Chapter 3

Scope & Limits of Employer Control

Control at Work

Employee Privacy

K-Mart Corp. Store No. 7441 v. Trotti

677 S.W.2d 632 (Tex. App. 1984)

BULLOCK, Justice.

K-Mart Corporation appeals from a judgment awarding the appellee, Trotti, $8,000.00 in actual damages and $100,000.00 in exemplary damages for invasion of privacy.

The appellee was an employee in the hosiery department at the appellants' store number 7441. Her supervisors had never indicated any dissatisfaction with her work nor any suspicion of her honesty.

The appellants provided their employees with lockers for the storage of personal effects during working hours. There was no assignment of any given locker to any individual employee. The employees could, on request, receive locks for the lockers from the appellants, and if the appellants provided the lock to an employee they would keep either a copy of the lock's combination or a master key for padlocks. Testimony indicated that there was some problem in providing a sufficient number of locks to employees, and, as a result, the store's administrative personnel permitted employees to purchase and use their own locks on the lockers, but in these instances, the appellants did not require the employee to provide the manager with either a combination or duplicate key. The appellee, with appellants' knowledge, used one of these lockers and provided her own combination lock.

On October 31, 1981, the appellee placed her purse in her locker when she arrived for work. She testified that she snapped the lock closed and then pulled on it to make sure it was locked. When she returned to her locker during her afternoon break, she discovered the lock hanging open. Searching through her locker, the appellee further discovered her personal items in her purse in considerable disorder. Nothing was missing from either the locker or the purse. The store manager testified that, in the company of three junior administrators at the store, he had that afternoon searched the lockers because of a suspicion raised by the appellants' security personnel that an unidentified employee, not the appellee, had stolen a watch. The manager and his assistants were also searching for missing

price-marking guns. The appellee further testified that, as she left the employee's locker area after discovering her locker open, she heard the manager suggest to his assistants, "Let's get busy again." The manager testified that none of the parties searched through employees' personal effects.

The appellee approached the manager later that day and asked if he had searched employees' lockers and/or her purse. The manager initially denied either kind of search and maintained this denial for approximately one month. At that time, the manager then admitted having searched the employees' lockers and further mentioned that they had, in fact, searched the appellee's purse, later saying that he meant that they had searched only her locker and not her purse.

The manager testified that during the initial hiring interviews, all prospective employees received verbal notification from personnel supervisors that it was the appellants' policy to conduct ingress-egress searches of employees and also to conduct unannounced searches of lockers. A personnel supervisor and an assistant manager, however, testified that, although locker searches did regularly occur, the personnel supervisors did not apprise prospective employees of this policy.

The fundamental and basic right to be left alone constitutes the essence of the right to privacy.

> The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity.

This right to privacy is so important that the United States Supreme Court has repeatedly deemed it to stem implicitly from the Bill of Rights. Our State courts have long recognized a civil cause of action for the invasion of the right to privacy and have defined such an invasion in many ways: As an intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person, and as the right to be free from the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

The appellants requested the trial court to define an "invasion of privacy" as "the intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person." The court refused to include the part of the requested instruction, "... that is highly offensive to a reasonable person." The appellants argue that this refusal constituted an abuse of discretion because the Rules of Civil Procedure require such an instruction. The appellee alleges that the record establishes that the intrusion was highly offensive as a matter of law, and that, therefore, the instruction was unnecessary.

The definition of "invasion of privacy" that the appellant requested is one widely and repeatedly accepted. Although the Texas Supreme Court has not adopted a verbatim rendition of this definition, it is clear that, in Texas, an actionable invasion of privacy by intrusion must consist of an

unjustified intrusion of the plaintiff's solitude or seclusion of such magnitude as to cause an ordinary individual to feel severely offended, humiliated, or outraged.

The appellants correctly point out that no Texas case yet reported has ever declined to include a requirement that the intrusion complained of be highly offensive to a reasonable person, and the appellee agrees with this statement. Nevertheless, the appellee urges that since the facts of this case established the highly objectionable nature of the intrusion as a matter of law, the requested instruction was unnecessary, and thus the trial court properly refused to include it.

We disagree with the appellee's contention. The record does indicate the appellee's outrage upon discovering the appellants' activities but fails to demonstrate that there could be no dispute as to the severity of the offensiveness of the intrusion, thereby making it impossible for us to conclude that the facts established the disputed portion of the instruction as a matter of law.

Moreover, we note that the result of accepting this contention would be to raise the legal theory of invasion of privacy from the realm of intentional torts into the sphere of strict liability. It would make any wrongful intrusion actionable, requiring a plaintiff to establish merely that the intrusion occurred and that the plaintiff did not consent to it. Because of the stern form of liability which already stems from an invasion of privacy, accepting a definition of invasion of privacy which lacked a standard of high offensiveness would result in fundamentally unfair assess-

ments against defendants who offended unreasonably sensitive plaintiffs, but whose transgressions would not realistically fill either an ordinary person or the general society with any sense of outrage. A business executive, for example, could find himself liable for entering an associate's office without express permission; so could a beautician who opened a co-worker's drawer in order to find some supplies needed for a customer.

The lockers undisputably were the appellants' property, and in their unlocked state, a jury could reasonably infer that those lockers were subject to legitimate, reasonable searches by the appellants. This would also be true where the employee used a lock provided by the appellants, because in retaining the lock's combination or master key, it could be inferred that the appellants manifested an interest both in maintaining control over the locker and in conducting legitimate, reasonable searches. Where, as in the instant case, however, the employee purchases and uses his own lock on the lockers, with the employer's knowledge, the fact finder is justified in concluding that the employee manifested, and the employer recognized, an expectation that the locker and its contents would be free from intrusion and interference.

In the present case, there is evidence that the appellee locked the locker with her own lock; that when the appellee returned from a break, the lock was lying open; that upon searching her locker, the appellee discovered that someone had rifled her purse; that the appellants' managerial personnel initially denied making the

search but subsequently admitted searching her locker and her purse. We find this is far more evidence than a "mere scintilla," and we hold that there is some evidence to support the jury's finding.

As to the "insufficiency" point, after examining the record as a whole, we find it indicates all of the above. The appellee remembers having locked the locker and having seen the lock closed before starting work that day. The record indicates that the searching personnel denied having gone through any employee's purses, yet nothing in the record directly challenges the appellee's testimony as to the disruption of her personal effects inside her purse, and, therefore, the jury could make a reasonable inference that the managerial personnel had, in fact, gone through her personal effects. The record also establishes that other employees knew these searches were going on. The store manager testified that all employees received notification of these sporadic searches during their hiring interviews; however, two administrators, including a former personnel supervisor, denied that employees ever received this notification. We hold that the weight of the evidence indicates that the appellants' employees came upon a locker with a lock provided by an employee, disregarded the appellee's demonstration of her expectation of privacy, opened and searched the locker, and probably opened and searched her purse as well; and, in so holding, we consider it is immaterial whether the appellee actually securely locked her locker or not. It is sufficient that an employee in this situation, by having placed a lock on the locker at the employee's own expense and

with the appellants' consent, has demonstrated a legitimate expectation to a right of privacy in both the locker itself and those personal effects within it.

The appellants urged the trial court to adopt concepts of negligence in submitting an intentional tort to the jury and now ask this court to require such concepts in all disputes involving an invasion of privacy. The appellants cite considerable authority applying negligence concepts to cases involving intentional civil assaults and batteries.

These concepts are inapplicable, and the appellants' authorities are distinguishable on two grounds. First, the circumstances of those assault and battery cases raised questions of causation not usually encountered in intentional torts. Here, however, there is no question that the appellants invaded the appellee's privacy by opening the locked locker and by opening and investigating her purse. This unwarranted invasion of privacy alone demonstrates that the single act of opening and inspecting the locker, and certainly the purse, was sufficient to justify the jury's findings. We overrule the appellant's eighteenth through twenty-first points of error.

The appellants further argue that any physical effects of the intrusion were merely effects stemming from an earlier health problem the appellee had suffered. The record does support these facts, and it would be reasonable to con-

clude that the unwarranted intrusion of the locker and purse at best exacerbated an earlier physical ailment. This contention, however, is immaterial in this kind of case.

The basis of a cause of action for invasion of privacy is that the defendant has violated the plaintiff's rights to be left alone. This intrusion itself is actionable, and the plaintiff can receive at least nominal damages for that actionable intrusion without demonstrating physical detriment. The appellants' improper intrusion of an area where the appellee had manifested an expectation of privacy alone raised her right to recover. We overrule the appellants' fifteenth point of error.

The jury awarded $8,000.00 as actual damages and $100,000.00 as exemplary damages to the appellee. The appellants contend that this award of exemplary damages was improper because: (1) no evidence, or insufficient evidence, exists of malice; [...].

An award of exemplary damages will be improper where the defendant acted in good faith. A mere wrongful act is insufficient to justify the award of exemplary damages. An award of exemplary damages requires a preliminary finding that the defendant behaved maliciously or with wanton disregard for the plaintiff. Malice is an unlawful act done intentionally and without justification or excuse.

The appellants argue that no malice exists in this case because: (1) the appellants acted correctly and lawfully in opening and searching the lockers; and (2) even if the appellants wrongfully searched the lockers, they did so in a good faith belief that they had the right to do so. Neither of the appellants' allegations has merit.

First, the record establishes, and we have held herein, that the appellants' search of the appellee's locker and purse was wrongful. The mere suspicion either that another employee had stolen watches, or that unidentified employees may have stolen price-marking guns was insufficient to justify the appellants' search of appellee's locker and personal possessions without her consent. The record also demonstrates that the appellants lied to appellee and concealed the truth of their wrongful search for approximately one month.

The record indicates, particularly through the appellants' subsequent denial of their activities, that there was sufficient evidence from which the jury could reasonably conclude that the appellants acted with malicious disregard for both the appellee's rights of privacy and the rights of privacy of her co-workers. We find that there was sufficient evidence to support the jury's finding of malice.

Stengart v. Loving Care Agency, Inc.

990 A.2d 650 (N.J. 2010)

Chief Justice RABNER delivered of the opinion of the Court.

In the past twenty years, businesses and private citizens alike have embraced the use of computers, electronic communication devices, the Internet, and e-mail. As those and other forms of technology evolve, the line separating business from personal activities can easily blur.

In the modern workplace, for example, occasional, personal use of the Internet is commonplace. Yet that simple act can raise complex issues about an employer's monitoring of the workplace and an employee's reasonable expectation of privacy.

This case presents novel questions about the extent to which an employee can expect privacy and confidentiality in personal e-mails with her attorney, which she accessed on a computer belonging to her employer. Marina Stengart used her company-issued laptop to exchange e-mails with her lawyer through her personal, password-protected, web-based e-mail account. She later filed an employment discrimination lawsuit against her employer, Loving Care Agency, Inc. (Loving Care), and others.

In anticipation of discovery, Loving Care hired a computer forensic expert to recover all files stored on the laptop including the e-mails, which had been automatically saved on the hard

drive. Loving Care's attorneys reviewed the e-mails and used information culled from them in the course of discovery. In response, Stengart's lawyer demanded that communications between him and Stengart, which he considered privileged, be identified and returned. Opposing counsel disclosed the documents but maintained that the company had the right to review them. Stengart then sought relief in court.

The trial court ruled that, in light of the company's written policy on electronic communications, Stengart waived the attorney-client privilege by sending e-mails on a company computer. The Appellate Division reversed and found that Loving Care's counsel had violated *RPC* 4.4(b) by reading and using the privileged documents.

We hold that, under the circumstances, Stengart could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them. By reading e-mails that were at least arguably privileged and failing to notify Stengart promptly about them, Loving Care's counsel breached *RPC* 4.4(b). We therefore modify and affirm the judgment of the Appellate Division and remand to the trial court to determine what, if any, sanctions should be imposed on counsel for Loving Care.

I.

This appeal arises out of a lawsuit that plaintiff-respondent Marina Stengart filed against her former employer, defendant-appellant Loving Care, its owner, and certain board members and officers of the company. She alleges, among other things, constructive discharge because of a hostile work environment, retaliation, and harassment based on gender, religion, and national origin, in violation of the New Jersey Law Against Discrimination. Loving Care denies the allegations and suggests they are an attempt to escape certain restrictive covenants that are the subject of a separate lawsuit.

Loving Care provides home-care nursing and health services. Stengart began working for Loving Care in 1994 and, over time, was promoted to Executive Director of Nursing. The company provided her with a laptop computer to conduct company business. From that laptop, Stengart could send e-mails using her company e-mail address; she could also access the Internet and visit websites through Loving Care's server. Unbeknownst to Stengart, certain browser software in place automatically made a copy of each web page she viewed, which was then saved on the computer's hard drive in a "cache" folder of temporary Internet files. Unless deleted and overwritten with new data, those temporary Internet files remained on the hard drive.

On several days in December 2007, Stengart used her laptop to access a personal, password-protected e-mail account on Yahoo's website, through which she communicated with her attorney about her situation at work. She never saved her Yahoo ID or password on the company laptop.

Not long after, Stengart left her employment with Loving Care and returned the laptop. On February 7, 2008, she filed the pending complaint.

In an effort to preserve electronic evidence for discovery, in or around April 2008, Loving Care hired experts to create a forensic image of the laptop's hard drive. Among the items retrieved were temporary Internet files containing the contents of seven or eight e-mails Stengart had exchanged with her lawyer via her Yahoo account. Stengart's lawyers represented at oral argument that one e-mail was simply a communication he sent to her, to which she did not respond.

