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SANDRA DAY O'CONNOR COLLEGE OF LAW
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EDITOR INTRODUCTION

The 2016 Law Journal for Social Justice Symposium, "Promising Practices in Criminal Justice" focused on current programs regarding re-entry and rehabilitation. Discussions ranged from specialty court programs like the Veteran's Court and Homeless Court, victim-oriented rehabilitation for trafficking victims, and re-entry programs. Panelists included judges, practicing attorneys, and community organizers.

Social justice is an evolving, broadening concept, finding new meaning throughout the academic community. This journal, and the articles found herein, is designed to present these emerging concepts in a manner that allows both the jurist and the layperson to engage them. The issue begins with *Zoning and Regulating for Obesity Prevention and Healthier Diets: What Does the South Los Angeles Fast Food Ban Mean for Future Regulation?*, written by Kim Weidenaar, an article commenting on local zoning ordinances as tools for preventing obesity in disproportionately affected populations. However, with the second article, *Eating Mascots for Breakfast: How Keeping Native Faces off Labels Can Grow Tribal Economies*, Leah K. Jurss concentrates on food sovereignty in tribal communities and labeling of Native food products. Alex D. Ivan then shifts the focus by studying how electronic monitoring may be used to empower victims while reducing burdens of imprisonment spending in *Utilizing Electronic Monitoring to Enhance Domestic Violence Victim Safety*. Next, in *Constitutional Protection of Domestic Violence Victims Reinforced by International Law* Marina Kovacevic argues ratification of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in the United States. Sara Movahed, in *Devastating Effects of the International Failure to Recognize Refugees of Gender Based Persecution*, then examines legal shortcomings resulting when asylum based solely on a history of gender-based persecution is not considered. Through *Kennedy's Law: The Hidden Constitutionally-Protected Classification*, Nicole Fries explores the necessity of Supreme Court action to provide lower courts the ability "to apply a suspect class framework to non-marriage sexual orientation laws." Next, Erin Iungerich, in *My Nurse is a Pornstar: Should Discrimination Law Protect Moonlighting in the Adult Industry?*, considers protections for at-will employees participating in adult industry activities after-hours. Finally, *Secrecy, Espionage, and Reasonable Efforts Under the Uniform Trade Secrets Act – An Unbalanced Mass* by Peter L. Krehbiel concludes the issue by analyzes concerns that shifting costs related to trade secrets may undermine public policy and society at large. Collectively, the unique perspectives of these articles present important domestic and international issues that must be examined in today's changing landscape.

Special thanks to the Law Journal for Social Justice Editorial Board for their hard work and dedication.

Asha McManimon
2015-2016 Editor-in-Chief
Law Journal for Social Justice

MY NURSE IS A PORNSTAR: SHOULD DISCRIMINATION LAW PROTECT MOONLIGHTING IN THE ADULT INDUSTRY

By Erin Iungerich*

INTRODUCTION

The story of George and Tracy Miller has become almost legendary in employment discrimination law. Not only was the couple big news when the story broke of their adult website, but their situation has been cited in books, blogs, and legal discussions since.[1]

What happened to the Millers was this: while working at Scottsdale Healthcare Osborn Hospital as nurses, the couple decided to create an adult website with content featuring Tracy Miller.[2] The website started as a hobby, but became so popular the couple decided to see if they could make money from it.[3] The pay version of their site eventually made income for the couple of about $41,000 in one month.[4] The hospital fired both George and Tracy, claiming the Millers were harassing hospital employees by attempting to recruit others to join the site.[5] However, George and Tracy claim the hospital fired them because there was a flurry of coworkers logging on to the site to view content of Tracy.[6] The Millers' experience is becoming less unusual, and in states with "At-Will" employment statutes, there may be no legal recourse for being fired for legal activities during off-duty hours.

