

Sexual Orientation-Based Workplace Discrimination: Carving a Public Policy Exception to Ohio’s At-Will Employment Doctrine

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I. INTRODUCTION

Ohio’s at-will employees have few protections against workplace discrimination based on sexual orientation.¹ Currently, there are no federal or Ohio statutes that specifically prohibit private or public workplace sexual orientation-based discrimination. With no statutory protections, Ohio employees subjected to this type of discrimination must rely on alternative ways to obtain legal recourse. One of those ways is to argue that sexual orientation-based discrimination in the workplace

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1. See generally Thomas H. Barnard & Timothy J. Downing, *Emerging Law on Sexual Orientation and Employment*, 29 U. MEM. L. REV. 555 (1999) (providing an overview of state and federal sexual orientation law and jurisprudence).

violates public policy and is therefore an exception to Ohio's doctrine of at-will employment.²

Without direct state or federal statutory enactments, the public policy exception may be an increasingly effective means to obtain legal recourse in some regions. There are several indications that Ohio has a sufficiently clear public policy against employment practices that discriminate on the basis of sexual orientation.

First, one state court has specifically held that Ohio has a clear public policy against employers who discriminate on the basis of sexual orientation in violation of a municipal ordinance.³ Moreover, a federal district court in Ohio has likewise found that clear public policy can be established on the basis of a city ordinance prohibiting sexual orientation discrimination.⁴

Second, while federal and state legislators have been slow to enact legislation against discrimination based on sexual orientation, smaller municipalities have increasingly enacted this type of legislation.⁵ Importantly, three of Ohio's ten largest cities have laws that prohibit workplace discrimination on the basis of sexual orientation, as do several suburban and rural municipalities.⁶

Third, the Supreme Court of Ohio's adoption of the Code of Professional Responsibility, Judicial Code of Conduct, prohibits bias on the basis of sexual orientation in the performance of judicial duties, which is applicable to the entire state judiciary.⁷

Fourth, although Governor Bob Taft recently removed "sexual orientation" from a fifteen-year-old executive order that prohibited employment bias within the state government, he has publicly declared that the deletion is only to ensure that "all Ohio citizens have equal employment opportunity" vis-à-vis state jobs.⁸

Part II of this Article briefly discusses the current protections afforded gay and lesbian at-will employees, and provides a limited review of Ohio's at-will employment doctrine as it relates to the public policy

2. See generally *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030 (Ohio Ct. App. 1995), cert. denied, 662 N.E.2d 22 (1996); see also *Das v. Ohio State Univ.*, 115 F. Supp. 2d 885 (S.D. Ohio 2000); *Mier v. Certified Oil Co.*, No. 97CVH-01-0203, slip op. 1 (C.P. Franklin County, Ohio, Feb. 4, 1997).

3. See *Mier*, No. 97CVH-01-0203, slip op. at 1.

4. See 115 F. Supp. 2d at 885.

5. See WAYNE VAN DER MEIDE, LEGISLATING EQUALITY, A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES 1-18 (2000).

6. See *id.*

7. See OHIO CODE OF JUD. CONDUCT Canon 3 (West 2001).

8. Bill Sloat, *Gays Cut From Job Protection Policy: Taft Drops 'Sexual Orientation' Reference*, THE PLAIN DEALER, Jan. 12, 2000, at 1A.

exception. Part III examines the only three Ohio cases, to date, in which an argument is made for a public policy exception to the at-will employment doctrine for sexual orientation-based discrimination. Part IV discusses some of the indications that a “public policy” argument can successfully be made and the potential difficulties that may arise in making such an argument.