A legend appears at the bottom of the e-mails that Stengart's lawyer sent. It warns readers that

> THE INFORMATION CONTAINED IN THIS EMAIL COMMUNICATION IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENT NAMED ABOVE. This message may be an Attorney-Client communication, and as such is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that you have received this communication in error, and that your review, dissemination, distribution, or copying of the message is

> strictly prohibited. If you have received this transmission in error, please destroy this transmission and notify us immediately by telephone and/or reply email.

At least two attorneys from the law firm representing Loving Care, Sills Cummis (the "Firm"), reviewed the e-mail communications between Stengart and her attorney. The Firm did not advise opposing counsel about the e-mails until months later. In its October 21, 2008 reply to Stengart's first set of interrogatories, the Firm stated that it had obtained certain information from "e-mail correspondence"—between Stengart and her lawyer—from Stengart's "office computer on December 12, 2007 at 2:25 p.m." In response, Stengart's attorney sent a letter demanding that the Firm identify and return all "attorney-client privileged communications" in its possession. The Firm identified and disclosed the e-mails but asserted that Stengart had no reasonable expectation of privacy in files on a company-owned computer in light of the company's policy on electronic communications.

Loving Care and its counsel relied on an Administrative and Office Staff Employee Handbook that they maintain contains the company's Electronic Communication policy (Policy). The record contains various versions of an electronic communications policy, and Stengart contends that none applied to her as a senior company official. Loving Care disagrees. We need not resolve that dispute and assume the Policy applies in addressing the issues on appeal.

The proffered Policy states, in relevant part:

> The company reserves and will exercise the right to review, audit, intercept, access, and disclose all matters on the company's media systems and services at any time, with or without notice.
>
> . . . .
>
> E-mail and voice mail messages, internet use and communication and computer files are considered part of the company's business and client records. Such communications are not to be considered private or personal to any individual employee.
>
> The principal purpose of electronic mail (*e-mail*) is for company business communications. Occasional personal use is permitted; however, the system should not be used to solicit for outside business ventures, charitable organizations, or for any political or religious purpose, unless authorized by the Director of Human Resources.

The Policy also specifically prohibits "[c]ertain uses of the e-mail system" including sending inappropriate sexual, discriminatory, or harassing messages, chain letters, "[m]essages in violation of government laws," or messages relating to job searches, business activities unrelated to Loving Care, or political activities. The Policy concludes with the following warning: "Abuse of the electronic communications system may result in disciplinary action up to and including separation of employment."

Stengart's attorney applied for an order to show cause seeking return of the e-mails and other relief. The trial court converted the application to a motion, which it later denied in a written opinion. The trial court concluded that the Firm did not breach the attorney-client privilege because

the company's Policy placed Stengart on sufficient notice that her e-mails would be considered company property. Stengart's request to disqualify the Firm was therefore denied.

The Appellate Division granted Stengart's motion for leave to appeal. The panel reversed the trial court order and directed the Firm to turn over all copies of the e-mails and delete any record of them. Assuming that the Policy applied to Stengart, the panel found that "[a]n objective reader could reasonably conclude. . . that not all personal emails are necessarily company property." In other words, an employee could "retain an expectation of privacy" in personal e-mails sent on a company computer given the language of the Policy.

The panel balanced Loving Care's right to enforce reasonable rules for the workplace against the public policies underlying the attorney-client privilege. The court rejected the notion that "ownership of the computer [is] the sole determinative fact" at issue and instead explained that there must be a nexus between company policies and the employer's legitimate business interests. The panel concluded that society's important interest in shielding communications with an attorney from disclosure outweighed the company's interest in upholding the Policy. As a result, the panel found that the e-mails were protected by the attorney-client privilege and should be returned.

The Appellate Division also concluded that the Firm breached its obligations under *RPC* 4.4(b) by failing to alert Stengart's attorneys that it possessed the e-mails before reading them. The panel remanded for a hearing to determine whether disqualification of the Firm or some other sanction was appropriate.

We granted Loving Care's motion for leave to appeal and ordered a stay pending the outcome of this appeal.

II.

Loving Care argues that its employees have no expectation of privacy in their use of company computers based on the company's Policy. In its briefs before this Court, the company also asserts that by accessing e-mails on a personal account through Loving Care's computer and server, Stengart either prevented any attorney-client privilege from attaching or waived the privilege by voluntarily subjecting her e-mails to company scrutiny. Finally, Loving Care maintains that its counsel did not violate *RPC* 4.4(b) because the e-mails were left behind on Stengart's company computer—not "inadvertently sent," as per the *Rule*—and the Firm acted in the good faith belief that any privilege had been waived.

Stengart argues that she intended the e-mails with her lawyer to be confidential and that the Policy, even if it applied to her, failed to provide adequate warning that Loving Care would save on a hard drive, or monitor the contents of, e-mails sent from a personal account. Stengart also maintains that the communications with her lawyer were privileged. When the Firm encoun-

tered the arguably protected e-mails, Stengart contends it should have immediately returned them or sought judicial review as to whether the attorney-client privilege applied.

III.

Our analysis draws on two principal areas: the adequacy of the notice provided by the Policy and the important public policy concerns raised by the attorney-client privilege. Both inform the reasonableness of an employee's expectation of privacy in this matter. We address each area in turn.

A.

We start by examining the meaning and scope of the Policy itself. The Policy specifically reserves to Loving Care the right to review and access "all matters on the company's media systems and services at any time." In addition, e-mail messages are plainly "considered part of the company's business . . . records."

It is not clear from that language whether the use of personal, password-protected, web-based e-mail accounts via company equipment is covered. The Policy uses general language to refer to its "media systems and services" but does not define those terms. Elsewhere, the Policy prohibits certain uses of "the e-mail system," which appears to be a reference to company e-mail accounts. The Policy does not address personal accounts at all. In other words, employees do not

have express notice that messages sent or received on a personal, web-based e-mail account are subject to monitoring if company equipment is used to access the account.

The Policy also does not warn employees that the contents of such e-mails are stored on a hard drive and can be forensically retrieved and read by Loving Care.

The Policy goes on to declare that e-mails "are not to be considered private or personal to any individual employee." In the very next point, the Policy acknowledges that "[o]ccasional personal use [of e-mail] is permitted." As written, the Policy creates ambiguity about whether personal e-mail use is company or private property.

The scope of the written Policy, therefore, is not entirely clear.

B.

The policies underlying the attorney-client privilege further animate this discussion. The venerable privilege is enshrined in history and practice. Its primary rationale is to encourage "free and full disclosure of information from the client to the attorney." That, in turn, benefits the public, which "is well served by sound legal counsel" based on full, candid, and confidential exchanges.

Under the [New Jersey Rules of Evidence] "[f]or a communication to be privileged it must initially be expressed by an individual in his capacity as a client in conjunction with seeking or receiving legal advice from the attorney in his capacity as such, with the expectation that its content remain confidential."

E-mail exchanges are covered by the privilege like any other form of communication.

The e-mail communications between Stengart and her lawyers contain a standard warning that their contents are personal and confidential and may constitute attorney-client communications. The subject matter of those messages appears to relate to Stengart's working conditions and anticipated lawsuit against Loving Care.

IV.

Under the particular circumstances presented, how should a court evaluate whether Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney?

A.

Preliminarily, we note that the reasonable-expectation-of-privacy standard used by the parties derives from the common law and the Search and Seizure Clauses of both the Fourth Amendment and Article I, paragraph 7 of the New Jersey Constitution. The latter sources do not apply in this case, which involves conduct by private parties only.

The common law source is the tort of "intrusion on seclusion," which can be found in the *Restatement (Second) of Torts* § 652B (1977). That section provides that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." A high threshold must be cleared to assert a cause of action based on that tort. A plaintiff must establish that the intrusion "would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object."

As is true in Fourth Amendment cases, the reasonableness of a claim for intrusion on seclusion has both a subjective and objective component. Moreover, whether an employee has a reasonable expectation of privacy in her particular work setting "must be addressed on a case-by-case basis."

B.

A number of courts have tested an employee's claim of privacy in files stored on company computers by evaluating the reasonableness of the employee's expectation. No reported decisions in New Jersey offer direct guidance for the facts of this case. In one matter, the Appellate Division found that the defendant had no reasonable expectation of privacy in personal information he stored on a workplace computer under a separate password. The defendant had been advised that all computers were company property. His

former employer consented to a search by the State Police, who, in turn, retrieved information tied to the theft of company funds. The court reviewed the search in the context of the Fourth Amendment and found no basis for the defendant's privacy claim in the contents of a company computer that he used to commit a crime.

In [another case], the Appellate Division found no legitimate expectation of privacy in an employee's use of a company computer to access websites containing adult and child pornography. In its analysis, the court referenced a policy authorizing the company to monitor employee website activity and e-mails, which were deemed company property.

Certain decisions from outside New Jersey, which the parties also rely on, are more instructive. Among them, *National Economic Research Associates v. Evans*, (Mass. Super. Ct. Sept. 25, 2006), is most analogous to the facts here. In *Evans,* an employee used a company laptop to send and receive attorney-client communications by e-mail. In doing so, he used his personal, password-protected Yahoo account and not the company's e-mail address. The e-mails were automatically stored in a temporary Internet file on the computer's hard drive and were later retrieved by a computer forensic expert. The expert recovered various attorney-client e-mails; at the instruction of the company's lawyer, those e-mails were not reviewed pending guidance from the court.

A company manual governed the laptop's use. The manual permitted personal use of e-mail, to "be kept to a minimum," but warned that computer resources were the "property of the Company" and that e-mails were "not confidential" and could be read "during routine checks."

The court denied the company's application to allow disclosure of the e-mails that its expert possessed. The court reasoned,

> Based on the warnings furnished in the Manual, Evans [(the employee)] could not reasonably expect to communicate in confidence with his private attorney if Evans e-mailed his attorney using his NERA [(company)] e-mail address through the NERA Intranet, because the Manual plainly warned Evans that e-mails on the network could be read by NERA network administrators. The Manual, however, did not expressly declare that it would monitor the *content* of Internet communications. . . . Most importantly, the Manual did not expressly declare, or even implicitly suggest, that NERA would monitor the content of e-mail communications made from an employee's personal e-mail account via the Internet whenever those communications were viewed on a NERA-issued computer. Nor did NERA warn its employees that the content of such Internet e-mail communications is stored on the hard disk of a NERA-issued computer and therefore capable of being read by NERA.

As a result, the court found the employee's expectation of privacy in e-mails with his attorney to be reasonable.

In [*In re Asia Global Crossing, Ltd.*,], the Bankruptcy Court for the Southern District of New York considered whether a bankruptcy trustee could force the production of e-mails sent by company employees to their personal attorneys

on the *company's* e-mail system. The court developed a four-part test to "measure the employee's expectation of privacy in his computer files and e-mail":

> (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Because the evidence was "equivocal" about the existence of a corporate policy banning personal use of e-mail and allowing monitoring, the court could not conclude that the employees' use of the company e-mail system eliminated any applicable attorney-client privilege.

Other courts have measured the factors outlined in *Asia Global* among other considerations. In reviewing those cases, we are mindful of the fact-specific nature of the inquiry involved and the multitude of different facts that can affect the outcome in a given case. No one factor alone is necessarily dispositive.

According to some courts, employees appear to have a lesser expectation of privacy when they communicate with an attorney using a company e-mail system as compared to a personal, web-based account like the one used here. As a result, courts might treat e-mails transmitted via an employer's e-mail account differently than they would web-based e-mails sent on the same company computer.

Courts have also found that the existence of a clear company policy banning personal e-mails can also diminish the reasonableness of an employee's claim to privacy in e-mail messages with his or her attorney. We recognize that a zero-tolerance policy can be unworkable and unwelcome in today's dynamic and mobile workforce and do not seek to encourage that approach in any way.

The location of the company's computer may also be a relevant consideration. In *Curto v. Medical World Communications, Inc.*, (E.D.N.Y. May 15, 2006), for example, an employee working from a home office sent e-mails to her attorney on a company laptop via her personal AOL account. Those messages did not go through the company's servers but were nonetheless retrievable. Notwithstanding a company policy banning personal use, the trial court found that the e-mails were privileged.

We realize that different concerns are implicated in cases that address the reasonableness of a privacy claim under the Fourth Amendment. This case, however, involves no governmental action. Stengart's relationship with her private employer does not raise the specter of any government official unreasonably invading her rights.

V.

A.

Applying the above considerations to the facts before us, we find that Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney on Loving Care's laptop.

Stengart plainly took steps to protect the privacy of those e-mails and shield them from her employer. She used a personal, password-protected e-mail account instead of her company e-mail address and did not save the account's password on her computer. In other words, she had a subjective expectation of privacy in messages to and from her lawyer discussing the subject of a future lawsuit.

In light of the language of the Policy and the attorney-client nature of the communications, her expectation of privacy was also objectively reasonable. As noted earlier, the Policy does not address the use of personal, web-based e-mail accounts accessed through company equipment. It does not address personal accounts at all. Nor does it warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the Policy created doubt about whether those e-mails are company or private property.

Moreover, the e-mails are not illegal or inappropriate material stored on Loving Care's equipment, which might harm the company in some way. They are conversations between a lawyer and client about confidential legal matters, which are historically cloaked in privacy. Our system strives to keep private the very type of conversations that took place here in order to foster probing and honest exchanges.

In addition, the e-mails bear a standard hallmark of attorney-client messages. They warn the reader directly that the e-mails are personal, confidential, and may be attorney-client communications. While a pro forma warning at the end of an e-mail might not, on its own, protect a communication, other facts present here raise additional privacy concerns.

Under all of the circumstances, we find that Stengart could reasonably expect that e-mails she exchanged with her attorney on her personal, password-protected, web-based e-mail account, accessed on a company laptop, would remain private.

