Labor and Employment Law Section Newsletter

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Romance in the Workplace: Are *Pasch* and *Wal-Mart* Truly Incompatible or Can They Reconcile?

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As long as workers of the opposite sex have fraternized, nonfraternization policies have existed. In 1980, the New York Court of Appeals decided in the *Manhattan Pizza Hut* case that a policy forbidding an employee from working under the supervision of a relative was not marital status discrimination under the Human Rights Law.[1] According to the Court, marital status discrimination only occurs where employers decide whether to hire, fire or promote because the person is single, married, divorced, separated or the like. It has no application where an individual is discharged not because she was married, but because of the fact that she was married to her supervisor. If she was married to anyone else, she would not have been discharged.

As with most provisions in the law, nothing remains settled for long. When the legislature enacted the Lawful Activities Act effective January 1993, few thought that the protection afforded to lawful recreational off-premises activities would implicate fraternization and nepotism rules, particularly in view of *Manhattan Pizza Hut*. Yet, that is exactly what has happened.

This article explores the history of the Lawful Activities Act, with particular emphasis upon two recent cases, the Third Department's decision in *State v. Wal-Mart Stores, Inc.*,[2] and the conflicting Southern District decision in *Pasch v. Katz Media Corporation*.[3] It does not address other bases for challenging fraternization policies, such as public policy,[4] invasion of a constitutional right of privacy,[5] sex discrimination,[6] or breach of the covenant of fair dealing in employment contracts.[7]

In *Wal-Mart*, the Third Department decided that the Lawful Activities Act was not violated when Wal-Mart discharged two of its employees for violating its fraternization policy, which prohibited a dating relationship between a married employee and another employee other than his or her own spouse. In *Pasch*, however, the Southern District found that cohabitation was a protected activity and that an allegation that plaintiff's living with an individual who had been but was not currently an employee at the time she was constructively discharged presented a claim of discrimination under the Lawful Activities Act. This article explores the two decisions to determine whether they are truly conflicting or whether they can be reconciled.

Legislative History

Labor Law section 201-d became effective on January 1, 1993. It represents a compromise that was

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passed after the governor had vetoed two bills in the preceding two years addressing the same subject matter. Originally, the concept of an off-duty conduct law was to protect smokers against discrimination in employment. However, legislators ultimately produced an expansive statute that prohibits discrimination in employment due to off-duty political activities, legal use of consumable products, legal recreational activities, union membership and the exercise of rights guaranteed by the Taylor Law or the National Labor Relations Act.[8]

Introduced in 1992 by Senator James J. Lack (R-2nd District), the bill was vigorously supported by a coalition that included NYSUT, the AFL-CIO and other unions, Philip Morris, the Miller Brewing Company, individual employees and the Broome County Chamber of Commerce. Supporters argued that the bill struck the appropriate balance between employee privacy rights and employer interests in regulating behavior that impacts on their business. For example, they asserted that employees should be entitled to do as they please on their own time, without employer control over off-duty conduct, provided the conduct did not create a material conflict of interest with the employer's business interests. They also contended that employees need protection from arbitrary termination based on off-duty conduct such as smoking or membership in an organization. Supporters also cited the fact that 26 other states had passed similar laws.

On the other side, the Governor's Office of Employee Relations, NYCOM, the Business Council of New York State, the American Lung Association, the American Cancer Society, the MTA and various other private sector employers and public sector municipalities lobbied against the measure. They argued that the bill's conflict-of-interest provision was inadequate because many employers, such as police departments and the anti-tobacco lobby, had a self-evident compelling interest in ensuring that their employees' off-duty conduct was consistent with their mission. Additionally, the opposition noted that employees were already protected against discrimination and whistle blowing by other state and federal laws. They also argued that the bill would increase litigation and legal expenses.

Eventually three bills were drafted and submitted for consideration, bill S. 6935-C became chapter 776 of the laws of 1992 and contained the substance of what became section 201-d. In order to increase its likelihood of being approved by the governor, the bill's drafters changed their approach from the two prior bills and this time specified types of protected outside activities rather than merely generally prohibiting discrimination based on "engagement in a legal activity during non-work hours." The drafters also detailed certain unprotected types of employment-related activities, such as those creating a material conflict of interest with the employer's business interests related to its trade secrets or which violated state, New York City or collectively bargained conflict of interest provisions.

Bill S. 9030 became chapter 777 of the laws of 1992. In response to concerns raised by Governor Cuomo, it amended chapter 776 by delaying the law's effective date to January 1, 1993. Bill A. 12380-A, which became chapter 778, amended chapter 776 by expanding, at the governor's request, exclusion from the law's coverage of any "executive order, policy, directive, or other rule which has been issued by the attorney general regulating outside employment or activities that could conflict with the employee's performance of their official duties." It also clarified and limited the employer's right to act against an employee based on the employer's belief that the employee's conduct violated a "workplace policy."

The bills were passed by a sweeping majority in the Senate and the Assembly. Assemblyman Barbaro reported to the Governor's Counsel, "several large corporations, as well as the Business Council, withdrew their opposition to the bill after it was narrowed into the current version."[9]

Despite his previous opposition, the bills were approved by Governor Cuomo on August 7, 1992. The governor determined that the amendments to S. 6935-C had alleviated his previous reservations about the law and that he was "approving these bills because they properly strike the difficult balance between the right to privacy in relation to the non-working hours activities of individuals and the right of employers to regulate behavior which has an impact on the employee's performance or on the employer's business."[10]

Description of *Wal-Mart* and *Pasch* Cases

In *State v. Wal-Mart Stores. Inc.*,[11] the Appellate Division, Third Department reversed a decision by the state Supreme Court and granted Wal-Mart's motion to dismiss a cause of action predicated upon section 201-d. The state had sought the reinstatement of two employees who had been discharged due to their violation of Wal-Mart's nonfraternization policy, which prohibited a married employee from dating another employee who was not his or her spouse. As part of its legal theory, the state asserted violations of section 201-d and Executive Law section 63(12), which prohibits repeated or persistent illegality in the transaction of business. The trial court had granted Wal-Mart's motion to dismiss the latter cause of action.