This paper will look briefly at the history of employment law in the United States, examining the master-servant theory and its past application, as well as a very short review of freedom to contract theory vis-a-vis employment law. There will also be a brief discussion of current At-Will employment law using Arizona as an example. I will then look at

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* The author wishes to thank Professor Zachary Kramer of the Sandra Day O'Connor College of Law for encouraging those in the legal profession to have a vision for how the world should be, and my very good friends Debi Kealey and Jen Farrar for graciously listening to, and providing feedback on, my frequent ideological outbursts.

[1] *See* Frederick S. Lane, *The Naked Employee: How Technology is Compromising Workplace Privacy,* 231-32 (2003).

[2] Michael A. Fuoco, *Nursing Couple Stripped of Arizona Jobs over Web Site Nudity*, POST-GAZETTE.COM (Aug. 10, 1999), http://old.post-gazette.com/regionstate/19990810porn4.asp.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Lane, *supra* note 1, at 231.

state laws, which offer some protection for employees' off-hour activities, and how courts have interpreted those statutes. There will be a policy discussion of how second jobs are or are not different from hobbies. Finally, I will propose a possible solution to the employee-employer tension over off-hour activities, touching upon European law as well as U.S. employment law.

A short note on why I chose to look at not just all after-hours activities, but adult industry activities in particular: I believe that most employers' initial reaction (and indeed final reaction) to work in adult films or on adult websites will be extremely negative. Sometimes, employers may have legitimate business reasons why an employee should not be engaged in the adult industry. However, adult-themed second jobs also serve as a test to examine our societal preconceptions as well as how far we would be willing to go to protect employees. If one type of second job is legal, say, working as a librarian, should equal protection be given to all legal types of second employment?

I. WHY AN EMPLOYER CAN CONTROL TIME AWAY FROM WORK

Adult websites are a recent phenomenon in the workplace. However, the legal theories behind why an employer can regulate employees' activities away from work stretch back to the beginning of the industrial age (and indeed before.) The United States has a long history of allowing employers a degree of control over how their employees spend time away from work. Two theories work to give employers a say in how employees live their lives: The master-servant relationship, and the freedom to contract.

A. Master-Servant

A Tennessee court in *Payne v. Western & Atlantic Railroad Co.* gives good insight into the history of master-servant legal philosophy in the United States.[7] The plaintiff, L. Payne, was a storeowner in Chattanooga who built a thriving business by selling to the employees of the Western & Atlantic Railroad.[8] One day in February 1883, an agent of the railroad sent a notice that any company employee who bought goods from Payne would be fired.[9] Payne then sued the railroad, claiming the railroad's

[7] 81 Tenn. 507 (1884).
[8] *Id.* at 509.
[9] *Id.* at 510.

agent was maliciously attempting to ruin his profitable business.[10] In its counter-arguments, the railroad stated first that they "had the right to discharge employes [sic] because they traded with plaintiff, or for any other cause."[11]

The court makes its way through the libel, agency, and standing concerns raised by the case, and then takes on the topic of the rights of employers with regard to the influence they may exert over where their employees spend off-hours. On depriving Payne of customers through threatening employees with discharge, the court asked:

> [I]s it legally wrong? Is it unlawful? May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number.[12]

In its evaluation, the court is comparing the power of an employer to restrict employees' activities away from work with that of a man in 1883 to order his family not to shop at a particular store. Also, the court draws a parallel between employees and an actual domestic servant. It is in *Payne* that the full scope of traditional American ideas of the employee as servant comes to the fore; an employer may treat his employees as a patriarchal landowner would treat his family or domestics.[13]

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[10] *Id.* at 511. As an aside, it may be interesting to note that it was not the employees of the railroad company who sued to maintain their right to buy from whom they wished. It is not discussed in the case, however, whether the employees thought they lacked such a right (and generally accepted the employer's ability to constrain their choice of stores), whether the employees thought the risk of losing their jobs was too high to attempt to shop at Payne's store again, or whether they had no particular preference for Payne's shop in the first place.

[11] *Id.*

[12] *Id*. at 518.

