of, entry of a guilty verdict, a plea of guilty, or a plea of no contest to a criminal offense involving moral turpitude").

III. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

Montana's "deviate sexual conduct" law was struck down by the Montana Supreme Court in 1997.[55] In *Gryczan v. State*, the court held that the law unconstitutionally infringed on the fundamental right to privacy expressly guaranteed by the Montana Constitution.[56] In at least one Montana Senate hearing, however, one private individual relied on the existence of the law as a reason to oppose the enactment of a state-wide law prohibiting employment discrimination based on sexual orientation.[57]

Despite the Montana Supreme Court's ruling, the law remains part of the Montana Code, in part due to opposition from political conservatives. For example, when legislation was introduced in the 2001 legislative session to remove it from the Montana statutes,[58] certain lawmakers opposed the effort, with state representative Verdell Jackson of Kalispell going so far as to offer that the law "protects me from propositions on the street."[59]

In 1995, the Montana Legislature considered a bill that sought to add "deviate sexual conduct," including homosexual sodomy and fellatio, to a measure requiring lifetime state registration of violent criminals.[60] Under the bill (which was introduced prior to the Montana Supreme Court's decision in *Gryczan*), individuals convicted of homosexual acts would have had to register with the local police or sheriff anywhere in the state where they planned to reside for over 14 days.[61] However, after a national

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[55] *See* Gryczan v. State, 942 P.2d 112 (Mont. 1997).

[56] *Id.* at 125-26 ("The right of consenting adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy; and, absent an interest more compelling than a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals, state regulation, much less criminalization, of this most intimate social relationship will not withstand constitutional scrutiny.").

[57] *See* Kathleen McLaughlin, *Senators Discuss Bill Barring Discrimination*, BILLINGS GAZ., Jan. 26, 2001 (noting testimony before the Montana Senate Judiciary Committee arguing that the proposed bill "would protect the employment of anyone who engaged in deviate sex"), *available at* http://bit.ly/uBNnq (last visited Sept. 6, 2009).

[58] H.B. 323, 57th Leg. Sess. (Mont. 2001). What appears to be the most recent bill that would have removed the statutory provision also failed to secure passage. *See* H.B. 294, 58th Leg. Sess. (Mont. 2003).

[59] *Out in Montana: After a Winter of Fear and Defeat, Advocates Renew Their Fights for Same-Sex Rights*, MISSOULA INDEP., June 7, 2001.

[60] *See* David W. Dunlap, *Montana Cuts Homosexual Acts from List of Registered Crimes*, N.Y. TIMES, Mar. 24, 1995.

[61] *See id.*

media uproar, the Montana Senate voted unanimously to amend the bill to remove homosexual acts from its scope.[62]

B. Housing and Public Accommodations Discrimination

Legislation to prohibit housing and public accommodations discrimination on "gender identity or expression" or "sexual orientation" was introduced, but died, in the 2009 session of the Montana Legislature.

C. Hate Crimes

Montana's "malicious intimidation or harassment" law does not extend to attacks or harassment motivated by a victim's sexual orientation or gender identity. Several bills have been introduced in the Montana legislature in recent sessions seeking to add "sexual orientation" to the enumerated classes of "biased-based" offenses.[63] None of these legislative attempts have been successful. The bill introduced by state senator Carol Juneau in the current legislative session, which would expand Montana's hate crimes law to cover both "sexual orientation" and "gender expression," was recently tabled before the Montana Senate Judiciary Committee on a 7-5 vote.[64] Although backers continued to support the bill,[65] it has now missed the deadline for transmittal to the state senate floor and appears dead.

D. Education

There have been small gains at the local level in education policy. The Bozeman School Board voted last year to update its discrimination policy to protect gay and lesbian students by adding "sexual orientation" to its scope.[66] The new policy provides that the school district "will make equal educational opportunities available for all students without regard to race, creed, religion, gender, *sexual orientation*, marital status, color, age, physical, or mental disability, national origin, or political beliefs."[67] Trustee Carson Taylor argued for adding "sexual orientation" to the list to protect gay and lesbian students because the "School Board's long-range strategic plan calls for teaching Bozeman students to be accepting, and the board should lead by setting an example."[68] Chairman Gary Lusin was the only member of the Bozeman School Board to vote against the proposal, based on his belief that gay and lesbian students were already sufficiently protected, and that to offer additional protections would purportedly send a message that

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[62] *Id.*

[63] S.B. 454, 60th Leg. Sess. (Mont. 2007); S.B. 202, 59th Leg. Sess. (Mont. 2005); S.B. 66, 56th Leg. Sess. (Mont. 1999).

