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

**Title**

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

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## MEMORANDUM

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

### I. OVERVIEW

Ohio has no state-wide law prohibiting discrimination based on sexual orientation or gender identity.

Several localities have enacted LGBT-related laws, including one designed to permit discrimination. Cincinnati passed a charter amendment in 1993 aimed at negating previous city legislation protecting gay, lesbian, bisexual persons from discrimination, and further prohibiting the city council from passing similar protections in the future. (*See* Section IV *infra*). In 2007, the governor issued an executive order prohibiting sexual orientation or gender identity discrimination in state government. (*See* Section II (C) *infra*.) Individuals who believe they have been discriminated against in violation of the executive order are permitted to file a complaint with the Equal Opportunity Division/Equal Employment Opportunity Section of the Ohio Department of Administrative Services, and violators are subject to the same sanctions that would be applied to illegal discriminatory conduct under Ohio state law. In addition, public universities have internal policies that bar such discrimination.

Documented examples of discrimination based on sexual orientation and gender identity by state and local government employers include:

- In 2008, a lesbian employee of a state department reported that she faced daily harassment including threats and intimidation because of her sexual orientation.<sup>1</sup>
- In 2006, a transgender electrician was not hired by an Ohio state university because of her gender identity.<sup>2</sup>
- A lesbian teacher was fired after she had preliminarily decided to include materials related to anti-gay bias in the readings for a unit on civil rights, despite the fact that she had shown them in advance to the principal and withdrew them from her teaching plans after he objected.<sup>3</sup>

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<sup>1</sup> E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

<sup>2</sup> Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

<sup>3</sup> *Beall v. London City School District Board of Education*, No. 2:04-cv-290, 2006 WL 1582447 (S.D. Ohio June 8, 2006).

- A gay male teacher was fired because of a false rumor that he was holding hands with another man at a holiday party.<sup>4</sup> He sued in federal court and won an award of over \$70,000 for back pay and damages.<sup>5</sup>
- A court ruled that a Cincinnati police officer had a viable claim of sex stereotype discrimination based on the harassment she suffered after telling supervisors that she was transgender and would soon be transitioning. She was fired on the ground that she “lacked command presence.”<sup>6</sup> A jury awarded the officer \$320,511 on his discrimination and harassment claims. Further, the court awarded the officer \$527,888 in attorneys fees and \$25,837 in costs.<sup>7</sup>
- Likewise, a firefighter in Salem, Ohio, sued on the ground of sex discrimination for sex stereotype discrimination after he informed his supervisors that he was a pre-operative transsexual. As a result, he was forced to undergo multiple psychological examinations. A federal court ruled that he could sue based on sex stereotype discrimination.<sup>8</sup>

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

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<sup>4</sup> *Glover v. Williamsburg Local School District Board of Education*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

<sup>5</sup> HOSTILE CLIMATE 188 (1999).

<sup>6</sup> *Barnes v. City of Cincinnati*, 401 F.3d 729 (Mar. 22, 2005).

<sup>7</sup> *Id.* at 733.

<sup>8</sup> *Smith v. City of Salem*, 378 F.3d 566 (Aug. 5, 2004).

## II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

### A. State-Wide Employment Statutes

Currently the state of Ohio has not enacted laws to protect sexual orientation and gender identity from employment discrimination.<sup>9</sup>

### B. Attempts to Enact State Legislation

On May 12, 2009 Rep. Dan Stewart introduced House Bill 176 on the floor of the Ohio State House of Representatives, which would add sexual orientation and gender identity and expression to the covered characteristics that can serve as the basis for a claim of unlawful discriminatory practices under the prohibitions of the existing Ohio Civil Rights Commission Law (the “OCRC Law”).<sup>10</sup>

The OCRC Law protects against discrimination in housing, employment and public accommodations on the basis of several protected classes. The bill defines “sexual orientation” as heterosexuality, homosexuality, or bisexuality whether actual or perceived and “gender identity and expression” as the gender-related identity, appearance, or expression of an individual regardless of the individual’s assigned sex at birth, and would afford largely the same protection against discrimination in housing, employment and public accommodations on the basis sexual orientation and gender identity. The bill includes an exemption for religious institutions.