[13] There is evidence that the parallel would be taken only so far by courts, however. At least by 1918, the Supreme Court of Nebraska reviewed a case where a restaurant worker suffered corporal punishment while he was working in a restaurant. The court found "there is no evidence in this record that would justify the finding that to use corporal punishment, or personal violence, was within the scope of [the kitchen supervisor's] employment. Indeed, the proprietor himself had no such function, and could not delegate such powers." Allertz v. Hankins, 166 N.W. 608, 609 (1918).

B. Freedom to Contract

Freedom to contract, a theory which applies most specifically to how employees spend their time at work, as well as the pay and benefits received by employees, can also affect time away from work. The Supreme Court's quintessential case on worker's rights prior to the Great Depression was *Lochner v. New York*.[14] In 1897, the state of New York had passed a labor law limiting the number of hours bakers could work in a week. The limit was set at what we might consider a reasonable amount of time; that is, bakers could be on the job no more than 60 hours per week.[15]

The Supreme Court used the Fourteenth Amendment to overturn the law. Although the Court recognized that states could regulate regarding safety, health, morals, and general welfare of the public,[16] the majority decided that "a purely labor law . . . involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act."[17] Before the Great Depression, attempts to regulate working hours were seen as an interference not only of the right to contract, but depriving an *employee* of a property right by not allowing that employee to sell as much of his labor as property as he could. The Court couched its rejection of limiting work hours, a decision which in effect limited an employee's non-work hours, as protecting the rights of employees to make money.

During the Great Depression, however, the Court's view changed significantly. In *West Coast Hotel Co. v. Parrish*, the Court also applied the Fourteenth Amendment to a labor dispute; in this case to the employer, West Coast Hotel, who was refusing to follow the state of Washington's minimum wage law.[18] However, quite differently from *Lochner*, the Court found that "power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable."[19] The Court also took a very different view from *Lochner* on the relationship between employer and employee, and the theory behind labor law:

> "The [employers] naturally desire to obtain as much labor as possible from their employees, while the [employees]

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[14] 198 U.S. 45 (1905).
[15] *Id.* at 52.
[16] *Id.* at 53.
[17] *Id.* at 57.
[18] 300 U.S. 379 (1937).
[19] *Id.* at 392-93.

> are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority."[20]

Through the drastic economic climate of the Great Depression, the Court's attitude toward pure labor laws and the employee interests they protected changed. Although the right to contract was still protected, states could begin to enact legislation that limited an employer's right to dictate contract terms to employees. After *West Coast Hotel*, however, no state was obliged to create legislation protecting employees from the unequal bargaining power of employers.

C. Current At-Will

According to the National Conference of State Legislatures, all states retain a presumption of At-Will employment, except Montana.[21] The United States is fairly unique in presuming the application of the At-Will doctrine; most countries allow dismissal only for cause.[22] Reasons for not requiring cause for dismissal are, "respect for freedom of contract, employer deference, and the belief that both employers and employees favor an at-will employment relationship over job security."[23]

The reasons for maintaining an At-Will regime are a bit problematic. As *West Coast Hotel* shows, the Court has already put definite bounds on the freedom to contract. *West Coast Hotel* also somewhat struck down employer deference, not allowing an employer to choose whether to follow minimum wage laws. Further, Title VII limited employer deference by making it unlawful, "for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[24] Certainly, employer deference is not absolute, and has been already limited in several important ways. Finally,

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[20] *Id.* at 394 (quoting Holden v. Hardy, 169 U.S. 366, 397 (1898)).

[21] *The At-Will Presumption and Exceptions to the Rule,* NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (last visited Apr. 5, 2015).

[22] *Id.*

[23] *Id.*

[24] 42 U.S.C.A. § 2000e-2 (West 2014).

the assertion that both employers and employees prefer At-Will law because it allows flexibility may be a bit of an exaggeration.