[64] S.B. 223, 61st Leg. Sess. (Mont. 2009); *see also* Michael A. Jones, *Montana and Florida to Take Up LGBT Rights Measures*, CHANGE, Jan. 18, 2009, http://bit.ly/UihZy.

[65] *See* Press Release, Montana Human Rights Network, Committee Votes "NO" on Hate Crimes Protections and Restorative Justice (Jan. 29, 2009).

[66] *School Board Updates Policy to Protect Gays, AP Alert - Montana,* A.P., Oct. 14, 2008.

[67] *See* Gail Schontzler, *School Board Votes to Protect Gay Students from Discrimination,* BOZEMAN DAILY CHRON., Oct. 14, 2008, *available at* http://bit.ly/8FT51 (emphasis added).

[68] *Id.*

"[y]ou're different."[69] The school system superintendent, Kirk Miller, also opposed adding sexual orientation to the policy, expressing that sexual orientation bullying and discrimination was supposedly not a problem in the schools and speculating that if this protection was added, then "[w]here does the list stop?"[70] However, student president Cody Combs testified to the School Board that anti-gay intimidation and insults were commonplace, such that "[t]o be called gay now in high school is a huge fear."[71]

Apart from this local initiative, legislation which was introduced, but died, in the 2009 session of the Montana Legislature would have also extended the scope of existing state law to prohibit discrimination based on "gender identity or expression" or "sexual orientation" by any educational institution in the state.[72]

E. **Health Care**

Montana law does not permit a same-sex partner to make decisions for his or her incapacitated partner.[73] But Montana law does permit a same-sex adult partner to execute a written declaration giving his or her partner authority to make certain medical decisions in the event of incapacitation.[74]

The Montana Chemical Dependency Center (the "Center"), a state operated in-patient chemical dependency and co-occurring disorders treatment facility, has issued an Organizational Code of Ethics, stating that Center employees "will honor and respect all racial, sexual, ethnic, cultural and religious differences and refrain from any and all acts of harassment or slurs related to race, sexual orientation, religion, ethnicity, cultural diversity, or position within the organization by treating others with courtesy and respect."[75] Under this Code of Ethics, the professionals employed by the Center are obligated to perform and fulfill their duties consistent with the principles, values, and obligations established in this and other applicable professional codes of ethics and are subject to sanctions for violations of the same.

The Montana State Hospital has issued a similar Code of Ethics for its employees, stating that its employees "will honor and respect all racial, sexual, ethnic, cultural and religious differences and refrain from any and all acts of harassment or slurs related to race, *sexual orientation*, religion, ethnicity, cultural diversity or position within the organization by treating others with courtesy and respect."[76] Under this Code of Ethics,

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[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See supra* Section II.B.
[73] MONT. CODE. ANN. § 50-9-106 (2007). The authority to make such decisions is vested in the following order of priority: the spouse, an adult child (or the majority of the adult children reasonably available), the parents, an adult sibling (or the majority of the adult siblings reasonably available), or the nearest other adult relative who is reasonably available, of the incapacitated individual. *Id.*
[74] MONT. CODE. ANN. § 50-9-103 (2007).
[75] *See* MONT. CHEMICAL DEPENDENCY CENTER, ORG. CODE OF ETHICS (2004), *available at* http://bit.ly/TYvSG (last visited Sept. 13, 2009) (emphasis added).
[76] *See* Mont. State Hospital, Policy & Proc. Code of Ethics for Employees of MSH (2006) Policy No. HR-05, *available at* http://bit.ly/16b2ar (last visited Sept. 13, 2009) (emphasis added).

the professionals employed by the Montana State Hospital are obligated to perform and fulfill their duties consistent with the principles, values, and obligations established in this and other applicable professional codes of ethics and are subject to sanctions for violations of the same.

