Employment Discrimination Based on Sexual Orientation and Gender Identity in South Carolina

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Executive Summary

More than 4% of the American workforce identifies as lesbian, gay, bisexual, or transgender (LGBT). Approximately 66,100 of these workers live in South Carolina. South Carolina does not have a statewide law that prohibits discrimination based on sexual orientation or gender identity in employment.

This report summarizes evidence of sexual orientation and gender identity employment discrimination, explains the limited current protections from sexual orientation and gender identity employment discrimination in South Carolina, and estimates the administrative impact of passing a law prohibiting employment discrimination based on these characteristics in South Carolina.

Key findings of this report include:

- In total there are approximately 106,500 LGBT adults in South Carolina, including over 66,000 who are part of the South Carolina workforce. [1]
- Media reports and lawsuits document incidents of sexual orientation and gender identity discrimination against South Carolina employees. These include reports from a public safety employee, a university student worker and a construction company employee.
- Recent surveys from South Carolina reflect discrimination and negative attitudes toward LGBT people in the workplace. For example, a 2010 survey of 1,000 LGBT South Carolinians found that 30% reported experiencing discrimination in employment because of their sexual orientation or gender identity, but 78% of those respondents did not report the discrimination to anyone.
- National surveys also confirm that discrimination against LGBT workers persists. Most recently, a 2013 Pew Research Center survey found that 21% of LGBT respondents had been treated unfairly by an employer in hiring, pay, or promotions.
- As recently as 2010, 78% of respondents to the largest survey of transgender people to date reported having experienced harassment or mistreatment at work, and 47% reported having been discriminated against in hiring, promotion, or job retention because of their gender identity.
- Disparities in wages are also a traditional way that discrimination has been measured. Census data show that in South Carolina, the median income of men in same-sex couples is 28% lower than men in different sex marriages.
- Only three South Carolina localities provide protection from sexual orientation and gender identity discrimination in public employment by local ordinance: Richland County, and the cities of Charleston and Columbia. Charleston County prohibits public employment discrimination

based on sexual orientation alone. These local ordinances do not prohibit discrimination in private employment.

- Approximately 82% of South Carolina's public sector workforce is not covered by a local ordinance that prohibits public employment discrimination based on sexual orientation, and approximately 88% of the public sector workforce is not covered by a local ordinance that prohibits public employment discrimination based on gender identity. None of South Carolina's private sector workforce is covered by a non-discrimination ordinance that prohibits discrimination in private employment.
- Even in those localities that have passed ordinances prohibiting discrimination based on sexual orientation or gender identity, the scope of those protections varies from place to place. Also, none of the local ordinances are as inclusive as the statewide non-discrimination law, which prohibits discrimination in private employment.
- Private companies may adopt internal non-discrimination policies to improve recruitment and retention of talented employees, to increase employee productivity and customer satisfaction, or to attract a larger customer base. Eight of the state's ten largest employers have internal corporate policies prohibiting sexual orientation and gender identity discrimination, and four Fortune 1000 companies with headquarters in South Carolina prohibit sexual orientation discrimination.
- Adding sexual orientation and gender identity to the state's current non-discrimination law would result in approximately 31 additional complaints being filed with the South Carolina Human Affairs Commission each year.
- Because the annual number of discrimination complaints filed with the South Carolina Human Affairs Commission each year varies by many more than 31, the anticipated new complaints based on sexual orientation and gender identity could likely be absorbed into the existing system with no need for additional staff and negligible costs. A conservatively high estimate suggests that enforcement would cost the state approximately $23,000 annually; which represents 1.4% of the South Carolina Human Affairs Commission's budget in fiscal year 2011-2012.