In the Millers' case, both employees would have preferred the employer's ability to discharge be limited; indeed, the employer did give a reason, but the Millers believed the reason to be false. The Millers were, in effect, requesting the employer substantiate its decision to terminate employment. Also, if At-Will law were modified, there is no reason employees could not still have a right to end the employment relationship at will, while requiring the employer to provide a valid business justification for dismissal.

Narrowing the scope of conversation to specific At-Will law, which is largely regulated by state statute, I would like to briefly examine Arizona's "Severability of Employment Relationships" law. Under Arizona law, either the employer or employee can terminate the employment relationship, "at the pleasure of either the employee or the employer."[25] There are several exceptions, dealing with issues such as violations of the state civil rights act, occupational health and safety, an employer requiring an employee to violate the state constitution, or retaliation for exercising specific rights, such as voting or crime victim's rights.[26]

Other than violations of state statutes, the main cause of action for an employee against an employer in an At-Will state, such as Arizona, is violation of an employment contract. In a suit against an employer, the employee bears the burden of overcoming the assumption that employment is At-Will.[27] Further, any employment contract must meet the formality requirements set forth by statute; that is, the contract must be written, and that written contract must show both parties agreed to a specified duration of employment or, "expressly restricts the right of either party to terminate the employment relationship."[28] However, the requirements for employment contracts have been slightly broadened to

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[25] ARIZ. REV. STAT. ANN. § 23-1501 (2014) (West).

[26] The full list of reasons an employee may sue his or her employer for wrongful termination are: breach of contract, violation of defined civil rights, occupational safety, hours of employment violations, violating the agricultural employment relations act, and retaliation, including for whistleblowing for violations of state law, refusing to violate the state constitution, exercising workers' compensation rights, jury service, voting rights, refusal to join a union, refusing to pay kickbacks to an employer, national guard or armed forces service, exercising a right to be free from coercion in purchasing goods [directly in opposition to the court's decision in Payne v. W. & A. R.R. Co., 81 Tenn. 507 (1884)], and finally the right to leave work to attempt to obtain court orders in relation to being a victim of a crime. *Id.*

[27] White v. AKDHC, LLC, 664 F. Supp. 2d 1054, 1063 (D. Ariz. 2009).

[28] *Id.* at 1062.

include implied-in-fact terms.[29] The Supreme Court of Arizona found in *DeMasse v. ITT Corp.* that if there is a promissory intent reasonably relied upon by the employee, and the employee acts in response to that promise, it is possible the employer could be held accountable for a statement offering job security even if that statement is not expressly written in a contract signed by both parties.[30]

In summary, even in At-Will states, there are some protections for employees. However, in the absence of an actual or implied-in-fact employment contract, the employer would have to commit a fairly serious violation of state statute (or indeed, of the state constitution) for an employee to have a cause of action against the employer. Having said that, while some At-Will states, such as Arizona, offer no statutory protection for activities after work hours, other states have created such exceptions to an employer's ability to terminate employees at will.

II. CURRENT LAWS OFFERING EMPLOYEES PROTECTIONS FOR OFF-WORK ACTIVITIES

A. American Labor Law in General

In a general survey of state laws protecting the off-work activities of employees, the National Conference of State Legislatures found the following:

> In total, 29 states and the District of Columbia have statutes that protect employees' [sic] from adverse employment actions based on their off-duty activities. These statutes provide three different levels of protection 1) use of tobacco only;[31] 2) use of lawful products; and 3) any and all lawful activities.[32]

Levels 1) and 2) in the description of protection may seem a bit odd at first. Was there a great hue and cry for legislative action from employees who were fired for smoking on their way home from work? Or "using"

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[29] DeMasse v. ITT Corp., 194 Ariz. 500, 505 (1999).

[30] *Id.*

[31] Arizona had a statute protecting tobacco use of employees during off-duty hours: "No state employer may discriminate against any employee or other person on the basis of the use or nonuse of tobacco products." ARIZ. REV. STAT. ANN. § 36-601.02(F) (2014) (West). The statute was repealed through the state's proposition system. ARIZ. REV. STAT. ANN. § 36-601.02 (2014) (West).

