



ANSWERS

for the LGBTQ Community

Maine

Overview of Legal Issues
For Gay Men, Lesbians, Bisexuals
and Transgender People

January 2015

This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, the law is constantly changing and evolving and this publication is based upon the information that is known to us as of this printing. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. Check our website, www.glad.org, for more information.

If you have questions about this publication, other legal issues or need lawyer referrals, contact **GLAD Answers** by live chat or email at www.GLADAnswers.org or by phone weekdays between 1:30 and 4:30 pm at (800) 455-GLAD (4523).

**GLAD thanks Patricia A. Peard of
Bernstein Shur for reviewing this publication.**

Contents

■ ANTI-DISCRIMINATION LAW	1
Employment	2
Harassment	4
Public Accommodations	6
Housing	7
Credit	8
Education	8
Transgender / Gender Identity	9
Pursuing a Complaint	10
■ FAMILY LAW	18
Marriage and Domestic Partnerships	18
Legal Protections for Same-Sex Couples	28
Adoption	32
Custody and Visitation	36
Domestic Violence	41
■ HATE CRIMES / SEX LAWS / POLICE	45
Hate Crimes & Violence	45
Criminal Sex Laws	48
Police Harassment	50
■ STUDENT RIGHTS	53
Harassment and Discrimination at School	53
Other Rights of Public School Students	56
Gay / Straight Alliances	57
Resources	57

Anti-Discrimination Law

Does Maine have an anti-discrimination law protecting gay, lesbian, bisexual and transgender individuals from discrimination?

Yes. On November 8, 2005, Maine voters agreed to keep in place a law, LD 1196, “An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation”, passed by the Legislature and signed by the Governor in the spring of 2005. The law went into effect December 28, 2005.

This marks the end of a long struggle in Maine to achieve legal protections for LGBT people. In November 1995, Maine voters rejected an attempt to limit the protected classes to those already included within the non-discrimination law. In May 1997, Maine approved an anti-discrimination law based on sexual orientation, but this law was repealed in a special election in February 1998. Then in November 2000, by the smallest of margins, Maine voters failed to ratify a second anti-discrimination law that had been approved by the legislature.

The law provides protection against discrimination based on sexual orientation which is defined as “. . . a person’s actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.”¹

Does it also protect people perceived of as gay, lesbian, bisexual and transgender?

Yes. The non-discrimination law specifically covers people who are perceived to be lesbian, gay, bisexual or transgender.

¹ 5 Me. Rev. Stat. sec. 4553 (9-C).

What kinds of discrimination does the anti-discrimination law address?

The Maine law prohibits discrimination in:

- EMPLOYMENT
- PUBLIC ACCOMMODATIONS,
- HOUSING,
- CREDIT and
- EDUCATION.²

Are there other non-discrimination protections available in Maine?

Yes. Several cities and towns have enacted non-discrimination ordinances, including Portland, Falmouth, South Portland, Long Island, Orono, Sorrento, Westbrook and Bar Harbor. In *Clarke v. Olsten Certified Healthcare Corp.*, the Maine Law Court assumed without so stating that the Portland ordinance is enforceable.³

■ **Employment**

To whom does the non-discrimination law apply and what does it forbid?

The non-discrimination law applies to governmental employers (local and state) and private employers with any number of employees.⁴ It forbids employers from refusing to hire, or discharging, or discriminating against the employee with respect to any employment matter, including hiring, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment. Nor may an employer use any employment agency that

² 5 Me. Rev. Stat. sec. 4552 et seq.

³ 714 A.2d 823 (Me. 1998).

⁴ 5 Me. Rev. Stat. sec. 4553 (4) (definition of employer).

discriminates.⁵ Harassment based on sexual orientation is included within “terms and conditions” of employment.

Employment agencies may not refuse to: classify properly; refer their customers for employment; or otherwise discriminate because of sexual orientation. Labor organizations (e.g. unions) may not deny apprenticeship, membership or any membership rights or otherwise penalize or discriminate against their members because of sexual orientation.⁶

The law also forbids any employer, employment agency, or labor organization, prior to employment or membership, from eliciting or recording information about a person’s sexual orientation, printing any advertisement indicating any preference or limitation based on sexual orientation, or having a system of denying or limiting employment or membership opportunities based on sexual orientation.⁷

Does the law apply to every employer?

No, there is a religious exemption that provides:

"Employer" does not include a religious or fraternal corporation or association, not organized for private profit and in fact not conducted for private profit, with respect to employment of its members of the same religion, sect or fraternity, except for purposes of disability-related discrimination, in which case the corporation or association is considered to be an employer.⁸

This appears to mean that certain non-profit religious entities (not individuals) are exempt from the law, and a religious organization may require all applicants and employees to conform to the religious tenets of that organization.⁹ The full scope of this exemption may be sorted out in specific court cases.

⁵ 5 Me. Rev. Stat. sec. 4572 (1)(A).

⁶ 5 Me. Rev. Stat. sec. 4572 (1)(B) & (C).

⁷ 5 Me. Rev. Stat. sec. 4572 (1)(D).

⁸ 5 Me. Rev. Stat. sec. 4553 (4) (definition of “employer”).

⁹ 5 Me. Rev. Stat. sec. 4573-A (2).

Does the non-discrimination law have any impact on my employer's obligation to provide domestic partner benefits to my partner of the same-sex?

Possibly yes. The non-discrimination law can be a powerful tool to equalizing treatment in compensation, and therefore, valuable “fringe benefits.” As discussed below in the family section of this booklet, the state and several municipalities have already equalized some benefits like health insurance.¹⁰

Private employers in Maine are neither required to offer health insurance to their employees nor to offer spousal or family coverage. However, some employers who provide such coverage may be obligated to provide insurance to same-sex partners to comply with the Maine insurance laws and/or anti-discrimination law. This area of law is complicated and you should feel free to contact GLAD for information specific to your situation.

■ Harassment

Does Maine law forbid sexual harassment?

Yes, sexual harassment is expressly prohibited by state law.

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when:

a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

¹⁰ This result also conforms with the better view of the law, i.e., that it is discrimination based on sexual orientation to condition benefits on a status (marriage) that only gay people cannot attain. See *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005); *Bedford v. N.H. Cmty. Technical Coll. Sys.*, Superior Court Order, 04-E-230 (May 3, 2006).

- b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.”¹¹

Although the Maine Law Court has not specifically ruled on the question, it should be as unlawful to sexually harass a gay, lesbian or bisexual person as it is to harass a non-gay person. Some harassment is specifically anti-gay, and may be more fairly characterized as harassment on the basis of sexual orientation, which is discussed below. Other harassment is sexual in nature and more appropriately categorized as “sexual harassment.” Both types of harassment can happen to the same person, and both are forbidden.

Both the United States Supreme Court and several state courts have found same-sex sexual harassment to violate sexual harassment laws. Compare *Oncale v. Sundowner Offshore Services*¹² (man can sue for sexual harassment by other men under federal sexual harassment laws) to *Melnychenko v. 84 Lumber Co.*¹³ (same-sex sexual harassment forbidden under Massachusetts state law).

Are there any protections from sexual orientation harassment?

Yes. In September 2007, the Maine Human Rights Commission (MHRC) adopted amendments to its employment and housing rules that expressly acknowledged the existence of sexual orientation harassment.¹⁴ Under these rules, unwelcome comments, jokes, acts, and other verbal or physical conduct on the basis of sexual orientation constitute harassment when:

- a) submission to this conduct is a condition of employment or a term of membership in a union;

¹¹ 94-348 Rules of Maine Human Rights Com'n, 3.06 I (1). Available at: <http://www.maine.gov/mhrc/laws/index.html>.

¹² 523 U.S. 75 (1998).

¹³ 424 Mass. 285, 676 N.E.2d 45 (1997).

¹⁴ See generally 94-348 Me. Hum Rights Comm'n Reg. Ch. 3, § 3.12. Available at: http://www.maine.gov/mhrc/laws/Sexual_Orientation_Adopted_Rule.htm.

- b) submission to or rejection of this conduct is used as a basis for a decision made by unions or employers that effect the individual;
- c) such conduct interferes or attempts to interfere with the individuals work performance or creates an intimidating, hostile, or offensive working or union environment.¹⁵

Employers or labor organizations are responsible for their actions and for those of their employees with respect to sexual orientation harassment.¹⁶

■ Public Accommodations

What is a place of public accommodation?

A place of public accommodation means a facility operated by a private or public entity whose operations fall into categories such as lodging, restaurants, entertainment, public gathering, retail stores, service establishments, transportation, museums, libraries, recreation facilities, exercise or health facilities, schools and educational institutions, social service establishments, or government buildings. Generally, any establishment that caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from the general public is a place of public accommodation.¹⁷

What does the law say about discrimination in places of public accommodation?

The law makes it illegal for places of public accommodation to discriminate on the basis of sexual orientation or “. . . in any manner withhold from or deny the full and equal enjoyment . . . of the accommodations, advantages, facilities, goods, services or privileges of public accommodation.” The law

¹⁵ 94-348 Me. Hum Rights Comm’n Reg. Ch. 3, § 3.12 (1) (a) - (c). Available at: http://www.maine.gov/mhrc/laws/Sexual_Orientation_Adopted_Rule.htm.

¹⁶ 94-348 Me. Hum Rights Comm’n Reg. Ch. 3, § 3.12 (2). Available at: http://www.maine.gov/mhrc/laws/Sexual_Orientation_Adopted_Rule.htm.

¹⁷ 5 Me. Rev. Stat. sec. 4553 (8) (definition of “public accommodation”).

also makes it illegal to advertise that any place of public accommodation is restricted to people of a particular sexual orientation.¹⁸

■ Housing

What is prohibited by the housing anti-discrimination law in Maine?

The fair housing laws apply to any person with the right to sell, rent, lease or manage residential housing. It covers any transaction related to housing—including advertising, inquiring, showing, selling, renting, leasing, pricing, evicting, misrepresenting availability or asking price, or failing to communicate an offer.¹⁹

The law declares that every individual has a basic civil right to secure decent housing in accordance with the individual's right to pay and without discrimination because of sexual orientation.²⁰

Those who finance housing – whether financing for the acquisition, construction, rehabilitation, repair or maintenance of residential housing – are barred from discriminating.

Are any landlords exempt from the housing anti-discrimination law?

The following landlords are exempt from the law:

- an owner-occupied 2-family dwelling;
- an owner-occupied single family dwelling that rents not more than 4 rooms; and
- a dwelling owned, controlled, or operated for other than a commercial purpose by a religious corporation that rents to its membership.²¹

¹⁸ 5 Me. Rev. Stat. sec. 4592 (1).

¹⁹ 5 Me. Rev. Stat. sec. 4582. See also “Panel backs 2 men in housing complaint,” *Bangor Daily News*, Sept. 18, 2007 (discusses first case where the Maine Human Rights Commission “found reasonable grounds to a housing discrimination claim based on sexual orientation.”)