In the Fiscal Note & Local Impact Statement, the Ohio Civil Rights Commission (the “Commission”) estimates that the bill may result in around 300-350 new case filings annually based on allegations of sexual orientation and/or gender identity discrimination, and accordingly recommended the hiring of four additional full-time investigators.<sup>11</sup>

The Commission’s most recent annual report indicates that it received 6,144 complaints in 2007, the vast majority of which (85.51%) were related to employment. Among the complaints received in 2007, 44.58% were related to race/color and 27.00% were related to gender/pregnancy.<sup>12</sup>

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

#### 1. Executive Orders

In May 2007, Ohio Governor Strickland issued executive order 2007-10S prohibiting discrimination in public employment based on sexual orientation and/or gender identity.<sup>13</sup> The Executive Order states that, “[i]nformation compiled by the Ohio Civil Rights Commission documents ongoing and past discrimination on the basis of

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<sup>9</sup> OHIO REV. CODE ANN. § 4112.02 (2009).

<sup>10</sup> OHIO REV. CODE ANN. § 4112.02 (2009).

<sup>11</sup> Fiscal Note and Local Impact Statement for H.B. 176 (Ohio 2009).

<sup>12</sup> OHIO CIVIL RTS. COMM’N ANNUAL REPORT (2007), available at <http://bit.ly/9rW1v>.

<sup>13</sup> Ohio Exec. Order No. 2007-10S (2007), available at <http://bit.ly/9liWZ>.

sexual orientation and/or gender identity in employment-related decisions by personnel at Ohio agencies, boards and commissions.”<sup>14</sup>

The Executive Order defines “sexual orientation” as “a person’s actual or perceived homosexuality; or heterosexuality, by orientation or practice, by and between adults who have the ability to give consent.” The Executive Order defines “gender identity” as “the gender a person associates with him or herself, regardless of the gender others might attribute to that person.”

## 2. State Government Personnel Regulations

Ohio State University prohibits discrimination against faculty, staff, student employees and employment applicants “based upon protected status, which is defined as age, color, disability, gender identity or expression, nation origin, race, religion, sex, sexual orientation, or veteran status.”<sup>15</sup> The same protected classes are included in OSU’s anti-harassment provision. OSU’s non-discrimination policy extends to student organizations as well, although exceptions are granted in cases where a student organization’s religious beliefs conflict with the contours of the University’s non-discrimination policy.<sup>16</sup>

Other public Ohio colleges and universities with anti-discrimination provisions that include sexual orientation and gender identity/expression include: Miami University;<sup>17</sup> Ohio University;<sup>18</sup> University of Toledo;<sup>19</sup> Wright State University;<sup>20</sup> and Youngstown State University.<sup>21</sup>

## 3. Attorney General Opinions

None.<sup>22</sup>

### D. Local Legislation

#### 1. City of Cincinnati

In 1993, Cincinnati enacted an ordinance declaring that the city may not “enact, adopt, enforce, or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes,

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<sup>14</sup> The referenced information compiled by the Ohio Civil Rights Commission could not be found publicly.

<sup>15</sup> See Ohio State University Non-Discrimination Policy, <http://bit.ly/1tu90u> (last visited Sept. 7, 2009).

<sup>16</sup> See Press Release, Ohio State University, University Revises Guidelines for Student Groups (Oct. 1, 2004), available at <http://bit.ly/RK9gy>.

<sup>17</sup> See Miami University of Ohio Non-Discrimination Policy, <http://bit.ly/nOKCE> (last visited Sept. 6, 2009).

<sup>18</sup> See Ohio University Non-Discrimination Policy, <http://bit.ly/9WtPu> (last visited Sept. 6, 2009).

<sup>19</sup> Ohio University Non-Discrimination Policy, <http://bit.ly/9WtPu> (last visited Sept. 6, 2009).

<sup>20</sup> See Wright State University Non-Discrimination Policy, <http://bit.ly/NmbDd> (last visited Sept. 6, 2009).

<sup>21</sup> See Youngstown State University Non-Discrimination Policy, <http://bit.ly/ddbyU> (last visited Sept. 6, 2009).

<sup>22</sup> See Archive of Ohio Attorney General Opinions, <http://www.ag.state.oh.us> (last visited Sept. 6, 2009).

entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.” *See* Section IV *infra* for a discussion of the legal battle over Cincinnati’s ordinance.

## 2. **City of Columbus**

In December 2008, Columbus passed an ordinance providing employment protections to LGBT persons. The Columbus ordinance states: “‘Discriminate and discrimination’ includes segregate or separate and any difference in treatment based on race, sex, sexual orientation, color, religion, ancestry, national origin or place of birth.” The definition of discrimination applies to the employment context, as well as housing and public accommodations.<sup>23</sup> *See* Section III(A) *infra* for discussion of a claim brought under the Columbus ordinance.

### E. **Occupational Licensing Requirements**

None.

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<sup>23</sup> COLUMBUS CODE § 2331 (2009).