[32] *Discrimination Laws Regarding Off-Duty Conduct*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/documents/employ/off-dutyconduct discrimination .pdf (last updated Oct. 18, 2010).

any "lawful product?" It is outside the scope of this paper to discuss the power of lobbying by the tobacco and alcohol industries. Instead, I will turn my focus to states, which offer broader protection for leisure activities (New York), and any lawful activity (Colorado).[33]

B. New York Protections

New York, the state that promulgated the 1897 work hour limit at issue in *Lochner*,[34] has a somewhat unique protection in force for off-duty employee activities. New York chose to protect lawful activities employees engage in away from work, but only leisure activities. It is unlawful in the state to take an adverse employment action, including refusing to hire, for "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes."[35] The law even goes so far as to grant protection for, "the viewing of television, movies and similar material."[36] The activities protected are those that take place, "outside work hours, off of the employer's premises and without use of the employer's equipment or other property."[37]

Thus far, state court decisions have focused on whether dating activities fall under the law's protections. The courts have been unanimous in holding that personal relationships are not protected, and therefore employers can take adverse actions for activities such as dating a coworker,[38] or living with another person's spouse.[39] Interestingly, the court declined to rule on whether an employee's membership in NAMBLA[40] constituted a protected off-duty activity.[41]

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[33] There are actually four states that offer protection for some or all lawful activities apart from smoking or using lawful products. Those states are New York, Colorado, California, and North Dakota. *Id.*

[34] *See supra* Part I.B.

[35] N.Y. LAB. LAW § 201-d(1)(b) (McKinney 1992).

[36] *Id.*

[37] N.Y. LAB. LAW § 201-d(2)(c) (McKinney 1992).

[38] *See, e.g.*, McCavitt v. Swiss Reinsurance Am. Corp., 89 F. Supp. 2d 495 (S.D.N.Y. 2000).

[39] Bilquin v. Roman Catholic Church, 729 N.Y.S.2d 519 (App. Div. 2001) ("[T]he plaintiff's conduct did not constitute a recreational activity within the meaning of Labor Law § 201-d(2)(c)").

[40] NAMBLA is the North American Man-Boy Love Association, a group dedicated to building support for sexual relationships between adult and minor males. *Who We Are,* NAMBLA, http://nambla.org/welcome.html (last visited Apr. 5. 2015).

[41] Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York, 196 F. Supp. 2d 229, 250 (E.D.N.Y. 2002).

C. Colorado Protections

On its face, the Colorado statute regarding off-duty activities is broader than New York's. While New York law only protects leisure activity, Colorado protects "any lawful activity off the premises of the employer during nonworking hours."[42] The law gives the employer three effective defenses: 1) that the adverse action taken by the employer was not in fact "due to" the off-duty activity;[43] 2) the restriction on the employee's activities relates to a bona fide occupational requirement or responsibilities or activities of the employee, or group of employees, in particular;[44] and 3) the adverse action is necessary to avoid a conflict of interest, or the appearance of a conflict of interest.[45]

The exception regarding "occupational requirement or responsibility" might be fertile ground for an employer to mount a defense under the law. Although the statute does limit application of the exception to only the particular employee or employees in question, it is unclear from the language of the statute whether an employer may be able to claim a general defense that upholding the organization's image is the responsibility of the particular employee at issue. However, at least one Colorado court of appeals has held the protections under the statute should be construed broadly to accomplish the goal of protecting all legal off-work activities.[46] There have been cases reviewing whether the statute protects the sale of medical marijuana by employees during off-hours. Courts have found such activity is not, because the sale of marijuana is legal under state law, but violates federal law.[47]

III. LIMITS ON EMPLOYEE OFF-WORK ACTIVITY AS DISCRIMINATION

A. Comparing to Price Waterhouse v. Hopkins

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[42] COLO. REV. STAT. ANN. § 24-34-402.5 (West 2013).

[43] *Id.* ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity."); *see also* Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 375 (Colo. 1997).