II. BACKGROUND

A. *Ohio Employment Laws and Sexual Orientation Discrimination*

The State of Ohio has never adopted a law to prohibit workplace discrimination based on sexual orientation. The closest the state has come to adopting a prohibition of this type was in the form of an executive order.⁹ Former Governor Richard Celeste issued an executive order on December 30, 1983, that made it unlawful for any agency, department, board, or commission in the executive branch of the Ohio state government to discriminate in state employment against any individual on the basis of sexual orientation.¹⁰ The order remained in effect throughout former Governor George Voinovich’s terms. However, in August of 1999, Governor Bob Taft issued a new executive order that eliminated mention of “sexual orientation.”¹¹ Although the deletion of sexual orientation from the executive order has been widely described as a set-back for gay rights, a spokesperson for Taft has stated that the governor is “opposed to discrimination against *any* person for any reason.”¹²

Without a statute or an executive order prohibiting private or public employment discrimination on the basis of sexual orientation, many aggrieved employees have consequently argued that sexual orientation as the sole basis of termination is a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.¹³ In a recent case, *Glover v. Williamsburg Local School District Board of Education*, the United States District Court for the Southern District of Ohio, while recognizing that gays and lesbians are not a suspect class, held that “state action which discriminates against homosexuals and is motivated solely by animus towards that group necessarily violates the Equal Protection Clause, because a ‘desire to effectuate one’s animus

9. See Exec. Order No. 83-64 (Ohio 1983) (amended 2000).

10. See *id.*

11. See Exec. Order No. 99-25T (Ohio 2000).

12. Sloat, *supra* note 8, at 1A.

13. See, e.g., *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

against homosexuals can never be a legitimate governmental purpose.”¹⁴ Because very few actions can be proven to be motivated “solely by animus” toward homosexuals, and because the equal protection argument only applies to government actions, most Ohio citizens have no legal recourse against employment discrimination on the basis of sexual orientation.¹⁵

Aggrieved employees fired on the basis of sexual orientation have also sought legal recourse by arguing that this type of wrongful discharge violates Ohio public policy. One of the benefits of this approach is that it potentially provides a legal option to all Ohio citizens. To date, there have been three cases—two reported, and one unreported—that address the public policy exception to at-will employment involving sexual orientation discrimination.¹⁶ Interestingly, the cases yield differing results. These three cases and the argument for the recognition of the existence of a public policy prohibiting sexual orientation discrimination in the workplace are the focuses of this Article and are treated in Parts III and IV, respectively.

B. At-Will Employment in Ohio and the Public Policy Exception

In Ohio, the doctrine of at-will employment provides that an employer can terminate an employee “for any cause, at any time whatsoever, even if done in gross or reckless disregard of any employee’s rights.”¹⁷ The Supreme Court of Ohio softened this harsh rule by creating a tort-based public policy exception to the employment-at-will doctrine.¹⁸ The employer’s wrongful discharge, however, must violate a “sufficiently clear” public policy.¹⁹

The Supreme Court of Ohio first embraced a public policy exception to at-will employment in the 1990 case of *Greeley v. Miami Valley Maintenance Contractors, Inc.*²⁰ In *Greeley*, the court recognized a limited public policy exception allowing recovery only “when an

14. *Id.* at 1169 (quoting *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997)).

15. *See, e.g., id.*

16. *See Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030 (Ohio Ct. App. 1995).

17. *Phung v. Waste Mgmt., Inc.*, 491 N.E.2d 1114, 1116 (Ohio 1986) (quoting *Peterson v. Scott Constr. Co.*, 451 N.E.2d 1236, 1239 (Ohio Ct. App. 1982)) (holding that public policy does not require that there be an exception to the employment-at-will doctrine, absent a sufficiently clear public policy warranting a cause of action).

18. *Greeley v. Miami Valley Maint. Contractors, Inc.*, 551 N.E.2d 981 (Ohio 1990).

19. *Id.* at 987.