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

#### A. Case Law

##### 1. State & Local Government Employees

Frontera v. City of Columbus, 2008 WL 203026 (S.D. Ohio Jan. 22, 2008).

In *Frontera v. City of Columbus*, a police officer brought various claims, including a claim under the 14th Amendment's Equal Protection clause, for sexual orientation discrimination when he was dismissed from his role as Advisor for the Columbus Division of Police Law Enforcement Explorer Posts, a program for adolescents who are interested in future careers in law enforcement.<sup>24</sup> The program is run by a subsidiary of the Boy Scouts of America. Plaintiff's supervisors were contacted regarding Plaintiff's inappropriate behavior during Explorer functions, most notably, that Plaintiff invited an 18 year old male he met at an Explorers meeting to stay the night at his home. An internal investigation by the Internal Affairs Bureau found the complaint against him to be largely without merit.

During the investigation, Plaintiff asserted that he was asked probing questions about his homosexuality and personal life and was temporarily suspended from his police post, to which he was later reinstated. At its conclusion, Plaintiff was commanded to cut off all contact with the Explorers group. The court granted Defendant's motion to dismiss with respect to claims against individuals in their personal capacities, but denied the motion with respect to claims against the City of Columbus and against his supervisors in their official capacities. The court subsequently granted Defendant's motion for summary judgment dismissing Plaintiff's remaining claims, finding that Plaintiff was not deprived of his First Amendment speech rights or his rights under the Equal Protection Clause, as he was never terminated or disciplined in his job as police officer, and had no positive right to be involved with the Explorers program.<sup>25</sup>

Beall v. London City School District Board of Education, 2006 WL 1582447 (S.D. Ohio June 8, 2006).

The plaintiff in *Beall v. London City School District Board of Education* was a high school teacher who was open about her homosexuality at school functions, but never discussed her sexual orientation or private life with her students.<sup>26</sup> Plaintiff was promised by her supervisor that she would be recommended for a contract renewal, since Plaintiff had very positive performance evaluations. Thereafter, Plaintiff began planning a civics unit on civil rights/civil liberties, where one of the subtopics presented and discussed was discrimination against homosexuals. Plaintiff alerted her principal of the new classroom topic before beginning class instruction. Plaintiff's principal did not approve of the message of the new topic, equating it with "teaching religion." Plaintiff

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<sup>24</sup> No. C2-06-1046, 2008 WL 203026 (S.D. Ohio Jan. 22, 2008).

<sup>25</sup> No. C2-06-1046, 2008 WL 5377960 (S.D. Ohio Dec. 23, 2008).

<sup>26</sup> No. 2:04-cv-290, 2006 WL 1582447 (S.D. Ohio June 8, 2006).

decided not to present the new classroom topic to her students based on the principal's objection. However, the principal subsequently recommended to the Board that Plaintiff's employment contract not be renewed. On a motion for summary judgment, the court held that Plaintiff had made a sufficient *prima facie* showing to sustain equal protection and discrimination claims, as well as an academic freedom claim (under First Amendment principles). This litigation has no further direct history available.

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).

In *Barnes v. City of Cincinnati*, a police officer brought a Title VII action against the city, alleging he was demoted due to sex discrimination.<sup>27</sup> Plaintiff was a pre-operative male-to-female transsexual who lived as a male during working hours but as a woman off-duty. Plaintiff had a reputation in the police department for being a homosexual, bisexual, and/or cross-dresser. According to the record, Plaintiff "had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions."<sup>28</sup> Also according to the record, the Cincinnati vice squad took pictures of Plaintiff at night out of sheer curiosity. After his commander complained that he had not been performing to expectations, Plaintiff was placed in a probationary "Sergeant Field Training Program" which required his superiors to evaluate him on a daily basis over a three month period. Further, Plaintiff was instructed not to go into the field alone, was required to wear a microphone at all times, and forced to ride in a car with a video camera during the final weeks of his probation. After failing his training program, Plaintiff was demoted. The reason provided to him was that he was performing under expectations. However, Plaintiff was informally told he failed training because he did not act masculine enough and "lacked command presence." Plaintiff was the only officer in his department to be placed in a Sergeant Field Training Program, and the only one to fail probation, between 1993 and 2000.

The City of Cincinnati argued that a legitimate reason -- poor performance -- justified Plaintiff's demotion. A jury awarded the officer \$320,511 on his discrimination and harassment claims. Further, the court awarded the officer \$527,888 in attorneys fees and \$25,837 in costs.<sup>29</sup> On appeal, the Sixth Circuit, in affirming the jury's verdict in favor of Plaintiff at the trial court level, held that even if transsexuality is not specifically covered by Title VII, accusations that an employee has failed to conform to sex stereotypes is covered under Title VII, and thus Plaintiff had made a sufficient *prima facie* claim by alleging he was demoted for failure to be "masculine enough."