F. **Gender Identity**

The Montana Department of Public Health and Human Services previously had issued regulations which provided that a transsexual individual born in Montana could amend his or her birth certificate "if the department receives a certified copy of the order of a court of competent jurisdiction indicating that the sex of [the] individual born in Montana has been changed by surgical procedure."[77] However, this regulatory provision was recently repealed.[78] It is unclear whether this action was taken due to political or other reasons. A new provision has been promulgated in its place that permits the amendment of filed birth certificates upon request or court order, if accompanied "by an order from a court with appropriate jurisdiction."[79] But the new regulation does not explicitly provide, as did the former, that an individual who undergoes sex reassignment surgery may obtain an amendment of his or her birth certificate, and it is unclear whether the new regulation makes it more difficult to obtain one.

The Montana Department of Motor Vehicles ("MTDMV") permits a licensed driver to change the individual's gender on his or her driver's license.[80] Under MTDMV policy, "[a]ny individual who presents a letter from their physician stating that they are in the process of a gender change may have a driver license issued with the proposed gender change (it will not be necessary for the individual to present a statement showing the process is completed)."[81] The policy apparently does require follow-up documentation for license renewal "to see that transition has been completed."[82]

H. **Parenting**

In one 1993 case, the Montana Supreme Court reversed a trial court judge's order awarding sole custody to the mother and restricting the father to supervised visitation, which was based on the judge's findings that the father was a cross-dresser and this behavior would irreparably harm his son.[83] The Montana Supreme Court found that "there was no competent evidence to support the District Court's findings which formed

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[77] MONT. ADMIN. R. 37.8.106(6) (2006); *see also* MONT. CODE ANN. § 50-15-204(2) ("The department or its designee may amend a birth, death, or fetal death certificate upon submitting proof as required by the department.").

[78] *See* MONT. ADMIN. R. 37.8.106(6) (2007) (noting repeal, effective Jan. 1, 2008).

[79] *See* MONT. ADMIN. R. 37.8.106(1) and (3) (2007).

[80] *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 826 n.420 (2008).

[81] *Id.* (quoting Letter enclosure from Patrick McJannet, Program Supervisor, Mont. DOJ/MVD Field Operation Bureau, to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Aug. 9, 2004) (*citing* MONT. DEP'T OF MOTOR VEHICLES, POLICY (2004) 300.6.1 (Gender Change))).

[82] *Id.* (*quoting* Enclosure Regarding Mont. Dep't of Motor Vehicles, Policy 600.6.2.1 (2004)).

[83] *See* In re D.F.D., 862 P.2d 368, 371-72 (Mont. 1993).

the basis for its denial of joint custody."[84] The Montana Supreme Court also found that, contrary to the trial judge's findings, the evidence showed that the father had sought counseling and no longer engaged in cross-dressing.[85] However, the Montana Supreme Court still concluded that "even assuming that, contrary to the counselor's expectation, the husband did cross-dress, and further assuming, contrary to all prior behavior, his cross-dressing was observed by his son, every counselor who testified in this case testified that the negative impact on the son would be less than the impact from not having a normal relationship with his father."[86]

In what appears to be Montana's first reported same-sex custody case,[87] Missoula District Court Judge Ed McLean in 2008 awarded parental rights over two children to their adoptive mother's (Barbara Maniaci) former female partner, Michelle Kulstad.[88] The central issue in the case was whether the women's live-in relationship, which lasted from about 1995 to 2006, allowed a parental relationship to form between Ms. Kulstad and the children adopted by Ms. Maniaci such that it would be in the best interest of the children to allow that relationship to continue.

The court chronicled the partnership the women had established, which included long-term domestic and financial commitments to each other and in which they held themselves out as "partners."[89] The court found that with the exception of two breaks in contact, "Ms. Kulstad has resided with the children, and functioned as a parent to them, on a day-to-day basis for the same length of time as has Ms. Maniaci."[90] Further, the court found that "[s]ignificant evidence" supported that the children regard Ms. Kulstad as their parent, and that based on expert testimony, the children would suffer significant psychological harm with long-term consequences if the children were not allowed to continue their relationship with Ms. Kulstad.[91] Not only had Ms. Maniaci engaged in conduct contrary to an exclusive child-parent relationship with the children, according to the court, but Ms. Kulstad had "established a child-parent relationship" and was their de facto parent.[92] The court thus found that it was in the best interest of the children to continue that relationship, and entered an order awarding joint custody to Ms. Kulstad under a "Positive Alternative for Children Team" plan, which would be supervised by the children's guardian ad litem for one year prior to an order on a final parenting plan.[93]