It follows that the attorney-client privilege protects those e-mails. In reaching that conclusion, we necessarily reject Loving Care's claim that the attorney-client privilege either did not attach or was waived. In its reply brief and at oral argument, Loving Care argued that the manner in which the e-mails were sent prevented the privilege from attaching. Specifically, Loving Care contends that Stengart effectively brought

a third person into the conversation from the start—watching over her shoulder—and thereby forfeited any claim to confidentiality in her communications. We disagree.

Stengart has the right to prevent disclosures by third persons who learn of her communications "in a manner not reasonably to be anticipated." That is what occurred here. The Policy did not give Stengart, or a reasonable person in her position, cause to anticipate that Loving Care would be peering over her shoulder as she opened e-mails from her lawyer on her personal, password-protected Yahoo account. The language of the Policy, the method of transmittal that Stengart selected, and the warning on the e-mails themselves all support that conclusion.

Loving Care also argued in earlier submissions that Stengart waived the attorney-client privilege. For similar reasons, we again disagree.

A person waives the privilege if she, "without coercion and with knowledge of [her] right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." Because consent is not applicable here, we look to whether Stengart either knowingly disclosed the information contained in the e-mails or failed to "take reasonable steps to insure and maintain their confidentiality."

As discussed previously, Stengart took reasonable steps to keep discussions with her attorney confidential: she elected not to use the company e-mail system and relied on a personal, password-protected, web-based account instead. She also did not save the password on her laptop or share it in some other way with Loving Care.

As to whether Stengart knowingly disclosed the e-mails, she certified that she is unsophisticated in the use of computers and did not know that Loving Care could read communications sent on her Yahoo account. Use of a company laptop alone does not establish that knowledge. Nor does the Policy fill in that gap. Under the circumstances, we do not find either a knowing or reckless waiver.

B.

Our conclusion that Stengart had an expectation of privacy in e-mails with her lawyer does not mean that employers cannot monitor or regulate the use of workplace computers. Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy. For example, an employee who spends long stretches of the workday getting personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet. But em-

ployers have no need or basis to read the specific *contents* of personal, privileged, attorney-client communications in order to enforce corporate policy. Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system—would not be enforceable.

VI.

We next examine whether the Firm's review and use of the privileged e-mails violated *RPC* 4.4(b). The *Rule* provides that "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." According to the ABA Model Rules on which *RPC* 4.4(b) is patterned, the term "'document' includes e-mail or other electronic modes of transmission subject to being read or put into readable form." *Model Rules of Prof'l Conduct R.* 4.4 cmt. 2 (2004).

Loving Care contends that the *Rule* does not apply because Stengart left the e-mails behind on her laptop and did not send them inadvertently. In actuality, the Firm retained a computer forensic expert to retrieve e-mails that were automatically saved on the laptop's hard drive in a "cache"

folder of temporary Internet files. Without Stengart's knowledge, browser software made copies of each webpage she viewed. Under those circumstances, it is difficult to think of the e-mails as items that were simply left behind. We find that the Firm's review of privileged e-mails between Stengart and her lawyer, and use of the contents of at least one e-mail in responding to interrogatories, fell within the ambit of *RPC* 4.4(b) and violated that rule.

To be clear, the Firm did not hack into plaintiff's personal account or maliciously seek out attorney-client documents in a clandestine way. Nor did it rummage through an employee's personal files out of idle curiosity. Instead, it legitimately attempted to preserve evidence to defend a civil lawsuit. Its error was in not setting aside the arguably privileged messages once it realized they were attorney-client communications, and failing either to notify its adversary or seek court permission before reading further. There is nothing in the record before us to suggest any bad faith on the Firm's part in reading the Policy as it did. Nonetheless, the Firm should have promptly notified opposing counsel when it discovered the nature of the e-mails.

Workplace Conduct

T-Mobile USA v. NLRB

865 F.3d 265 (5th Cir. 2017)

E. GRADY JOLLY, Circuit Judge:

In this appeal, the National Labor Relations Board ("NLRB" or "Board") challenges certain T-Mobile workplace rules, which it contends prohibit employees from exercising unionizing rights.

T-Mobile's employee handbook (1) encouraged employees to "maintain a positive work environment"; (2) prohibited "[a]rguing or fighting," "failing to treat others with respect," and "failing to demonstrate appropriate teamwork"; (3) prohibited all photography and audio or video recording in the workplace; and (4) prohibited access to electronic information by non-approved individuals. The Board determined that all four provisions violated the National Labor Relations Act because each of them discouraged unionizing or other concerted activity protected by the Act. T-Mobile resists and seeks review of the Board's order.

We hold that the Board erred in finding that a reasonable employee would construe policies (1), (2), and (4) to prohibit protected activity. However, we will not upset the Board's finding

that a reasonable employee would construe policy (3) to prohibit protected activity. Accordingly, we grant in part and deny in part enforcement of the Board's order.

I.

T-Mobile and MetroPCS are telecommunications companies that market cell phones and related services, with offices and retail locations located throughout the United States. In 2014, based on charges filed by the Communication Workers of America, the NLRB brought a complaint against T-Mobile alleging that several of the provisions of T-Mobile's employee handbook violated the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* This appeal concerns four provisions of the handbook that the NLRB determined were forbidden under the NLRA.

A.

The "workplace conduct" policy is found under the "Standards of Conduct" heading in the employee handbook. The policy provides:

> [T-Mobile] expects all employees to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.

The "commitment-to-integrity" policy is found under the "Conducting Business" heading in the code of business conduct. The policy begins with the preface:

> At T-Mobile, we expect all employees, officers and directors to exercise integrity, common sense, good judgment, and to act in a professional manner. We do not tolerate inconsistent conduct. While we cannot anticipate every situation that might arise or list all possible violations, the acts listed below are unacceptable.

The commitment-to-integrity policy then lists seventeen non-inclusive examples of "unacceptable" acts, including, in relevant part:

> Arguing or fighting with co-workers, subordinates or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork.

The "recording" policy is found under the "Workplace Expectations" heading of the employee handbook. The policy provides:

> To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees are prohibited from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace. Apart from customer calls that are recorded for quality purposes, employees may not tape or otherwise make sound recordings of work-related or workplace discussions. Exceptions may be granted when participating in an authorized [T-Mobile] activity or with permission from an employee's Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants.

Finally, the "acceptable use" policy is found under the "Security" heading of T-Mobile's "Acceptable Use Policy for Information and Communication Resources." The policy provides:

> Users may not permit non-approved individuals access to information or information resources, or any information transmitted by, received from, printed from, or stored in these resources, without prior written approval from an authorized T-Mobile representative.

B.

[The NLRB held that the challenged policies violated the NLRA. T-Mobile appealed.]

II.

A.

Section 7 of the NLRA provides a declaration of statutory policy: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act in turn provides enforcement of that policy by stating that it shall be an "unfair labor practice" to "interfere with, restrain, or coerce employees in the exercise of the rights" protected by Section 7. Here, the "appropriate inquiry" is whether T-Mobile's rules for workplace conduct violate § 8(a)(1) by chilling a reasonable employee in the exercise of his or her Section 7 rights. Indeed, our precedent has previously noted that "[w]here the rules are likely to have a chilling effect, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement."

In order to determine whether a workplace rule violates Section 8(a)(1), this Court applies the two-part *Lutheran Heritage* framework. First, the Court decides "whether the rule *explicitly* restricts activities protected by Section 7." Second, even if the restriction is not explicit, the rule may still violate Section 8(a)(1) where "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." When construing a work rule, the Board must "give the rule a reasonable reading." Additionally, the Board "must refrain from reading particular phrases in isolation" and "must not presume improper interference with employee rights." The appropriate, objective inquiry is not whether the rules "*could* conceivably be read to cover Section 7 activity, even though that reading is unreasonable," but rather whether "a reasonable employee reading the[] rules *would* . . . construe them to prohibit conduct protected by the Act."

The "reasonable employee," although not specifically defined in *Lutheran Heritage* or subsequent jurisprudence, refers to a hypothetical, objective standard analogous to the "reasonable person" in tort law. In this case, where the record does not suggest that the rules have been applied in the context of union or collective activity, the "reasonable employee" is a T-Mobile employee aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA. Indeed, "[the Board] must not presume

improper interference with employee rights." The question is whether a reasonable T-Mobile employee "would *reasonably construe* the language to prohibit Section 7 activity."

III.

The NLRB found that each of the four policies at issue—the workplace conduct policy, the commitment-to-integrity policy, the recording policy, and the acceptable use policy—violated the Act because "employees would reasonably construe the language to prohibit Section 7 activity." We address each policy in turn.

A.

We first address the workplace conduct policy. The Board found that the workplace conduct policy, which encouraged employees to maintain a "positive work environment," violated the NLRA because a reasonable employee would read the language to discourage protected activity, including candid, potentially contentious discussions of unionizing. This finding is unreasonable.

To a "reasonable employee," context matters in the interpretation of these rules. The policy is titled "*Workplace* Conduct." The rule refers to a positive *work environment* and effective *working relationships,* and requires employees to behave in a way that "promotes efficiency, productivity, and cooperation," with the obvious implication "with respect to work." In the context of the workplace presented in the record, this rule addresses a normal workplace, on a normal workday.

A reasonable employee of T-Mobile would interpret the policy as requiring professional manners, positive work environment, effective and courteous communications, getting along with everybody, common sense, and people skills. The reasonable T-Mobile employee would understand the rule to express a universally accepted guide for conduct in a responsible workplace. Indeed, the Board itself admonishes that these rules must be given a "reasonable reading." In other words, the NLRB erred by interpreting the rule as to how the reasonable employee *could,* rather than *would,* interpret these policies—an analysis eschewed by the Board's own precedent.

This reading of these workplace rules is consistent with the only other circuit to have spoken on the matter. The DC Circuit in *Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB,* 253 F.3d 19 (D.C. Cir. 2001), addressed a policy similar to the ones at issue. There, asserting expected conduct from employees such as "[t]rust and respect for self and others," "[t]eamwork and cooperation," and "[e]ffective communication," the company prohibited "abusive or threatening language to anyone on company premises." The NLRB had declared this rule in violation of the NLRA on the grounds that it prohibited an employee from engaging in heated labor discussions. The DC Circuit did not buy in: "This position is not 'reasonably defensible.' It is not even close." The court further rejected the NLRB's argument that the company's "effort to maintain a civil and decent workplace is an unfair labor practice that threatens the statutory rights of [its] employees under the NLRA." The DC Circuit

was in no mood for temporizing, saying that "it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language."

Still further, in *Community Hospitals of Central California v. NLRB,* 335 F.3d 1079 (D.C. Cir. 2003), the DC Circuit continued to reject the Board's displacement of facially-neutral work rules. The court held that a rule prohibiting "insubordination. . . or other disrespectful conduct," "read in context," "applies to incivility and outright insubordination, in whatever context it occurs." Furthermore, it held, such a rule would not restrict protected activity, including "vigorous proselytizing for or against a union."

In sum, we conclude that a reasonable employee would not construe a requirement to "maintain a positive work environment by communicating in a manner that is conducive to effective working relationships" to restrict Section 7 activity. We therefore deny enforcement of the Board's order as to the workplace conduct policy.

B.

The Board also found that the commitment-to-integrity policy violated the NLRA because the policy would inhibit robust discussion of labor issues. The rule, like the workplace conduct rule, is on its face, only a common sense civility guideline.

The policy, which prohibits "arguing or fighting," "failing to treat others with respect," and "failing to demonstrate appropriate teamwork," is prefaced by the conventional, common-sense admonition that T-Mobile expects its employees to "to exercise integrity, common sense, good judgment, and to act in a professional manner." These acts appear in a long, non-inclusive list of prohibited activity, including theft, fraud, dishonesty, and sleeping on the job. These examples that define the parameters of the rule address misconduct. As the DC Circuit noted in addressing such a rule, "[a]lthough [reasonable] employees are perhaps unlikely to know the term *ejusdem generis,* they no doubt grasp as well as anyone the concept it encapsulates."

Here, a reasonable employee would understand the language of the commitment-to-integrity policy to refer to similar misconduct. Furthermore, a reasonable employee would be fully capable of engaging in debate over union activity or working conditions, even vigorous or heated debate, without inappropriately "arguing or fighting," "failing to treat others with respect," or "failing to demonstrate appropriate teamwork." As the Board delineated in *Lutheran Heritage,* we view the rule from the perspective of the reasonable employee, not from the point of view of the exceptions to reasonableness.

Accordingly, we decline to enforce the Board's order as to the commitment-to-integrity policy.

C.

The Board next found that T-Mobile's recording policy violates the NLRA because it would discourage workers from engaging in protected activity.

We are primarily concerned with the broad reach of the recording ban. The ban, by its plain language, encompasses any and all photography or recording on corporate premises at any time without permission from a supervisor. This ban is, by its own terms alone, stated so broadly that a reasonable employee, generally aware of employee rights, would interpret it to discourage protected concerted activity, such as even an off-duty employee photographing a wage schedule posted on a corporate bulletin board. *Cf. Flex Frac,* 746 F.3d at 208 ("A workplace rule that forbids the discussion of confidential wage information between employees patently violates section 8(a)(1)."); *accord Whole Foods Mkt. Grp., Inc. v. NLRB,* 691 Fed. Appx. 49 (2d Cir. 2017) (holding that where "no-recording policies prohibited all recording without management approval, employees would reasonably construe the language to prohibit recording protected by Section 7").

T-Mobile argues that the ban's stated purposes—"[t]o prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information"—are legitimate business interests that ordinarily would justify the ban. But merely reciting such justifi-

cations does not alter the fact that the operative language of the rule on its face prohibits protected Section 7 activity, including Section 7 activity wholly unrelated to those stated interests.