Evidence of Discrimination

Survey Data and Specific Examples of Sexual Orientation and Gender Identity Discrimination in South Carolina

Research shows the existence of widespread and continuing discrimination against LGBT workers in the U.S. In response to surveys, LGBT workers consistently report having experienced discrimination, and non-LGBT people often report having witnessed discrimination against their LGBT co-workers. For example, a national survey conducted by Pew Research Center in 2013 found that 21% of LGBT respondents had been treated unfairly by an employer in hiring, pay, or promotions.[2] Additionally, the nationally representative 2008 General Social Survey found that 37% of gay men and lesbians had experienced workplace harassment in the last five years, and 12% had lost a job because of their sexual

orientation.[3] As recently as 2010, 78% of respondents to the largest survey of transgender people to date reported having experienced harassment or mistreatment at work, and 47% reported having been discriminated against in hiring, promotion, or job retention because of their gender identity.[4]

Similar statistics have been found in surveys of LGBT individuals in South Carolina. In 2010, SC Equality surveyed over 1,000 LGBT South Carolinians from 44 of the 46 counties in South Carolina.[5] Thirty percent of the respondents reported having experienced employment discrimination in hiring, firing or promotion decisions because of their sexual orientation or gender identity.[6] Despite this level of discrimination, respondents tended not to report these incidents: 78% did not report the discrimination to anyone and only 13% reported it to a human resources department.[7] These levels of discrimination were reported despite 57% of respondents stating that they were not very open about their sexual orientation or gender identity at work, and only 50% reporting being open with their family.[8]

Employment discrimination against LGBT people has also been documented in court cases, state and local administrative complaints, complaints to community-based organizations, academic journals, newspapers, books, and other media. Additionally, a number of federal, state, and local administrative agencies and legislative bodies have acknowledged that LGBT people have faced widespread discrimination in employment.[9]

Several recent instances of employment discrimination against LGBT people in South Carolina have been documented in the media, court cases, and reports to legal organizations:

- In May 2013, a transgender public safety employee of Cayce, South Carolina filed suit against the city for forcing him to wear a woman's bulletproof vest following his gender reassignment surgery.[10] According to his complaint, this act by the city was only one in a series of moves to embarrass or subordinate him after he informed his superiors of his intention to transition, which led to reassignment and a pre-textual firing.[11]
- In 2013, a student worker was removed from his university work study position as a resident assistant when he began posting YouTube videos about being an openly gay Christian.[12] He was told that parents might find his videos online and be uncomfortable with their children having a gay resident assistant.[13]
- In 2008, a popular human resources website reported that a South Carolina worker's colleagues constantly abused him and called him names based on his sexual orientation.[14] When he complained to his supervisors, they fired him.[15]
- In 2007, an employee of a South Carolina-based construction company filed a claim for intentional infliction of emotional distress against his employer after allegedly suffering constant verbal harassment over his perceived homosexuality.[16]

Wage Inequity

Census data show that men in same-sex couples in South Carolina earn less than men married to different-sex partners. On average, men in same-sex couples in South Carolina earn $27,417 each year,

significantly less than the $42,810 for men married to different-sex partners.[17] The median income of men in same-sex couples in South Carolina is $24,000, or 28% less than that of married men ($33,500).[18] Men with same-sex partners earn lower wages, despite the fact that they are more likely to have a college degree than men married to different-sex partners,[19] a comparison that supports the possibility that people in same-sex couples are not treated equally by employers. A 2009 study indicated that the wage gap for gay men is smaller in states that implement non-discrimination laws, suggesting that such laws reduce discrimination against LGBT people.[20]

Women in same-sex couples earn less than married men as well as men in same-sex couples.[21] Women in same-sex couples in South Carolina earn an average of $26,569 per year (with a median of $20,000), which is more than married women, whose earnings average $23,173 (with a median of $20,000).[22]

These findings are not unique to South Carolina. Analyses of national data consistently find that men in same-sex couples and gay men earn 10-32% less than similarly qualified men who are married to different-sex partners, or men who identify as heterosexual.[23] Surveys of transgender people find that they have high rates of unemployment and very low earnings.[24]

Current Protections from Discrimination

South Carolina does not have a statewide law that prohibits discrimination based on sexual orientation and/or gender identity in employment.[25] Efforts were made to pass such a law in the South Carolina Senate in 2007 and 2009.[26] In late April 2013, the South Carolina House introduced a similar bill, H.B. 4025 where it remains in the Judiciary Committee.[27] Through these bills, the South Carolina Legislature sought to prohibit employment discrimination based on sexual orientation and gender identity by adding the characteristics to its existing employment discrimination statute, the South Carolina Human Affairs Law (SC-HAL).[28]

