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When Your Personal Life Affects Your Professional Life

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Almost daily we hear stories about people who were not hired for a job because of something they posted online or someone that lost a job for the same reason. I caution employees regularly to be mindful of what they post online because everyone can see it. I advise them to refrain from posting that "awesome picture" of them playing beer pong or that picture of them at the Mets game when they were allegedly "out sick." People forget that the internet is not their "private" playground. It is a mechanism in which your world (should you allow it) becomes an open book.

So, what about blogging? People argue it is harmless. It is just my thoughts about a situation. But is it?

Imagine the Following Scenario

Jill, an employee at a large consulting firm in New York, keeps a food blog that she updates regularly as a form of relaxation and entertainment outside of work. On Monday of this week, Jill and her boyfriend, John, went out to eat at The Oven, a brand new pizza place nearby. Since Jill was less than impressed with her experience, she bashed the restaurant on her blog. Not only did she say that the pizza was awful, but she said the décor was tacky and tasteless. Jill commented that she hoped the store did not pay someone to decorate the establishment because, if so, they were robbed.

Well, The Oven actually did hire an interior designer. In fact, their designer was her boss's nephew. To make matters worse, Jill's boss religiously reads her blog. Not surprisingly, Jill was fired the next day. Does she have any legal recourse?

Since Jill is an "at-will" employee, her employment can be terminated at any time for any reason (as long as it is not for discriminatory reasons).[1] As we know, an employer is prohibited from discharging an employee for discriminatory reasons under federal, state, and city laws. However, under our scenario, Jill's boss did not terminate her because of her race, sex, age, national origin, religion, disability, or any other protected category. He fired her because he was mad at what she wrote on her blog. Therefore, Jill, our hypothetical potential plaintiff, cannot find protection in any anti-discrimination statute.

Similarly, Jill cannot stand on her soap box and argue a violation of her First Amendment right to free speech because that right does not apply to private employers within the workplace.[2] Jill's "Right to Privacy" equally fails her in this context because blog posts are public and available for the world to see.[3]

Although it appears Jill has no recourse, that may not be the case. As an employee in New York she may be able to avail herself of New York Labor Law § 201-d, or New York's "lifestyle discrimination" statute.[4]

The "Lifestyle Discrimination" Statute

Section 201-d of the New York State Labor Law protects private employees like Jill from adverse employment actions based on their lifestyle choices outside of the workplace. Specifically, the statute prohibits an employer from firing an employee for recreational or political activities outside of work, for legal use of consumable products outside of work, or for membership in a union. The statute provides in pertinent part:

> [I]t shall be unlawful for any employer…to discharge from employment or otherwise discriminate against an individual…because of…an individual's legal *recreational activities* outside work hours, off of the employer's premises and without use of the employer's equipment or other property.[5]

The key term in this provision for our purpose is "recreational activities." If blogging is considered a recreational activity, then an employee is free to blog outside the workplace[6] and may be protected under this statute as long as the posts do not adversely affect the employer.[7] So what is a recreational activity?

> The statue defines "recreational activity" as:
>
> any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, *hobbies*, exercise, reading and the viewing of television, movies and similar material.[8]

Among the categories listed as recreational activities, "hobbies" is probably the best fit for blogging. As long as a court determines that blogging is a hobby, then an employee that posts recreationally outside the workplace should be protected under New York's lifestyle discrimination statute.

An employee harmed by her employer under this statute is entitled to bring an action for equitable relief and damages.[9] This means the employee can get reinstatement, injunctive relief, and back pay to put her in the same place she would have been had her employer not discriminated against her.[10] In addition, the Attorney General can issue an order restraining the employer's unlawful acts and the issuing court may impose civil penalties for the first violation and for each subsequent violation.[11]

New York case law applying § 201-d provides almost no guidance for figuring out whether blogging is a "recreational activity" or "hobby" under the statute. Only a few New York cases discuss "recreational activities" under § 201-d, and no case provides an analysis of the term "hobbies" in this context. To date, cases interpreting "recreational activities" under § 201-d have dealt mostly with romantic relationships or affairs, which courts have found are not protected under the lifestyle discrimination statute.[12]

Last year, a federal court provided some guidance as to what is considered a recreational activity. In *Kolb v. Camilleri,* the court considered whether picketing was a protected recreational activity.[13] In concluding that it was not, the court reasoned that since the "[p]laintiff did not engage in picketing for his *leisure*, but as a form of protest" it could not be characterized as a recreational activity.[14] One can infer from *Kolb* that "recreational activities" under the statute must be engaged in for leisure purposes.