Unlike the "workplace conduct" policy and the "commitment-to-integrity" policy, the recording policy forbids certain forms of clearly protected activity. We have earlier held that held those two policies would not be interpreted by a reasonable T-Mobile employee as forbidding protected activity. By contrast, a reasonable T-Mobile employee, aware of his legal rights, would read the language of the recording policy as plainly forbidding a means of engaging in protected activity.

Because a reasonable employee would construe the recording policy to prohibit forms of protected activity, we hold that the Board's determination that the recording policy violated the NLRA is supported by a reasonable interpretation of the record. Its order will be enforced in that respect.

D.

Finally, the Board found that the acceptable use policy violated the NLRA because a reasonable employee would construe it to prohibit protected activity such as accessing and sharing wage and benefit information contained in his or her e-mail.

The NLRB's decision, however, disregards the context in which the acceptable use policy is to be read and understood. The "Scope" section of the acceptable use policy explicitly states that the policy "applies to all non-public T-Mobile information." Thus the policy only prohibits employees from sharing *non-public* information.

Where a company policy prohibits the disclosure of non-public information, courts presume that a reasonable employee would not construe the policy to prohibit the disclosure of information that may be properly used in protected activity, such as wage and benefit information, so long as the policy does not explicitly state that it encompasses such information. Here, the policy does not define "non-public T-Mobile information" in a way that would lead a reasonable worker to believe that it includes protected wage and benefit information. Instead, the policy only applies to the sort of proprietary business information that an employer may properly restrict its employees from sharing out-side of the company.

Thus the NLRB's finding that a reasonable worker would construe the acceptable use policy to discourage protected activity is unreasonable, and we deny enforcement as to that part of its order.

Discrimination & Harassment

Jesperson v. Harrah's Operating Company, Inc.

444 F.3d 1104 (9th Cir. 2006)

SCHROEDER, Chief Judge.

We took this sex discrimination case en banc in order to reaffirm our circuit law concerning appearance and grooming standards, and to clarify our evolving law of sex stereotyping claims.

The plaintiff, Darlene Jespersen, was terminated from her position as a bartender at the sports bar in Harrah's Reno casino not long after Harrah's began to enforce its comprehensive uniform, appearance and grooming standards for all bartenders. The standards required all bartenders, men and women, to wear the same uniform of black pants and white shirts, a bow tie, and comfortable black shoes. The standards also included grooming requirements that differed to some extent for men and women, requiring women to wear some facial makeup and not permitting men to wear any. Jespersen refused to comply with the makeup requirement and was effectively terminated for that reason.

The district court granted summary judgment to Harrah's on the ground that the appearance and grooming policies imposed equal burdens on both men and women bartenders because, while

women were required to use makeup and men were forbidden to wear makeup, women were allowed to have long hair and men were required to have their hair cut to a length above the collar. The district court also held that the policy could not run afoul of Title VII because it did not discriminate against Jespersen on the basis of the "immutable characteristics" of her sex. The district court further observed that the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), prohibiting discrimination on the basis of sex stereotyping, did not apply to this case because in the district court's view, the Ninth Circuit had excluded grooming standards from the reach of *Price Waterhouse.* In reaching that conclusion, the district court relied on *Nichols v. Azteca Restaurant Enters., Inc.,* 256 F.3d 864 (9th Cir.2001) ("We do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."). The district court granted summary judgment to Harrah's on all claims.

The three-judge panel affirmed, but on somewhat different grounds. The panel majority held that Jespersen, on this record, failed to show that the appearance policy imposed a greater burden on women than on men. It pointed to the lack of any affidavit in this record to support a claim that the burdens of the policy fell unequally on men and women. Accordingly, the panel did not agree with the district court that grooming policies could never discriminate as a

matter of law. [T]he panel also held that *Price Waterhouse* could apply to grooming or appearance standards only if the policy amounted to sexual harassment, which would require a showing that the employee suffered harassment for failure to conform to commonly-accepted gender stereotypes. The dissent would have denied summary judgment on both theories.

We agree with the district court and the panel majority that on this record, Jespersen has failed to present evidence sufficient to survive summary judgment on her claim that the policy imposes an unequal burden on women. With respect to sex stereotyping, we hold that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping. We therefore affirm.

I. BACKGROUND

Plaintiff Darlene Jespersen worked successfully as a bartender at Harrah's for twenty years and compiled what by all accounts was an exemplary record. During Jespersen's entire tenure with Harrah's, the company maintained a policy encouraging female beverage servers to wear makeup. The parties agree, however, that the policy was not enforced until 2000. In February 2000, Harrah's implemented a "Beverage Department Image Transformation" program at twenty Harrah's locations, including its casino in Reno. Part of the program consisted of new grooming

and appearance standards, called the "Personal Best" program. The program contained certain appearance standards that applied equally to both sexes, including a standard uniform of black pants, white shirt, black vest, and black bow tie. Jespersen has never objected to any of these policies. The program also contained some sex-differentiated appearance requirements as to hair, nails, and makeup.

In April 2000, Harrah's amended that policy to require that women wear makeup. Jespersen's only objection here is to the makeup requirement. The amended policy provided in relevant part:

> All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.
>
> * * *
>
> Beverage Bartenders and Barbacks will adhere to these additional guidelines:
>
> • Overall Guidelines (applied equally to male/ female):
>
> • Appearance: Must maintain Personal Best image portrayed at time of hire.
>
> • Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.

> • No faddish hairstyles or unnatural colors are permitted.
>
> • Males:
>
> • Hair must not extend below top of shirt collar. Ponytails are prohibited.
>
> • Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
>
> • Eye and facial makeup is not permitted.
>
> • Shoes will be solid black leather or leather type with rubber (non skid) soles.
>
> • Females:
>
> • Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
>
> • Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
>
> • Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
>
> • Shoes will be solid black leather or leather type with rubber (non skid) soles.
>
> • *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times. (emphasis added).*

Jespersen did not wear makeup on or off the job, and in her deposition stated that wearing it would conflict with her self-image. It is not disputed that she found the makeup requirement offensive, and felt so uncomfortable wearing makeup that she found it interfered with her ability to perform as a bartender. Unwilling to

wear the makeup, and not qualifying for any open positions at the casino with a similar compensation scale, Jespersen left her employment with Harrah's.

After exhausting her administrative remedies with the Equal Employment Opportunity Commission and obtaining a right to sue notification, Jespersen filed this action in July 2001. In her complaint, Jespersen sought damages as well as declaratory and injunctive relief for discrimination and retaliation for opposition to discrimination, alleging that the "Personal Best" policy discriminated against women by "(1) subjecting them to terms and conditions of employment to which men are not similarly subjected, and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment."

Harrah's moved for summary judgment, supporting its motion with documents giving the history and purpose of the appearance and grooming policies. Harrah's argued that the policy created similar standards for both men and women, and that where the standards differentiated on the basis of sex, as with the face and hair standards, any burdens imposed fell equally on both male and female bartenders.

In her deposition testimony, attached as a response to the motion for summary judgment, Jespersen described the personal indignity she felt as a result of attempting to comply with the makeup policy. Jespersen testified that when she wore the makeup she "felt very degraded and very demeaned." In addition, Jespersen testified

that "it prohibited [her] from doing [her] job" because "[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person." Jespersen made no cross-motion for summary judgment, taking the position that the case should go to the jury. Her response to Harrah's motion for summary judgment relied solely on her own deposition testimony regarding her subjective reaction to the makeup policy, and on favorable customer feedback and employer evaluation forms regarding her work.

The record therefore does not contain any affidavit or other evidence to establish that complying with the "Personal Best" standards caused burdens to fall unequally on men or women, and there is no evidence to suggest Harrah's motivation was to stereotype the women bartenders. Jespersen relied solely on evidence that she had been a good bartender, and that she had personal objections to complying with the policy, in order to support her argument that Harrah's "'sells' and exploits its women employees." Jespersen contended that as a matter of law she had made a prima facie showing of gender discrimination, sufficient to survive summary judgment on both of her claims.

The district court granted Harrah's motion for summary judgment on all of Jespersen's claims. In this appeal, Jespersen maintains that the record before the district court was sufficient to create triable issues of material fact as to her unlawful discrimination claims of unequal burdens and sex stereotyping. We deal with each in turn.

II. UNEQUAL BURDENS

In order to assert a valid Title VII claim for sex discrimination, a plaintiff must make out a prima facie case establishing that the challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on the basis of gender. Once a plaintiff establishes such a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."

In this case, Jespersen argues that the makeup requirement itself establishes a prima facie case of discriminatory intent and must be justified by Harrah's as a bona fide occupational qualification. *See* 42 U.S.C. § 2000e-2(e)(1).[1] Our settled law in this circuit, however, does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case.

In *Gerdom v. Cont'l Airlines, Inc.,* 692 F.2d 602 (9th Cir.1982), we considered the Continental Airlines policy that imposed strict weight restrictions on female flight attendants, and held it constituted a violation of Title VII. We did so because the airline imposed no weight restriction whatsoever on a class of male employees who performed the same or similar functions as the flight attendants. Indeed, the policy was touted by the airline as intended to "create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls.'" In fact, Continental

1 (n.1 in opinion) "[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise[.]"

specifically argued that its policy was justified by its "desire to compete [with other airlines] by featuring attractive female cabin attendants[,]" a justification which this court recognized as "discriminatory on its face." The weight restriction was part of an overall program to create a sexual image for the airline.

In contrast, this case involves an appearance policy that applied to both male and female bartenders, and was aimed at creating a professional and very similar look for all of them. All bartenders wore the same uniform. The policy only differentiated as to grooming standards.

In *Frank v. United Airlines, Inc.,* 216 F.3d 845 (9th Cir.2000), we dealt with a weight policy that applied different standards to men and women in a facially unequal way. The women were forced to meet the requirements of a medium body frame standard while men were required to meet only the more generous requirements of a large body frame standard. In that case, we recognized that "[a]n appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment." The United weight policy, however, did not impose equal burdens. On its face, the policy embodied a requirement that categorically "'applie[d] less favorably to one gender[,]'" and the burdens imposed upon that gender were obvious from the policy itself.

This case stands in marked contrast, for here we deal with requirements that, on their face, are not more onerous for one gender than the other. Rather, Harrah's "Personal Best" policy contains

sex-differentiated requirements regarding each employee's hair, hands, and face. While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory.

We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits. The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an "unequal burden" for the plaintiff's gender.

Not every differentiation between the sexes in a grooming and appearance policy creates a "significantly greater burden of compliance[.]" For example, in *Fountain,* this court upheld Safeway's enforcement of its sex-differentiated appearance standard, including its requirement that male employees wear ties, because the company's actions in enforcing the regulations were not "overly burdensome to its employees[.]" Similarly, as the Eighth Circuit has recognized, "[w]here, as here, such [grooming and appearance] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities." Under established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.

Jespersen asks us to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short, but these are not matters appropriate for judicial notice. Judicial notice is reserved for matters "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The time and cost of makeup and haircuts is in neither category. The facts that Jespersen would have this court judicially notice are not subject to the requisite "high degree of indisputability" generally required for such judicial notice.

Having failed to create a record establishing that the "Personal Best" policies are more burdensome for women than for men, Jespersen did not present any triable issue of fact. The district court correctly granted summary judgment on the record before it with respect to Jespersen's claim that the makeup policy created an unequal burden for women.

III. SEX STEREOTYPING

In *Price Waterhouse,* the Supreme Court considered a mixed-motive discrimination case. There, the plaintiff, Ann Hopkins, was denied partnership in the national accounting firm of Price Waterhouse because some of the partners found her to be too aggressive. While some partners praised Hopkins's "'strong character, independence and integrity[,]'" others commented that

she needed to take "'a course at charm school[.]'" The Supreme Court determined that once a plaintiff has established that gender played "a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."

Consequently, in establishing that "gender played a motivating part in an employment decision," a plaintiff in a Title VII case may introduce evidence that the employment decision was made in part because of a sex stereotype. According to the Court, this is because "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for 'in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" It was therefore impermissible for Hopkins's employer to place her in an untenable Catch-22: she needed to be aggressive and masculine to excel at her job, but was denied partnership for doing so because of her employer's gender stereotype. Instead, Hopkins was advised to "'walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry.'"

The stereotyping in *Price Waterhouse* interfered with Hopkins' ability to perform her work; the advice that she should take "a course at charm school" was intended to discourage her use of the forceful and aggressive techniques that made her successful in the first place. Impermissible sex stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men.

Harrah's "Personal Best" policy is very different. The policy does not single out Jespersen. It applies to all of the bartenders, male and female. It requires all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. It is for the most part unisex, from the black tie to the non-skid shoes. There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.

Judge Pregerson's dissent improperly divides the grooming policy into separate categories of hair, hands, and face, and then focuses exclusively on the makeup requirement to conclude that the policy constitutes sex stereotyping. This parsing, however, conflicts with established grooming standards analysis. The requirements must be viewed in the context of the overall policy. The dissent's conclusion that the unequal bur-

dens analysis allows impermissible sex stereotyping to persist if imposed equally on both sexes, is wrong because it ignores the protections of *Price Waterhouse* our decision preserves. If a grooming standard imposed on either sex amounts to impermissible stereotyping, something this record does not establish, a plaintiff of either sex may challenge that requirement under *Price Waterhouse.*

We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.