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[84] *Id.* at 371.
[85] *Id.* at 375-76.
[86] *Id.* at 376.
[87] *See* Tristan Scott, *Court: Same-Sex Parent has Custody Rights*, MISSOULIAN, Oct. 30, 2008, *available at* http://bit.ly/W3a48 (last visited Sept. 6, 2009).
[88] *See* Kulstad v. Maniaci, No. DR-07-34 (Mont. Dist. Ct. Sept. 29, 2008).
[89] *Kulstad*, slip op. at 2-3.
[90] *Id.* at 8.
[91] *Id.* at 8-16; *see also id.* at 29 ("Indeed, the evidence shows that rupture of the children's relationship with Ms. Kulstad would be not only contrary to their best interests, but severely detrimental to their well being.").
[92] *Id.*
[93] *Id.* at 37-38.

Ms. Maniaci has since appealed the decision to the Montana Supreme Court.[94]

In addition to married couples jointly, or singly if the other spouse is the parent of the child, Montana law permits "an unmarried individual who is at least 18 years of age" who otherwise meets the requirements for adoption proceedings to be eligible to adopt a child.[95] In issuing an adoption decree, the Montana courts must "consider all relevant factors in determining the best interests of the child."[96] Although there are no specific statutory prohibitions on homosexuals or real or perceived gender nonconforming individuals with regard to adoption, it remains unclear as to whether a court would deem such a person "unfit" or "incompetent" to be a parent. It similarly remains unclear whether the state would permit a same-sex couple to jointly petition to adopt. It also remains unclear whether Montana would permit a same-sex partner of a biological parent to petition to adopt the partner's child.

I. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

The Montana Code prohibits "a marriage between persons of the same sex."[97] Additionally, in 2004, the Montana electorate approved Constitutional Initiative 96. The Montana Constitution now provides that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state."[98]

2. Benefits

In *Snetsinger v. Montana University System*, the Montana Supreme Court ruled in favor of a challenge brought by gay employees of the Montana University System, Carol Snetsinger and Carla Grayson, to a policy which denied them dependent insurance coverage for their same-sex domestic partners (Nancy Siegel and Adrianne Neff, respectively).[99] The employees argued that the policy, under its definition of "dependent," impermissibly discriminated against them on the basis of their sex, sexual orientation, and marital status in violation of their rights to equal protection and dignity (as well as other rights) under the Montana Constitution.[100] Although the University System's group health insurance plan excluded same-sex domestic partners under its definition of "dependent," it did permit an employee to enroll not only children or

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[94] *Maniaci Appeals Custody Ruling*, MISSOULA INDEP., Oct. 9, 2008. *See Lesbian Parent Case Heads to Montana Supreme Court*, 365GAY, Oct. 4, 2008, http://bit.ly/DYqkZ (last visited Sept. 6, 2009). Although Ms. Maniaci's attorney told the press that he questioned why the judge made sexual orientation an issue in his ruling, *see id.*, the court's decision reveals that the parties put on opposing experts who testified as to the effects of parental sexual orientation on the development of children. *See Kulstad*, slip op. at 14-17.

[95] MONT. STAT. ANN. § 42-1-106 (2007).

[96] MONT. STAT. ANN. § 42-5-107(1) (2007).

[97] MONT. CODE ANN. § 40-1-401(d) (2007).

[98] MONT. CONST. Art. XIII, § 7.

[99] 104 P.3d 445 (Mont. 2004).

[100] *Id.* at 448.

spouses, but also an opposite-sex "common-law spouse" upon the filing of an affidavit of common-law marriage.[101]

The Montana Supreme Court analyzed the University System policy under the equal protection clause of the Montana Constitution.[102] It concluded that "the policy [was] inherently flawed" because it permitted unmarried opposite-sex couples, "who may only have a fleeting relationship," to obtain health insurance benefits through an affidavit process.[103] Because unmarried opposite-sex couples could avail themselves of the affidavit process to obtain benefits whereas similarly-situated unmarried same-sex couples could not, the Montana Supreme Court found that no legitimate basis existed for treating the two groups differently, in violation of equal protection.[104]

