

MEMORANDUM

To: Dublin City Council
Dana McDaniel, City Manager

From: Stephen Smith, Law Director
Jennifer Readler, Assistant Law Director
Laura Leister

Date: December 3, 2015

Re: Options for Formal Protection of Employment-Related Sexual Orientation
Discrimination

Resolution 86-15 - A Resolution Rejecting Discrimination Of Any Kind,
And Urging The Ohio General Assembly To Consider Legislation To Ensure
Equal Opportunity And Respect For All Persons.

I. Background and Question Presented

Given the recent developments involving municipalities adopting regulations explicitly prohibiting discrimination based on sexual orientation, in combination with evolving case law and progressive Equal Opportunity Commission (EEOC) decisions, we have been asked to prepare a memorandum discussing the current local, state and federal laws relating to LGBT protection, and provide recommendations.

II. Federal Law

There is a broad umbrella of federal laws which protect people from workplace discrimination on the basis of race, national origin, sex, age, and disability. There is, however, no federal law that explicitly prohibits sexual orientation discrimination in private employment. While Title VII prohibits discrimination based on sex, federal courts have consistently held that the term “sex” does not include sexual orientation. *See e.g., Vickers v. Fairfield Medical Center*, 453 F.3d 757, 766 (6th Cir. 2006) (“It is beyond debate that Title VII does not prohibit workplace discrimination or harassment based on sexual preference, sexual orientation, or homosexuality.”). *See also Obergefell v. Hodges*, 576 U.S. ____, (2015) (declared same-sex marriage a fundamental right, but did not elevate “sexual orientation” into a protected class).

Notwithstanding the above, the Sixth Circuit does recognize employment discrimination based on *sex stereotypes* (*i.e.*, discriminating against a female because she does not dress femininely or discriminating against a male because he does not talk in a “masculine” way). In *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), the Court held that Title VII prohibits employers from discriminating against employees who exhibit gender-nonconforming behavior. However, it has been held that an employer is permitted to require employees to comply with the accepted principles established for gender-distinct public restrooms.

Compare to Johnson v. Fresh Mark, Inc., 337 F.Supp.2d 996, 1000 (N.D.Ohio 2003) *aff'd*, 98 Fed.Appx. 461 (6th Cir.2004), (gender-distinct public restrooms is not discrimination based on sex stereotypes).

III. Ohio Law

“Under Ohio law, an employer may not discharge without just cause, refuse to hire or otherwise discriminate against an individual with respect to hire, tenure, terms, conditions or privileges of employment ‘because of the race, color, religion, sex, military status, national origin, disability, age or ancestry’ of that person.” *Burns v. Ohio State Univ. College of Veterinary Med.*, 10th Dist., 2014-Ohio-1190, ¶ 6 (quoting R.C. § 4112.02(A)). These are the only protected classes acknowledged in Ohio and, similar to the federal government, Ohio courts have consistently held that the term “sex” does not include sexual orientation. *See id.* at ¶¶ 6-11; *Inskeep v. W. Res. Transit Auth.*, 7th Dist., 2013-Ohio-897, ¶11 (“[s]everal states have chosen to enact legislation prohibiting discrimination against homosexuals by adding sexual orientation as a protected status in their discrimination statutes. Because Ohio has not, it has been concluded that sexual orientation is not protected.”).

Governor Kasich signed an executive order in January 2011 prohibiting discrimination based on sexual orientation of state employees. Also, since the early 1990s, some Ohio municipalities and counties have enacted ordinances prohibiting sexual orientation discrimination.

IV. Resolution Urging the General Assembly to Take Action

Grandview Heights passed a resolution explicitly “rejecting discrimination of any kind and urging the Ohio General Assembly to consider legislation to ensure equal opportunity and respect for all persons.” The resolution also “encourages all other Central Ohio municipalities to support this Resolution, pass a similar resolution or legislation.”

We would recommend that Dublin pass a similar resolution. This is recommended because it provides an official statement of Dublin’s rejection of discrimination within its boundaries and advocates that the state government use its resources and expertise to craft uniform legislation. With 247 cities in Ohio, it is simply not practical for each city to have its own unique anti-discrimination ordinance with different exceptions, definitions, and protections. Additionally, the task of enforcing a fully comprehensive anti-discrimination ordinance against private employers, landlords, real estate agents, and owners of public accommodations would be an immensely burdensome and costly operation.