This is not a case where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype women as sex objects. In [*EEOC v. Sage Realty Corp.,* 507 F.Supp. 599 (S.D.N.Y.1981)], the plaintiff was a lobby attendant in a hotel that employed only female lobby attendants and required a mandatory uniform. The uniform was an octagon designed with an opening for the attendant's head, to be worn as a poncho, with snaps at the wrists and a tack on each side of the poncho, which was otherwise open. The attendants wore blue dancer pants as part of the uniform but were prohibited from wearing a shirt, blouse, or skirt under the outfit. There, the plaintiff was required to wear a

uniform that was "short and revealing on both sides [such that her] thighs and portions of her buttocks were exposed." Jespersen, in contrast, was asked only to wear a unisex uniform that covered her entire body and was designed for men and women. The "Personal Best" policy does not, on its face, indicate any discriminatory or sexually stereotypical intent on the part of Harrah's.

Nor is this a case of sexual harassment. Following *Price Waterhouse,* our court has held that sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation of Title VII. In *Nichols,* a male waiter was systematically abused for failing to act "as a man should act," for walking and carrying his tray "like a woman," and was derided for not having sexual intercourse with a female waitress who was his friend. Applying *Price Waterhouse,* our court concluded that this harassment was actionable discrimination because of the plaintiff's sex. In *Rene,* the homosexual plaintiff stated a Title VII sex stereotyping claim because he endured assaults "of a sexual nature" when Rene's co-workers forced him to look at homosexual pornography, gave him sexually-oriented "joke" gifts and harassed him for behavior that did not conform to commonly-accepted male stereotypes. *Nichols* and *Rene* are not grooming standards cases, but provide the framework for this court's analysis of when sex stereotyping rises to the level of sex discrimination for Title VII purposes. Unlike the situation in both *Rene* and *Nichols,* Harrah's actions have

not condoned or subjected Jespersen to any form of alleged harassment. It is not alleged that the "Personal Best" policy created a hostile work environment.

Nor is there evidence in this record that Harrah's treated Jespersen any differently than it treated any other bartender, male or female, who did not comply with the written grooming standards applicable to all bartenders. Jespersen's claim here materially differs from Hopkins' claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender.

We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves. This record, however, is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer. This case is essentially a challenge to one small part of what is an overall apparel, appearance, and grooming policy that applies largely the same requirements to both men and women. As we said in *Nichols,* in commenting on grooming standards, the touch-stone is reasonableness. A makeup requirement must be seen in the context of the overall standards imposed on employees in a given workplace.

PREGERSON, Circuit Judge, with whom Judges KOZINSKI, GRABER, and W. FLETCHER join, dissenting:

I agree with the majority that appearance standards and grooming policies may be subject to Title VII claims. I also agree with the majority that a Title VII plaintiff challenging appearance standards or grooming policies may "make out a prima facie case [by] establishing that the challenged employment action was *either* intentionally discriminatory *or* that it had a discriminatory effect on the basis of gender." Maj. Op. at 1108 (emphasis added). In other words, I agree with the majority that a Title VII plaintiff may make out a prima facie case by showing that the challenged policy either was motivated in part "because of a sex stereotype," Maj. Op. at 1111, or "creates an 'unequal burden' for the plaintiff's gender," Maj. Op. at 1110. Finally, I agree with the majority that Jespersen failed to introduce sufficient evidence to establish that Harrah's "Personal Best" program created an undue burden on Harrah's female bartenders.[2] I part ways with the majority, however, inasmuch as I believe that the "Personal Best" program was part of a policy motivated by sex stereotyping and that Jespersen's termination for failing to comply with the program's requirements was "because of" her sex. Accordingly, I dissent from Part III of the majority opinion and from the judgment of the court.

The majority contends that it is bound to reject Jespersen's sex stereotyping claim because she presented too little evidence —only her "own subjective reaction to the makeup requirement."

2 (n.1 in dissenting opinion) I have little doubt that Jespersen could have made some kind of a record in order to establish that the "Personal Best" policies are more burdensome for women than for men. The cost of makeup and time needed to apply it can both be quantified as can, for example, the cost of haircuts and time needed for nail trimming; had a record been offered in this case to establish the alleged undue burden on women, the district court could have evaluated it. Having failed to create such a record, Jespersen did not present any triable issue of fact on this issue.

I disagree. Jespersen's evidence showed that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders. Harrah's stringent "Personal Best" policy required female beverage servers to wear foundation, blush, mascara, and lip color, and to ensure that lip color was on at all times. Jespersen and her female colleagues were required to meet with professional image consultants who in turn created a facial template for each woman. Jespersen was required not simply to wear makeup; in addition, the consultants dictated where and how the makeup had to be applied.

Quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination "because of" sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that "gender must be *irrelevant* to employment decisions."[3]

Notwithstanding Jespersen's failure to present additional evidence, little is required to make out a sex-stereotyping—as distinct from an undue burden—claim in this situation. In *Price Waterhouse,* the Supreme Court held that an employer may not condition employment on an employee's conformance to a sex stereotype associated with their gender. As the majority recognizes, *Price Waterhouse* allows a Title VII plaintiff to "introduce evidence that the employment decision was made in part because of a sex stereotype." It is not entirely clear exactly what

3 (n.2 in dissenting opinion) Title VII identifies only one circumstance in which employers may take gender into account in making an employment decision—namely, "when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Harrah's has not attempted to defend the "Personal Best" makeup requirement as a BFOQ. In fact, there is little doubt that the "Personal Best" policy is not a business necessity, as Harrah's quietly disposed of this policy after Jespersen filed this suit. Regardless, although a BFOQ is a defense that an employer may raise, it does not preclude the employee from demonstrating the elements of a prima facie case of discrimination and presenting her case to a jury.

this evidence must be, but nothing in *Price Waterhouse* suggests that a certain type or quantity of evidence is required to prove a prima facie case of discrimination.

Moreover, *Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves, not only as to how they should behave.

Hopkins, the *Price Waterhouse* plaintiff, offered individualized evidence, describing events in which she was subjected to discriminatory remarks. However, the Court did not state that such evidence was required. To the contrary, the Court noted that

> By focusing on Hopkins' specific proof . . . we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, 'standing alone,' would or would not establish a plaintiff's case, since such a decision is unnecessary in this case.

The fact that Harrah's required female bartenders to conform to a sex stereotype by wearing full makeup while working is not in dispute, and the policy is described at length in the majority opinion. This policy did not, as the majority suggests, impose a "grooming, apparel, or appearance requirement that an individual finds personally offensive," but rather one that treated Jespersen differently from male bartenders "because of" her sex. I believe that the fact that Har-

rah's designed and promoted a policy that required women to conform to a sex stereotype by wearing full makeup is sufficient "direct evidence" of discrimination.

The majority contends that Harrah's "Personal Best" appearance policy is very different from the policy at issue in *Price Waterhouse* in that it applies to both men and women. I disagree. As the majority concedes, "Harrah's 'Personal Best' policy contains sex-differentiated requirements regarding each employee's hair, hands, and face." The fact that a policy contains sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny. By refusing to consider the makeup requirement separately, and instead stressing that the policy contained some gender-neutral requirements, such as color of clothing, as well as a variety of gender-differentiated requirements for "hair, hands, and face," the majority's approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate non-discriminatory requirement that applies to both men and women. By this logic, it might well have been permissible in *Frank v. United Airlines, Inc.* to require women, but not men, to meet a medium body frame standard *if* that requirement were imposed as part of a "physical appearance" policy that also required men, but not women, to achieve a certain degree of upper body muscle definition. But the fact that em-

ployees of both genders are subjected to gender-specific requirements does not necessarily mean that particular requirements are not motivated by gender stereotyping.

Because I believe that we should be careful not to insulate appearance requirements by viewing them in broad categories, such as "hair, hands, and face," I would consider the makeup requirement on its own terms. Viewed in isolation—or, at the very least, as part of a narrower category of requirements affecting employees' faces—the makeup or facial uniform requirement becomes closely analogous to the uniform policy held to constitute impermissible sex stereotyping in *Carroll v. Talman Federal Savings & Loan Ass'n of Chicago,* 604 F.2d 1028 (7th Cir. 1979). In *Carroll,* the defendant bank required women to wear employer-issued uniforms, but permitted men to wear business attire of their own choosing. The Seventh Circuit found this rule discriminatory because it suggested to the public that the uniformed women held a "lesser professional status" and that women could not be trusted to choose appropriate business attire.

Just as the bank in *Carroll* deemed female employees incapable of achieving a professional appearance without assigned uniforms, Harrah's regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform designed by a consultant and required by Harrah's. The inescapable message is that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption—and gender-

based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup. We need not denounce all makeup as inherently offensive, just as there was no need to denounce all uniforms as inherently offensive in *Carroll,* to conclude that *requiring* female bartenders to wear full makeup is an impermissible sex stereotype and is evidence of discrimination because of sex. Therefore, I strongly disagree with the majority's conclusion that there "is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear." Maj. Op. at 1112.

I believe that Jespersen articulated a classic case of *Price Waterhouse* discrimination and presented undisputed, material facts sufficient to avoid summary judgment. Accordingly, Jespersen should be allowed to present her case to a jury. Therefore, I respectfully dissent.

KOZINSKI, Circuit Judge, with whom Judges GRABER and W. FLETCHER join, dissenting:

I agree with Judge Pregerson and join his dissent—subject to one caveat: I believe that Jespersen also presented a triable issue of fact on the question of disparate burden.

The majority is right that "[t]he [makeup] requirements must be viewed in the context of the overall policy." But I find it perfectly clear that Harrah's overall grooming policy is substantially more burdensome for women than for men. Every requirement that forces men to spend

time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. "teased, curled, or styled" hair; clean trimmed nails v. nail length and color requirements; black leather shoes v. black leather shoes. The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the "overall policy" more burdensome for the former than for the latter. The only question is how much.

It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees.

Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists. It's hard to imagine that a woman could "put on her face," as they say, in the time it would take a man to shave—certainly not if she were to do the careful and thorough job Harrah's expects. Makeup, moreover, must be applied and removed every day; the policy burdens men with no such daily ritual. While a man could jog to the casino, slip

into his uniform, and get right to work, a woman must travel to work so as to avoid smearing her makeup, or arrive early to put on her makeup there.

It might have been tidier if Jespersen had introduced evidence as to the time and cost associated with complying with the makeup requirement, but I can understand her failure to do so, as these hardly seem like questions reasonably subject to dispute. We could—and should—take judicial notice of these incontrovertible facts.

Alternatively, Jespersen did introduce evidence that she finds it burdensome to *wear* makeup because doing so is inconsistent with her self-image and interferes with her job performance. My colleagues dismiss this evidence, apparently on the ground that wearing makeup does not, as a matter of law, constitute a substantial burden. This presupposes that Jespersen is unreasonable or idiosyncratic in her discomfort. Why so? Whether to wear cosmetics—literally, the face one presents to the world—is an intensely personal choice. Makeup, moreover, touches delicate parts of the anatomy—the lips, the eyes, the cheeks—and can cause serious discomfort, sometimes even allergic reactions, for someone unaccustomed to wearing it. If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the

bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.

Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences, such as a requirement that women wear bathing suits that cover their breasts. Women's faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics. But cultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed. So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like.

Nor do I think it appropriate for a court to dismiss a woman's testimony that she finds wearing makeup degrading and intrusive, as Jespersen clearly does. Not only do we have her sworn statement to that effect, but there can be no doubt about her sincerity or the intensity of her feelings: She quit her job—a job she performed well for two decades—rather than put on the makeup. That is a choice her male colleagues were not forced to make. To me, this states a case of disparate burden, and I would let a jury decide whether an employer can force a woman to make this choice.

Finally, I note with dismay the employer's decision to let go a valued, experienced employee who had gained accolades from her customers, over what, in the end, is a trivial matter. Quality employees are difficult to find in any industry and I would think an employer would long hesitate before forcing a loyal, long-time employee to quit over an honest and heartfelt difference of opinion about a matter of personal significance to her. Having won the legal battle, I hope that Harrah's will now do the generous and decent thing by offering Jespersen her job back, and letting her give it her personal best—without the makeup.

Cloutier v. Costco Wholesale Corp.

390 F.3d 126 (1st Cir. 2004)

LIPEZ, Circuit Judge.

Kimberly Cloutier alleges that her employer, Costco Wholesale Corp. (Costco), failed to offer her a reasonable accommodation after she alerted it to a conflict between the "no facial jewelry" provision of its dress code and her religious practice as a member of the Church of Body Modification. She argues that this failure amounts to religious discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a), and the corresponding Massachusetts statute. The district court granted summary judgment for Costco, concluding that Costco reasonably accommodated Cloutier by offering to reinstate her if she either covered her facial piercing with a band-aid or replaced it with a clear retainer. We affirm the

grant of summary judgment, but on a different basis. We hold that Costco had no duty to accommodate Cloutier because it could not do so without undue hardship.

I.

Kimberly Cloutier began working at Costco's West Springfield, Massachusetts store in July 1997. Before her first day of work, Cloutier received a copy of the Costco employment agreement, which included the employee dress code. When she was hired, Cloutier had multiple earrings and four tattoos, but no facial piercings.

Cloutier moved from her position as a front-end assistant to the deli department in September 1997. In 1998, Costco revised its dress code to prohibit food handlers, including deli employees, from wearing any jewelry. Cloutier's supervisor instructed her to remove her earrings pursuant to the revised code, but Cloutier refused. Instead, she requested to transfer to a front-end position where she would be permitted to continue wearing her jewelry. Cloutier did not indicate at the time that her insistence on wearing her earrings was based on a religious or spiritual belief.

Costco approved Cloutier's transfer back to a front-end position in June 1998, and promoted her to cashier soon thereafter. Over the ensuing two years, she engaged in various forms of body modification including facial piercing and cutting. Although these practices were meaningful to Cloutier, they were not motivated by a religious belief.