²⁰ 5 Me. Rev. Stat. sec. 4581.

²¹ 5 Me. Rev. Stat. sec. 4553 (6).

■ Credit

How does the Maine anti-discrimination law protect people with regard to credit?

It is unlawful credit discrimination for any creditor to refuse the extension of credit to any person solely on the basis of sexual orientation.²² The law requires that the Superintendent of Financial Institutions and the Superintendent of Consumer Credit Protection cooperate with the Maine Human Rights Commission in enforcing the credit anti-discrimination law.²³

■ Education

How does the Maine anti-discrimination law apply to education?

Maine law applies to both public and private schools and makes the following discrimination on the basis of sexual orientation unlawful:

- to exclude a person from, deny a person the benefits of, or subject a person to discrimination in any academic, extracurricular, research, occupational training or other program or activity;
- to deny a person equal opportunity in athletic programs;
- to deny admission to the institution or program or fail to provide equal access to any information about an institution or program;
- to deny financial assistance availability and opportunity.²⁴

Are any educational institutions exempt from the law?

²² 5 Me. Rev. Stat. sec. 4596.

²³ 5 Me. Rev. Stat. sec. 4598.

²⁴ 5 Me. Rev. Stat. sec. 4602.

Yes. Any educational facility owned, controlled or operated by “a bona fide religious corporation, association or society” is exempt.²⁵

■ Transgender/Gender Identity

What protections exist for transgender people under the discrimination laws?

The definition of sexual orientation in the law includes a person’s “actual or perceived...gender identity or expression.” This is explicit protection for transgender persons in Maine.²⁶

The Maine Human Rights Commission has also set out its view that employers must “reasonably accommodate” employees with respect to gender identity and gender expression issues in the workplace. The only legitimate reason for failure to do so is if doing so “would impose an undue hardship on the conduct of the business.”²⁷

In some situations a transgender person may also have a claim of sex or disability discrimination if he or she is adversely treated at work, in housing, in a place of public accommodation, in a credit transaction or at an educational institution. If the adverse action is triggered by the sense that the individual does not meet the expectations of or act like a “real man” or “real woman,” then this can be the basis for a sex stereotyping claim as well. See *Price Waterhouse v. Hopkins*²⁸ and *Rosa v. Park West Bank*.²⁹

In September 2007, the Maine Human Rights Commission (MHRC) adopted amendments to its employment and housing rules to add “sexual orientation” to the protected classifications under the Maine Human Rights

²⁵ 5 Me. Rev. Stat. sec. 4602.

²⁶ 5 Me. Rev. Stat. sec. 4553 (9-C).

²⁷ 94-348 Me. Hum Rights Comm’n Reg. Ch. 3, § 3.12 (F) (1). Available at: http://www.maine.gov/mhrc/laws/Sexual_Orientation_Adopted_Rule.htm.

²⁸ 490 U.S. 228, 251 (1989).

²⁹ 214 F.3d 213 (1st Cir. 2000).

Act. As part of these amendments,” the MHRC defined both “gender identity” and “gender expression” as protected under the definition of “sexual orientation.”

The Commission defined “gender identity” as an “individual’s gender-related identity, whether or not the identity is different from that traditionally associated with that individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.”³⁰

It has also defined “gender expression” as “the manner in which an individual’s gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech, or lifestyle.”³¹

For more information, *see* GLAD’s publication, *Transgender Legal Issues*, at <http://glad.org/uploads/docs/publications/trans-legal-issues.pdf>.

■ Pursuing a Complaint

How do I file a complaint of discrimination? What happens after I file?

You should contact the Maine Human Rights Commission (MHRC) at (207) 624-6050, or at State House Station #51, Augusta, ME 04333-0051, or on the web at <http://www.state.me.us/mhrc/index.shtml>. The Commission prefers for people to file complaints in writing. For an overview of this process refer to the MHRC regulations, available at <http://www.maine.gov/mhrc/laws/index.html>.

The complaint must be under oath, state the name and address of the individual making the complaint as well as the entity he or she is complaining against (called the “respondent”). The complaint must set out the particulars of the alleged unlawful acts and the times they occurred.³²

³⁰ 94-348 Me. Hum Rights Comm’n Reg. Ch. 3, § 3.02(D) (2). Available at: http://www.maine.gov/mhrc/laws/Sexual_Orientation_Adopted_Rule.htm.

³¹ 94-348 Me. Hum Rights Comm’n Reg. Ch. 3, § 3.02(D) (3). Available at: http://www.maine.gov/mhrc/laws/Sexual_Orientation_Adopted_Rule.htm.

³² 5 Me. Rev. Stat. sec. 4611.

Once a complaint is timely filed, a Commissioner or investigator will seek to resolve the matter. If he or she cannot do so, the Commission will proceed with an investigation to determine if there are reasonable grounds to believe that unlawful discrimination has occurred. The Commission has extensive powers during the course of the investigation. Among other things, it can examine persons, places and documents, and require attendance at a fact-finding hearing, and issue subpoenas for persons or documents.

If the Commissioner or investigator concludes:

- there are no reasonable grounds, it will dismiss the case, and the complainant may file a new case in the Superior Court;³³
- there are reasonable grounds, it will try to resolve the matter through settlement.³⁴

Once the Commission process is complete, and if settlement has failed, a person can file an action for relief in court. A person may also request a “right to sue” letter from the MHRC if there has been no court action filed and no conciliation agreement in place within 180 days of filing the complaint.³⁵ The person may then file an action in the Superior Court.³⁶ In some situations, the Commission may file an action in court on your behalf.³⁷

Do I need a lawyer?

Not necessarily. The process is designed to allow people to represent themselves. However, GLAD strongly encourages people to find a lawyer to represent them throughout the process. Not only are there many legal rules governing the MHRC process, but employers and other respondents will almost certainly have legal representation. Please call the GLAD Answers for help or for an attorney referral.

³³ See generally 5 Me. Rev. Stat. sec. 4612.

³⁴ 5 Me. Rev. Stat. sec. 4612.

³⁵ 5 Me. Rev. Stat. sec. 4612 (6).

³⁶ 5 Me. Rev. Stat. sec. 4621.

³⁷ See generally 5 Me. Rev. Stat. sec. 4612.

What are the deadlines for filing a complaint of discrimination?

A complaint must be filed with the MHRC within 300 days of the discriminatory act or acts.³⁸ There are virtually no exceptions for lateness, and GLAD encourages people to move promptly in filing claims. Actions filed in Superior Court must generally be filed “not more than 2 years after the act of unlawful discrimination complained of.”³⁹

What are the legal remedies for discrimination?

This is a complicated area and depends on a variety of factors, including the type of discrimination and its intersection with federal laws.

As a general matter, the MHRC tries to resolve cases in which reasonable cause is found. It is not empowered to award emotional distress damages or attorney’s fees, but the parties may agree to whatever terms are mutually satisfactory for resolving the issue.⁴⁰

As a general matter, if a person has filed with the MHRC, completed the process there, and later files his or her case in court, then a full range of compensatory and injunctive relief is available.⁴¹ If a discrimination complainant takes his or her case to court without first filing at the MHRC, then only injunctive relief is available in court, such as a cease and desist order, or an order to do training or post notices.⁴²

The relief ordered by a court may include: (a) hiring, reinstatement and back pay in employment cases; (b) an order to rent or sell a specified housing accommodation (or one that is substantially identical), along with damages of up to three times any excessive price demanded, and civil penal damages, to the victim in housing cases; and (c) in all cases, where the individual has exhausted the MHRC process, an order for attorney’s fees, civil penal

³⁸ 5 Me. Rev. Stat. sec. 4611.

³⁹ 5 Me. Rev. Stat. sec. 4613(2)(C).

⁴⁰ 94-348 Rules of Maine Human Rights Com’n secs. 2.07, 2.08, 2.09. Available at <http://www.maine.gov/mhrc/laws/index.html>.

⁴¹ 5 Me. Rev. Stat. secs. 4613, 4614.

⁴² 5 Me. Rev. Stat. sec. 4622.

damages, cease and desist orders, and other relief that would fulfill the purposes of the anti-discrimination laws (e.g. training programs, posting of notices).

Can I claim discrimination on a basis other than sexual orientation?

Yes, but only if you are treated differently because of a personal characteristic protected by Maine law.

- a) The present non-discrimination laws for employment forbid taking action against someone because of race, color, sex, physical or mental disability, religion, ancestry, national origin, age, or because a person previously filed a worker's compensation claim, as well as sexual orientation.⁴³
- b) In public accommodations, it is illegal to discriminate on the basis of race, color, sex, physical or mental disability, religion, ancestry or national origin, as well as sexual orientation.⁴⁴
- c) In housing, the protected characteristics for public accommodations apply plus familial status.⁴⁵
- d) In credit, in addition to sexual orientation, the protected characteristics are age, race, color, sex, ancestry, religion, national origin and marital status.
- e) In education, the protected characteristics in addition to sexual orientation are sex, physical or mental disability, national origin or race.

Can I also file a discrimination complaint with a federal agency?

Yes, in many cases. Federal employment non-discrimination law, called Title VII, applies only to employers with at least 15 employees, and complaints must be filed within 180 days of the discriminatory act with the Equal Employment Opportunity Commission (EEOC). But if you initially

⁴³ 5 Me. Rev. Stat. sec. 4572.

⁴⁴ 5 Me. Rev. Stat. sec. 4553 (8) (definition), 4592 (prohibition).

⁴⁵ 5 Me. Rev. Stat. sec. 4582.

institute your complaint with MHRC and indicate that you wish to have the complaint cross-filed with the EEOC, then the time limit is extended to the earlier of 300 days or 30 days after MHRC has terminated the case.⁴⁶ (People who work for federal agencies are beyond the scope of this publication.)

Someone who brings a claim of discrimination may sometimes pursue protections under both state and federal law. This is true because there may be overlapping provisions of state and federal law. For example, Title VII forbids employment discrimination based on race, sex, age, religion and disability (which includes HIV status), but does not expressly forbid discrimination based on “sexual orientation” or “gender identity.”

Because a growing number of courts and government agencies have recognized that the root of sexual orientation and gender identity discrimination is sex discrimination, the federal EEOC has recently indicated that it will accept both “gender identity” and “sexual orientation” discrimination complaints in order to investigate whether the complainant may have experienced prohibited “sex” discrimination. For more information go to: <http://www.eeoc.gov/eeoc/publications/upload/Gender-Stereotyping-LGBT-brochure-OLC.pdf>.

GLAD recommends that, where there may be overlapping state and federal jurisdiction, you explore filing with MHRC first but keep in mind the possibility of pursuing a federal claim as well. If you have a sexual orientation or gender identity complaint, you should check off “sex” as well as “sexual orientation” or “gender identity” as the bases for your claim and request that MHRC cross-file your complaint with the EEOC.