[44] *Id*.

[45] *Id*.

[46] Watson v. Pub. Serv. Co. of Colorado, 207 P.3d 860, 863-64 (Colo. Ct. App. 2008) (finding a temporary employee's report of possible safety violations at work was protected by the statute, since the report was made off-duty and away from the employer's premises).

[47] *See* Coats v. Dish Network, L.L.C., 303 P.3d 147, 151 (Colo. Ct. App. 2013).

Price Waterhouse v. Hopkins involved a candidate for partnership who had her candidacy placed in a sort of limbo.[48] The system for reviewing candidates involved other partners in the firm submitting comments regarding a candidate's acceptability for partnership.[49] Hopkins had received generally very positive reviews regarding her job performance.[50] However, there was negative input on Hopkins' interpersonal skills, with reference to her "aggressiveness" and "brusqueness."[51] Some other comments stated that Hopkins was "macho," needed a "course at charm school," and should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[52]

The Court not only found the presence of sex-based stereotyping,[53] but also that a company which acts on the basis of a stereotype in evaluating an employee's job performance is acting "on the basis of gender."[54] While the court noted that remarks based on stereotypes are not dispositive of a gender-based decision,[55] the court noted "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[56] The Court embraced the view that stereotyping is "not . . . 'discrimination in the air'; rather, it is . . . 'discrimination brought to ground and visited upon' an employee."[57]

Like the partners at Price Waterhouse who made stereotype-based comments regarding Ann Hopkins, stereotyping also plays a role in adverse employment actions due to some off-work activities. The Millers believe they were fired because of their participation in the adult industry. Implicit in such an idea is that such work is the result of immorality, or at least negative social standards. In other words, no good employees or citizens make pornography. Even if we accept that as probably the case, surely it is not necessarily *always* the case. After all, the Millers themselves were a married couple raising two children, with good jobs, which contributed (literally) to the health of the community.

Even if employees do not hold traditional moral values, it is not necessarily the case that they are bad or dishonest employees. I suggest that employees who work in adult businesses on off-work hours can

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[48] Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989).
[49] *Id*. at 232.
[50] *Id*. at 233-34.
[51] *Id*. at 234.
[52] *Id*. at 235.
[53] Price Waterhouse v. Hopkins, 490 U.S. at 255.
[54] *Id*. at 250.
[55] *Id*. at 251.
[56] *Id*.
[57] *Id*.

certainly be valuable employees, and adverse employment action based solely on that work is based on stereotyping, as was the case in *Hopkins*. Of course, the major difference is that the stereotype in *Hopkins* was based on sex, a class protected by Title VII. Working in sex-based industries has not been protected under Title VII. However, we need to expand how we look at discrimination protection.

B. Expanding Our Idea of Discrimination

European countries have a significantly different approach to discrimination than has been traditionally the case in the United States. As a starting point, the European Convention on Human Rights (ECHR) establishes that "everyone has the right to respect for his private and family life, his home and his correspondence."[58] It can be argued that the United States has very similar rights, not constitutionally, but through Supreme Court decisions. Also, the ECHR only applies to state action, and not private action. However, it is beneficial to start with the ECHR because 1) it is a broad, aspirational document which sets out general guidelines for all European states-parties to implement as best they can, and 2) the ECHR has led to important decisions by the European Court of Human Rights on non-discrimination issues.

The ECHR has been interpreted to not only "prohibit scenarios where *persons or groups of people* in an identical situation are treated different, [but also] where *persons or groups of people* in different situations are treated identically" (emphasis added).[59] While the emphasis shifts slightly under EU legal decisions from groups to "persons or groups of people," there is still a need for courts interpreting the ECHR to use comparators; that is, comparing the person's treatment with that of other people who are either similarly or dissimilarly situated.[60] Two problems remain with ECHR interpretations: 1) they apply only to actions by states-parties, and 2) they require comparisons among people in order to find discrimination. Comparisons are problematic, because they require employees to argue others are in a similar, or dissimilar, situation, when there may be no example of such employees. However, the ECHR does have the positive

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[58] European Convention on Human Rights, art. 8, §1, Nov. 11, 1950, C.O.E. F-67075 Strasbourg cedex [hereinafter ECHR].