In March 2001, Costco further revised its dress code to prohibit all facial jewelry, aside from earrings, and disseminated the modified code to its employees. Cloutier did not challenge the dress code or seek an accommodation, but rather continued uneventfully to wear her eyebrow piercing for several months.

Costco began enforcing its no-facial-jewelry policy in June 2001. On June 25, 2001, front-end supervisors Todd Cunningham and Michele Callaghan informed Cloutier and another employee, Jennifer Theriaque, that they would have to remove their facial piercings. Cloutier and Theriaque did not comply, returning to work the following day still wearing their piercings. When Callaghan reiterated the no-facial-jewelry policy, Cloutier indicated for the first time that she was a member of the Church of Body Modification (CBM), and that her eyebrow piercing was part of her religion.

The CBM was established in 1999 and counts approximately 1000 members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation. Among the goals espoused in the CBM's mission statement are for its members to "grow as individuals through body modification and its teachings," to "promote growth in mind, body and spirit," and to be "confident role models in learning, teaching, and displaying body modification." The church's website, apparently its primary mode for reaching its adherents, did not state that members' body modifications had to be visible at all times or that temporarily removing body modifications would violate a religious tenet.

Still, Cloutier interprets the call to be a confident role model as requiring that her piercings be visible at all times and precluding her from removing or covering her facial jewelry. She does not extend this reasoning to the tattoos on her upper arms, which were covered at work by her shirt.

After reviewing information that Cloutier provided from the CBM website, Callaghan's supervisor, Andrew Mulik, instructed Cloutier and Theriaque to remove their facial jewelry. They refused. The following day, Cloutier filed a religious discrimination complaint with the Equal Employment Opportunity Commission (EEOC), which is empowered to enforce Title VII.

When Cloutier returned to work for her next shift on June 29, 2001, she was still wearing her facial jewelry. She met with Mark Shevchuk, the store manager, about her membership in the CBM and the EEOC complaint. During the course of the meeting, Cloutier suggested that she be allowed to cover her eyebrow piercing with a flesh-colored band-aid. Shevchuk rejected the suggestion and told Cloutier that she had to remove the piercing or go home. She left.

Theriaque also returned to work wearing her facial jewelry on June 29, 2001 and was reminded of the dress code. She asked whether she could wear clear plastic retainers in place of her jewelry to prevent the piercings from closing. The parties disagree as to whether Costco accepted this arrangement immediately or after several weeks of consideration. For purposes of our summary

judgment analysis, we accept Cloutier's contention that Theriaque wore the retainers to work for several weeks unnoticed before Costco gave her permission to do so.

Although Cloutier learned during the week of July 2, 2001 that Theriaque had returned to work with retainers, she chose to wait for her EEOC complaint to be resolved rather than following suit. During the week of July 7, 2001, Cloutier inquired of her superiors whether she could use vacation time to cover her absences and was told that she had been suspended. The following week, on July 14, Cloutier received notice in the mail that she had been terminated for her unexcused absences resulting from noncompliance with the dress code. She claims that this was her first notice that Costco had decided not to grant her request for an accommodation that would reconcile the dress code with her religious requirement of displaying her facial jewelry at all times.

The parties remained in contact after Cloutier's termination through the EEOC mediation process. During a meeting on August 10, 2001, Costco offered to let Cloutier return to work wearing either plastic retainers or a band-aid over her jewelry (the same accommodation that Cloutier had suggested prior to her termination). Shevchuk repeated the offer in a letter dated August 29, 2001, asking Cloutier to respond by September 6, 2001.

Although there is some dispute as to whether Cloutier attempted to respond to Costco's offer before the deadline, she now maintains that neither of the proffered accommodations would be adequate because the CBM's tenets, as she interprets them, require her to display all of her facial piercings at all times. Replacing her eyebrow piercing with a plastic retainer or covering it with a band-aid would thus contradict her religious convictions. Cloutier asserts that the only reasonable accommodation would be to excuse her from Costco's dress code, allowing her to wear her facial jewelry to work. Costco responds that this accommodation would interfere with its ability to maintain a professional appearance and would thereby create an undue hardship for its business.

The EEOC determined in May 2002 that Costco's actions violated Title VII of the Civil Rights Act of 1964. It found that Cloutier's refusal to remove her facial jewelry was "religiously based as defined by the EEOC," that Costco did not allow her to wear her facial jewelry at work, and that there was no evidence that allowing her to wear the jewelry would have constituted an undue hardship. Based on this determination, Cloutier filed a suit against Costco in federal district court in August 2002 alleging a Title VII violation. She amended the complaint four months later, adding state law claims for religious discrimination and violation of her civil rights.

The district court granted Costco's motion to dismiss Cloutier's state civil rights claim but allowed the federal and state discrimination claims to proceed. Costco then moved for summary judgment on the discrimination claims.

In ruling on that motion, the court applied the two-part framework set forth in *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico,* 279 F.3d 49 (1st Cir.2002). First, the court evaluated Cloutier's *prima facie* case, which required her to show that (1) a bona fide religious practice conflicted with an employment requirement, (2) she brought the practice to Costco's attention, and (3) the religious practice was the basis for the termination. The court expressed serious doubts as to whether Cloutier's claim was based on a "bona fide religious practice" for purposes of the first element, noting that even assuming arguendo that the CBM is a bona fide religion, it "in no way requires a *display* of facial piercings *at all times.* The requirement that she display her piercings, open and always, represents the plaintiff's personal interpretation of the stringency of her beliefs." The court also questioned the sincerity of Cloutier's personal interpretation, given that she initially offered to cover her piercing with a band-aid, an alternative that she now claims would violate her religion.

The court ultimately avoided ruling on whether the CBM is a religion or whether Cloutier's interpretation of the CBM tenets is protected by Title VII. Instead, the court concluded that even if Cloutier had met her *prima facie* case, Costco should prevail because it fulfilled its obligations

under the second part of the Title VII framework. Specifically, the court found that Costco met its burden of showing that it had offered Cloutier a reasonable accommodation of her religious practice:

> Costco's offer of accommodation was manifestly reasonable as a matter of law. The temporary covering of plaintiff's facial piercings during working hours impinges on plaintiff's religious scruples no more than the wearing of a blouse, which covers plaintiff's tattoos. The alternative of a clear plastic retainer does not even require plaintiff to cover her piercings. Neither of these alternative accommodations will compel plaintiff to violate any of the established tenets of the CBM.

In granting summary judgment on the Title VII claim, the court stressed that "the search for a reasonable accommodation goes both ways. Although the employer is required under Title VII to accommodate an employee's religious beliefs, the employee has a duty to cooperate with the employer's good faith efforts to accommodate." The court also noted that Title VII does not require Costco to grant Cloutier's preferred accommodation, but merely a reasonable one. While Costco's suggested accommodation balanced Cloutier's beliefs with its interest in presenting a professional appearance, Cloutier "offered no accommodation whatsoever."

Having resolved the federal claim, the court turned to Cloutier's state law claim under Mass. Gen. Laws ch. 151B § 4(1A), which has been interpreted largely to mirror Title VII. The statute prevents employers from imposing a condition of employment which "would require [an employee] to violate, or forego the practice of, his

creed or religion as required by that creed or religion." "Creed or religion" is defined as "any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization." The employee bears the burden of proof in establishing that something is a practice of his creed or religion. Under this examination, "[i]nquiry as to whether an employee's belief is sincere is constitutionally appropriate." Where the employee demonstrates that a conflict exists, the burden shifts to the employer, who must prove that it offered the employee a "reasonable accommodation," defined as one that "shall not cause undue hardship in the conduct of the employer's business."

Under the foregoing framework, the district court concluded that summary judgment for Costco was appropriate. Although it noted the possibility that the state statute "casts a broader net than Title VII in covering purely personal beliefs that may be entitled to protection from discrimination," the court relied on its previous finding that Costco's offer to let Cloutier return to work wearing a band-aid or plastic retainer was "reasonable as a matter of law."

Cloutier now appeals, arguing that the court erred in finding no violation of Title VII or [state law] and that disputed material facts made summary judgment inappropriate.

II.

On appeal, Cloutier vigorously asserts that her insistence on displaying all her facial jewelry at all times is the result of a sincerely held religious belief. Determining whether a belief is religious is "more often than not a difficult and delicate task," one to which the courts are ill-suited. Fortunately, as the district court noted, there is no need for us to delve into this thorny question in the present case. Even assuming, *arguendo,* that Cloutier established her *prima facie* case, the facts here do not support a finding of impermissible religious discrimination.

We find dispositive that the only accommodation Cloutier considers reasonable, a blanket exemption from the no-facial-jewelry policy, would impose an undue hardship on Costco. [4] In such a situation, an employer has no obligation to offer an accommodation before taking an adverse employment action.

A. Title VII

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of, among other things, religion. Under Title VII, an employer must offer a reasonable accommodation to resolve a conflict between an employee's sincerely held religious belief and a condition of employment, unless such an accommodation would create an undue hardship for the employer's business.

4 (n.6 in opinion) We note that Cloutier's requested accommodation has evolved over time. When she first informed Costco management that her religious practice conflicted with its no-facial-jewelry requirement, Cloutier proposed that she be allowed to cover her piercing with a band-aid while working. In the course of this litigation, she has asserted that, even at the time, she believed that wearing the band-aid would violate the tenets of the CBM but nonetheless proposed it to "try and come to an agreement with them." She now maintains that covering her piercings with a band-aid or temporarily replacing them with a plastic retainer would violate her religious beliefs and thus that any such accommodation would not be reasonable. We accept the finality of Cloutier's position in evaluating whether Costco could have reasonably accommodated her religious practice without suffering an undue hardship.

As noted, the First Circuit applies a two-part framework to religious discrimination claims under Title VII. First, the plaintiff must make her *prima facie* case that a bona fide religious practice conflicts with an employment requirement and was the reason for the adverse employment action. If the plaintiff establishes her *prima facie* case, the burden then shifts to the employer to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship.

We follow the district court in assuming, *arguendo,* that Cloutier established a *prima facie* case sufficient to shift the burden to Costco to demonstrate that it offered a reasonable accommodation or that it could not do so without suffering undue hardship.

1. Reasonable accommodation

The parties dispute when Costco first offered Cloutier an accommodation, but we view the facts on summary judgment in the light most favorable to Cloutier. Cloutier was terminated on July 14, 2001. She maintains that Costco did not extend any offer of accommodation until August 10, 2001, approximately one month later, during a meeting that was part of the EEOC mediation process. The district court acknowledged this time line but asserted that "[t]his delay [in making the offer after Cloutier had been terminated] does not justify denial of the motion for summary judgment." The court offered three explanations for this statement: (1) Costco may have offered Cloutier back pay, (2) "the delay in trans-

mitting the offer emerged as much from a failure of cooperation by plaintiff as from any intransigence on the part of the defendant," and (3) the assumption that Cloutier would not bring the case to trial over four weeks' salary. Unpersuaded that the first and third points are relevant to our reasonable accommodation inquiry, we question the district court's dismissal of this timing difficulty.

Courts in at least two of our sister circuits have ruled that an accommodation offered after an adverse employment action does not shield an employer from liability under Title VII. Courts have also acknowledged that the opposite rule, treating as reasonable a post-termination offer extended during the EEOC mediation process, would "encourage the making of such offers, thus furthering [Title VII's] important statutory policy favoring voluntary reconciliation." Yet, as the Tenth Circuit has noted, this rule would also leave employers' conduct "virtually unregulated" when conflicts first arise. As a consequence, "Title VII would provide employees no protection until after the fact, an important consideration given the impact a suspension, termination, or rejection may have on an individual's life."

Even this limited discussion illustrates that the question of whether a post-termination offer extended during the EEOC mediation process can be a reasonable accommodation raises difficult issues. We have yet to consider this question directly and decline to do so here on the limited summary judgment record. Our affirmance rests

instead on an alternative ground advanced by Costco — namely, that the only accommodation Cloutier considers reasonable would impose an undue hardship on Costco.

2. Undue hardship

Cloutier asserts that the CBM mandate to be a confident role model requires her to display all of her facial piercings at all times. In her view, the only reasonable accommodation would be exemption from the no-facial-jewelry policy. Costco maintains that such an exemption would cause it to suffer an undue hardship, and that as a result it had no obligation to accommodate Cloutier.

An accommodation constitutes an "undue hardship" if it would impose more than a *de minimis* cost on the employer. This calculus applies both to economic costs, such as lost business or having to hire additional employees to accommodate a Sabbath observer, and to non-economic costs, such as compromising the integrity of a seniority system.

Cloutier argues that Costco has not met its burden of demonstrating that her requested accommodation would impose an undue hardship. She asserts that she did not receive complaints about her facial piercings and that the piercings did not affect her job performance. Hence, she contends that any hardship Costco posits is merely hypothetical and therefore not sufficient to excuse it from accommodating her religious practice under Title VII.

Courts are "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice." "Nevertheless, it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations...." It can do so by "examining the specific hardships imposed by specific accommodation proposals." Here, Costco has only one proposal to evaluate (allowing Cloutier to wear and display her body jewelry as she demands) and has determined that it would constitute an undue hardship.

The district court acknowledged that "Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance." Costco's dress code, included in the handbook distributed to all employees, furthers this interest. The preface to the code explains that, "Appearance and perception play a key role in member service. Our goal is to be dressed in professional attire that is appropriate to our business at all times.... All Costco employees must practice good grooming and personal hygiene to convey a neat, clean and professional image."

It is axiomatic that, for better or for worse, employees reflect on their employers. This is particularly true of employees who regularly interact with customers, as Cloutier did in her cashier position. Even if Cloutier did not personally receive any complaints about her appearance, her facial jewelry influenced Costco's public image and, in Costco's calculation, detracted from its professionalism.