LGBT people who are discriminated against in housing may also be able to file a complaint with the federal Department of Housing and Urban Development (HUD) in addition to MHRC. For more information go to: http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination.

Are there other options for filing a complaint for discrimination?

⁴⁶ United States Code 42 sec. 2000e-5(e)(1).

Possibly yes, depending on the facts of your particular situation.

1. Union: If you are a member of a union, your contract (collective bargaining agreement) may provide additional rights to you in the event of discipline, discharge or other job-related actions. In fact, if you obtain relief under your contract, you may decide not to pursue other remedies. Get and read a copy of your contract and contact a union steward about filing a grievance. Deadlines in contracts are strict. Bear in mind that if your union refuses to assist you with a complaint, you may have a discrimination action against it for its failure to work with you, or for failure of duty of fair representation.

2. State or Federal Court: After filing with the MHRC or EEOC, a person may decide to remove his or her discrimination case from those agencies and file in court. There are rules about when and how this must be done.

In addition, a person may file a court case to address other claims that are not appropriately handled by discrimination agencies. For example:

- If a person is fired in violation of a contract, or fired without the progressive discipline promised in a handbook, or fired for doing something the employer doesn't like but which the law requires, then these matters are beyond the scope of what the agencies can investigate and the matter can be pursued in court.
- If a person has a claim for a violation of constitutional rights, such as a teacher or other governmental employee who believes his or her free speech or equal protection rights were violated, then those matters must be heard in court.

What can I do if my employer fires me for filing a complaint of discrimination?

It is illegal to retaliate in these circumstances, and the employee could file an additional complaint against the employer for retaliation. “Retaliation” protections cover those who participate in MHRC proceedings or otherwise oppose unlawful conduct, whether as a complainant or as a witness. If the employer takes action against an employee because of that conduct, then the employee can state a claim of retaliation.⁴⁷

What can I do to prepare myself before filing a complaint of discrimination?

In evaluating your potential claims, you have the right to request a complete copy of your personnel file at any time.⁴⁸ Personnel files are the official record of your employment and are an invaluable source of information.⁴⁹

Whether you leave a job voluntarily or not, be cautious about signing any documents admitting to wrongdoing, or that waive your legal rights, or that are a supposed summary of what you said in an exit interview. Sometimes employees are upset or scared at the time they are terminating employment, but the documents will likely be enforceable against you later. Please be cautious.

As a general matter, people who are still working under discriminatory conditions have to evaluate how filing a case will affect their job or housing, and if they are willing to assume those possible consequences. Of course, even if a person has been fired, he or she may decide it is not worth it to pursue a discrimination claim. This is an individual choice which should be made after gathering enough information and advice to make an informed decision.

Some people prefer to meet with an attorney to evaluate the strength of their claims before filing a case. It is always helpful if you bring to your attorney an outline or diary of what happened on the job that you are complaining about. It is best if the information is organized by date and explains who the

⁴⁷ 5 Me. Rev. Stat. sec. 4572 (1)(E). *See also Provencher v. CVS Pharmacy*, 76 Fair Empl.Prac.Cas. (BNA) 1569 (1st Cir.(N.H.) 1998) (upholding federal retaliation claim of gay man).

⁴⁸ 5 Me. Rev. Stat. sec. 7071 (Employee right to request personnel file).

⁴⁹ 5 Me. Rev. Stat. sec. 7070 (Definition of personnel record).

various players are (and how to get in touch with them), as well as what happened, who said what, and who was present for any important conversations or incidents. Try to obtain and bring copies of your employee handbooks or personnel manuals, any contracts, job evaluations, memos, discharge letters and the like. If you are concerned about a housing matter, bring a copy of your lease, along with any notices and letters you have received from your landlord.

Family Law

■ Marriage and Domestic Partnerships

Can same-sex couples marry in Maine?

Yes! On November 6, 2012, Maine became the first state to obtain marriage rights for same-sex couples through an initiative process rather than a court case or vote by a legislature. Maine Question 1, *An Act To Allow Marriage Licenses For Same-Sex Couples And Protect Religious Freedom*,⁵⁰ was approved by the voters of Maine 53 to 47 percent.

This Act:

- repeals the provision that limits marriage to one man and one woman,
- replaces it with the authorization for marriage between any 2 persons who meet the other marriage requirements of Maine law,
- specifies that a marriage between 2 persons of the same sex in another state that is valid in that state is valid and must be recognized in Maine, and
- provides that a member of the clergy is not required to perform and a religious institution is not required to host a marriage in violation of religious beliefs, and that refusal
 - cannot be the basis for a lawsuit or liability, and
 - will not affect the tax-exempt status of the religious institution.

In 2009, a marriage equality bill, *An Act To End Discrimination In Civil Marriage And Affirm Religious Freedom*, was passed by the legislature and signed into law by former Governor John Baldacci. Opponents initiated a referendum and the law was held in abeyance until a November referendum vote could be taken. The referendum passed 53 to 47 percent, preventing any same-sex couples from marrying in Maine.

⁵⁰ See http://www.mainelegislature.org/legis/bills/bills_125th/billtexts/IB000301.asp.

On June 30, 2011, Equality Maine and GLAD announced plans to place a voter initiative in support of the right for same-sex couples to marry on Maine's November 2012 ballot. Equality Maine and Mainers United for Marriage began the campaign for the initiative on May 15, 2012 and the initiative was approved by the voters on November 6, 2012. The law went into effect on December 29, 2012.

The process for getting married in Maine basically requires the following basic steps:

1. an eligible couple submits an application for a license in either the town or city in Maine where one of the parties lives (out-of-state couples can go to any town or city clerk);
2. the couple must pay the applicable fee and receive a marriage license from the clerk;
3. the couple must have the marriage solemnized anywhere in Maine (i.e., have a ceremony) within 90 days of filing the application. In addition to the officiant, the ceremony requires 2 witnesses;
4. once the ceremony has been performed, the person who performed it has 7 days to send the license back to the city or town where it was issued; and
5. the clerk will then file the original and the couple can receive an official certificate of their marriage.

Do we have to be a Maine resident?

No. Provided a couple is otherwise eligible to marry, neither member of the couple needs to be a Maine resident. Non-resident couples can go to any town or city in Maine to apply for a marriage license and can then have the marriage solemnized in any town or city in Maine.

Is there anywhere else that we can get married?

Yes. On June 26, 2015, the United States Supreme Court ruled in *Obergefell v. Hodges* that it is unconstitutional to deny same-sex couples the

right to marry⁵¹, and so now same-sex couples can marry anywhere in the United States and every state and the federal government must recognize the marriages of same-sex couples.

There is information about getting married in Massachusetts, Vermont, Connecticut, New Hampshire, Maine, Rhode Island and Canada (same-sex couples can marry in Canada and there is no residency requirement) on GLAD's website at: www.glad.org/rights/publications/c/marriage/.

For information about getting married outside New England, contact Lambda Legal (www.lambdalegal.org).

Some people may be able to wed outside the United States (see https://en.wikipedia.org/wiki/Same-sex_marriage for a list of countries), but some of these locales have residency and other requirements that make it difficult for non-citizens to marry.

How will the marriage of a same-sex couple be respected?

Maine will generally respect the legal marriages of same-sex couples regardless of where the marriage was consecrated, and a Maine marriage will be respected as a marriage anywhere that same-sex couples can marry.

The 1996 federal law, the Defense of Marriage Act (DOMA), which prevented same-sex married couples from accessing the 1,138 federal laws that pertain to marriage, was finally ruled unconstitutional by the United States Supreme Court on June 26, 2013. This case, *Windsor v. United States*, was filed by the American Civil Liberties Union. GLAD filed the first challenge to DOMA in 2009, *Gill v. OPM*, and the legal framework developed in that case was used in subsequent cases, including the *Windsor* case. GLAD was also responsible for coordinating the amici briefs in that case.

⁵¹ GLAD Attorney, Mary Bonauto, argued this case. For more information go to: www.glad.org/work/cases/deboer-v.-snyder.

This means that same-sex married couples living in places that recognize their marriages will have their marriages respected by the federal government for all purposes, e.g. taxes, Social Security (including SSDI and SSI), immigration, bankruptcy, FMLA, federal student financial aid, Medicaid, Medicare, veteran's benefits, TANF and many more.

For same-sex married couples who live in non-recognition states, even though their state will not recognize their marriage, the federal government will for some purposes (e.g. taxes and immigration) and not for others. GLAD and other legal organizations are advocating that the federal government respect the marriages of same-sex couples for all federal programs wherever they reside, but it will take some time to achieve this goal. For more detailed information about various federal programs and whether the program will recognize the marriages of same-sex couples who live in non-recognition states, go to: www.glad.org/doma.

Also, while DOMA was in effect, if an employer granted a spousal benefit to an employee (e.g. allowing the spouse of the employee to be on the company health plan), the employee was taxed on that benefit. Now that DOMA is gone, that is no longer the case. And since the IRS respects the marriages of same-sex couples wherever they live, this applies to all married same-sex couples regardless of where they reside.

Unfortunately, one issue that was not resolved by taking down DOMA was whether an employer can be legally required to provide health insurance to a same-sex spouse. If the company has a self-insured health plan, that plan is controlled by a federal agency called ERISA, and because the federal anti-discrimination employment law, Title VII, does not explicitly prohibit discrimination based on "sexual orientation," some employers are claiming that they are not legally required to provide this benefit to same-sex spouses.

Also, if the health plan is insured and the owner of the plan is situated in a state that doesn't recognize the marriages of same-sex couples, some employers are choosing to discriminate against same-sex spouses.

However, for both self-insured and insured health plans, nothing prevents the employer from offering coverage to same-sex spouses. If your employer is discriminating against same-sex spouses, contact GLAD Answers.

For more detailed information about the process for getting married in Maine, whether you should enter a Maine marriage, and what it all means, read GLAD’s publication, *Marriage In Maine*, at: <http://www.glad.org/uploads/docs/publications/me-marriage.pdf>.

Can same-sex couples obtain any other legal recognition of their relationships in Maine?

Yes, in 2004, the Maine legislature approved and former Governor John Baldacci signed a domestic partnership law titled “An Act to Promote the Financial Security of Maine’s Families and Children.”⁵² This law creates a domestic partnership registry in Maine and affords certain rights to registered domestic partners in the event of a partner’s death or incapacity. It defines “domestic partners” as “2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other’s welfare.”⁵³ The specific requirements for registration are set out below.

What protections do I obtain by registering as a domestic partner under the state law?

a) **Inheritance Rights:** In the absence of a will, registered domestic partners in Maine are given the same inheritance rights as a legally recognized spouse (although unequal tax burdens remain).

b) **Legal Priority:** The law provides that a domestic partner:

- will be treated like a spouse when seeking to be a guardian of his or her partner in the event of that partner’s incapacity;

⁵² LD 1579, 2004 Leg., 121st Leg. (Me. 2004).