[59] European Union and Agency for Fundamental Rights [FRA] and European Court of Human Rights [ECHR], *Handbook on European Non-Discrimination Law*, at 22 (July 2010), *available at* http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf.

[60] *Id*. at 23, 31.

characteristic of beginning to move away from a group-oriented approach to a more individualist way of analyzing discrimination.

A better solution for off-duty employment discrimination law is the German constitution. While the German constitution does set out specific groups that are to be protected,[61] it also contains a provision that "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."[62]

The right to personality has been interpreted fairly broadly by German courts. In his article *Life Away from Work*, Matthew Finkin cites two cases that underscore the importance German jurisprudence gives to development of personality. In one case, a public relations worker has a highly publicized affair; in another, a preschool teacher has a second job as an exotic dancer.[63] Quoting the German court in the public relations employee case, Finkin points out "[t]he defendant fails to appreciate his place as an employer. As such, he is not called upon to judge the morals of his employees"[64] Similarly, the teacher's part-time employment as a dancer was found to not be grounds for dismissal, since the club was not near the school, and the teacher's activities had been unknown to parents and colleagues.[65] Finkin ends with "[a]t a minimum, absent proof of actual loss to the civic organization or disruption of the school, one is hard pressed to conclude other than in favor of individual freedom, just as these courts did."[66] Not only is Finkin's point an excellent one, but also, the German economy seems quite capable of coping with such laws in place.[67]

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[61] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESET] [GG] [BASIC LAW], July 21, 2010, GG art. 3 (Ger.). ("No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability"). (Translation by Professor Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag).

[62] *Id*. at art. 2.

[63] Matthew W. Finkin, *Life Away from Work*, 66 LA. L. REV. 945, 969 (2006).

[64] *Id*. at 969-70 (quoting Judgement of Feb. 24, 1969, LAG Dusseldorf, reported in DB 1969, at 667).

[65] *Id*. at 970.

[66] *Id*.

[67] The European Union as a whole is the world's largest economy. *See The World Factbook,* CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html (last updated June 17, 2014). Within the European Union, Germany is the largest individual state economy, with a gross domestic product of $3.6 trillion. Matthew Lynn, *Why Britain's Economy will Overtake Germany's*, THE SPECTATOR (Oct. 5, 2013), http://www.spectator.co.uk/features/9039871/why-britains-economy-will-overtake-germanys/.

CONCLUSION

At-will law, which is prevalent in almost every state in the United States, must be abandoned. It is based on outdated theories of the roll of an employer in the lives of employees. No longer do employees see themselves as "servants" of their employer, nor should they. The supposed freedom to contract has had its weaknesses exposed by cases such as *West Coast Hotel*.[68] State legislatures are already beginning to implement protections for employees' off-duty activities, such as Colorado's statute. While the *Hopkins* case gave additional protections based on stereotypes, it did not go far enough.

I propose we move past group-based employment safeguards to protection, which can be applied on an individual basis. Moving out of the At-Will era, states should implement statutes that not only protect legal off-duty conduct, but also protect the employees themselves as well as their actions. Employees, through a German-style law, should be encouraged to develop themselves as they see fit. If their self-development includes work in an adult industry, or a self-produced adult website, then the state should enact legislation that employers do not have a say in that activity. Since At-Will employment would no longer be the law, employers should be required to not only state a business-related cause for any adverse employment action based on off-duty activity (such as the employee's activities causing an *actual* loss of income for the business, not merely theoretical), but the employer should then be required to show evidence for that cause. Such a solution would allow employees protection against the imbalanced employer-employee power dynamic, and allow employees to act as individuals, while avoiding some of the problems of group-based analysis.

[68] W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).