20. *See id.*

employee is discharged or disciplined for a reason which is prohibited by statute.”²¹

In 1994, the Supreme Court of Ohio in *Painter v. Graley* significantly expanded the sources from which a public policy exception could be established.²² The *Painter* court held that the public policy

sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments. The existence of such a public policy may be discerned by the Ohio judiciary based on sources such as the [c]onstitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law.²³

The *Painter* court also provided direction for lower courts to determine whether an employee's wrongful discharge violated public policy, suggesting that the lower courts might find the analysis formulated by Villanova Professor Henry H. Perritt useful in developing case law in this area.²⁴ Professor Perritt's analysis requires a plaintiff-employee to establish:

- (1) that clear public policy existed and was manifested in a state or federal constitution, statute, or administrative regulation, or in the common law (the *clarity* element);
- (2) dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element);
- (3) the plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element); and
- (4) the employer lacked any overriding legitimate business justification for the dismissal (the *overriding justification* element).²⁵

In subsequent cases, the Supreme Court of Ohio has noted that the “clarity” and “jeopardy” elements of the tort of wrongful discharge in violation of public policy are questions of law to be determined by the courts.²⁶

The Supreme Court of Ohio also provided guidance regarding the quality of the source of public policy, to which many of the post-*Painter* decisions have cited.²⁷ It opined that “[i]n making such determinations,

21. *Id.* at 986.

22. 639 N.E.2d 51 (Ohio 1994).

23. *Id.* at 56.

24. *Id.* at 57.

25. *Id.* at 57 n.8 (quoting Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398-99 (1989)).

26. *See, e.g.*, *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 321 (Ohio 1997).

27. *See Painter*, 639 N.E.2d at 56.

courts should be mindful of our admonition in *Greeley* that an exception to the traditional doctrine of employment at-will should be recognized only where the public policy alleged to have been violated is of equal importance as the violation of a statute.²⁸ In essence, courts should not create a public policy exception “out of thin air” and on “individual conceptions of what the law ought to be.”²⁹ Rather, as one court aptly stated, “[a] public policy ought to be objectively discernable from sources outside the judge’s individual social or legal philosophy before being permitted to override the settled doctrine of employment at will.”³⁰

The cases following *Painter* indicate that Ohio courts have primarily, but not exclusively, recognized a public policy exception to the at-will employment doctrine based on statutory sources.³¹ In *Kulch v. Structural Fibers, Inc.*, the Supreme Court of Ohio recognized a public policy exception based on the Occupational Safety and Health Act (OSHA) provision that prohibits retaliation against employees who file OSHA complaints.³² The court also relied on other statutory provisions favoring safety in the workplace.³³ In *Collins v. Rizkana*, the court again held that “a cause of action may be brought for wrongful discharge in violation of public policy based on sexual harassment/discrimination.”³⁴

In *Stephenson v. Litton Systems, Inc.*, the Ohio Court of Appeals for Montgomery County recognized a public policy that favors removing drunk drivers from state roads.³⁵ In *Stephenson*, an employee was terminated after notifying the police that her supervisor was going to be driving while intoxicated.³⁶ The court based its finding of sufficient public policy on the “sweeping enactments by the General Assembly” designed to discourage drunk driving, and, in part, on the existence of a police drunk driving hotline that was well publicized at the time.³⁷

In *Smith v. Troy Moose Lodge No. 1044*, the Court of Appeals for Miami County found sufficient public policy for an exception to the employment-at-will doctrine when an employee was terminated for exercising her right to participate in the benefits of an unemployment

28. *Id.*

29. *Stephenson v. Litton Systems, Inc.*, 646 N.E.2d 259, 261 (Ohio Ct. App. 1994) (creating a public policy exception to employment-at-will for employees who are fired for reporting drunken driving by their employers).

30. *Id.*

31. *Kulch*, 677 N.E.2d at 321.

32. *Id.* at 321-22.

33. *See id.* at 323-24.

34. 652 N.E.2d 653, 661 (Ohio 1995) (basing the policy on state statutory sources).

35. 646 N.E.2d 259 (Ohio Ct. App. 1994).