Costco is far from unique in adopting personal appearance standards to promote and protect its image. As the D.C. Circuit noted, "Perhaps no facet of business life is more important than a company's place in public estimation.... Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility." Courts have long recognized the importance of personal appearance regulations, even in the face of Title VII challenges. Such regulations are often justified with regard to safety concerns. *E.g., Bhatia v. Chevron U.S.A., Inc.,* 734 F.2d 1382 (9th Cir.1984) (affirming summary judgment for employer who refused to exempt a Sikh employee from the requirement that all machinists be clean-shaven, where the policy was based on the necessity of being able to wear a respirator with a gas-tight face seal because of potential exposure to toxic gases).

Courts considering Title VII religious discrimination claims have also upheld dress code policies that, like Costco's, are designed to appeal to customer preference or to promote a professional public image. The majority of religious discrimination cases in this arena appear to involve policies regulating facial hair.

But we are not the first court to consider a religious discrimination claim involving jewelry. In *Daniels v. City of Arlington,* 246 F.3d 500 (5th Cir.2001), a former police officer claimed that his dismissal for wearing a gold cross pin on his uniform in violation of the police department's no-pin policy violated Title VII. The only reasonable

accommodation that Daniels cited was to exempt him from the no-pin policy. The Fifth Circuit granted summary judgment for the police department, concluding that "[t]he only accommodation Daniels proposes is unreasonable and an undue hardship for the city as a matter of law."

The assessment of what constitutes an undue hardship may be somewhat different for a private employer than for a police department. Still, we are faced with the similar situation of an employee who will accept no accommodation short of an outright exemption from a neutral dress code. Granting such an exemption would be an undue hardship because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the "neat, clean and professional image" that it aims to cultivate. Such a business determination is within its discretion. As another court has explained, "Even assuming that the defendants' justification for the grooming standards amounted to nothing more than an appeal to customer preference, ... it is not the law that customer preference is an insufficient justification as a matter of law."

Cloutier argues that regardless of the reasons for the dress code, permitting her to display her facial jewelry would not be an undue hardship because Costco already overlooks other violations of its policy. In support of her position, she cites affidavits from two Costco employees identifying co-workers who "were allowed to wear facial piercing[s] ... and were not disciplined." Costco

responds that any employees who displayed facial jewelry did so without its permission or knowledge, noting that constant monitoring is impossible in a facility with several hundred employees.

We find Cloutier's contention, and the affidavits underlying it, unpersuasive. To the extent that the ambiguous term "allowed" implies that Costco was aware of the piercings, the affidavits are marred by an evidentiary flaw: the affiants do not appear to have personal knowledge of Costco's awareness. And to the extent that the affidavits suggest that other employees' piercings went unnoticed, we do not believe that such isolated violations diminish the hardship Costco would suffer if it were forced to exempt Cloutier from its no-facial-jewelry policy.

Cloutier appears to reason that because other employees have violated the no-facial-jewelry policy, it would not be an additional burden on Costco's effort to present a professional workforce for her to display her piercings as well. But there is an important distinction between an employee who displays facial jewelry unnoticed in violation of the dress code and one who does so under an exemption from the dress code. In the first scenario, Costco can instruct an employee to remove facial jewelry as soon as it becomes aware of a violation. In the second scenario, Costco forfeits its ability to mandate compliance and thus loses control over its public image. That loss, as we have discussed, would constitute an undue hardship.

Hogan v. Forsyth Country Club Co.

340 S.E.2d 116 (N.C. App. 1986)

MARTIN, Judge.

Plaintiffs assert error with respect to the entry of summary judgment dismissing each of their multiple claims. For the reasons which follow, we conclude that April Cornatzer is entitled to a trial upon two of the three claims which she asserts. However, with respect to her claim for wrongful discharge from employment and to each of the claims of Marlene Hogan and Sonya Mitchell, we affirm the judgment of the trial court.

II

The first issue raised by each of the plaintiffs involves the entry of summary judgment dismissing her claim for intentional infliction of emotional distress. Each plaintiff contends that her forecast of evidence is sufficient to raise genuine issues of material fact with respect to her claim sufficient to survive summary judgment.

The tort of intentional infliction of mental or emotional distress was formally recognized in North Carolina by the decision of our Supreme Court in *Stanback v. Stanback,* 297 N.C. 181 (1979). The claim exists "when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress

of a very serious kind.'" The elements of the tort consist of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress.

> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

III

A

The evidence with respect to April Cornatzer's claim for intentional infliction of emotional distress, taken in the light most favorable to her, tends to show that in September 1982, Hans Pfeiffer began making sexual advances toward her. At her deposition, and in an affidavit, Cornatzer maintained that Pfeiffer made sexually suggestive remarks to her while she was working, coaxing her to have sex with him and telling her that he wanted to "take" her. He would brush up against her, rub his penis against her buttocks and touch her buttocks with his hands. When she refused his advances, he screamed profane names at her, threatened her with bodily injury, and on one occasion, advanced toward her with a knife and slammed it down on a table in front of her. As a result of Pfeiffer's actions toward her, Cornatzer maintains that she became very nervous, anxious, humiliated and depressed, to the extent that she was required to seek medical treatment for ulcers.

Defendant contends that, as a matter of law, the conduct directed toward Cornatzer by Pfeiffer was insufficiently outrageous to meet the requirement of *Dickens*. We disagree. It is a question of law for the court to determine, from the materials before it, whether the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery. However, once conduct is shown which may be reasonably regarded as extreme and outrageous, it is for the jury to determine, upon proper instructions, whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability.

That Cornatzer's forecast of evidence shows sufficiently outrageous conduct directed toward her by Pfeiffer to entitle her to go to the jury strikes us as irrefutable. No person should have to be subjected to non-consensual sexual touchings, constant suggestive remarks and on-going sexual harassment such as that testified to by Cornatzer, without being afforded remedial recourse through our legal system. Such conduct, if found by a jury to have actually existed, is beyond the "bounds usually tolerateds by decent society" and would permit Cornatzer to recover, at least as against Pfeiffer.

Defendant argues further, however, that even if Pfeiffer would be liable, it should not be held liable for his intentional or wanton acts committed against Cornatzer because the acts were not committed for any purpose connected with the

work he was employed to do. On the other hand, Cornatzer argues that defendant may be held liable for Pfeiffer's conduct under the doctrine of *respondeat superior*.

As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal. There is no contention that defendant expressly authorized Pfeiffer's conduct; if defendant is to be held liable, there must be some evidence that Pfeiffer was acting within the scope of his employment or that defendant ratified his wrongful conduct.

It is well settled in this State that "[i]f the act of the employee was a means or method of doing that which he was employed to do, though the act be unlawful and unauthorized or even forbidden, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do." this Court stated that "[t]he principal is liable for the acts of his agent, whether malicious or negligent, and the employer for similar acts of his employees,.... The test is whether the act was done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do."

Although Pfeiffer's acts against Cornatzer were committed while both were at their jobs on defendant's premises, we can find no evidence, and Cornatzer points us to none, which would support a finding that Pfeiffer was acting within the scope of his employment or in the furtherance of any purpose of the defendant in committing the acts. Rather, it appears that he was acting in pursuit of some corrupt or lascivious purpose of his own.

However, we are constrained to hold that Cornatzer has presented a sufficient showing of ratification of Pfeiffer's conduct by defendant to warrant submission of the question to the jury. Cornatzer's evidence, considered in the light most favorable to her, indicates that she complained to Richard Brennan, defendant's general manager, several times concerning Pfeiffer's conduct and that Brennan did nothing to prevent further sexual harassment by Pfeiffer. "The designation 'manager' implies general power and permits a reasonable inference that he was vested with the general conduct and control of defendant's business ..., and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." Thus, Brennan, whose responsibilities as manager included his duty to oversee all aspects of defendant's business and to supervise defendant's employees, was vested with authority to act on behalf of defendant and if, by his actions, he ratified Pfeiffer's wrongful conduct, such ratification would be imputed to defendant. In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all

material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act. Whether Brennan's actions, consisting of retaining Pfeiffer in defendant's employ, declining to intervene to prevent his further offensive behavior toward Cornatzer, and ultimately terminating Cornatzer from employment, amount to a course of conduct signifying an intention to acquiesce in, approve and ratify Pfeiffer's acts is a question for the jury. For the foregoing reasons, we hold that summary judgment dismissing Cornatzer's claim for intentional infliction of mental distress was improvidently granted.

B

We do not reach the same result, however, with respect to the claims of Marlene Hogan and Sonya Mitchell for intentional infliction of mental distress. Hogan's evidence tends to show that Pfeiffer screamed and shouted at her, called her names, interfered with her supervision of waitresses under her charge, and on one occasion threw menus at her. She also testified that she shouted back at Pfeiffer. This conduct lasted during the period from 22 June 1983 until her termination on 24 July 1983. The general manager, Clifford Smith, received complaints from both Hogan and Pfeiffer concerning the temper of the other. His attempt to discuss the situation with both employees was unsuccessful because Pfeiffer walked out.

While we do not condone Pfeiffer's intemperate conduct, neither do we believe that his alleged acts "exceed all bounds usually tolerated by a decent society," so as to satisfy the first element of the tort, requiring a showing of "extreme and outrageous conduct."

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community....
>
> The liability clearly does not extend to mere insults, indignities, threats,.... The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam....

We hold Pfeiffer's conduct, as shown by Hogan's forecast of evidence, was not such as to be reasonably regarded as "extreme and outrageous" so as to permit Hogan to recover for intentional infliction of mental distress.

Sonya Mitchell bases her claim for intentional infliction of emotional distress upon the alleged conduct and acts of Richard Brennan. Mitchell's evidence, if accepted as true by a jury, would show that Brennan refused to grant her a pregnancy leave of absence, directed her to carry objects such as trash bags, vacuum cleaners, and bundles of linen weighing more than 10 pounds. He cursed at her on one occasion. When she re-

quested, on 10 July 1983, to be allowed to leave work to go to the hospital, Brennan refused to grant permission. When she left without his permission, he terminated her from employment.

We find that Brennan's alleged conduct, though unjustified under the circumstances apparent from Mitchell's testimony, was not so "extreme and outrageous" as to give rise to a claim for intentional infliction of mental or emotional distress.

Control Outside Work

Social Media

Three D, LLC v. NLRB

629 Fed. Appx. 33 (2d Cir. 2015)

Three D, LLC d/b/a Triple Play Sports Bar and Grille v. NLRB

629 Fed. Appx. 33 (2d Cir. Oct. 21, 2015)

SUMMARY ORDER

Three D, LLC, d/b/a Triple Play Sports Bar and Grille ("Triple Play") appeals a decision of the National Labor Relations Board ("NLRB" or "Board") finding that Triple Play violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") by taking certain actions against its

employees, including discharge, for their Facebook activity. Triple Play also appeals the Board's finding that Triple Play violated Section 8(a)(1) of the Act by maintaining an overbroad Internet/Blogging policy.

Employee Discharges and Other Violations of Section 8(a)(1)

Section 7 of the Act guarantees that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations ... and to engage in other concerted activities for the purpose of ... mutual aid or protection...." Section 8(a)(1) of the Act protects employees' Section 7 rights by prohibiting an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in [Section 7]...."

An employee's Section 7 rights must be balanced against an employer's interest in preventing disparagement of his or her products or services and protecting the reputation of his or her business. Accordingly, an employee's communications with the public may lose the protection of the Act if they are sufficiently disloyal or defamatory. These communications may be sufficiently disloyal to lose the protection of the Act if they amount to criticisms disconnected from any ongoing labor dispute. See *NLRB v. Elec. Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

An employee's public statement is defamatory if made maliciously, meaning "with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Linn v. United Plant Guard*

Workers of America, Local 114, 383 U.S. 53 (1966). "The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. Where an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act."

The Board determined as an initial manner that the only employee conduct at issue was (1) Spinella's "like" of LaFrance's initial status update ("Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money … Wtf!!!!"); and (2) Sanzone's comment stating "I owe too. Such an asshole." Regarding this conduct, the Board concluded that, "in the context of the ongoing dialogue among employees about tax withholding," Spinella and Sanzone had at maximum endorsed LaFrance's claim that Triple Play had erred in her tax withholding. Special App'x 5. The Board declined to hold either Sanzone or Spinella responsible for any other statement posted in the Facebook discussion on ground that "neither Sanzone nor Spinella would have lost the protection of the Act merely by participating in an otherwise protected discussion in which other persons made unprotected statements."

The ALJ found and the Board agreed that the Facebook activity in this case was "concerted", because it involved four current employees and was "part of an ongoing sequence of discussions

that began in the workplace about [Triple Play's] calculation of employees' tax withholding." The Board also adopted the ALJ's recommendation that the Facebook activity was "protected" because "the discussion concerned workplace complaints about tax liabilities, [Triple Play's] tax withholding calculations, and LaFrance's assertion that she was owed back wages."

After finding that Sanzone's and Spinella's Facebook activity constituted protected concerted activity, the only remaining question before the Board was whether that Facebook activity was so disloyal or defamatory as to lose the protection of the Act. The Board applied *Jefferson Standard* to conclude that Sanzone's and Spinella's Facebook activity was not so disloyal as to lose protection of the Act because "[t]he comments at issue did not even mention [Triple Play]'s products or services, much less disparage them." The Board further concluded that Triple Play failed to meet its burden under *Linn* to establish that the comments at issue were defamatory because "there is no basis for finding that the employees' claims that their withholding was insufficient to cover their tax liability, or that this shortfall was due to an error on [Triple Play]'s part, were maliciously untrue."