⁵³ 22 Me. Rev. Stat. sec. 2710(2) (establishing Registry); 18-A M.R.S.A §1-201 (defining “domestic partner” for purposes of Registry).

- will have the same priority as legal spouses in seeking a protective order concerning the partner's estate or the welfare of the partner;
- is entitled to notice of hearings concerning the appointment of guardians in the event of the partner's incapacity; and
- is entitled to notice of the issuance of protective orders in the event of death.

c) **Survivorship Rights:** In the event of one partner's death, the law makes the surviving domestic partner the first of the next of kin when determining who has the right to make funeral and burial arrangements. (As with surviving spouses, if a surviving domestic partner is estranged from the partner at the time of death, the domestic partner may not have custody and control of the deceased's remains.)

Note: It is important to remember that in these matters, a written will and advance directive will supersede this law. Thus, if your partner has a written will or directive giving someone else any of these rights, that person will be given priority over you in asserting those rights, regardless of your registration as Domestic Partners.

Who can register?

Couples may become registered domestic partners in the State of Maine if they are "one of two unmarried adults who are domiciled under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare,"⁵⁴ and they meet the following specific requirements:

- each partner is a mentally competent adult and not closely related (e.g. close relatives);
- the domestic partners have been living together in the state for at least 12 months before the filing;
- neither domestic partner is married or in a registered domestic partnership with another person; AND

⁵⁴ 18-A Me. Rev. Stat. sec. 1-201 (10-A).

- each domestic partner is the sole domestic partner of the other and expects to remain so.⁵⁵

How do you register in a registered domestic partnership?

All Domestic Partner registrations are filed with the Office of Health Data and Program Management. To become registered domestic partners, the partners must jointly file a notarized form and pay the required filing fee of \$35. Forms can be accessed at municipal offices, probate courts, Department of Health and Human Services offices and on the Office of Vital Records webpage: <http://www.state.me.us/dhs/bohodr/domstcprtnrspge.htm>.

Once completed and notarized, the form needs to be returned to the Office of Vital Records in Augusta with the required filing fee, either by mail or in person. Once received, the registry will file the declaration and return two certified copies of it to the domestic partners at the address provided as their common residence.⁵⁶

How do you end a registered domestic partnership?

A registered domestic partnership is ended by:

- the marriage of either registered partner;
- the filing of a notice of termination indicating each partner's consent to the termination, which must be signed by both registered domestic partners before a notary; OR
- the filing of a notice under oath from either domestic partner that the other registered partner was directly given a notice of intent to terminate the partnership. If giving notice by hand is not feasible, then a different way of giving notice may be accomplished as provided by the Maine Rules of Civil Procedure for commencement of a civil action. Termination under this method is not effective until 60 days after the notice has been given.⁵⁷ (Note: Failure to give notice could

⁵⁵ 22 Me. Rev. Stat. sec. 2710(2).

⁵⁶ 22 Me. Rev. Stat. sec. 2710(3).

⁵⁷ 22 Me. Rev. Stat. sec. 3710(4).

result in having to pay any loss suffered by the opposing partner due to lack of notice.)

What exists beyond the Statewide registry?

- State law requires all insurers providing health coverage in the State of Maine to offer their policyholders the option of additional benefits for their “domestic partner.”⁵⁸
- Maine’s Family Medical Leave Law was amended in June 2007⁵⁹ to include the employee’s “domestic partner” and child of the employee’s “domestic partner.” The law allows up to 10 weeks unpaid leave to care for a sick partner or the child of either the employee or partner. Also, family medical leave provides leave if an employee is a “domestic partner” of a member of the armed services.⁶⁰
- In 2007, the Maine legislature passed an “Act Regarding Fairness for Families Regarding Worker’s Compensation Coverage” which added “domestic partners” of employers to the list of individuals who may waive worker’s compensation coverage in certain circumstances.⁶¹
- Also in 2007, the law concerning absentee ballot procedures was amended to include “domestic partners” under the definition of “immediate family” for the purpose of requesting an absentee ballot.⁶²

To access the above benefits, registration in the statewide domestic partnership registry is not required and the definition of “domestic partner” for these benefits is slightly different. Generally, to access these benefits, you may be required to sign an affidavit before a notary stating that:

- a) each partner is a mentally competent adult (not required for requesting an absentee ballot);
- b) the domestic partners have been legally living together for at least 12 months;

⁵⁸ 24 Me. Rev. Stat. sec. 2319-A; 24-A Me. Rev. Stat. secs 2832-A & 4249 (2).

⁵⁹ 26 Me. Rev. Stat. sec. 843 (4).

⁶⁰ “An Act to Assist Maine Military Families” LD 256, 2007 Leg., 123rd Leg. (Me. 2007). *See also*, 26 Me. Rev. Stat. sec 843 (4).

⁶¹ 39-A Me. Rev. Stat. sec. 102 (sub-§11) (A) & (B-1).

⁶² 31-A Me. Rev. Stat. sec. 1 (20).

- c) neither domestic partner is legally married to or legally separated from another person;
 - d) each domestic partner is the sole domestic partner of the other and expects to remain so;
 - e) the domestic partners are jointly responsible for each other's common welfare as evidenced by joint living arrangements, joint financial arrangements or joint ownership of real or personal property.⁶³
- Same-sex couples can also execute a variety of estate planning documents and designate a non-legally related adult to have certain rights and responsibilities (see “Legal Protections for Same-Sex Couples” below).

Does the State of Maine provide domestic partner benefits to state employees, such as health insurance for the employees' partners?

Yes. State employees can receive health insurance for their domestic partners.

- The value of the state paid portion of the domestic partner health insurance coverage is income and taxable wages to the employee participant at both the federal and state level, unless the partner is also a tax dependent.
- Domestic partners of employees of the University of Maine System can receive health insurance, tuition waiver, access to university facilities, and all spousal benefits not restricted by federal law.

Can cities and towns in Maine provide domestic partner health insurance benefits to their own employees?

Yes. Many lawyers also believe this result is required by the non-discrimination law if the city or town provides benefits to heterosexual couples.

⁶³ 26 Me. Rev. Stat. sec. 843 (7); 21-A Me. Rev. Stat. sec. 1 (13-A); 24 Me. Rev. Stat. sec. 2319-A (1)

It is also possible that under Maine's mini-COBRA law for companies with fewer than 20 employees (domestic partnership is not covered by the Federal COBRA law), employees with domestic partners will have the same right as heterosexual couples to maintain health insurance coverage after employment ends.⁶⁴

Some employers provided these benefits before the non-discrimination law was amended to include sexual orientation. For example, the City of Portland extends domestic partner benefits, including health insurance, to qualified domestic partners of City and School Department employees. In order to qualify for such benefits, an employee must have his or her partnership registered by the City and must provide the City or School Department with two or more forms of proof exhibiting that they are jointly responsible for each other's common welfare and share financial obligations. Examples of such proof include the joint mortgage or ownership of property; the designation as a beneficiary in the employee's will, retirement contract or life insurance; a notarized partnership agreement or relationship contract; and any two of the following: a joint checking account, a joint credit account, a joint lease, or the joint ownership of a motor vehicle.⁶⁵

Note that municipal domestic partner plans have withstood a court challenge. In 2004, GLAD, together with the Portland City Attorney and cooperating counsel, successfully represented the City of Portland in a challenge to the domestic partnership registry system and benefits offered there. The claim was that the domestic partnership law was superceded by the state anti-gay, anti-marriage law. See *Pulsifer v. City of Portland*, <http://www.glad.org/work/cases/pulsifer-v-portland/> and <http://www.glad.org/current/pr-detail/maine-trial-court-upholds-portlands-domestic-partnership-ordinance-despite/>.

In addition, the cities of Bar Harbor and Camden and the County of Cumberland provide domestic partner health insurance benefits to their employees. Portland also maintains a domestic partner registry which allows

⁶⁴ 24-A Me. Rev. Stat. secs. 2849-B & C.

⁶⁵ Portland, Me. Code, sec. 13.6-21 (2001). Available at: http://www.portlandmaine.gov/Chapter013_6.pdf.

people to register their relationships and receive family memberships and rights in city-run facilities.

What kinds of domestic partner benefits may private employers provide?

Private employers can provide to domestic partners many benefits, such as health insurance, family medical or bereavement leave, equal pension benefits, relocation expenses, or access to company facilities. While it's hard to identify all employers providing benefits in Maine, they include L.L. Bean, Care Development of Maine, Fairchild Semiconductor, Idexx Laboratories, Inc., Energy East Corp., The Gale Group, Hannaford, Maine Coast Memorial Hospital, Maine Medical Center, TD Banknorth Group, the University of Maine System, the University of New England, and Bowdoin, Bates, and Colby Colleges.⁶⁶

Even when employers provide these benefits, though, federal and state laws require different tax treatment of the benefits for domestic partners as compared to spouses. For example, an employee must pay federal and state income tax on the value of his or her partner's health insurance benefits (unless the partner is a tax dependent), but a spouse does not.⁶⁷ Partners do not qualify as spouses under federally-controlled Flexible Spending Accounts unless the partner is also a tax dependent.

As for pensions, under the Federal Pension Protection Act of 2006, employers may amend their 401(k) plans so that non-spouse beneficiaries may retain the asset as a retirement asset. If a plan is so amended, beneficiaries may "roll over" the 401(k) into an IRA depending upon the employee's death whereas previous law required the beneficiary to take and pay income taxes on the 401(k) as a lump sum.⁶⁸

However, other discriminatory aspects of federal law remain regarding pensions. A domestic partner has no right to sign off if his or her partner decides to name someone else as the beneficiary of a pension, although a

⁶⁶ See The Human Rights Campaign's Employer Database, available at http://www.hrc.org/issues/workplace/equal_opportunity/search_employers.asp.

⁶⁷ See e.g., Internal Revenue Code, Private Letter Ruling 9603011 (Jan. 19, 1996).

⁶⁸ See Human Rights Campaign, Pension Plans, available at <http://www.hrc.org/issues/4821.htm>.

spouse would have that right. In addition, a domestic partner has no right comparable to that of a spouse to sign off on his or her partner's designation of another person for survivor benefits.

■ Legal Protections for Same-Sex Couples

What steps can a couple take to safeguard their legal relationship in Maine?

1. Relationship Agreement or Contract: Agreements regarding property and finances *should* be respected and honored according to ordinary rules of contract law. The Maine Law Court has not yet specifically ruled on the subject, but that result comports with Maine contract law and the law of other states that have found such agreements to be enforceable.⁶⁹

2. Durable Power of Attorney:⁷⁰ Any competent person may appoint another person as his or her “attorney-in-fact” for financial and/or other matters in the event he or she becomes incapacitated or disabled.⁷¹ If no such appointment is made, then a “family” member will be empowered to make decisions for the disabled or incapacitated individual.