Smith v. City of Salem, 378 F.3d 566 (Aug. 5, 2004).

The plaintiff in *Smith v. City of Salem, Ohio* was a Lieutenant in the Salem Fire Department who was born male, but later diagnosed as having gender identity disorder.<sup>30</sup> Upon being diagnosed, Plaintiff began expressing "a more feminine appearance on a full-

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<sup>27</sup> 401 F.3d 729 (6th Cir. 2005).

<sup>28</sup> *Barnes*, 401 F.3d at 734.

<sup>29</sup> *Id.* at 733.

<sup>30</sup> 378 F.3d 566 (6th Cir. 2004).



time basis.”<sup>31</sup> Plaintiff confided his diagnosis results with his immediate supervisor, and also told him about his intent to eventually undergo surgery to become female. The supervisor divulged the information up the chain of command. Plaintiff’s supervisors attempted to force Plaintiff to undergo multiple psychological evaluations with doctors of the City’s choosing, apparently hoping Plaintiff would refuse to comply and thus give the department grounds for dismissal. Plaintiff retained legal counsel, who informed the City of the legal ramifications of subjecting Plaintiff to unnecessary psychological evaluations. The City suspended Plaintiff, who filed suit with the EEOC.

The trial court granted Defendant’s motion to dismiss on the grounds that Plaintiff had not stated a legal claim under Title VII. The Sixth Circuit reversed the trial court, ruling that although transgender persons or transsexuals are not covered under Title VII, Plaintiff had pled a *prima facie* case of discrimination by alleging he was retaliated against for failure to hold up to sexual stereotypes -- in essence, for failure to be masculine enough.

Das v. Ohio State University, 115 F. Supp. 2d 885 (S.D. Ohio 2000).

In *Das v. Ohio State University*, Plaintiff, a native of India, brought a Title VII discrimination claim (and a claim under the Ohio state analog) against Ohio State University because she was allegedly forced to resign from her position as Clinical Quality Engineer.<sup>32</sup> Plaintiff largely based her discrimination claim on comments made by her co-workers and supervisors regarding her national origin. However, the Court did consider Plaintiff’s additional claim that she was terminated because of her sexual orientation in contravention of Columbus City Code 2331.03, which, unlike the Ohio Code, does prohibit discrimination on the basis of sexual orientation. The Court agreed that “a claim of sexual orientation discrimination may be brought by an aggrieved plaintiff under Ohio’s public policy exception based on Columbus City Code section 2331.03”<sup>33</sup> but found that, for purposes of summary judgment, Plaintiff had not put forth sufficient proof to sustain a claim in this instance. In a footnote, the Court noted, “In so finding, the Court does not turn a blind eye to the fact that persons of gay, lesbian, and bisexual orientation are often discriminated against in the workplace with no legal recourse.”<sup>34</sup>

Glover v. Williamsburg Local School District Board of Education, 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

In *Glover v. Williamsburg Local School District Board of Education*, a public school teacher alleged that the school district’s decision not to renew his teaching contract was discriminatory, based on his sexual orientation, his gender, and the race of his partner.<sup>35</sup> After a bench trial, the court concluded that Plaintiff had established his equal protection claim based on sexual orientation discrimination, using the standards of

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<sup>31</sup> *Smith*, 378 F.3d at 568.

<sup>32</sup> 115 F. Supp. 2d 885 (S.D. Ohio 2000).

<sup>33</sup> *Das*, 115 F. Supp. 2d at 892.

<sup>34</sup> *Das*, 115 F. Supp. 2d at 893.

<sup>35</sup> 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

proof from Title VII. The court held that upon review of Plaintiff's work record, the Board's proffered reasons were mere pretext for discrimination on the basis of sexual orientation. The court held the school had demonstrated no rational basis for the discrimination, and ordered reinstatement and compensatory damages.

Weaver v. Ohio State University, 1997 WL 1159680 (S.D. Ohio June 4, 1997).

The Plaintiff in *Weaver v. Ohio State University* was the head coach for the Ohio State University women's field hockey team for nine years before her employment was terminated, allegedly because of her gender and sexual orientation (plaintiff was a lesbian).<sup>36</sup> In considering Defendant's motion to dismiss each of the claims against the state, the court held that the state may not be sued in federal court for an alleged violation of Columbus City Code 2331.03 absent its express consent, due to the 11th Amendment. The court permitted Plaintiff to move forward with her Title VII and Title IX claims. However, Plaintiff's remaining claims did not survive Defendants' subsequent summary judgment motion.<sup>37</sup>

Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 1993 WL 492181 (Nov. 19, 1993).