V. Other Courses of Action

We also recommend that the City take the following actions:

- Amend the current non-discrimination provision in Dublin’s standard public contract to require independent contractors to have inclusive equal opportunity policies encompassing “sexual orientation” and “gender identity.”

Staff recommends that this contract revision be implemented in conjunction with the passage of a resolution rejecting discrimination as described above. This approach provides concrete support for Dublin’s position of intolerance for discrimination and would be as simple as inserting the words

“sexual orientation” and “gender identity” (or “sexual expression and identity”) within the current standard contract provision as follows:

“No discrimination for reason of race, color, national origin, religion, sex, genetic information, pregnancy, age, ancestry, military status, sexual orientation, gender identity, or disability shall be permitted or authorized by Dublin and/or Service Provider in connection with the Services.”

- Amend the Code to include a clause prohibiting discrimination based on sexual orientation and gender identity in City employment. This ordinance would protect city employees from discriminatory hiring, firing, and retention because of sexual orientation and/or gender identity.

Staff recommends this amendment, which should be implemented in conjunction with the standard public contract amendment and the passage of a resolution rejecting discrimination. Implementing this approach would further solidify Dublin’s intolerance of discrimination by explicitly prohibiting it within its own employment practices. Under § 33.07, amendments to Chapter 33 do not require separate legislation, but rather simply require that the Human Resources Director and City Manager report such amendments to City Council. City Council then has 30 days to amend or disapprove the amendments.

Dublin’s current Affirmative Action Policy, provided for in § 33.09(B)(1) of the Code, “prohibits discrimination because of race, color, national origin, religion, sex or handicap in all aspects of its personnel policies, working conditions and relationship with employees and applicants for employment, as well as to provide equal access to all programs in order to promote a continuing affirmative action program by the municipality.” It is recommended that Dublin amend this provision to include “sexual orientation” and “gender identity.” Once amended, individuals who believe they have been discriminated against in City employment may file a grievance as provided for in §33.09(B) and (C).

Attached is a redline of the proposed amendments to § 33.09. Staff requests feedback from Council if any revisions are desired.

Implementing this option would additionally require that all Administrative Orders of the City Manager relating to Dublin’s Discrimination Policy or Affirmative Action Policy be revised to include “sexual orientation” and “gender identity”. Such Administrative Orders would include AO 2.66 and AO 2.12.

VI. Conclusion

In conclusion, Staff recommends that Council approve Resolution 86-15 at the public hearing on December 7, 2015. Staff also requests feedback as to the proposed amendments to the standard contract language and the City’s affirmative action policy.

RECORD OF RESOLUTIONS

Dayton Legal Blank, Inc., Form No. 30045

Resolution No. 86-15

Passed _____, 20____

**A RESOLUTION REJECTING DISCRIMINATION OF ANY KIND,
AND URGING THE OHIO GENERAL ASSEMBLY TO CONSIDER
LEGISLATION TO ENSURE EQUAL OPPORTUNITY AND
RESPECT FOR ALL PERSONS.**

WHEREAS, the City of Dublin is a diverse community of families and individuals; and

WHEREAS, appreciation for diversity in all forms strengthens a community, fosters a welcoming environment, and is a critical component of a thriving, successful city; and

WHEREAS, the laws of the State of Ohio do not currently provide express protections based on sexual orientation or gender identity and expressions.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Dublin, ___ of its elected members concurring, that:

Section 1. The City of Dublin rejects discrimination of any kind and respects the inherent worth of all people without regard to race, color, national origin, religion, sex, genetic information, pregnancy, age, ancestry, military status, sexual orientation, gender identity, disability marital status, veteran's status, or other protected factor.

Section 2. The City encourages the Ohio General Assembly to consider legislation to ensure the equal protection of all Ohio citizens, regardless of race, color, national origin, religion, sex, genetic information, pregnancy, age, ancestry, military status, sexual orientation, gender identity, disability, marital status, veteran's status, or other protected factor.

Section 3. The City encourages all other Central Ohio municipalities to support this Resolution and pass similar legislation.