A person may also nominate his or her guardian or conservator in the same document. This is a longer-term appointment that takes priority over the attorney-in-fact. This choice can only be rejected by a court for “good cause or disqualification.”⁷² The mere fact that a family member is not named as the guardian or conservator does not constitute good cause.

3. Durable Power of Attorney for Health Care:⁷³ Medical care providers often look to next-of-kin to make health care decisions for an incapacitated individual. If an unmarried person wants someone other than his or her legal family to make these decisions, then a durable power of attorney for health care is a critical source of protection. In Maine, a person can appoint a health

⁶⁹ See *Wilcox v. Trautz*, 427 Mass. 326 (1998); *Doe v. Burkland*, 808 A.2d 1090 (R.I. 2002).

⁷⁰ See generally, 18-A Me. Rev. Stat. sec. 5, part 9..

⁷¹ 18-A Me. Rev. Stat. secs. 5-904, 5-905, 5-909(c).

⁷² 18-A Me. Rev. Stat. sec. 5-908(a)

⁷³ See generally, 18-A Me. Rev. Stat. sec. 5, part 8.

care agent to make decisions for him or her immediately, or upon incompetence.⁷⁴ It must be signed by two witnesses (not including the person appointed as attorney-in-fact). It can only be revoked while he or she is still competent. Otherwise it must be revoked in court.⁷⁵

While a written Durable Power of Attorney provides the most certainty that a person will be cared for by the person he or she wants to make those decisions, Maine law also has a procedure by which “an adult who shares an emotional, physical and financial relationship with the patient similar to that of a spouse”⁷⁶ can make health care decisions for an incapacitated person. This provision might be cumbersome to enforce, but provides a way for a partner to be involved in his or her incapacitated partner’s health care decisions absent documentation.

Within this Durable Power of Attorney for Health Care, or in a separate document called an “Advance Directive,” a person may address end of life issues like artificial nutrition and other life-sustaining treatments.⁷⁷ The Attorney General’s Office has a model advance directive posted on their website, <http://www.maine.gov/ag/index.php?r=healthissues&s=endoflife&t>.

While a written Advance Directive provides the most certainty that a person’s wishes will be followed, Maine law also allows a procedure for a person to make end of life decisions for another if they can prove they are family members.⁷⁸ Spouses are given first priority, followed by “an adult who shares an emotional, physical and financial relationship with the patient similar to that of a spouse.”⁷⁹ This provision might be cumbersome to enforce, but provides a way for a partner to be involved in his or her partner’s end of life decision.

4. Will: Without a will and without having registered as a domestic partner, a deceased unmarried person’s property passes to: (1) his or her children; (2)

⁷⁴ 18-A Me. Rev. Stat. sec. 5-802(b),(c).

⁷⁵ 18-A Me. Rev. Stat. sec. 5-803.

⁷⁶ 18-A Me. Rev. Stat. sec. 5-805 (b)(1-A).

⁷⁷ 18-A Me. Rev. Stat. sec. 5-802.

⁷⁸ 18-A Me. Rev. Stat. sec. 5-805.

⁷⁹ 18-A Me. Rev. Stat. sec. 5-805 (b)(1-A).

his or her family; (3) if next-of-kin cannot be located, to the state. If the person wishes to provide for others, such as his or her partner, a will is essential. Even if a person has few possessions, he or she can name in the will who will administer his or her estate. If a person has children, he or she can nominate a guardian of the child which will become effective upon death. Such nominations are highly regarded by courts although they are not binding on the court.

5. Funeral Planning Documents: Upon death, a person's next-of-kin is given control of the deceased's body. This means that a person's own partner has no automatic right to remove the body or make plans for a final resting place.⁸⁰

If a person has either (1) registered as a domestic partner under the state law; and/or (2) designated in writing that another person is to have custody and control of their remains (such as their partner or a friend), then that person will have control over the body as well as funeral arrangements and the selection of a final resting place.⁸¹ It is infinitely preferable to prepare funeral planning documents in advance than to leave instructions as part of a will since a will may not be found for days after death.

Does a person need an attorney to get these documents?

GLAD recommends working with an attorney on these documents. Although some forms are available, the form may not be suited to your individual needs and wishes and may not conform to the specific requirements of Maine law, which would render them invalid and unenforceable. Moreover, attorneys may be able to help effectuate your goals, for example, by drafting a will in a way which is more likely to deter a will contest by unhappy family members. In addition, many people find attorney assistance critical because same-sex couples are afforded different tax treatment from married heterosexual couples. Failure to consider tax consequences can lead to enormous difficulties upon death or separation.

⁸⁰ 22 Me. Rev. Stat. sec. 2843-A.

⁸¹ 22 Me. Rev. Stat. sec. 2843-A (2)(A).

If a couple separates, what is the legal status of a Relationship/Partnership Agreement/Contract?

Upon separation, the terms of a Relationship or Partnership Agreement/Contract will come into play if the couple has one.

Absent an agreement, generally applicable rules about jointly owned property and accounts come into play. Some couples can get involved in costly and protracted litigation about property and financial matters but without the predictable rules of the divorce system to help them sort through it. It is notable that the Law Court has respectfully handled the dissolution of a same-sex domestic partnership under equitable principles and the law of joint tenancy.⁸²

PLEASE NOTE: If a person has changed his or her mind about who should be his or her attorney-in-fact, or health care agent, or beneficiary or executor under a will, or funeral planner, then those documents should be revoked -- with notice to all persons who were given copies of those documents, and new documents should be prepared which reflect the person's present wishes.

■ Adoption

Can a single gay individual adopt a child in Maine?

Yes.⁸³

Can same-sex partners together adopt a child in Maine?

Yes, as the result of an appeal that GLAD made to the Maine Law Court concerning the refusal of a Maine Probate Court to assume jurisdiction of the joint adoption petition by a lesbian couple.⁸⁴ In August 2007, the Maine Law

⁸² *Ackerman v. Hojnowski*, 2002 Me. 147, 804 A. 2d 412 (2002).

⁸³ 18-A Me. Rev. Stat. sec. 9-301.

⁸⁴ *In re Adoption of M.A.*, --- A.2d ----, 2007 WL 2446019 (Me. 2007).

Court ruled that the Probate Court did have jurisdiction and that state law allows for unmarried couples to adopt. This ruling makes it clear that joint or second parent adoptions by unmarried couples are permitted under Maine law. For more specific information on the process, see GLAD's publication, *Joint Adoption Practice and Procedure in Light of Adoption of M.A.: Second Parent Adoption* at <http://glad.org/uploads/docs/publications/me-joint-adoption-practice-and-procedure.pdf>.

\What is the advantage of doing a second parent or joint adoption?

An adoption is a court judgment that the child has two legal parents for all purposes. In addition to providing legal security, an adoption decree mirrors the actual family situation and thereby provides emotional comfort and security as well.

Without an adoption, the non-legal parent needs special permission to seek medical care for the child, or to attend school meetings. With an adoption, the adopting parent is a legal parent entitled to make decisions for the child in day-to-day and emergency matters without special authorization.

With an adoption, if one parent dies, the other parent will automatically assume custody of the child. In addition, the child would have the automatic right to inherit from the deceased parent, even if there is no will. The child could also collect social security survivor benefits based on the deceased parent's work record.

Finally, if the couple separates, then the adoption means that both parents have the right to seek parental rights and responsibilities, and any disputes will be decided based on what is in the best interests of the child.

Short of joint adoption or second parent adoption, how can a family protect the interests of the child vis-à-vis his or her second parent?

There are a number of steps that can be taken, although none offer the security of a second parent adoption or marriage. Among these are:

1. Co-parenting agreement: An agreement setting out the parents' expectations about each other's roles, and their plans in the event of separation, disability or death. While these agreements may not be enforceable as a contract, they are important indicators of what the couple's intent was when they formed their family and what they believed was in the best interests of the child, and thus may be influential on a court's assessment of who the parents are and their respective parental rights and responsibilities.

2. Wills: The legal parent may nominate a guardian of the child upon the parent's death. These "testamentary appointments" are given strong and respectful consideration by courts. Of course, if the child has another legal parent living, then that person would have priority over the nominated guardian.⁸⁵

3. Co-guardianship: This process allows a biological or adoptive parent to name his or her partner as a co-guardian so that the partner may secure medical attention and health insurance for the child and in most other ways act with the legal authority of a parent. The Probate Court may appoint the legal parent and his or her partner as co-guardians if the legal parent consents to the appointment and the court finds the appointment to be in the best interests of the child.⁸⁶ This status is not permanent, and may be terminated by the court upon a legal petition if the guardianship is no longer in the best interests of the child. Additionally, co-guardianship status ceases to be recognized once the child reaches the age of eighteen.⁸⁷

4. Power of Attorney Delegating Parent's Rights: This document is signed by the parent and delegates to another adult all powers regarding that parent's child, except the power to consent to the child's adoption. It must be notarized, and it must be renewed every six months.

⁸⁵ See 18-A Me. Rev. Stat. sec. 5-301 et seq.

⁸⁶ See 18-A Me. Rev. Stat. sec. 5-204(b).. GLAD's case, *In re Guardianship of I.H.*, 834 A.2d 922 (Me. 2003), clarified the law in this area. See also http://www.glad.org/News_Room/press62-11-4-03.shtml.

⁸⁷ 18-A Me. Rev. Stat. sec. 5-212(d). In addition, a court can order a "de facto" guardianship even if the parents do not consent where the child has lived with another person and the parents have consistently not participated in the child's life. 18-A Me. Rev. Stat. sec. 5-101.

If same-sex parents raise a child together, but only one is the “legal” parent (because of birth or adoption), then what rights does the other parent have vis-à-vis the child?

This area of law is rapidly evolving in Maine. If the non-birth or non-adoptive parent is a “de facto parent,” then he or she is entitled to be considered for an award of full parental rights and responsibilities, which may include custody or visitation.⁸⁸ Although the Maine Law Court has not clearly defined who qualifies as a de facto parent, that Court has stated:

- a) the de facto parent must have developed a parent-child relationship with the child;
- b) the legal parent must have consented to and encouraged the development of this relationship;
- c) the de facto parent must have performed a share of the care-taking functions at least a great as the legal parent.⁸⁹

The Law Court added that a de facto parent “must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child’s life.”⁹⁰ This area of law needs further clarification. For example, even though the Law Court has not required this, many judges and practitioners have imported a two year term of the child and de facto parent living together. For additional legal information about other states, see GLAD’s *Selected Bibliography of Recent Co-Parent Cases* at <http://glad.org/uploads/docs/publications/co-parent-bibliography.pdf>.

Regardless of the status of a person’s legal rights, it is critical to remember that children form strong attachments to their parental caregivers regardless of legal labels. Separating a child from a person who has acted as his or her parent can be a devastating loss for a child. Moreover, court proceedings to establish de facto parenthood will be painful and costly, so anything people can do outside of court to make decisions together about a child’s interests is

⁸⁸ See *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004).