Cincinnati Voter Referendum, Issue 3, would have amended Cincinnati's charter to make unenforceable the provisions of the city's civil rights ordinance to the extent that the ordinance protects lesbian, gay and bisexual people, and prevented any future enactments or policies that might treat gays or bisexuals as a protected class. It was passed decisively in the November 1993 election. A district court judge, using the same reasoning as the Colorado Supreme Court in *Evans v. Romer*, held that strict scrutiny must be applied to Issue 3 because it infringes the rights of political participation of an identifiable group, and therefore issued an injunction barring its enforcement. After a detailed summary of the U.S. Supreme Court precedents on electoral rights, the court asserted,

“[we] conclude that there is a strong likelihood that under the Issue 3 Amendment, all citizens, with the express exception of gay, lesbian and bisexual citizens, have the right to appeal directly to the members of city council for legislation, while only members of the Plaintiffs identifiable group must proceed via the exceptionally arduous and costly route of amending the city charter before they may obtain any legislation bearing on their sexual orientation. Thus, there is a substantial likelihood that the Issue 3 Amendment ‘fences out’ an identifiable group of citizens -- gay, lesbian and bisexuals -- from the political process by imposing upon them an added and significant burden on their quest for favorable legislation,

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<sup>36</sup> No. C2-96-1199, 1997 WL 1159680 (S.D. Ohio June 4, 1997).

<sup>37</sup> 71 F. Supp. 2d 789 (S.D. Ohio 1998).

regulation and policy from the City Council and city administration.”

The court also found that Issue 3 places a significant burden on advocacy rights of the Plaintiffs, because "their advocacy may expose them to discrimination for which they will have no recourse even remotely comparable to that of other groups, to obtain protection, thereby increasing the risks of, and consequently chilling, such expression." The court found it to be "especially significant" that Issue 3 does not remove "sexual orientation" from the human rights ordinance, but rather prohibits using that provision to protect gays while leaving it to protect heterosexuals. "This only reinforces our conclusion that the Defendants have proffered no compelling justification to single out gay, lesbian and bisexual citizens for the additional and substantial burdens. . ." Spiegel found the necessary irreparable harm to support preliminary relief, given the likelihood that fundamental rights would be abridged by allowing Issue 3 to go into effect, and concluded that "maintaining the status quo under the existing City Human Rights Ordinance and EEO Ordinance is the far more prudent course of action in light of the nature of the threat faced by the Plaintiffs in, among other things, their employment and housing situations."<sup>38</sup>

Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).

Plaintiff, a bisexual guidance counselor, sued her employer, the Mad River Local School District, which, upon learning of her bisexuality, asked her to resign and suspended her when she refused, ultimately failing to renew her contract when it expired. Although the district court found in favor of the Plaintiff, the Sixth Circuit reversed. The school learned of Plaintiff's bisexuality because she told a secretary and other co-workers who were personal friends that she was bisexual and had a female lover. She also told the secretary that she was advising two homosexual students. The Sixth Circuit reasoned that the Plaintiff committed a "breach of confidentiality" by telling the secretary she was advising two homosexual students, and concluded that there was no evidence that heterosexual employees who communicated their sexual preferences would be treated any differently than heterosexual employees who communicated their sexual preference. Under the court's reasoning, the communication of sexual preference, no matter what the preference was, was the improper action deserving of termination. Plaintiff appealed the Circuit's holding to the United States Supreme Court. The petition for writ of certiorari was denied. However, Justice Brennan and Justice Marshall dissented to the denial of the petition for writ of certiorari, explaining that this case raises "important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences." Justices Brennan and Marshall explained that Rowland was discharged merely because she was bisexual and revealed that fact to acquaintances at her workplace.<sup>39</sup>

## B. Other Documented Examples of Discrimination

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<sup>38</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 1993 WL 492181 (Nov. 19, 1993).

<sup>39</sup> *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984).

Ohio State Agency

In 2008, a lesbian employee of a state department reported that she faced daily harassment including threats and intimidation because of her sexual orientation.<sup>40</sup>

An Ohio State University

In 2006, a transgender electrician was not hired by an Ohio state university because of her gender identity.<sup>41</sup>

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<sup>40</sup> E-mail from Ming Wong, National Center for Lesbian Rights, to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

<sup>41</sup> E-mail from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

#### IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

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

##### A. Criminalization of Same-Sex Sexual Behavior

Ohio's sodomy law<sup>42</sup> was repealed by the General Assembly effective January 1, 1974.<sup>43</sup>

##### B. Housing & Public Accommodations Discrimination

Ohio housing law prohibits discrimination based on race, color, religion, sex and familial status, but not sexual orientation or gender identity.<sup>44</sup>

Ohio public accommodations law prohibits discrimination based on race, color, religion, sex, national origin, disability, age or ancestry, but not sexual orientation or gender identity.