Four days after the lawsuit was initially filed, on February 8, 2002, an unknown person committed an arson at the home of plaintiffs Carla Grayson and Adrianne Neff, while the couple and their toddler child were at home asleep.[105] The arson incident spurred the Missoula City Council to begin exploring the possibility of offering health benefits to domestic partners of city employees.[106] The County of Missoula preceded the City in amending its health plan on the same basis, which became the subject of a lawsuit by conservative activists that was also rejected by the Montana Supreme Court.[107] In the wake of the Montana Supreme Court's rulings, the City of Missoula finally approved changes to its health plan to permit employees to obtain health benefits for their same-sex partners by filing an affidavit as to their relationship status and meeting other requirements.[108]

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

1. Judicial Code

In 2008, the Montana Supreme Court adopted a new Montana Code of Judicial Conduct (the "Judicial Code"), which provides as follows:

> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon . . . *sexual orientation* and shall

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101 *Id.*

102 *Id.* at 449.

103 *Id.* at 451. The Court noted that such persons "may choose not to marry at all, but rather may choose to sign a document in order to receive employment benefits." *Id.*

104 *Id.* at 451-52 ("These two groups, although similarly situated in all respects other than sexual orientation, are not treated equally and fairly.").

105 *Wedding Bills: The Ledge Debates the Same-Sex Marriage Question*, MISSOULA INDEP., Feb. 6, 2003.

106 *Id.*

107 *See* Jones v. County of Missoula, 127 P.3d 406, 413 (Mont. 2006) (rejecting challenge asserting that Missoula County had not given plaintiffs proper notice of its vote to offer domestic partner health insurance benefits to county employees).

108 *See* MISSOULA CITY COUNCIL ADMIN. & FINANCE COMM. REPORT (2005).

> not permit court staff, court officials, or others subject to the judge's direction and control to do so.
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> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited . . . *sexual orientation* . . . against parties, witnesses, lawyers or others.[109]

These restrictions "do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding."[110]

With respect to the conduct of state judges, the Judicial Code also notes that a judge may engage in extrajudicial activities, except as prohibited by law or the Judicial Code. However, when engaging in extrajudicial activities, a judge may not "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."[111] The comments to the rule note:

> Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon … sexual orientation…. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination.[112]

The Judicial Code further provides that "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of . . . *sexual orientation* and a judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on more or more of the [above] bases."[113] But the Judicial Code also states that "[a] judge's

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[109] MONT. CODE OF JUD. CONDUCT, R. 2.3(A)(C) (2008), adopted by the Montana Supreme Court in *In re 2008 Montana Code of Judicial Conduct*, No. AF 08-0203 (Mont. Dec. 12, 2008) (hereinafter No. AF 08-0203), *available at* http://bit.ly/yl0yy (last visited Sept. 6, 2009) (emphasis added).

[110] *Id.* R. 2.3(D). Comment 3 to Rule 2.3 of the Judicial Code defines harassment as "verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status or political affiliation."

[111] *Id.* R. 3.1(C).

[112] *Id.* R. 3.1(C) cmt. 3 (emphasis added).

[113] *Id.* R. 3.6(A) through (B) (emphasis added). According to Comment 2 to Rule 3.6 of the Judicial Code:

> [a]n organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or

membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of [Rule 3.6]."[114]

2. Addiction Counselors

Professional codes applicable to licensed addiction counselors in Montana define acts of "sexual misconduct" as unprofessional conduct.[115] Given the status of Montana's "deviate sexual acts" law, the impact on licensing of individuals who are gay, lesbian, or transgendered is unclear. Nonetheless, the very same code of conduct also deems it unprofessional conduct to "discriminate[e] against or refus[e] professional services to anyone on the basis of . . . sexual orientation."[116]

3. Montana Department of Corrections

The Montana Department of Corrections has issued a similar policy, stating that "[n]o facility may discriminate against any youth based on . . . *sexual orientation*."[117]

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sexual orientation persons who would otherwise be eligible for admission. *Id.* R. 3.6 cmt. 2.

[114] *Id.* at R. 3.6(C).

[115] MONT. ADMIN. R. 8.11.120(2) (2007).

[116] MONT. ADMIN. R. 8.11.120(15) (2007).

[117] MONT. ADMIN. R. 20.9.620(4) (2007) (emphasis added).