⁸⁹ See *Stitham v. Henderson*, 768 A.2d 598, 605-06 (Me. 2001) (Saufley, J., concurring) (quoting *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999)).

⁹⁰ See *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004).

strongly encouraged. See GLAD's publication: *Protecting Families: Standards for LGBT Families*, at <http://www.glad.org/uploads/docs/publications/protecting-families-standards-for-lgbt-families.pdf>.

■ Custody and Visitation

What standards should same-sex couples with children who are breaking up maintain?

Same-sex couples with children who are breaking up should:

1. Support the rights of LGBT parents;
2. Honor existing relationships regardless of legal labels;
3. Honor the children's existing parental relationships after the break-up;
4. Maintain continuity for the children;
5. Seek a voluntary resolution;
6. Remember that breaking up is hard to do;
7. Investigate allegations of abuse;
8. The absence of agreements or legal relationships should not determine outcome;
9. Treat litigation as a last resort; and
10. Refuse to resort to homophobic/transphobic laws and sentiments.

For more detailed information about these standard see the publication *Protecting Families: Standards for LGBT Families* at: <http://www.glad.org/uploads/docs/publications/protecting-families-standards-for-lgbt-families.pdf>.

I am in the middle of a divorce and I am now involved with a same-sex partner. Can my "ex" use this against me to deny me parental rights and responsibilities for my children?

The Maine Law Court has not yet addressed a case like this, but the majority rule in the country is “No.” Most states, and two Maine Superior Court cases, use the “nexus test” under which a parent’s sexual orientation is not relevant unless there is actual evidence of harm to the child. Speculation of harm or teasing is not enough.

In *Whitehead v. Black*,⁹¹ a case decided by the Superior Court, an ex-husband from Georgia petitioned for a change of custody when he learned that his ex-wife, who had since moved to Maine, was a lesbian. The court ruled that the children had always lived with the mother, that she was otherwise fit, and she “was aware that her homosexual lifestyle could have an impact on her children and was intelligently seeking to minimize, if not totally eliminate, that impact.”⁹² That reasoning from a court is good for its time.

Finally, many reputable attorneys have refused even to make the argument that a parent’s sexual orientation – standing alone – should be a factor in child welfare decisions. For more legal information, see GLAD’s *Bibliography of Custody and Visitation Cases Involving Divorce From A Different-Sex Spouse* at <http://glad.org/uploads/docs/publications/custody-bibliography.pdf>.

What are the factors for making parental rights and responsibilities determinations generally?

Courts consider the parents as equals, whether married or unmarried, and make orders based on the best interests of the children.

The permissible factors for consideration are set out by law. The factors focus on child welfare and none automatically advantages a non-gay parent over a gay parent.

The law provides: “In making decisions regarding the child’s residence and parent-child contact, the court shall consider as primary the safety and well-being of the child. In applying this standard, the court shall consider the following factors:

⁹¹ 2 BNA Family Law Rptr 2593 (Me. Super. 1976).

⁹² Id. at 2594.

- a) The age of the child;
- b) The relationship of the child with the child's parents and any other person who may significantly affect the child's welfare;
- c) The preference of the child, if old enough to express a meaningful preference;
- d) The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;
- e) The stability of any proposed living arrangements for the child;
- f) The motivation of the parties involved and their capacities to give the child love, affection and guidance;
- g) The child's adjustment to the child's present home, school and community;
- h) The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;
- i) The capacity of each parent to cooperate or to learn to cooperate in childcare;
- j) Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;
- k) The effect on the child if one parent has sole authority over the child's upbringing;
- l) The existence of domestic abuse between the parents, in the past or currently, and how that abuse affects: 1. The child emotionally; and 2. The safety of the child;
- m) The existence of any history of child abuse by a parent;
- n) All other factors having a reasonable bearing on the physical and psychological well-being of the child; and
- o) A parent's willful misuse of the protection from abuse process...⁹³

Are there different kinds of parental rights and responsibilities?

Yes, and the courts may allocate some particular rights to one parent and others to another parent.⁹⁴ The rights that may be divided include primary

⁹³ 19-A Me. Rev. Stat. sec. 1653(3).

⁹⁴ 19-A Me. Rev. Stat. sec. 1501.

physical residence, visitation, support, education, medical and dental care, religious upbringing or any other matter. Sometimes a parent will be solely responsible for the child in all aspects; this is called “sole parental rights and responsibilities.” Other times, the parents will share all of these issues; this is called “shared parental rights and responsibilities.”

Is it considered harm to the child if he or she is teased about having a gay or lesbian parent?

It shouldn't be. One of the additional responsibilities of being a gay or lesbian parent is helping one's children deal with this possibility or reality. Of course, children can be teased about everything from the size of their ears to their parents' accent to their lack of fashion sense, so all parents need to help their children develop coping mechanisms and strategies when peer harassment arises.

As a legal matter, particularly instructive is a U.S. Supreme Court case, *Palmore v. Sidoti*,⁹⁵ in which the U.S. Supreme Court reversed a Florida court's change of custody from the mother to the father. The reason custody had been switched was because the white mother was involved with a black man whom she later married. The Supreme Court acknowledged the reality of bias and prejudice, and that the child might be teased, but refused to cater to those prejudices or give them the force of law by changing the custody arrangement that previously existed. In a statement of constitutional principle applicable to all, the Court unanimously stated, “The Constitution cannot control prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”⁹⁶

Does it matter if my “ex” knew I was gay or lesbian or might be before we separated?

It may, but does not necessarily make a difference with respect to future modification of court orders for custody. People can seek to modify court

⁹⁵ 466 U.S. 429 (1984).

⁹⁶ *Palmore*, 466 U.S. at 432.

orders for custody when there has been a “substantial change in circumstances.” If a spouse did not know of his or her spouse’s sexual orientation at the time of the initial court proceedings, but learns it later, he or she may argue that this is a substantial change of circumstances and that the custody issues should be reviewed. There are many cases from around the country rejecting this as a basis for seeking modification. See GLAD’s *Bibliography of Custody and Visitation Cases Involving Divorce From A Different-Sex Spouse* at <http://glad.org/uploads/docs/publications/custody-bibliography.pdf>. Of course, if one spouse or former heterosexual partner knew of the other’s same-sex sexual orientation at the time of the court proceedings establishing custody, a modification petition on those grounds would be pointless.⁹⁷

Can a court keep my children from visiting when my partner is present?

This issue has not been decided by the Maine Law Court, but a Superior Court case, *Stone v. Stone*,⁹⁸ applied the right test. A mother went back to court seeking a restriction on her ex-husband’s “overnight visitors,” as he was now partnered with a man. The Superior Court struck the restriction imposed by a lower court because the father was discreet and there was no evidence of harm to the children.

Moreover, visitation restrictions are inherently suspect. In *Lawrence v. Texas*,⁹⁹ the U.S. Supreme Court did more than decriminalize sexual acts. It acknowledged the right of gay people to form and sustain loving personal relationships and lead their private lives free of government restrictions and legal condemnation. Since gay people may make “personal decisions relating to ... family relationships [and] child rearing,” custody and visitation restrictions must be handled accordingly. Mere differences in moral values between a court and a parent, presumptions about a gay parent’s conduct, or “social condemnation” of their relationship should no longer be permissible factors, if they ever were. While courts have the power to do this, visitation should not be restricted unless there is actual evidence that the partner is

⁹⁷ See generally, 19-A Me. Rev. Stat. sec. 1653 (10).

⁹⁸ *Stone v. Stone*, 1980 Me. Super. LEXIS 30 (1980).

⁹⁹ 539 U.S. 558, 574 (2003).

causing harm to the child. The touchstone for these decisions is the best interests of the child.

■ Domestic Violence

What is domestic violence?

Domestic violence may take many forms. Generally, domestic violence is a pattern of coercive behavior in which one person attempts to control another through threats or actual use of tactics, which may include any or all of the following: physical, sexual, verbal and psychological abuse.

Under the law, “abuse” means that any of the following have occurred between people who are “family, household members or dating partners”:

- Attempting to cause or causing bodily injury or offensive physical contact;
- Attempting to place or placing another in fear of bodily injury through any course of conduct, including, but not limited to, threatening, harassing or tormenting behavior;
- Compelling, by force, threat of force, or intimidation, a person to engage in conduct, such as causing another to engage involuntarily in sexual relations by force, or to abstain from conduct in which they have a right to engage;
- Restricting another person’s movement, by knowingly removing them from home, work or school, or moving them a substantial distance from where they were found, or confining the person;
- Placing a person in reasonable fear that a crime will be committed by threatening them or another person that they will be committing a crime of violence against the person; or
- Repeatedly and without reasonable cause following a person or being in the vicinity of their work, school or home.¹⁰⁰

¹⁰⁰ 19-A Me. Rev. Stat. sec. 4002(1).

Do the domestic violence laws apply to people in same-sex relationships?

Generally yes. The definition of “family, household members and dating partners” includes married couples, domestic partners or former domestic partners, people who are or have “liv[ed] together as spouses,” people who are sexual partners or are living together (or did so previously), as well as individuals currently or formerly dating each other, whether or not the individuals are or were sexual partners.¹⁰¹ The law applies equally to all people, but the application depends upon the nature of the relationship of the people involved.

How do I get a court order protecting me from an abusive partner?

To get protection, go to the District Court in the community where you live or where the abuser lives. The court clerk will have a packet of information for you to complete. There is no fee, and there is a means of keeping your address confidential from the public. You will have to allege abuse as defined above, and indicate where you think the abuser/defendant can be found so that he or she can be served with (given a copy of) the court papers. If the courts are closed, contact your local police who will locate a judge to help. On this basis, you may receive a temporary order of protection good for up to 21 days. In order for those orders to be enforceable, the police must serve a copy on the defendant/abuser, and a defendant cannot be arrested for violating orders if he or she has not been given a copy of them. The orders can restrain the defendant from coming near you or your children, keep the defendant away from your home, and/or place of employment or contacting you at all, and determine child custody issues on a short-term basis.

¹⁰¹ 19-A Me. Rev. Stat. sec 4002

Violation of a protection order is a criminal offense.¹⁰²

The temporary orders will indicate the date set for the court hearing at which you can try to extend your court orders. At this point, the defendant will tell his or her side of the story as well, and you can be called upon to answer questions. At this stage, both parties often have attorneys. If the Court determines the defendant has made a credible threat to the physical safety of you or a child in your household, the relief may be extended for up to two years.

If for some reason you decide not to go through with the order, it is important to show up in court on your assigned date and ask that the case be dismissed.

In addition, Maine's harassment law described below may be useful for people who are experiencing harassment from a partner of the same sex. An order preventing harassment can be taken out against anyone.¹⁰³

Where can I go to get help?