36. *See id.*

37. *Id.* at 261.

compensation fund.³⁸ The court held that the public policy existed because the “right to receive unemployment compensation benefits is grounded in Ohio statutory law.”³⁹

In *Simonelli v. Anderson Concrete Co.*, the Court of Appeals for Franklin County held that firing an at-will employee for consulting an attorney could serve as a basis for the public policy exception.⁴⁰ Based on a federal district court case in Iowa, the court reasoned that the “legislative recognition of the power of the state judiciary to regulate the legal profession . . . the fact that lawyers, as guardians of the law, play an important role in the preservation of society; [and] the adoption by the Iowa Supreme Court of the Code of Professional Responsibility, which articulates the public policy that citizens of the state are entitled to access to professional legal services” provided a basis for the public policy exception to the employment-at-will doctrine.⁴¹ The court further noted “that a consultation with a lawyer is so fundamental to our system of justice that an employer’s discharge of an employee for consulting a lawyer would violate public policy.”⁴²

III. OHIO CASE LAW: THE PUBLIC POLICY EXCEPTION AND SEXUAL ORIENTATION

A. *Greenwood v. Taft, Stettinius & Hollister (1996)*

In *Greenwood v. Taft, Stettinius & Hollister* a plaintiff-attorney employed by a Cincinnati-based law firm brought a wrongful discharge action against his former employer.⁴³ The plaintiff alleged that he was terminated for being homosexual and for working on behalf of a homosexual cause.⁴⁴ The Court of Appeals for Hamilton County held that a Cincinnati ordinance prohibiting employment discrimination based on sexual orientation was insufficient to support a public policy exception to the employment-at-will doctrine.⁴⁵ The court stated that a sufficient public policy exception “*must* be of uniform statewide application; it cannot be fragmentary, as with a single municipal

38. 645 N.E.2d 1352 (Ohio Ct. App. 1994).

39. *Id.* at 1353.

40. 650 N.E.2d 488 (Ohio Ct. App. 1994).

41. *Id.* at 491-92 (adopting the reasoning of the Northern District of Iowa as articulated in the case of *Thompto v. Coborn’s Inc.*, 871 F. Supp. 1097 (1994)).

42. *Id.* (quoting *Thompto*, 871 F. Supp. at 1097).

43. 663 N.E.2d 1030, 1031 (Ohio Ct. App. 1995), *cert. denied*, 662 N.E.2d 22 (Ohio 1996).

44. *See id.*

45. *See id.* at 1033.

ordinance.”⁴⁶ Unfortunately, in *Greenwood*, the plaintiff could not contend that his dismissal was in violation of the Ohio Code of Professional Conduct because he did not raise the argument at the trial level.⁴⁷

In 1996, the Supreme Court of Ohio denied a motion for a discretionary appeal.⁴⁸ Justice Pfeifer dissented because he believed that the case involved “a matter of great public or general interest.”⁴⁹ He opined that the case presented novel legal questions that deserved answers, such as:

Can an employer in Ohio fire an employee based upon his sexual preference? Does the Code of Professional Responsibility enunciate a public policy that lawyers should not be fired because of the clients they choose to represent? Does the recently adopted Disciplinary Rule prohibiting discrimination based on sexual orientation (DR 1-102[B]) provide the requisite public policy?⁵⁰

These questions remain unanswered by the court.⁵¹

B. *Mier v. Certified Oil Co. (1997)*

In 1997, the Franklin County Court of Common Pleas held that Ohio has a clear public policy against employers who discriminate on the basis of sexual orientation in violation of a municipal ordinance.⁵² In *Mier*, the plaintiffs, who were employed by the defendant in Columbus, Ohio, alleged that they were terminated because they are lesbians, in violation of section 2331.03 of the Columbus City Code. Section 2331.03 prohibits employment discrimination on the basis of sexual orientation. The court stated that the violation of section 2331.03 is sufficient to give rise to a public policy exception to the doctrine of at-will employment and therefore denied the defendant’s motion to dismiss.⁵³

The *Mier* court applied the *Painter* test, requiring that the “public policy alleged to have been violated [to be] of equally serious import as the violation of a statute.”⁵⁴ The court concluded that, because the

46. *Id.*

47. *Id.* at 1034.

