management matters

Is Workplace Dating a Protected 'Recreational Activity'?

By Jonathan A. Wexler

Enacted in 1993, the New York State Legal Activities Law prohibits employers from discriminating against applicants or employees for engaging in certain activities outside the workplace, during nonworking times, and without the use of the employer's property. These activities include running for public office, campaigning for public office, or fundraising for public office; participating in legal recreational activities, including but not limited to sports, games, hobbies, exercise, reading, or watching television, movies, or other material; and the legal use of consumable products.

The prohibitions of the law do not apply to situations in which the employer believes that its actions were required by statute; the employer believes that its actions were permissible under an applicable substance abuse policy, professional contract, or collective bargaining agreement; the employer deems the employee's actions to be illegal or to constitute poor performance, incompetence, or misconduct; or the employee is under a professional services contract in which the unique services required allow the employer to impose limitations on the employee's activities outside of work.

The federal district court in Manhattan and the federal Court of Appeals for the Second Circuit recently considered whether dating at the workplace is a "recreational activity" within the meaning of the Legal Activities Law. The issue generally arises where an employer seeks to enforce a "no fraternization" policy that prohibits employees from dating or having romantic relationships.

The leading case decided by a New York state court on this issue is *State v. Wal-Mart Stores, Inc.* (1995), in which two employees of Wal-Mart were discharged for violating the company's policy prohibiting dating between a married employee and another employee, other than his or her own spouse.

The New York State Appellate Division in the Wal-Mart case held that the plain language of the statute required the conclusion that dating was not a recreational activity.

In the recent federal case, *McCavitt v. Swiss Reinsurance America Corp.*, the plaintiff, Jess McCavitt, was employed as a senior vice president of the defendant when he began dating another senior vice president, Diane Butler. Three months after learning of McCavitt's relationship with Butler, the company terminated McCavitt's employment.

In analyzing the plaintiff's claim under the Legal Activities Law, the federal district court assumed that McCavitt's discharge resulted solely as a result of his relationship with Butler and that the relationship was conducted entirely after work hours and had no adverse impact on McCavitt's work performance.

The district court examined the legislative history of the Legal Activities Law and the Wal-Mart decision and concluded that there was no support for the proposition that romantic dating constituted a recreational activity deserving protection. The court also noted that employers could lawfully issue and enforce no fraternization policies.

The district court also discussed two previous New York district court decisions that suggested that "co-habitation" and a "close personal friendship" could be recreational activities deserving of protection under the Legal Activities Law. One of those cases read the law broadly and interpreted the statute to prohibit employers from discriminating against employees simply because the employer does not like the activities in which the employees engage after work.

However, the district court in McCavitt rejected the two other district courts' decisions and held that the Legal Activities Law did not prevent an employer from discharging the plaintiff as a result of his romantic relationship with another senior executive.

The McCavitt court dismissed the complaint and, further, held that neither punitive damages nor attorneys' fees were recoverable under the Legal Activities Law.

In a brief opinion, the Court of Appeals for the Second Circuit affirmed the district court's dismissal of the complaint in McCavitt, agreeing that romantic dating should not be considered a recreational activity within the meaning of the law. The Court of Appeals for the Second Circuit predicted that New York state's highest court (the New York Court of Appeals) would not rule that it is. This decision settles the issue in the federal district courts of New York.

However, if presented with the issue, it is possible that New York state's highest court would rule differently. That possibility was the wish of Judge Joseph M. McLaughlin, who wrote a concurring opinion in the second circuit's McCavitt decision. While he "grudgingly" agreed with the majority, Judge McLaughlin cited approvingly Justice Paul J. Yesawich's dissenting opinion in the Wal-Mart case.

Yesawich's view was that the intent of the Legal Activities Law was to curtail employers' ability to discriminate on the basis of an employee's activities that occur outside work and have no bearing on job performance. Judge McLaughlin lamented the fact that while the law protects from employer retribution an employee's right to ride a motorcycle or hang-glide, the same protection is not extended to "whom one is courting." Employee relationships are differently situated, however, in that they have the potential to lead to claims of sexual harassment and other disruption at the workplace.

Of course, employers must be careful to assure that their handling of workplace romances does not run afoul of Title VII of the Civil Rights Act, or state or local fair employment practices laws. However, until the New York State Court of Appeals has occasion to consider the question, or the New York Legislature changes the law, the Legal Activities Law does not prohibit employers from making personnel decisions on the basis of romantic relationships among their employees.

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