Section 4. This Resolution shall take effect upon adoption in accordance with Section 4.04(a) of the Revised Charter.

Passed this _____ day of _____.

Mayor - Presiding Officer

ATTEST:

Clerk of Council

§ 33.09 AFFIRMATIVE ACTION POLICY.

(A) *Nondiscrimination.* In compliance with Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Act of 1972, as well as Section 504 of the 1973 Rehabilitation Act, amended in 1976 by Title 3, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act, it is the policy of the municipality:

- (1) To provide equality of opportunity in employment with the municipality for all persons.
- (2) To carry out all programs and activities in such manner that no person shall, on the grounds of race, color, national origin, religion, sex, genetic information, pregnancy, age, ancestry, military status, sexual orientation, gender identity, marital status, veteran's status, or handicap disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination with respect to such programs or activities.

(B) *Employment, personnel and program practices.*

(1) The municipality prohibits discrimination because of race, color, national origin, religion, sex, genetic information, pregnancy, age, ancestry, military status, sexual orientation, gender identity, marital status, veteran's status, or handicap disability, in all aspects of its personnel policies, working conditions and relationship with employees and applicants for employment, as well as to provide equal access to all programs in order to promote a continuing affirmative action program by the municipality.

(2) The municipality shall put forth every effort to see that contractors and subcontractors who perform work for the municipality shall comply with all federal, state and equal employment opportunity policies when applicable ~~this policy.~~

(3) The Mayor-City Manager shall designate an Equal Employment Opportunity (EEO) officer who will coordinate the municipal equal employment opportunity efforts. It shall be the duty of the EEO officer to provide advice, conduct initial investigations and to seek conciliation of employee discriminatory complaints.

(C) *Grievance hearing committee.* The following procedure is established for the grievant:

(1) The grievant shall, within five days within the action, submit such complaint in writing to the EEO officer.

(2) The grievant shall request a hearing through the EEO officer, and shall select the first member of the hearing committee.

(3) The municipality shall select the second member.

(4) These two members shall select the third member who becomes the chairperson.

(5) The hearing committee will weigh the evidence presented before it; prepare finding of facts, conclusions of law, and a decision, including appropriate corrective action, if any, to effectuate the municipality's policy established by the affirmative action program.

(6) The decision of the hearing committee shall be final.

(D) *Program implementation.*

(1) The Mayor-City Manager shall direct the implementation of the affirmative action program to promote equal opportunity in every aspect of employment policy and practice, including but not

limited to: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including workshops, seminars and schooling. This implementation shall include, but not be limited to the following:

(a) A notice of the municipality's policy on nondiscrimination in employment shall be posted on bulletin boards in all municipal buildings so as to come to the attention of all employees.

(b) Notification of employment opportunities, new positions, vacancies, promotion possibilities and training opportunities shall be posted on bulletin boards in all municipal buildings so as to come to the attention of all employees.

(c) Newspaper advertisements and other public announcements of employment opportunities placed by or on behalf of the municipality shall state that the municipality is an equal opportunity employer.

(d) The name of the Equal Opportunity Employment officer shall be posted on bulletin boards in all municipal buildings.

(e) Place employment advertisements in appropriate newspapers.

(f) Systematic contacts will be made with minority and human relations organizations to encourage referral of qualified minority applicants to the municipality, and maintain records of such responses.

(g) The municipality shall make every effort to promote after-school, summer and vacation employment to minorities.

(h) The municipality shall continually inventory and evaluate all minority personnel for promotion opportunities and encourage minority employees to seek such opportunities.

(i) The municipality shall insure that seniority practices, job classification, and the like, do not have a discriminatory effect.

(j) The municipality shall develop and maintain records as related to aspects of this affirmative action program such as recruitment, employment, hiring, promotions, and the like.