48. *Greenwood v. Taft, Stettinius & Hollister*, 662 N.E.2d 22 (Ohio 1996).

49. *Id.* at 22 (Doyles, J., dissenting).

50. *Id.*

51. *Id.*

52. *Mier v. Certified Oil Co.*, No. 97CVH-01-0203, slip op. 1 (C.P. Franklin County, Ohio, Feb. 4, 1997).

53. *Id.*

54. *Id.* at 5 (quoting *Painter v. Graley*, 639 N.E.2d 51 (Ohio 1994)).

supreme court has held that the state constitution conferred on municipalities the right to adopt and enforce police regulations not in conflict with the general laws of Ohio, a municipal ordinance has the same legal import as a statute.⁵⁵ Accordingly, the court stated that “under the test set forth in *Painter*, a municipal ordinance is a sufficient basis for a public policy exception to the employment-at-will doctrine.”⁵⁶ Sufficient public policy, according to the *Mier* court, could be determined by a nonexhaustive list of sources that includes the constitutions of Ohio and the United States, administrative rules and regulations, as well as the common law.⁵⁷

The *Mier* court went on to reject the *Greenwood* court’s contention that “public policy which warrants an exception to the employment-at-will doctrine must be of uniform, statewide application; it cannot be fragmentary, as with a single municipal ordinance.”⁵⁸ According to the *Mier* court, the *Greenwood* decision invented a new standard for determining the sufficiency of public policy and ignored existing precedent.⁵⁹ The court also rejected the *Greenwood* court’s reasoning that because municipal ordinances are subject to revision, repeal, or findings of unconstitutionality, an ordinance cannot constitute a sufficient source of public policy.⁶⁰ The court posited:

[I]f this argument were accepted, it would follow that statutes also cannot give rise to a sufficiently clear public policy since they too are subject to repeal, revision, or findings of unconstitutionality. Nevertheless, the Supreme Court has repeatedly found the public policy exceptions to the employment-at-will doctrine can be based upon statutes.⁶¹

C. *Das v. Ohio State University (2000)*

Most recently, in *Das v. Ohio State University*, a federal district court in Ohio asserted that a plaintiff may bring a claim for sexual orientation discrimination under the Ohio public policy exception based on a city code.⁶² The plaintiff, *Das*, argued that she was terminated because of her sexual orientation in violation of Columbus City Code section 2331.03, and thus in violation of Ohio public policy.⁶³ The *Das*

55. *Id.* at 6.

56. *Id.*

57. *Id.*

58. *Id.* (quoting *Greenwood*, 662 N.E.2d at 22).

59. *Id.* at 6.

60. *Id.*

61. *Id.* at 7.

62. 115 F. Supp. 2d 885, 892 (S.D. Ohio 2000).

63. *See id.* at 891.

court recognized that the *Painter* decision allowed exceptions to the at-will employment doctrine if the violation of public policy based on an acceptable source was “of equally serious import as the violation of statute.”⁶⁴ The court found that municipalities are given the power, under Section 3, Article XVIII of the Ohio Constitution, to adopt antidiscrimination legislation as long as it is not in conflict with state statute.⁶⁵ The court determined that the Columbus code was not in conflict with any state statutes; therefore, it was a valid source for the public policy.⁶⁶

The court ultimately determined that there was not enough evidence to prove that Das was fired because of her sexual orientation, and consequently affirmed her employer’s motion for summary judgment.⁶⁷ Notwithstanding this finding, the court stated that it “does not turn a blind eye to the fact that persons of gay, lesbian, and bisexual orientation are often discriminated against in the workplace.”⁶⁸ The court clearly left the door wide open for future sexual orientation discrimination claims to be brought under the Ohio public policy exception to at-will employment, at least in Columbus.