##### C. Education

Ohio has no positive law specifically affording protections to gay, lesbian, bisexual, or transgender students.

In *Schroeder v. Maumee Board of Education*, the plaintiff high school student brought an action against his principal, assistant principal, and the board of education, alleging violations of his First Amendment rights, Equal Protection rights, and violations of Title IX.<sup>45</sup> Plaintiff was an open advocate for gay rights since becoming aware of his brother's homosexuality. Plaintiff claims Defendants did nothing to stop the verbal and physical harassment suffered by Plaintiff on account of his advocacy, even though administrators were well aware of why Plaintiff was being targeted by other students. The court sustained Plaintiff's actions for equal protection (against the principal and assistant principal) and Title IX violations against Defendants' motion for summary judgment.<sup>46</sup>

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<sup>42</sup> OHIO REV. CODE ANN. § 2905.44 (repealed January 1, 1974).

<sup>43</sup> See *State v. Phipps*, 389 N.E.2d 1128, 1132 (Ohio 1979).

<sup>44</sup> OHIO REV. CODE ANN. § 4112.01 (2009).

<sup>45</sup> 296 F. Supp. 2d 869 (N.D. Ohio 2003).

<sup>46</sup> See also *Weaver v. Ohio State Univ.*, *supra* at Section II.5. (regarding Title IX) and *Beall v. London City School Dist. Bd. of Educ.*, *supra* at Section II.5. (regarding academic freedom).

Ohio State University’s student code provides that misconduct based on gender identity or sexual orientation may be considered “aggravated” for purposes of sanctioning.<sup>47</sup>

#### D. Health Care

By statute, Ohio forbids individuals from making medical decisions on behalf of their same-sex partners unless there is a written directive, such as a durable power of attorney.<sup>48</sup> An adult may designate his or her partner as health care agent through the durable power of attorney for health care.<sup>49</sup>

#### E. Gender Identity

Ohio law generally permits its citizens to amend their birth certificates.<sup>50</sup> However, under Ohio law,<sup>51</sup> such amendments are permitted only to correct errors such as the spelling of names, dates, race, and sex, if in fact the original entry was in error. The Court in *In re Declaratory Relief for Ladrach*,<sup>52</sup> the court held that the petitioner, a male-to-female transsexual, had no right to change the sex information on her birth certificate because the original sex assignment on petitioner’s birth certificate was not in error, even though petitioner had undergone sex-reassignment surgery. Thus, petitioner could not obtain a marriage license to marry a man.

Ohio also does not honor amendments to birth certificates made out of state. In 2003, a post-operative transgender male applied for a marriage license to wed a female, and was denied because he failed to disclose his prior marriage. While applicant’s appeal was being considered, he filed a second application that revealed he was previously married and divorced. The court considered the fact that transgender male had his birth certificate from Massachusetts changed to reflect his new status as “male,” but then held that an out-of-state birth certificate is not conclusive proof of a marriage applicant’s gender. The court subsequently denied plaintiff a marriage license because Ohio public policy forbids female-to-male transgenders from marrying females.<sup>53</sup>

#### F. Parenting

##### 1. Adoption

Unmarried adults may adopt children.<sup>54</sup> Individual gay men and lesbians may adopt children if that is found to be in best interest of child.<sup>55</sup> The Ohio Supreme Court

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<sup>47</sup> OHIO STATE UNIVERSITY CODE OF STUDENT CONDUCT § 3335-23-17 (General Guidelines for Sanctions).

<sup>48</sup> OHIO REV. CODE ANN. §§ 2133.01-2133.26 (2009).

<sup>49</sup> OHIO REV. CODE ANN. §§ 1337.11-1337.20 (2009).

<sup>50</sup> OHIO REV. CODE ANN. § 3705.15 (2009).

<sup>51</sup> OHIO REV. CODE ANN. § 3705.20 (2009).

<sup>52</sup> 513 N.E.2d 828 (Ohio Misc. 1987).

<sup>53</sup> *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio App. Dec. 31, 2003).