The South Carolina Human Affairs Law

Currently, the SC-HAL prohibits employment discrimination by most employers with 15 or employees[29] on the bases of race, religion, color, sex (including pregnancy)[30], age, national origin (including ancestry)[31], and disability status.[32] The SC-HAL applies to both public sector and private sector employers.[33]

The SC-HAL exempts religious organizations from coverage to the extent that such organizations may give employment preference to "individuals of a particular religion to perform work connected with the carrying on by the [religious organization] of its activities."[34] Religious organizations include a "religious corporation, association, educational institution, or society."[35]

The Human Affairs Commission (the Commission) enforces the SC-HAL. The Commission has the power to intake, investigate, and prosecute specific instances of employment discrimination, and to study and

report on discrimination statewide.[36] An employee must file a complaint with the Commission within 180 days after the discriminatory practice occurred.[37]

During the fiscal year 2011-2012, the Commission received 1,028 new complaints of employment discrimination, resulting in 765 final actions through mediations and suits.[38] The Commission also does intake and mediations regarding claims of housing discrimination, although this represents a small number of the Commissions complaints each year (64 in fiscal year 2011-2012).[39]

Local-Level Protections from Discrimination

Three localities in South Carolina prohibit public sector employment discrimination based on sexual orientation and gender identity by local ordinance: Richland County[40] and the cities of Charleston[41] and Columbia.[42] Charleston County prohibits public sector employment based on sexual orientation alone.[43] Additionally, North Charleston prohibits discrimination based on sexual orientation and gender identity in housing,[44] and Folly Beach prohibits discrimination based on sexual orientation in public accommodations.[45] None of the LGBT-inclusive local ordinances prohibit discrimination in private employment. Approximately 82% of South Carolina's public sector workforce is not covered by a local ordinance that prohibits public employment discrimination based on sexual orientation, and approximately 88% of the public sector workforce is not covered by a local ordinance that prohibits public employment discrimination based on gender identity.[46]

Even within those localities that have non-discrimination ordinances, the scope of the protection varies from place to place. For example, while Richland[47] County, Columbia,[48] Charleston[49] and North Charleston[50] include both sexual orientation and gender identity in their ordinances and policies, Folly Beach[51] and Charleston County[52] do not explicitly provide any protection against discrimination based on gender identity. Additionally, Folly Beach's ordinance only applies to public accommodations,[53] and North Charleston's ordinance only applies to housing,[54] while Richland County covers public employment and public accommodations,[55] and Columbia[56] and Charleston[57] have ordinances and policies that cover public employment, public accommodations and housing. Finally, none of the local ordinances provide as much protection as the statewide law, which also prohibits discrimination in private employment.[58]

Private Company Non-Discrimination Policies

Private companies adopt internal policies prohibiting discrimination based on sexual orientation and gender identity for a variety of reasons including improved recruitment and retention of talented employees, increasing employee productivity and customer satisfaction, and attracting a larger customer base.[59] One study of corporate motivations behind adopting workplace non-discrimination policies found that 53% of the top companies in the U.S. with LGBT-supportive policies had adopted the policies for economic reasons.[60]

Academic research has found that LGBT-supportive corporate policies are linked to positive business-related outcomes, including greater job commitment, improved workplace relationships, increased job satisfaction, and improved health outcomes among LGBT employees.[61] For example, a 2006 national poll found that 89% of LGBT respondents and 72% of non-LGBT respondents reported that when deciding where to work, it was important that an employer have a written non-discrimination policy that includes race, ethnicity, sex, religion, age, sexual orientation and disability.[62] Research also suggests that employers limit their available talent pool by screening out applicants based on their sexual orientation. One study found that the rate of screening out gay male applicants was twice as high in regions without sexual orientation non-discrimination laws.[63]

Additionally, LGBT-supportive workplace policies can expand opportunities to secure potentially lucrative government contracts for corporate employers. A 2011 study found that 68 local governments had laws requiring contractors to have LGBT-inclusive non-discrimination policies.[64] A number of states have similar laws that apply to state government contracts.[65] Without such policies, companies would not be eligible to bid for contracts with these state and local governments.