IV. PROS AND CONS OF A PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT

Numerous municipalities, in both urban and rural locales in many different areas of the state, have enacted ordinances prohibiting workplace discrimination on the basis of sexual orientation.⁶⁹ One compelling indication that a public policy against workplace discrimination on the basis of sexual orientation should be recognized is that three of the ten largest cities in Ohio have ordinances that prohibit employment discrimination on the basis of sexual orientation.⁷⁰ Cleveland, Columbus, and Toledo all have laws that prohibit workplace discrimination on the basis of sexual orientation.⁷¹ Further, many mid-size and smaller municipalities throughout the state also have similar ordinances, such as Cleveland Heights, North Olmsted, Westlake, Lakewood, Athens, Oberlin, and Yellow Springs. In Cuyahoga County,

64. *Id.* at 892.

65. *See id.*

66. *See id.*

67. *See id.* at 893.

68. *Id.* at 892 n.4.

69. *See generally* VAN DER MEIDE, *supra* note 5, at 69-71 (2000).

70. *See id.*

71. Cleveland, Ohio, Ordinance 77-94 (Mar. 23, 1994); COLUMBUS, OHIO, CITY CODE tit. 2331.03 (1984); TOLEDO, OHIO, MUNICIPAL CODE § 554.02 (Dec. 8, 1998).

which includes Cleveland, county government employees are expressly protected from sexual orientation-based discrimination.⁷²

Another indicator that a “sufficiently clear public policy” against sexual orientation-based discrimination exists in Ohio is that the state, in 1974, repealed a law criminalizing consensual sodomy.⁷³ In a dissenting opinion to *Ohio ex rel. Grant v. Brown*, Justice Stern stated:

The recent amendments to R.C. Title 29, which decriminalize all private sexual activity between consenting adults, indicate an express public policy to tolerate the existence of different sexual life styles in this state. Insofar as the Criminal Code in Ohio is now concerned, no distinction is drawn between heterosexual and homosexual activities.⁷⁴

However, the majority in *Brown*, in a brief 4-3 decision, ruled that although homosexual acts between consenting adults are not prohibited by law, “the promotion of homosexuality as a valid life style is contrary to the public policy in the state.”⁷⁵ In *Brown*, a relator tendered articles of incorporation for the Greater Cincinnati Gay Society, Inc., a nonprofit corporation, to the Secretary of State.⁷⁶ The Secretary of State refused to accept the articles because they “appear[ed] to be contrary to public policy since homosexuality as a ‘valid life style’ has been and is currently defined by statute as a criminal act.”⁷⁷

The *Brown* majority rejected the argument that there was no animus against homosexuals in the Ohio Criminal Code, despite the fact that no statute existed that defined homosexuality as a criminal act. The court noted that the Secretary of State had broad discretion in the matter, and without further discussion found that the promotion of homosexuality was against public policy.⁷⁸ Acknowledging that homosexual acts between consenting adults were no longer offenses under the Criminal Code, the court without discussion found that the promotion of homosexuality is against Ohio public policy.⁷⁹

The *Brown* majority opinion was not well reasoned with regard to the proposition that homosexuality, even at that time, was against Ohio

72. Cleveland Heights, Ohio, Ordinance 77-94 (Mar. 23, 1994).; North Olmsted, Ohio, Ordinance 96-154 (1996); ATHENS, OHIO, CITY CODE § 3.07.62 (Dec. 15, 1997); Yellow Springs, Ohio, Town Charter § 29 (Nov. 1979); Cuyahoga County, Ohio, Affirmative Action Plan (Aug. 8, 1986).

73. OHIO REV. CODE ANN. § 2905.44 (West 1997) (repealed 1974).

74. *Ohio ex rel. Grant v. Brown*, 313 N.E.2d 847, 851 (Ohio 1974) (Stern, J., dissenting).

75. *Id.* at 848.