In Maine, local domestic violence projects across the state provide direct services to victims of domestic violence. The Maine Coalition to End Domestic Violence (MCEDV) is a coalition of the nine domestic violence projects in the state. There is a statewide domestic violence helpline at 1-866-834-HELP (4357). This number will direct victims to the support centers in their county. These support centers also provide court advocacy. MCEDV maintains information for same-sex partners on their website at <http://www.mcedv.org>.

In addition to the local police, there are several other hotlines and on-line resources:

¹⁰² See generally 19-A Me. Rev. Stat. sec. 4001 et seq.

¹⁰³ 5 Me. Rev. Stat. § 4651. See also http://www.courts.state.me.us/courtservices/guide_protect_abuse.pdf.

- Sexual Assault Support Hotline, (800) 871-7741 (statewide, 24-hours), a complete listing of local member sexual assault centers can be found at <http://www.mecasa.org/>;
- Office of the Maine Attorney General, 207-626-8800, <http://www.maine.gov/ag/index.php?r=crimeandvictims&s=domesticviolence>.

Does domestic violence play a role in parental rights and responsibilities decisions?

Yes. It is a factor the court must consider in allocating parental rights and responsibilities, and courts may provide conditions upon an abuser seeing his or her children.¹⁰⁴

¹⁰⁴ See generally 19-A Me. Rev. Stat. sec. 1653 (6).

Hate Crimes / Sex Laws / Police

■ Hate Crimes & Violence

Does Maine have a hate crimes law?

Maine has a hate crimes law that permits consideration of the nature of the crime during the sentencing phase.¹⁰⁵ If the defendant selected a person or his or her property for criminal activity because of, among other things, sexual orientation, then that fact can be taken into account. The law, however, does not include gender identity or expression among the factors to be taken into consideration upon sentencing.

Where can I call if I think I've been a victim of a hate crime?

In addition to the local police, you may contact the Attorney General's Civil Rights Unit at (207) 626-8800, or online at:

http://www.maine.gov/ag/civil_rights/index.shtml.

What additional protections against hate crimes and harassment exist in Maine law?

1. General Criminal Laws: Hate crimes are prosecuted under existing criminal laws, such as assault and battery, assault and battery with a dangerous weapon, murder, and so on. These generic laws do nothing to address the fact that an assault was hate-motivated, but they provide for criminal accountability, and the selection of a person (or his or her property) because of sexual orientation can then be considered in the sentencing phase.

2. "Civil Rights Law": On the civil side, Maine law provides for civil remedies when a person violates another person's state or federal rights in certain circumstances.¹⁰⁶ This provision, known as the "Maine Civil Rights

¹⁰⁵ 17-A Me. Rev. Stat. sec. 1151 (8)(B).

¹⁰⁶ 5 Me. Rev. Stat. sec. 4682.

Act” specifically states that a “person has the right to engage in lawful activities” without being subject to the infliction or threat of physical force or violence or the damage, destruction or trespass of property, motivated by reason of sexual orientation.¹⁰⁷ Contact local law enforcement or the Attorney General’s office if you have been a victim under this law as the State is the primary enforcer of this statute.

More specifically, the law allows a person to bring a private action against someone who

1. uses or threatens physical force or violence,
2. damages, destroys or trespasses on property,
3. threatens to damage, destroy or trespass on property

in a manner that intentionally interferes or attempts to interfere with another person’s exercise or enjoyment of their rights under state or federal law.¹⁰⁸

If those elements are met, then a person may bring an action for legal and equitable relief. Aside from the possibility of recovering money damages, equitable relief means that the person suing can obtain an order forbidding the attacker from coming near him or her, whether at home, at work, in school, or even from telephoning him or her. Actions must be brought within 6 years, although moving promptly is always an advantage.¹⁰⁹

In addition to whatever relief a restraining order may provide, it is also important that violation of a restraining order is a criminal offense that can be prosecuted. You should report any violations of a restraining order to local police, and keep careful records of any and all violations.

The Attorney General’s Office also has the power to bring civil rights actions on behalf of people who are harassed or threatened.¹¹⁰ The contact information is listed above.

¹⁰⁷ 5 Me. Rev. Stat. sec. 4684-A.

¹⁰⁸ 5 Me. Rev. Stat. sec. 4681.

¹⁰⁹ 14 Me. Rev. Stat. sec. 752.

¹¹⁰ 5 Me. Rev. Stat. sec. 4681.

3. Harassment Law: Maine law permits people to petition the District or Superior Court for an order preventing harassment.¹¹¹ “Harassment” is defined as “any repeated act of intimidation, harassment, physical force or threat of physical force directed against any person, family, or their property or advocate with the intention of causing fear or intimidation or to deter free exercise or enjoyment of any rights or privileges secured by” the Constitution or laws of Maine or the United States.

Under this law, a person may seek emergency orders, and later seek temporary orders, and ultimately seek final orders of protection. In addition, with final orders, a successful plaintiff may be awarded damages for direct losses caused by the harassment (*e.g.*, lost earnings, property repair or replacement), reasonable moving expenses and court costs and attorney’s fees.¹¹² Violation of a court restraining order is a criminal offense.¹¹³

In what ways might the recently passed federal hate crimes law help to investigate and prosecute hate crimes?

The *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*¹¹⁴ was passed by Congress on October 22, 2009 and was signed into law by President Obama on October 28, 2009. It expands the 1969 United States federal hate crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity or disability.

First, and perhaps foremost, the Act allows local and state law enforcement agencies to apply for the following federal assistance from the U.S. Attorney General:

- investigative, technical, forensic or prosecutorial support for criminal investigations and prosecutions,
- grants for extraordinary expenses associated with the investigation and prosecution of hate crimes, and
- grants to combat hate crimes committed by juveniles.

¹¹¹ 5 Me. Rev. Stat. sec. 4652.

¹¹² 5 Me. Rev. Stat. sec. 4655.

¹¹³ 5 Me. Rev. Stat. sec. 4659.

¹¹⁴ See H.R. 2647 at <http://thomas.loc.gov/cgi-bin/query/F?c111:6:./temp/~c111X7TYvf:e1999565:>

In providing assistance to local and state authorities, the priorities are hate crimes:

- where the offender(s) has committed crimes in more than one state, or
- that occur in rural areas which do not have the resources needed to prosecute such crimes.

Second, for hate crimes that in some way involve crossing state or national borders, or involve or affect interstate commerce, and where a state does not have jurisdiction or has requested federal assumption of jurisdiction, or where the federal government feels that justice has not been served or that U.S. prosecution is in the public interest, the Act authorizes the federal government to prosecute the case.

The Act also requires the Federal Bureau of Investigation to track statistics on hate crimes on the basis of gender and gender identity (statistics for the other groups are already tracked) and on crimes committed by and against juveniles. This is the first federal law to explicitly extend legal protections to transgender persons.

■ Criminal Sex Laws

Does Maine have a sodomy law?

No, Maine long ago repealed its sodomy law. Moreover, in Lawrence v. Texas (2003)¹¹⁵, the U.S. Supreme Court struck down all sodomy laws, making clear that private, adult sexual conduct cannot be criminalized.

Why do some gay people get arrested?

All people are subject to the criminal laws. Sex in public, or with underage persons, or without consent, or with force, are illegal. Sex for pay -- as the customer or the provider -- *i.e.*, prostitution, is also illegal.

¹¹⁵ 539 U.S. 558 (2003)

There is also an “indecent conduct” law that targets sexual activity or exposure which:

1. occurs in a public place (including motor vehicles on public ways), or
2. occurs in a private place with the intent that it be seen from another public or private place, or
3. occurs in a private place with the intent that it be seen by others and where the actor knows observation will cause affront or alarm.¹¹⁶

The penalties may be increased under the law if a person has two or more convictions for this offense.

The State has a legitimate law enforcement interest in protecting the general public from open displays of sexual activity -- whether the sex is between people of the same sex or of different sexes, but socializing and expressions of same-sex affection are not illegal, *regardless of where they occur*. No one should be hassled or arrested for foot-tapping, handholding, talking, flirting, or other non-sexual touching.

Sexual activity is not illegal simply because it takes place outdoors, in parked cars, or on public lands. However, as a practical matter, regardless of one’s rights, having sex in a public venue or outdoors is a risky business. Based on numerous reports to us, we believe that some police will overlook sexual activity of non-gay people occurring in a public setting, but arrest gay people engaged in sexual activity in the same types of venues. Another concern is that some police “hunt” for gay people having sex outdoors in parklands and rest areas -- sometimes in uniform and sometimes as undercover decoys. Either way, a person can be charged with indecent conduct.

What is the age of consent for sexual activity?

Generally, the age of consent for sexual activity is 16.¹¹⁷ School teachers and other school employees may be charged with sexual abuse of minors if

¹¹⁶ 17-A Me. Rev. Stat. sec. 854.

¹¹⁷ 17-A Me. Rev. Stat. sec. 254.

they have sex with a student who is under age 18.¹¹⁸ A person who is at least 19 and has sex with a 14 or 15 year old can be charged with sexual abuse of a minor if the adult is at least 5 years older than the minor.¹¹⁹

Does Maine have a “sex offender registry” or “Megan’s” law?

Yes. Every state now has such a law, although the terms differ from state to state. Many states, including Maine, initially included as registrable offenses crimes for which gay men have been unfairly targeted. However, this is no longer the case in Maine. For example, violation of the Indecent Conduct law is *not* considered a registrable offense under Maine law. Contact GLAD for a fact sheet about the sex offender law.

How can I find out of what charges I have been convicted?

To find out your criminal record, you can contact the State Bureau of Identification at (207) 624-7270 (voice) or (207) 287-3659 (TDD). You can also request information by mail if you send a check for \$8 payable to the Treasurer of State along with a written request, your name, date of birth, and any aliases. The address is State Bureau of Identification, 45 Commerce Drive, Suite #1, Statehouse Station #42, Augusta, ME 04333. The website is <http://www.informe.org/PCR/>.

■ **Police Harassment**

Is it legal for the police to tell me to “move along” from public areas?

Not necessarily. If the area is public and not posted as having particular hours, you generally have a right to be there as long as you are engaged in lawful activity. Public places belong to everyone. Even if police officers want to deter crime, or suspect some kind of unlawful intent, they have no

¹¹⁸ 17-A Me. Rev. Stat. sec. 254 (1)(C).

¹¹⁹ 17-A Me. Rev. Stat. sec. 254 (1)(A).

general right to request people to move from one place to another *unless there is unlawful conduct*.¹²⁰

What are the general rules about interaction with police?

The presence of individuals who appear to be gay, lesbian, bisexual or transgender -- whether because such individuals are displaying symbols such as a rainbow flag or pink triangle or for any other reason -- should not trigger any special scrutiny by a police officer, other than a concern for the safety and well-being of those persons that the officer would have for any other park or rest area patron.