Some of South Carolina's top companies and employers have adopted internal corporate policies that prohibit sexual orientation and gender identity discrimination. According to the Human Rights Campaign, at least 12 companies headquartered in South Carolina prohibit discrimination based on sexual orientation, including four Fortune 1000 companies: Domtar Corp., SCANA Corp., ScanSource, Inc., and Sonoco Products Company.[66] Eight of South Carolina's top ten employers, as ranked in the Chamber of Commerce's Big 50[67] have non-discrimination policies that explicitly include both sexual orientation and gender identity: Walmart Stores Inc.,[68] Greenville Health System,[69] Palmetto Health,[70] Blue Cross Blue Shield of South Carolina,[71] Food Lion,[72] the Boeing Company,[73] Lowe's Companies, Inc.[74] and Wells Fargo and Company.[75] Additionally, some public universities provide sexual orientation discrimination protections, including the University of South Carolina system,[76] Clemson University[77] and the Citadel.[78]

Administrative Impact

Complaint Estimate

Despite the persistence and pervasiveness of employment discrimination against LGBT people, studies show that enforcing sexual orientation and gender identity provisions in non-discrimination laws has only a minimal burden on state agencies. Complaints of sexual orientation discrimination are filed by LGBT people at approximately the same rate as complaints of race and sex discrimination are filed by people of color and women, respectively.[79] However, because the LGBT population is so small, the absolute number of sexual orientation and gender identity complaints filed under state non-discrimination laws is very low.[80]

We estimate that approximately 31 complaints of sexual orientation or gender identity discrimination would be filed with the South Carolina Human Affairs Commission each year. To reach this estimate, we

drew on Gallup polling data and Census data from South Carolina to estimate the size of the LGBT workforce in the state, and applied a national sexual orientation and gender identity complaint rate to that population. We have previously used this methodology to estimate the number of complaints that would be filed on the basis of sexual orientation and gender identity in other states, including Missouri, Ohio, Pennsylvania, South Dakota, Texas, Utah, and West Virginia.[81]

Results from a 2012 Gallup poll show that 2.9% of people in South Carolina identify as LGBT.[82] Applying this percentage to the number of people in South Carolina's workforce (2,280,559 [83]) indicates that there are 66,136 LGBT workers in South Carolina.

Next, we applied the rate of complaints filed on the basis of sexual orientation or gender identity to the number of LGBT workers in South Carolina to determine how many complaints will be filed annually if these characteristics are added to the employment non-discrimination law. We used the national average complaint rate from a 2008 study that analyzed administrative complaint data from 17 states that prohibited sexual orientation discrimination at that time.[84] The study found that across these states, the average rate of complaints filed on the basis of sexual orientation was 4.7 per 10,000 LGB workers.[85] There is not sufficient data to make a similar calculation of the average rate of complaints file on the basis of gender identity.[86] Therefore, we assume that this rate is also 4.7 per 10,000 transgender workers.

Applying the national complaint rate (4.7 per 10,000 LGBT workers) to the number of LGBT workers in South Carolina (66,136) suggests that 31 complaints of sexual orientation and gender identity discrimination would be filed annually if these characteristics were added to the state's employment non-discrimination law.

Cost of Enforcement

Using Information from the most recent Accountability Report of the South Carolina Human Affairs Commission (fiscal year 2011-2012), we can estimate the cost associated with handling the additional 31 complaints that would be filed if sexual orientation and gender identity were added to the South Carolina Human Affairs Law.

In fiscal year 2011-2012, the South Carolina Human Affairs Commission received 1,028 employment discrimination complaints and 64 housing discrimination complaints, or 1,092 in total.[87] The Commission operated on a budget of $1,634,478.[88] In previous years, the Commission broke down the budget into five major program areas and an "other" category. The five major program areas were: administration (to provide administrative direction, control and supervision of the agency); consultive services (to provide technical services, training, equal opportunity reporting and community relations consulting services); compliance programs (to provide intake, referral, investigative, mediation and compliant resolution services); employer contributions; and non-recurring appropriation (to provide non-recurring support for agency personnel).[89] Most likely, "compliance programs" is the only area that would be noticeably impacted by more complaints being filed. It is unlikely that the amount spent on

administration services would change, or that consultive services would be burdened by the addition of two personal characteristics (sexual orientation and gender identity) to an already existing law. Once these characteristics are integrated into the Commission's paperwork and trainings, there should be no ongoing expenses associated with them in these areas.