76. *See id.*

77. *Id.*

78. *See id.*

79. *See id.*

public policy.⁸⁰ As Justice Stern's dissent highlighted, past judicial decisions failed to support the majority's contention.⁸¹ In fact, according to Justice Stern, "nowhere in the recorded decisions of the Ohio Supreme Court has any justice ever used the term 'homosexual' or 'homosexuality,' let alone discuss the policy implications of such a life style."⁸² The majority merely made a naked statement without further analysis.

Today, the *Brown* decision is unequivocally devoid of force as a statement about whether Ohio has a public policy against discriminating in employment on the basis of sexual orientation.⁸³ The *Brown* decision is over twenty-five years old, and Ohio public policy unquestionably has changed over time. Moreover, *Brown* addressed what the court characterized as the "promotion of homosexuality," not whether it was against public policy to fire or discriminate against an employee on the basis of sexual orientation. The Secretary of State has since allowed the incorporation of pro-gay organizations, such as the Ohio Human Rights Bar Association and various Stonewall affiliate organizations including Stonewall Cleveland and Stonewall Columbus. The Supreme Court of Ohio itself has since adopted the Ohio Code of Judicial Ethics that expressly prohibits a judge from discriminating or showing bias on the basis of sexual orientation in his or her duties.⁸⁴ In short, times have changed, both legally and socially.⁸⁵

Ohio courts, under *Painter*, may recognize a code-based public policy exception to at-will employment that is of equal importance and authority as a statute.⁸⁶ Employees who are members of a profession governed by a professional code of ethics may be able to make a viable argument that a professional code is sufficiently clear public policy.⁸⁷ An ethical rule that prohibits discrimination on the basis of sexual orientation may be a suitable source of public policy because it is aimed

80. See *id.* at 851 (Stern, J., dissenting).

81. *Id.*

82. *Id.* at 851.

83. See *id.* at 848.

84. See *infra* notes 92-93 and accompanying text.

85. For instance, in *In re Adoption of Charles B.*, the Supreme Court of Ohio held that homosexuality is not a bar to adoption. 552 N.E.2d 884 (Ohio 1990).

86. See Angela Gilmore, *Employment Protection for Lesbians and Gay Men*, 6 TUL. J.L. & SEXUALITY 83, 94 (1996). (discussing the pros and cons of using a professional code as a source of public policy for purposes of forming an exception to various states' employment-at-will doctrines). Gilmore's discussion derives from the decision of the Colorado Supreme Court in *Rocky Mountain Hospital & Medical Service v. Mariani*, 916 P.2d 519 (Colo. 1996).

87. *Id.*

at serving the interests of the public and is applied throughout a state.⁸⁸ As one commentator noted, such a rule “serves the interests of the public by forbidding discriminatory employment practices,” and also by providing a “bright-line test for measuring employment decisions.”⁸⁹

In Ohio, the legal profession, for example, is governed by the Ohio Code of Professional Responsibility.⁹⁰ Disciplinary Rule 1-102(B) states: “A lawyer shall not engage, in a professional capacity, in conduct involving discrimination prohibited by law because of . . . sexual orientation.”⁹¹ As such, the rule presents a very clear public policy against sexual orientation-based discrimination that governs the entire legal profession, from a solo-practitioner’s law firm to the state attorney general’s office.

Similarly, in an area with a regional prohibition, such as a city or county ordinance, against sexual orientation discrimination in the workplace, one could conceivably argue that an employee who is fired on the sole basis of sexual orientation should be able to carve out a sufficiently clear public policy. First, there is a statewide policy that governs sexual orientation discrimination by lawyers. Second, the prohibition “by law” would be found in the regional ordinance, as well as supported by the numerous regional ordinances that further the notion of a statewide public policy.

Canon 3 of the Ohio Code of Judicial Conduct provides a more general statement of public policy.⁹² Canon 3 states:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . sexual orientation . . . and shall not permit staff, court officials, and others subject to the judge’s direction and control to do so.⁹³

While the judicial code clearly states to the public the standard of conduct expected by the profession from itself, Canon 3 can reasonably be understood as an expression of a more general, statewide embodiment of a public policy against discriminatory employment practices based on sexual orientation under the common law. One of the sources of public

88. *Id.* The Colorado court in fact expressed that the scope of ethics codes as sources for public policy should be limited to those situations where the “ethical provision [is] designed to serve the interests of the public rather than the interests of the profession.” *Id.* (brackets in original).