**CITY OF DUBLIN
ADMINISTRATIVE ORDERS
OF THE CITY MANAGER**

ADMINISTRATIVE ORDER 2.12	
TO:	Director of Personnel & Purchasing <u>Human Resources</u> and Chief of Police
FROM:	Timothy C. Hansley <u>Dana L. McDaniel</u> , City Manager
SUBJECT:	Affirmative Action & EEO Plan for the Recruitment of Law Enforcement Personnel
DATE:	
Supersedes and Replaces Administrative Order 2.12 dated 9/17/92 Regarding Same Subject	

I. PURPOSE

The purpose of this Administrative Order is:

- A. To provide a ratio of employment that is representative of the community;
- B. To establish the Division's Affirmative Action Plan;
- C. To establish the Division's Equal Employment Opportunity Plan,

II. EMPLOYEE MINORITY RATIO

See Section III. (Affirmative Action Plan) immediately following.

III. AFFIRMATIVE ACTION PLAN

- A. This Policy establishes an Affirmative Action Compliance Program, composed of specific steps that will be under-taken to implement the plan.
- B. The Police Division shall engage in positive efforts to employ ethnic minority group members and women by taking affirmative action to achieve a ratio of minority group employees in approximate proportion to the composition of the service area.
- C. In seeking to employ qualified ethnic minority members and women, the Division may conduct research, develop, and implement specialized minority and female recruitment methods. These methods may include, but not necessarily be limited to:

1. Application form and related pre-employment inquiry forms that are in compliance with applicable federal, state, and local EEO laws.;
 2. Job descriptions that are reviewed periodically to properly identify job related, job requirements;
 3. Liaison with local minority community leaders to emphasize police sincerity and encourage referrals of minority candidates to the police agency;
 4. Active cooperation and utilization of the minority media, as well as the general media, in minority recruiting efforts;
 5. Regular, personal contact with the minority or female candidate from initial application to final determination of employment;
 6. Increased overall recruitment efforts with special attention to inner-city neighborhoods and college campuses;
 7. Periodic review of the entire selection process to ensure it is non-discriminatory; (No standards are used which have the effect of eliminating from consideration a significantly higher percentage of minorities or women that of non-minorities or men.)
 8. The encouragement of minority and women employees to refer friends to the agency for potential employment;
 9. Becoming involved with and providing notification to local minority organizations, women's organizations, community action groups, and community service programs, at the time of recruitment; and
 10. The encouragement of minority and women employees to participate in community programs.
- D. An evaluation of the Division's Affirmative Action Plan shall be performed periodically in order to:
1. Measure the plan's effectiveness;
 2. Determine the degree to which the objectives and goals have been achieved; and,
 3. Indicate any need for additional action.
- E. As needed, when employment openings exist within the Division, the Chief of Police shall set forth an itemized budget for affirmative action efforts. This may be included as part of the overall budget for the recruitment and selection process, and shall be submitted at the time the personnel request is submitted.

IV. EQUAL EMPLOYMENT OPPORTUNITY PLAN

- A. It is the policy of the Dublin Division of Police not to discriminate against applicants on the basis of race, color, national origin, religion, sex, genetic information, pregnancy, age, ancestry, military status, sexual orientation, gender identity, disability, marital status, or veteran's status, with respect to recruitment, hiring, training, promotion, or other terms and conditions of employment. Further, it is the policy of the Division to comply voluntarily with the concepts and practices contained in affirmative action.
1. Accordingly, all employment decisions shall be consistent with the principal of Equal Employment Opportunity (EEO).
 2. All promotion decisions shall be consistent with the principal of EEO, and only valid qualifications will be required for promotions.
 3. All other personnel actions or programs such as compensation, benefits, transfers, layoffs, re-calls, training, and education will be administered in a non-discriminatory manner without regard to race, color, national origin, religion, sex, genetic information, pregnancy, age, ancestry, military status, sexual orientation, gender identity, disability, marital status, or veteran's status.
- B. This policy includes, without limitations, the following commitments:
1. To provide equal employment opportunity to all persons in all recruitment, selection, training, compensation, and promotional practices without regard to race, color, national origin, religion, sex, genetic information, pregnancy, age, ancestry, military status, sexual orientation, gender identity, disability, marital status, or veteran's status,
 2. To identify and analyze all areas of the employment process to further the principal of equal employment opportunity; employment decisions in all areas will be made on the basis of furthering the objective of equal opportunity employment.
- C. This policy is in conjunction with the Affirmative Action Compliance Plan described in Section III. of this Administrative Order, which specifies steps that will be taken in order to implement this plan.