<sup>54</sup> OHIO REV. CODE ANN. § 3107.03 (2009).

found that there was no abuse its discretion in allowing a gay man to adopt because the lower court's ruling was not "unreasonable, arbitrary, or unconscionable."<sup>56</sup>

However, Ohio law does not permit a same-sex partner to petition to adopt his or her partner's child.<sup>57</sup> Heterosexual couples may adopt, usually when the spouse joins the petition of his or her partner.<sup>58</sup> Ohio state courts have not addressed the issue of whether a homosexual couple may jointly petition to adopt.

## 2. Child Custody & Visitation

Under Ohio case law, a parent's sexual orientation can be treated as a negative factor in a dispute over child custody and/or visitation, but such rights should not be denied to a parent solely because he or she is homosexual.

The appeals court upheld the denial of custody to a mother who was involved in a lesbian affair, but held that a trial court could treat a parent's homosexual relationship as only one of many factors to be considered in establishing the best interest of the child.<sup>59</sup> The appeals court has also held that a parent's sexual orientation may be considered as part of determining parental rights and obligations only if that sexual orientation has a direct negative impact on the child.<sup>60</sup>

The Ohio Supreme Court has found that gay and lesbian couples can enter into enforceable custody-sharing agreements for their children.<sup>61</sup>

### G. Recognition of Same-Sex Couples

#### 1. Marriage, Civil Unions & Domestic Partnership

The Ohio Constitution provides that "[o]nly a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."<sup>62</sup> Marriage between same-sex couples is also prohibited by statute.<sup>63</sup>

In *Gajovski v. Gajovski*, the court found that a homosexual partner does not constitute a "concubine" for purposes of terminating an alimony agreement, since state

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<sup>55</sup> *In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990); see also Judith A. Lintz, Casenote, The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children - In Re Adoption of Charles B., 50 Ohio St.3d 88, 552 N.E.2d 884 (1990), 16 U. Dayton L. Rev. 471 (1991).

<sup>56</sup> 552 N.E.2d at 890.

<sup>57</sup> *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio App. 1998).

<sup>58</sup> OHIO REV. CODE ANN. § 3107.03 (2009).

<sup>59</sup> *Mohrman v. Mohrman*, 565 N.E.2d 1283 (Ohio App. 1989).

<sup>60</sup> See e.g., *Inscoe v. Inscoe*, 700 N.E.2d 70 (Ohio App. 1997).

<sup>61</sup> *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002).

<sup>62</sup> OHIO CONST. art. XV, § 11.

<sup>63</sup> OHIO REV. CODE ANN. § 1301.01 (2009).

law does not permit marriage between members of the same sex.<sup>64</sup> The alimony agreement entered by the court stated weekly alimony was to be paid until the wife “dies, remarries or lives in a state of concubinage, which shall first occur.”

In *City of Cleveland Heights v. City of Cleveland Heights*, the court upheld a domestic-partner-registry ordinance, established by a voter referendum, on the grounds that the ordinance only affected the municipality and thus was properly within a sphere of local self-government.<sup>65</sup>

#### **H. Other Non-Employment Sexual Orientation & Gender Identity Related Laws**

Ohio has a sexual solicitation law that provides: “No person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard.”<sup>66</sup> In *State v. Philipps*, the Supreme Court of Ohio held that the statute is neither constitutionally overbroad nor vague, although to be constitutional as applied, it must be construed to apply only to situations where the solicitation amounts to “fighting words.”<sup>67</sup> In *State of Ohio Metroparks v. Lasher*, Plaintiff challenged his conviction under the statute.<sup>68</sup> The Court maintained the *stare decisis* power of *Philipps* by refusing Plaintiff’s equal protection challenge, but reversed the conviction because the record was insufficient to show that Plaintiff’s solicitation constituted “fighting words” under *R.A.V.* In *Cleveland v. Maistros*, the Ohio Court of Appeals reversed course, finding that the Ohio solicitation statute violated the equal protection guarantees of the United States and Ohio Constitutions because there was no rational basis in differentiating homosexual solicitations from heterosexual solicitations.<sup>69</sup>

#### Professional Codes of Ethics

The Ohio Code of Judicial Conduct states that

“[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 race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and other subject to the judge’s direction and control to do so.”<sup>70</sup>

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<sup>64</sup> 610 N.E.2d 431 (Ohio App. 1991).

<sup>65</sup> 832 N.E.2d 1275 (Ohio App. 2005).

<sup>66</sup> OHIO REV. CODE ANN. § 2907.07(B) (2009).

<sup>67</sup> 58 Ohio St.2d 271 (1979).

<sup>68</sup> No. 73085, 1999 WL 13971 (Ohio App. Jan. 14, 1999).