89. Gilmore, *supra* note 86, at 96.

90. OHIO CODE OF PROF’L RESP. (1999).

91. *Id.* at DR 1-102(B).

92. CODE OF JUD. CONDUCT Canon 3 (West 2001).

93. *Id.*

policy underlying the *Painter* decision is the common law.⁹⁴ The Code of Judicial Conduct, which governs Ohio's judges, the administrators of the common law, plainly embodies a public policy against sexual orientation discrimination. The Ohio Supreme Court, in pronouncing the ethical rules that govern the legal profession, has not only codified the rules that govern the entire profession but has also set an example of a public policy of tolerance and nondiscrimination.

Probably one of the most damaging setbacks to the argument for the recognition of a public policy exception to at-will employment on the basis of sexual orientation is Governor Taft's executive order that replaced a sixteen-year-old policy specifically protecting gays and lesbians working for state agencies from workplace discrimination and providing a clear statement of public policy prohibiting workplace discrimination on the basis of sexual orientation.

An executive order carried the weight of Ohio's highest office, giving it "equally serious import as the violation of a statute."⁹⁵ Even under the *Greenwood* court's erroneous contention that the public policy "exception must be of uniform statewide application and cannot be fragmentary," the Celeste executive order provided for state workers, and arguably private workers, as well as a broad policy statement that extends over the entire state.

The Taft executive order, at the very least, removed a readily available statement of statewide policy against sexual orientation-based discrimination in the workplace. However, if the public statements of the Taft administration are taken seriously, the policy of discriminating on the basis of sexual orientation should still be in place, even after Taft's removal of the reference to "sexual orientation" in the order. After all, if Governor Taft is "opposed to discrimination against *any* person for any reason," as has been stated by his administration to the media, then the newly revised executive order certainly protects gays and lesbians who are discriminated against in the workplace.⁹⁶

Although the legislature has repealed laws prohibiting sodomy, Ohio's civil rights statutes, as codified in R.C. Chapter 4112, do not include sexual orientation among their protections. In fact, as the *Greenwood* court pointed out, "while R.C. 4112.02 prohibits discrimination based on 'handicap,' that term is defined specifically to exclude homosexuality, bisexuality, and other sexual disorders or

94. See *Painter v. Graley*, 639 N.E.2d 51, 56 (Ohio 1994).

95. *Id.*

96. Sloat, *supra* note 8.

dysfunctions.”⁹⁷ Further, the Ohio ethnic intimidation statute does not include a penalty for crimes motivated by sexual orientation.⁹⁸

V. CONCLUSION

Ohio’s at-will employees have minimal express state and federal protections against workplace discrimination based on sexual orientation. Currently, the public policy exception to the at-will employment doctrine holds promise for an employee who has been wrongfully terminated on the basis of sexual orientation to establish a viable cause of action against an employer. As explained in this Article, support for a sufficiently clear public policy against discriminatory employment practices based on sexual orientation can be found in the common law, numerous municipal ordinances, the Supreme Court’s adoption of The Code of Professional Responsibility, the repeal of state sodomy laws, and the publicly stated intent of Governor Taft’s executive order.

97. *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030, 1032 (Ohio Ct. App. 1995).

98. OHIO REV. CODE ANN. § 2927.12 (West 1997). However, House Bill 277, if enacted, would “enhance the penalty for an offense if the offender purposely selects the person or property that is the subject of the offense because of a person’s race, color, religion, gender, disability, *sexual orientation*, national origin, or ancestry” H.B. 277, 123d Gen. Assem., Reg. Sess. (Ohio Mar. 24, 1999) (emphasis added).