The only case that squarely addressed recreational activities under 201-d and came out on the side of the employee was *Cavanaugh v. Doherty*.[15] There, the court ruled that an employee who was terminated as a result of a discussion during recreational activities—dinner at a restaurant outside of the workplace during which her political affiliations became an issue—stated a cause of action for a violation of § 201-d.[16]

This case was decided over a decade ago and since then the lifestyle discrimination statute has been dormant. A lot has changed in the last ten years—especially the introduction and mass use of blogging. What remains constant, however, is the intent of this statute: To prohibit employers from discriminating against their employees simply because they do not like the activities their employees engage in after work.[17]

As we evolve as a society, it seems plausible that this statute may grow and mature. Our hypothetical situation seems like the exact type of situation that this statute is intended to protect. The statute appears to be more relevant now than ever before.

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[1] *Wright v. Cayan*, 817 F.2d 999, 1002 (2d Cir. N.Y. 1987).

[2] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *See* Paul M. Secunda, *Reflections on the Technicolor Right to Association in American Labor and Employment Law*, 96 KY. L.J. 343, 343 (2007-2008) ("to the extent that federal constitutional protections exist in the workplace for the right to association, they primarily apply to public employees in the United States because of the 'state action' requirement").

[3] *See, e.g., Katz v. U.S.*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); *U.S. v. Barrows*, 481 F.3d 1246, 1249 (10th Cir. 2007) ("those who bring personal material into public spaces, making no effort to shield that material from public view, cannot reasonably expect their personal materials to remain private").

[4] Four other states have enacted statutes that protect "lifestyle discrimination" legal conduct, including California, Colorado, Connecticut, and North Dakota. Connecticut's "lifestyle discrimination" statute is limited to protecting employees who exercise state or federal first amendment rights. CONN. GEN. STAT. § 31-51q (2007).

[5] N.Y. Labor Law § 201-d(a)(2)(c) (2009) (emphasis added).

[6] Work hours under the statute include "paid and unpaid breaks and meal periods that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work." N.Y. Labor Law § 201-d(a)(1)(c) (2009).

[7] Section 201-d does not protect activity that "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest." N.Y. Labor Law § 201-d(3)(a).

[8] N.Y. Labor Law § 201-d(a)(1)(b) (2009) (emphasis added).

[9] N.Y. Lab. Law § 201-d(7)(b).

[10] *See State v. Wal-Mart Stores*, 207 A.D.2d 150 (App. Div. 3d Dep't 1995) (reinstatement, back pay, and injunctive relief denied).

[11] N.Y. Lab. Law § 201-d(7)(a). Section 201-d(7)(a) specifically provides for a $300 penalty for the first violation and a $500 penalty for each additional penalty.

[12] *See McCavitt v. Swiss Reinsurance Am. Corp*., 89 F. Supp. 2d 495, 498 (S.D.N.Y. 2000) (§ 201-d "does not protect activities associated with dating or personal relationships, romantic or otherwise").

[13] *Kolb v. Camilleri*, No. 02 Civ. 0117A, 2008 U.S. Dist. LEXIS 59549 (W.D.N.Y. Aug. 1, 2008).

[14] *Id*.

[15] 243 A.D.2d 92 (App. Div. 3d Dep't 1998).

[16] *Cavanaugh v. Doherty*, 243 A.D.2d 92 (App. Div. 3d Dep't 1998).

[17] *Pasch v. Katz Media Corp.*, No. 84 Civ 8554, 1995 U.S. Dist. LEXIS 11153 at *5 (S.D.N.Y. Aug. 4, 1995) (quoting New York State Assembly 215th Session, Senate Memo at 9 (1992)).

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