By a three-to-one vote, the Third Department agreed with Wal-Mart that, " 'dating' is entirely distinct from and, in fact, bears little resemblance to 'legal recreational activity'" as defined by section 201-d. The court explained that fundamental rules of statutory construction required application of a clearly and unambiguously expressed legislative intent. Here, the court found, dating of necessity involved a romantic element lacking from the types of recreational activities protected by the statute: "although a dating couple may go bowling and under the circumstances call that activity a 'date,' when two individ-

uals lacking amorous interest in one another go bowling or engage in any other kind of 'legal recreational activity,' they are not 'dating'."[12]

The court also determined that the statute's legislative history evidenced an "obvious intent" to protect only "certain clearly defined categories of leisure-time activities."[13] Applying the doctrine of *noscitur a sociis*, the court noted the statutory inclusion of activities such as sports, games, exercise and reading and concluded that the absence of dating relationships manifested an intent to exclude them from protection. The court further reasoned that its construction of the statute properly imposed upon the employer the burden of showing that the questioned activity intertwined both recreational and romantic conduct, thereby preserving the statutory protection afforded nonromantic relationships between employees.[14]

Justice Yesawich dissented on two grounds. First, he disagreed with the majority's finding that "dating" necessarily included an "amorous interest," particularly since he found nothing in Wal-Mart's policy, its application or Webster's Dictionary's definition of a "date" ("a social engagement between persons of opposite sex") that compelled such a conclusion.[15] He also interpreted the statute's scope more broadly than his colleagues, pointing to its protection of "any" lawful activity pursued for recreational purposes and undertaken during leisure time.[16] Turning again to Webster's, he noted its definition of "recreation" as "a means of refreshment or diversion" and concluded that "social interaction surely qualifies as a 'diversion'."[17]

Justice Yesawich concluded that the majority's interpretation of section 201-d ignored the statute's remedial purpose by excluding any social relationship that might contain a romantic element, "regardless of the marital status of the participants, or the impact that the relationship has on their capacity to perform their jobs." This, he opined, disregarded the legislature's intent to extend, rather than limit, the statute's coverage.[18] Accordingly, he would have affirmed the trial court's denial of Wal-Mart's motion to dismiss the section 201-d cause of action and reinstated the state's cause of action under Executive Law section 63(12).

In *Pasch v. Katz Media Corp.*,[19] Judge Patterson of the Southern District of New York adopted Justice Yesawich's reasoning and concluded that dating did constitute a "recreational activity" protected by section 201-d. The plaintiff in this case had alleged that she had been demoted and ultimately constructively discharged for maintaining "a personal relationship" with a former coworker. The defendant then moved for a judgment on the pleadings on the ground that, even if true, these allegations could not state a cause of action pursuant to section 201-d(2)(c).

The court disagreed. While recognizing that the plaintiff's allegations regarding her cohabitation were similar to those before the *Wal-Mart* court, and acknowledging his obligation to carefully consider state court interpretations of state law, Judge Patterson decided that the New York Court of Appeals would not adopt the Third Department's construction of the statute. Reviewing section 201-d's legislative history, and in particular Governor Cuomo's veto of the two earlier and more expansive bills and Senator Lack's Memorandum in Support of the bill that became section 201-d, Judge Patterson reasoned, "A careful reading of the statute and its Pocket Bill indicates that 'cohabitation' that occurs off the employer's premises, without use of the employer's equipment and not on the employer's time, should be considered protected activity."[20] From this he concluded that Justice Yesawich had correctly determined that the legislature's primary intent "was to curtail employers' ability to discriminate on the basis of activities . . . that have no bearing on one's ability to perform one's job, and concomitantly to guarantee employees a certain degree of freedom to conduct their lives as they please during nonworking hours."[21]

The True Meaning of *Pasch* and *Wal-Mart*

In many respects, the opinions in *Wal-Mart* and *Pasch* read like the "War of the Roses," and one may realistically wonder whether there is any way to square them. We submit that there is and to do so requires a closer analysis of each of the two cases and the statute.

Essentially, the Lawful Activities Act was intended to regulate employee conduct that has no reasonable relationship to the workplace. The conduct alleged in *Wal-Mart* did have a reasonable relation to the workplace. The conduct alleged in *Pasch* did not.

The Lawful Activities Act prohibits taking adverse action against an employee because of off-duty activities that are not engaged in at the workplace and that do not involve the use of work equipment. When current employees are having an affair, the conduct is brought into the workplace by its very nature. The relationship, of necessity, involves the employer's greatest form of equipment, its employees. In *Wal-Mart*, the employer sought to enforce its policy because two employees were currently engaged in a relationship. Whether it continued off premises or not, the dating relationship perforce included the time that they were at work. If one asked the employees, "Are you dating?" the answer would be, "Yes," not, "Only off work." Thus, when employees having a relationship are currently working for the employer, it cannot be contended that work equipment is not involved or that the conduct occurs solely off premises.

In addition, the Lawful Activities Act exempts from its protection employee activities that constitute a material conflict of interest with the employer's business interests.[22] Employers have a business interest in assuring that employees cannot claim that they were sexually harassed. Whenever current employees engage in a dating relationship, particularly if one is supervised by another, the potential for a conflict of interest exists. When employees owe their company an undivided duty