<sup>69</sup> 762 N.E.2d 1065 (Ohio App. 2001).

<sup>70</sup> OHIO CODE OF JUD. CONDUCT, Canon 3(B)(5).



The Code continues:

“A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel or others. Division (B)(6) of this canon does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding.”<sup>71</sup>

In the judicial campaign communications context, the Code states that

“[a] judicial candidate...shall not knowingly or with reckless disregard...[m]anifest bias or prejudice toward an opponent based on race, sex, religion, national origin, disability, sexual orientation, or socioeconomic status or permit members of his or her campaign committee or others subject to his or her direction or control to do so.”<sup>72</sup>

The Ohio Code of Professional Responsibility also states that

“[a] lawyer shall not engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability. This prohibition does not apply to a lawyer’s confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.”<sup>73</sup>

The Licensure Code of Professional Conduct for Ohio Educators states that

“[c]onduct unbecoming to the profession includes... [d]isparaging a colleague, peer or other school personnel while working in a professional setting (e.g. teaching, coaching, supervising, or conferencing) on the basis of race or ethnicity, socioeconomic status, gender, national origin, sexual orientation, political and religion affiliation, physical characteristics, age, disability, or English language proficiency,”<sup>74</sup> or “disparaging a student on the basis of

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<sup>71</sup> OHIO CODE OF JUD. CONDUCT Canon 3(B)(6).

<sup>72</sup> OHIO CODE OF JUD. CONDUCT Canon 7(E).

<sup>73</sup> OHIO CODE OF PROF. CONDUCT DR 1-102.

<sup>74</sup> LICENSURE CODE OF PROF’L CONDUCT FOR OHIO EDUCATORS (1)(c).

race or ethnicity, socioeconomic status, gender, national origin, sexual orientation, political or religion affiliation, physical characteristics, academic or athletic performance, disability or English language proficiency.”<sup>75</sup>

## I. Other Evidence of Animus towards LGBT Individuals

On November 2, 1993 the people of Cincinnati passed “Article XII” to the City Charter, an initiative petition aimed at negating previous legislation protecting gay, lesbian, and bisexual persons from discrimination, and further prohibiting the city council from passing similar protections in the future. Article XII states that “No special class status may be granted based upon sexual orientation, conduct or relationships.” It further explains that:

“[t]he City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce, or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void, of no force or effect.”<sup>76</sup>

Article XII was a response to two major employment initiatives passed in Cincinnati in previous years. In 1991, Cincinnati passed the Equal Employment Opportunity Ordinance (“EEO”) prohibiting discrimination in city employment and appointments to city commissions and boards on the basis of sexual orientation. In 1992, these protections were expanded through the Human Rights Ordinance (“HRO”) to prohibit discrimination based on sexual orientation in private employment, public accommodations, and housing. Article XII was an attempt to nullify the EEO and HRO on the issue of discrimination on the basis of sexual orientation, and to prevent similar legislation in the future.

The legislation was challenged in federal district court on constitutional grounds.<sup>77</sup> The district court found the Charter Amendment unconstitutional and permanently enjoined the implementation and enforcement of the Charter Amendment.

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<sup>75</sup> LICENSURE CODE OF PROF’L CONDUCT FOR OHIO EDUCATORS (2)(D).

<sup>76</sup> See generally Robert F. Bodi, *Note, Democracy At Work: The Sixth Circuit Upholds the Right of the People of Cincinnati to Choose Their Own Morality in Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 32 AKRON L. REV. 667, 1999.

<sup>77</sup> *Equal. Found. Of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993).

However, the Sixth Circuit reversed the district court.<sup>78</sup> Plaintiffs appealed to the Supreme Court, which remanded to the Sixth Circuit for further consideration under *Romer v. Evans*.<sup>79</sup> The Sixth Circuit distinguished the Cincinnati Charter Amendment from the legislation held unconstitutional in *Romer* by arguing (a) the Cincinnati Amendment was rationally related to the city’s valid interest in conserving public costs accruing from investigation and adjudication of sexual orientation discrimination claims; and (b) the *Romer* holding was specific to *state* governments not being structured to burden the ability of gays to participate in political life, whereas the Cincinnati ordinance “merely reflects the kind of social and political experimentation that is such a common characteristic of *city* government.”<sup>80</sup>

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<sup>78</sup> *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

<sup>79</sup> *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).

<sup>80</sup> Order, *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, No. 94-3855, 94-3973, 94-4280, 1998 WL 101701, \*2 (6th Cir. Feb. 5, 1998) (emphasis added), *cert. denied*, 525 U.S. 943 (1998); *see also* *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).