Police may of course approach a person, and make inquiries, but even if a person has been convicted of a past offense, or fails to respond, or responds in a way which does not satisfy the officer, that alone is not grounds for the person to be arrested.

Brief intrusions upon a person are permitted if an officer can say why he or she is concerned and that concern is reasonable. For example, if an officer is concerned about someone's safety, or suspects the person may have committed a crime, or suspects the person has committed a traffic infraction, then a stop is reasonable.¹²¹

An arrest can only occur upon "probable cause" that a crime has been committed.¹²²

¹²⁰ *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *State v. Aucoin*, 278 A.2d 395, 397 (Me. 1971)(striking down former version of Portland's loitering ordinance).

¹²¹ *State v. Gulick*, 759 A.2d 1085 (Me. 2007), *2; *State v. Connors*, 734 A.2d 195 (Me. 1999)(investigatory stop justified when officer has articulable suspicion of civil violation or criminal activity and such suspicion is objectively reasonable in the totality of circumstances).

¹²² *State v. Boylan*, 665 A.2d 1016 (Me. 1995)(probable cause to arrest where officer has reasonably trustworthy information that would warrant an ordinarily prudent and cautious officer to believe the subject did commit or was committing a crime). See also *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

What can I do if I believe I have been improperly treated by the police?

Complaints may be made to any individual police department for matters concerning its officers, and complaints to the Maine State Police may be made to the commanding officer of the alleged harasser. The contact person is Lieutenant Luce, Director of Internal Affairs (207) 624-7290. The State Police have a toll-free number at (800) 452-4664. The complaint should specify the name or badge number of the officer, and state whether the complaint is for actual misconduct, harassment or discrimination.

In some cases, an individual may decide to pursue a lawsuit -- because of injuries, improper detainment, or for some other reason. These matters are highly specialized, and GLAD can provide you with attorney referrals. People can also register serious complaints with the Attorney General's Office, Investigations Unit at (207) 626-8800.

Students' Rights

■ Harassment and Discrimination at School

Are there any laws protecting gay, lesbian and transgender students in Maine?

Yes. The state anti-discrimination law specifically protects students from discrimination based on sexual orientation, including gender identity and expression, in any academic, extracurricular, athletic, research, occupational training or other program or activity. It also protects students during the admissions process and in obtaining financial aid. The law defines "educational institution" as:

“any public school or educational program, any public post-secondary institution, any private school or educational program approved for tuition purposes if both male and female students are admitted and the governing body of each such school or program. For purposes related to disability-related discrimination, ‘educational institution’ also means any private school or educational program approved for tuition purposes.”¹²³

The complainant must file a complaint with the MHRC within 6 months. The MHRC will conduct the same type of investigation as it does in other types of discrimination cases.¹²⁴ See the employment section in this booklet for more information about this process.

¹²³ 5 Me. Rev. Stat. sec. 4553 (2) (A) (definition of “educational institution”).

¹²⁴ 5 Me. Rev. Stat. sec. 4611.

Are there other laws which may protect me from discrimination and harassment because of my sexual orientation?

Under federal law, public schools which receive federal funds may not discriminate on the basis of sex. Sometimes, the harassment of a LGBT student will be sexual harassment forbidden by this federal law, known as Title IX. Complaints can be made to your school Title IX coordinator, as well as to the federal Dept. of Education, Office of Civil Rights, in Boston.¹²⁵ In addition, inaction in the face of pervasive harassment or discrimination can violate a student's rights under the state and federal constitutions.

What can I do if I'm being discriminated against at school?

There are many ways to approach the issue. One is to ask for support from a friend, teacher or counselor and talk to the people who are bothering you. That is not an option, however, if you don't feel safe doing so.

Take a look at your school policies and notify whoever is supposed to be notified -- usually a vice principal or Title IX coordinator. You should document any incidents of harassment or discrimination in writing with at least the date and time. Once you meet with the right officials, write yourself notes about what you told them and on what date and ask when they will be getting back to you with a response. If they don't help you or don't follow through, you may wish to write to the principal and superintendent and ask for them to end the discrimination.

At the same time, or after contacting the administration as set out above, you may contact the State Dept. of Education for further information at (207) 624-6747 (ask for the Affirmative Action Officer). If this fails, you may also wish to consider legal action against the town. This is a complicated area of law as well as being emotionally challenging. Contact GLAD for further information and attorney referrals.

¹²⁵ Office for Civil Rights, Boston Office, U.S. Department of Education, 33 Arch Street, Suite 900, Boston, MA 02110-1491, (617) 289-0111; FAX# (617) 289-0150, <http://www.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt>.

Does Maine have an anti-bullying law that protects public school students?

Yes. In 2012 Maine passed a law, “An Act To Prohibit Bullying and Cyberbullying in Schools.”¹²⁶ The Act defines bullying as any communication (written, oral or electronic) or physical act or gesture that:

1. harms or seriously threatens you or your property;
2. creates a hostile school environment; or
3. interferes with your academic performance or ability to participate in school activities.

The law identifies certain characteristics that are often a target for bullying, including actual or perceived race sexual orientation or gender identity and expression or association with another person with one or more of these actual or perceived characteristics.

The Maine Department of Education developed a model policy that includes:

- A requirement that school staff report bullying and procedures for school staff, students, parents and others to report bullying;
- A procedure for promptly investigating and responding to incidents of bullying, including written documentation of incidents and the outcome of investigations;
- A process for communicating with the parent(s) of a student who has been bullied the measures taken to ensure the safety of the student and to prevent further acts of bullying;
- Each school’s anti-bullying policy must be as stringent as the model policy and must be widely published and disseminated in written form annually to all students, parents and staff.
- Each school shall provide staff training in the best approaches to implementing the anti-bully policy.

¹²⁶ See http://www.mainelegislature.org/legis/bills/bills_125th/chapters/PUBLIC659.asp.

■ Other Rights of Public School Students

In addition to the right to attend school in safety and free from discrimination and harassment based on your sexual orientation or gender identity or expression:

- LGBTQ youth must have equal access to and be allowed to participate on equal terms in all school programs, including extracurricular activities.
- Schools must respect the gender identity of transgender students, including using appropriate names and pronouns, and allowing transgender students to wear clothing consistent with their gender identity.
- LGBTQ youth have the right to acknowledge their sexual orientation and gender identity and expression.
- LGBTQ students have the right to express themselves on issues relating to sexual orientation or gender identity and expression within constitutional limits.
- Students have the right to learn about LGBT issues and have access to pedagogically and age appropriate information and resources about LGBT issues and people, regardless of objecting school officials or parents.

For additional information and resources see GLAD's publication, Rights of LGBTQ Youth in Maine at: <http://glad.org/uploads/docs/publications/rights-of-lgbtq-youth-in-me.pdf>.

■ Gay/Straight Alliances

Do students have the right to form Gay Straight Alliances in their schools even if the principal or community opposes it?

Most student-initiated groups should be allowed to form. A federal law known as the Equal Access Act provides that secondary school students in schools that 1) receive federal funding, and 2) have extra-curricular groups, must allow students to form other extra-curricular groups without discriminating based on the religious, philosophical, political or other content of the speech at meetings. GLAD brought and won a case for students seeking to form a Gay Straight Alliance at West High in Manchester, New Hampshire on this very basis.¹²⁷ PFLAG estimates that over 20 Southern Maine high schools have GSAs.

In addition to GSAs, over 200 schools (including elementary schools) have “Civil Rights Teams” that work to reduce bias language and the behaviors that lead to threats and violence. These collaborations of students, faculty, and community advisors teach intervention strategies and peer education to reduce intolerance of all types and build an understanding of the Maine Civil Rights Act (discussed earlier in this publication). Additional information is available from the Attorney General’s office.¹²⁸

■ Resources

PROTECT YOUR RIGHTS

GLAD Answers

Call: (800) 455-GLAD (4523)

Email or Live Chat:

www.GLADAnswers.org

¹²⁷ Available at: http://glad.org/GLAD_Cases/Manchester_GSA.pdf.

¹²⁸ Available at: http://www.maine.gov/ag/crime/crimes_we_prosecute/civil_rights/in_schools/civil_rights_teams.shtml.

Maine Human Rights Commission

(207) 624-6290

www.state.me.us/mhrc

Maine Department of Education

Voice: (207) 624-6600

www.maine.gov/doe/

US Department of Education Office for Civil Rights

(617) 289-0111

OCR.Boston@ed.gov

KNOW MORE ABOUT YOUR RIGHTS

The text of the Maine anti-bullying law: <http://bit.ly/mainebullylaw>

GLAD's Maine students' rights webpage: <http://bit.ly/mestudentrights>

GLAD's webpage on student rights: <http://bit.ly/gladstudentrights>

LOCAL LGBTQ YOUTH GROUPS

Proud Rainbow Youth of Southern Maine (PRYSM)

(207) 874-1022 X222

prism@commcc.org

Gay, Lesbian, and Straight Network (GLSEN)

Downeast Maine Chapter

(207) 667-2358

downeastme@chapters.glsen.org

Southern Maine Chapter

(207) 775-0173

glsen@zwi.net

www.glsen.org/southernme

PFLAG Portland

(207) 831-3015

New Beginnings

(207) 795-4077

www.newbeginmaine.org

Out As I Want to Be

(800) 530-6997

outmaine@yahoo.com

www.outmaine.org

Trans Youth Equality Foundation

contact@transyouthequality.org

www.transyouthequality.org

OTHER RESOURCES YOU CAN USE

Maine HIV Prevention Community Planning Group

(207) 622-7566 X233

mehivcpg@mcd.org

www.mehivcpg.org

Frannie Peabody Center

HIV Testing Tel: (207) 749-6818

prevention@peabodycenter.org

Maine Youth Action Network

www.myan.org

Maine Transgender Network

(207) 408-1685

www.mainetransnet.org

Maine Coalition to End Domestic Violence (MCEDV)

(866) 83-4HELP (HelpLine); (207) 430-8334 (general)

info@mcedv.org

www.mcedv.org

Maine Coalition Against Sexual Assault (MECASA)

800-871-7741

www.mecasa.org

GLAD has a brochure that summarizes the rights of students in Maine called, *Want to Know Your Rights As an LGBTQ Student?*, that can be found at: <http://www.glad.org/uploads/docs/publications/lgbtq-student-rights-me.pdf>. We would be pleased to mail you a printed version of the brochure, just contact GLAD Answers, www.GLADAnswers.org.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity, HIV status, and sexual orientation.

GLAD Answers and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, log on to www.glad.org, or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 30 Winter Street, Suite 800, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

Thank You!



GLBTQ Legal Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108
Tel 617.426.1350
1.800.455.GLAD (4523)
Fax 617.426.3594

www.GLAD.org | www.GLADAnswers.org

**GLAD thanks Patricia A. Peard of Bernstein
Shur for reviewing this publication.**