Based on these assumptions, we can calculate the impact of adding sexual orientation and gender identity to the state's non-discrimination law by determining the average cost of enforcing a complaint, and then multiplying the cost by the number of complaints we expect to be filed on the basis of sexual orientation and gender identity. In the 2011-2012 fiscal year, 46.5% of the Commission's budget went to the compliance programs area.[90] Based on this figure, $760,032 was spent on compliance programs in 2011-2012.

In the fiscal year 2011-2012, the South Carolina Human Affairs Commission received 1,028 employment discrimination complaints and 64 housing discrimination complaints, or 1,092 in total.[91] Dividing the estimated compliance programs budget by the number of complaints received indicates that enforcement costs an average of $740 per complaint filed. Based on this assumption, if 31 complaints of sexual orientation and gender identity discrimination were filed each year, it would cost the state approximately $23,000 to enforce them.

This estimate is likely to be conservatively high. Annual fluctuations in the number of complaints filed with the Commission are greater than 31. From fiscal year 2008-2009 to fiscal year 2011-2012, the number of complaints filed from year to year varied by 476, on average. There was no corresponding impact on the Commission's budget. This information suggests that the additional complaints could be absorbed into the existing budget with no noticeable impact on the budget.

Fiscal Year	Number of Complaints Handled	Budget
2008-2009[92]	1,797	$2,540,060
2009-2010[93]	1,184	$1,420,817
2010-2011[94]	730	$1,837,359
2011-2012[95]	1,092	$1,634,478

Conclusion

Documented evidence shows that LGBT people face employment discrimination across the country, including in South Carolina. There is currently no law that prohibits employment discrimination based on sexual orientation or gender identity in South Carolina. Adding these characteristics to the South Carolina Human Affairs Law would provide protection from discrimination to approximately 66,000 LGBT workers in the state. Based on data from other state administrative enforcement agencies, we estimate that approximately 31 complaints of sexual orientation or gender identity employment discrimination would be filed in South Carolina annually if the law were amended. A conservatively high estimate based on data from the South Carolina Human Affairs Commission suggests that it would cost the state approximately $23,000 to enforce these complaints each year; which represents 1.4% of the South

Carolina Human Affairs Commission's budget in fiscal year 2011-2012. This amount represents a small percentage of the Commission's 2011-2012 budget; and given fluctuations in the annual budget and the number of complaints filed, it is likely that 31 additional complaints would have no noticeable impact on the Commission's budget.

About the Williams Institute

The Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law advances law and public policy through rigorous, independent research and scholarship, and disseminates its work through a variety of education programs and media to judges, legislators, lawyers, other policymakers and the public. These studies can be accessed at the Williams Institute website.

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Endnotes

[1] These estimates were reached by applying the percentage of people in South Carolina that are LGBT (2.9%) to the population of South Carolina aged 16 years and older (3,675,075) and the number of people in the South Carolina labor force (2,280,559), respectively. Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP, Feb. 15,2013, http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx; American Community Survey, U.S. Census Bureau, American FactFinder, 2012 ACS Table DP03: Selected Economic Characteristics, 1-Year Estimates, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_5YR_DP03.

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[15] *Id.*

[16] Hansson v. Scalise Builders of S.C., 374 S.C. 352, 354 (2007).

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[23] M.V. Lee Badgett, Holning Lau, Brad Sears & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI.-KENT L. REV. 559, 559-60 (2009).

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[28] S.C. Code Ann. §§ 1-13-10 – 1-13-110 (2013).

[29] S.C. Code Ann. § 1-13-30(e) (2013). The SC-HAL limits causes of actions to those covered by Title VII of the Civil Rights Act of 1964 if the cause of action arises from discrimination on the basis of race, color, religion, sex, or national origin, and those covered by the Age Discrimination in Employment Act of 1967 if the cause of action arises from discrimination on the basis of age, which may in rare cases limit the applicability of the law against some employers with 15 or more employees. S.C. Code Ann. § 1-13-100 (2013).

[30] S.C. Code Ann. § 1-13-30(l) (2013).

[31] S.C. Code Ann. § 1-13-30(b) (2013).

[32] S.C. Code Ann. § 1-13-30 (2013).

[33] *See*, *Compliance Division*, S.C. HUM. AFF. COMMISSION, http://www.state.sc.us/schac/compliance_division.htm (last visited June 17, 2013) (discussing Human Affairs Commission's Private Sector Investigations unit, which "processes employment discrimination complaints filed against private, non-governmental, employers in South Carolina," and its Public Sector Investigations unit, which does the same for "State government agencies and their local subdivisions, city and county government agencies and regional government agencies.").

[34] S.C. Code Ann. § 1-13-80(i)(5) (2013).

[35] S.C. Code Ann. § 1-13-80(i)(5) (2013).

[36] S.C. Code Ann. §§ 1-13-40, 1-13-70 (2013).

[37] S.C. Code Ann. § 1-13-90(a) (2013).

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[45] FOLLY BEACH, S.C., CODE § 96.06 (2012).

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[48] COLUMBIA., S.C., CODE §§ 11-393; 11-503 (2009); CITY OF COLUMBIA, EMPLOYEE HANDBOOK, 5 (2011).

[49] CHARLESTON., S.C., CODE §§ 16-20; 16-33 (2009).

[50] N. CHARLESTON, S.C., CODE § 10-92 (2012).

[51] FOLLY BEACH, S.C., CODE § 96.06 (2012).

[52] *Diversity/Equal Employment Opportunity/Affirmative Action*, *in* CHARLESTON COUNTY PERSONNEL POLICY MANUAL (Apr. 18, 2013) (on file with the author).

[53] *Id.*

[54] N. CHARLESTON, S.C., CODE § 10-92 (2012).

[55] RICHLAND CNTY., S.C., CODE § 16-67 (2011) (public accommodations); RICHLAND CNTY. COUNCIL, REGULAR SESSION AGENDA, 119-20 (May 3, 2011), *available at* http://www.richlandonline.com/Portals/0/Departments/CountyCouncil/Archive/agendas/20110503.pdf (public employment)

[56] CITY OF COLUMBIA, EMPLOYEE HANDBOOK, 5 (2011) (public employment); COLUMBIA., S.C., CODE §§ 11-503 (public accommodations); 11-393 (housing) (2009).

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[58] S.C. Code Ann. § 1-13-80 (2013).

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[81] *See Workplace*, THE WILLIAMS INST., http://williamsinstitute.law.ucla.edu/category/research/workplace/ (last updated Dec. 10, 2013).

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[83] American Community Survey, U.S. Census Bureau, American FactFinder, 2012 ACS Table DP03: Selected Economic Characteristics, 1-Year Estimates, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_5YR_DP03.

[84] "National average" refers to the average of the complaint rates in 17 states across the country that prohibited sexual orientation discrimination in 2008. BADGETT, RAMOS & SEARS, *supra* note 79.

[85] The data gathered for the 2008 study included all employment discrimination complaints filed on the basis of sexual orientation; it was not limited to complaints filed by LGB employees. Heterosexual employees may also file complaints under sexual orientation non-discrimination laws if they were discriminated against because of their heterosexuality or because they were perceived to be LGB. However, we use the LGB workforce as the underlying population for purposes of our analysis because LGB employees likely file the vast majority of sexual orientation discrimination complaints. See Rubenstein, *supra* note 79.

[86] BADGETT, RAMOS & SEARS, *supra* note 79, at 5.

[87] S.C. HUM. AFF. COMMISSION, 2011-2012 ACCOUNTABILITY REPORT 32 (2013), *available at* http://www.scstatehouse.gov/reports/aar2012/l36.pdf.

[88] *Id.* at 11

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[95] S.C. HUM. AFF. COMMISSION, 2011-2012 ACCOUNTABILITY REPORT, *supra* note 87 at 11, 32-33.