Triple Play argues on appeal that because Sanzone's and Spinella's Facebook activity contained obscenities that were viewed by customers, the Board should have found that this activity lost the protection of the Act under *Starbucks [v. NLRB]*, a case in which a Second Circuit panel remanded a Board Order for reconsideration of the proper standard to apply when analyzing an em-

ployee's utterance of obscenities in the presence of customers. In Triple Play's view, the panel in *Starbucks* "strongly suggested" that an employee's obscenities uttered in the presence of customers "would not be protected in most or all circumstances."

Triple Play's reliance on *Starbucks* is misplaced. The *Starbucks* panel premised its decision on a finding that the Board had "disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers." Here, the Board stated unequivocally that its application of *Jefferson Standard* and *Linn* was based on its longstanding recognition "that an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation ... from defamation."

Furthermore, accepting Triple Play's argument that *Starbucks* should apply because the Facebook discussion took place "in the presence of customers" could lead to the undesirable result of chilling virtually all employee speech online. Almost all Facebook posts by employees have at least some potential to be viewed by customers. Although customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer's brand. The Board's decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of modern-day social media use.

Triple Play further argues that, even if the Board were correct to apply *Jefferson Standard* and *Linn*, the Board's factual conclusions relating to those standards were unsupported because "no evidence in the record ... establishes that Sanzone's comment was limited" only to "endorsing LaFrance's complaint that she owed money on her taxes due to a tax withholding error on [Triple Play]'s part." Triple Play would have us find that "the evidence, when taken as a whole, demonstrates that Sanzone clearly endorsed such a comment by LaFrance and that Spinella also endorsed disparaging comments about Triple Play and its owners." Triple Play also argues that the Board erred in concluding under Linn that Sanzone's comment was not defamatory because "the evidence unequivocally establishes that Sanzone's endorsement of LaFrance's complaint was knowingly false, as Sanzone did not believe that Triple Play had made any errors with respect to her income tax withholdings."

We agree with counsel for the Board that "Spinella's and Sanzone's communications, which were made to seek and provide mutual support looking toward group action, were not made to disparage Triple Play or to undermine its reputation." The Facebook discussion clearly disclosed the ongoing labor dispute over income tax withholdings, and thus anyone who saw Spinella's "like" or Sanzone's statement could evaluate the message critically in light of that dispute.

We also agree with counsel for the Board that Sanzone's comment was not defamatory under the *Linn* standard in light of the fact that she had conversations with other employees regarding their tax concerns prior to the Facebook discussion. As the Board observed, "simply because Sanzone knew that Triple Play did not make an error on her (own) tax withholdings does not mean that Sanzone's endorsement of LaFrance's complaint about Triple Play making tax withholding errors was deliberately or maliciously false." Although Sanzone may not have believed that Triple Play erroneously withheld her taxes, that has no bearing on the truth of her statement "I owe too" or her conceivable belief that Triple Play may have erroneously withheld other employees' taxes. It is certainly plausible that Sanzone truly owed taxes, even if that was not the result of an error on Triple Play's part—and even if other employees' claims regarding erroneous tax withholdings later proved inaccurate, such inaccuracies by themselves do not remove the statement from the protection of the Act.

In addition to finding that the discharges of Sanzone and Spinella violated the Act, the Board adopted the ALJ's conclusions that Triple Play violated the Act by (1) threatening employees with discharge for their Facebook activity; (2) interrogating employees about their Facebook activity; and (3) informing employees that they were being discharged for their Facebook activity. Because Sanzone's and Spinella's Facebook activity did not lose the protection of the Act, Triple Play's challenge to the other violations of Section 8(a)(1) must necessarily fail.

Internet/Blogging Policy

A rule violates Section 8(a)(1) if it would reasonably tend to chill employees in the exercise of their Section 7 rights. If the rule explicitly restricts activities protected by Section 7, then it is unlawful. "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

Neither party disputed the ALJ's findings that Triple Play's Internet/Blogging policy (1) did not explicitly restrict the exercise of Section 7 rights, (2) was not promulgated in response to union activity, and (3) was not applied to restrict Section 7 rights. The inquiry before the Board was thus limited to whether "employees would reasonably construe the language to prohibit Section 7 activity."

Although the ALJ found that employees would not reasonably construe the language of the Internet/Blogging policy to restrict Section 7 activity, the Board declined to adopt this recommendation and found instead that [...]"employees would reasonably interpret [Triple Play]'s rule as proscribing any discussions about their terms and conditions of employment deemed 'inappropriate' by [Triple Play]." We believe that the majority opinion of the Board correctly identified the [...] governing rule on this question and reasonably applied that rule to the facts of this case.

Ehling v. Monmouth-Ocean Hospital Service, Inc.

872 F.Supp.2d 369 (D.N.J. 2012)

WILLIAM J. MARTINI, District Judge.

Plaintiff Deborah Ehling brings this action against Monmouth-Ocean Hospital Service Corp. ("MONOC"), Vincent Robbins, and Stacy Quagliana (collectively "Defendants"), alleging violations of the Electronic Communications Privacy Act, the Family Medical Leave Act, and various state laws. This matter comes before the Court on Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. For the reasons set forth below, Defendants' Rule 12(b)(6) motion is GRANTED in part, and DENIED in part.

I. Background

Plaintiff Deborah Ehling is a registered nurse and paramedic. Defendant Monmouth-Ocean Hospital Service Corporation ("MONOC") is a non-profit hospital service corporation dedicated to providing emergency medical services to the citizens of the State of New Jersey. Defendant Vincent Robbins is the President and CEO of MONOC. Defendant Stacy Quagliana is the Executive Director of Administration at MONOC.

Plaintiff was hired by MONOC in 2004 as a registered nurse and paramedic. In July of 2008, Plaintiff took over as the Acting President of the local union for Professional Emergency Medical

Services Association — New Jersey (the "Union"). As President, Plaintiff was "very proactive in attempting to protect the rights and safety of her union members" and filed numerous complaints and charges against MONOC to that end. Plaintiff alleges that, as soon as she became President of the Union, Defendants began engaging in a pattern of retaliatory conduct against her, eventually culminating in her termination in July 2011. Although the Amended Complaint contains allegations regarding a wide range of conduct, the Court will discuss only those allegations that are relevant to the motion to dismiss.

During the 2008-2009 timeframe, Plaintiff maintained an account on Facebook, a social networking website. According to Plaintiff, if someone was not invited to be her Facebook "friend," he or she could not access and view postings on Plaintiff's Facebook "wall." Many of Plaintiff's coworkers were invited to be Plaintiff's Facebook friends. Plaintiff did not invite any members of MONOC management as friends.

Plaintiff alleges that MONOC "[s]ubsequently... gained access to Ms. Ehling's Facebook account by having a supervisor(s) summon a MONOC employee, who was also one of Ms. Ehling's Facebook friends, into an office" and "coerc[ing], strong-arm[ing], and/or threaten[ing] the employee into accessing his Facebook account on the work computer in the supervisor's presence." Am. Compl. 20. Plaintiff claims that the supervisor viewed and copied Plaintiff's Face-

book postings. One such posting was a comment that Plaintiff made regarding a shooting that took place at the Holocaust Museum in Washington, DC, stating:

> An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards .... go to target practice.

On June 17, 2009, MONOC sent letters regarding Plaintiff's Facebook posting to the New Jersey Board of Nursing and the New Jersey Department of Health, Office of Emergency Medical Services. The letters state that MONOC was concerned that Plaintiff's Facebook posting showed a disregard for patient safety. Plaintiff alleges that these letters were sent in a "malicious" attempt to attack Plaintiff, damage her reputation and employment opportunities, and potentially risk losing her nursing license and paramedic certification status.

III. Discussion

Defendants move to dismiss two of the nine counts in the Amended Complaint: (1) Count II, alleging a violation of the New Jersey Wiretapping and Electronic Surveillance Control Act; and (2) Count IV, alleging common law invasion of privacy. Each issue will be addressed in turn.

b. Common Law Invasion of Privacy

Plaintiff asserts a claim for common law invasion of privacy. Plaintiff's claim is premised on Defendants' alleged unauthorized "accessing of her private Facebook postings" regarding the Holocaust Museum shooter. Defendants move to dismiss, arguing that Plaintiff did not have a reasonable expectation of privacy in her Facebook posting. The Court finds that the motion to dismiss should be denied.

Under New Jersey law, to state a claim for intrusion upon one's seclusion or private affairs, a plaintiff must allege sufficient facts to demonstrate that (1) her solitude, seclusion, or private affairs were intentionally infringed upon, and that (2) this infringement would highly offend a reasonable person. "[E]xpectations of privacy are established by general social norms" and must be objectively reasonable — a plaintiff's subjective belief that something is private is irrelevant.

Privacy in social networking is an emerging, but underdeveloped, area of case law. There appears to be some consistency in the case law on the two ends of the privacy spectrum. On one end of the spectrum, there are cases holding that there is *no* reasonable expectation of privacy for material posted to an unprotected website that anyone can view. On the other end of the spectrum, there are cases holding that there *is* a reasonable expectation of privacy for individual, password-protected online communications.

Courts, however, have not yet developed a coherent approach to communications falling between these two extremes. Although most courts hold that a communication is not necessarily public just because it is accessible to a number of people, courts differ dramatically in how far they think this theory extends. What is clear is that privacy determinations are made on a case-by-case basis, in light of all the facts presented.

In this case, Plaintiff argues that she had a reasonable expectation of privacy in her Facebook posting because her comment was disclosed to a limited number of people who she had individually invited to view a restricted access webpage. Defendants argue that Plaintiff cannot have a reasonable expectation of privacy because the comment was disclosed to dozens, if not hundreds, of people. The Amended Complaint and underlying documents do not indicate how many Facebook friends Plaintiff had at the time the comment was made; thus, there is no indication of how many people could permissibly view Plaintiff's posting.

The Court finds that Plaintiff has stated a plausible claim for invasion of privacy, especially given the open-ended nature of the case law. Plaintiff may have had a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing. More importantly, however, reasonableness (and offensiveness) are highly fact-sensitive inquiries. As such, these issues are not properly resolved on a motion to dismiss.

Cal. Labor Code, Chap. 2.5—Employer Use of Social Media

§ 980

(a) As used in this chapter, "social media" means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

(b) An employer shall not require or request an employee or applicant for employment to do any of the following:

(1) Disclose a username or password for the purpose of accessing personal social media.

(2) Access personal social media in the presence of the employer.

(3) Divulge any personal social media, except as provided in subdivision (c).

(c) Nothing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.

(d) Nothing in this section precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.

(e) An employer shall not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates this section. However, this section does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law.

Political & Social Activity

Truitt v. Salisbury Bank & Trust Co.

52 F.4th 80 (2d Cir. 2022)

Chin, Circuit Judge:

In this case, plaintiff-appellant William Gunnar Truitt, an employee of defendant-appellee Salisbury Bank and Trust Company (the "Bank"), announced his candidacy for a New York State Assembly seat. The Bank thereafter advised Truitt that he had to choose between running for office and continuing his employment with the Bank. Truitt decided not to discontinue his campaign, and his employment with the Bank ended.

Truitt brought this action below, contending that the Bank violated New York Labor Law § 201-d by requiring him to cease protected political activity as a condition of retaining his employment at the Bank. The statute makes it unlawful for an employer to discharge or discriminate against an employee for engaging in, *inter alia,* specified political activities outside of working hours. N.Y. Lab. Law § 201d(2)(a). Protected activities expressly include "running for public office." The district court granted summary judgment in favor of the Bank, concluding, as a matter of law, that because Truitt voluntarily resigned from his position and was not constructively discharged, his suit could not succeed. The court thereafter denied Truitt's motion for reconsideration, and this appeal followed.

For the reasons discussed below, we vacate the judgment and remand.

Background

A. The Facts

On February 26, 2018, Truitt, a part-time Dutchess County legislator, began working for the Bank as a full-time mortgage lending officer trainee. As a trainee, Truitt began a six-month training program, to be followed by a four-month secondary training program. Upon successful completion of both programs, Truitt would be promoted to a full-time mortgage loan officer position in January 2019. Truitt's employment with the Bank was at-will, and both he and the Bank could "terminate the employment relationship at any time, for any *legal* reason, with or without cause, with or without notice."

On April 12, 2018, Truitt announced on Facebook that he was running as a Republican candidate in the upcoming election for the New York State Assembly seat in the 106th District. Candidates elected to the New York State Legislature serve as part-time legislators during the legislative session, which lasts from January to June, in Albany, New York. Truitt did not let the Bank know he decided to run for the seat before he made the announcement.

The next day, after learning about the campaign announcement, Truitt's supervisor Amy Raymond asked Truitt to meet with her and Doug Cahill, the Bank's Vice President of Human Resources. In its Rule 56.1 Statement, the Bank stated that Raymond and Cahill sought to "determine what kind of time commitment such a campaign (and subsequently job) would entail." Evidence the Bank cited in support of this description does not show that Raymond and Cahill expressed concerns about the time Truitt would spend campaigning, as distinct from the time he would spend discharging the duties of an Assembly member.

The Bank has internal policies and procedures concerning outside employment opportunities for its employees. The Bank's January 2018 Employee Handbook, for instance, explains that an employee who wishes to accept outside employment must "first notify the Human Resource Administrator or the President." Outside employment, as the Bank's Code of Ethics and Conflicts of Interest Policy also provides, is then permitted only if it is approved in advance by the Board of Directors (or in the case of a non-officer em-

ployee, executive management). When deciding whether to approve the employment request, the Board of Directors will consider, *inter alia,* if the outside employment will "interfere with work assignments or performance."

Three days later, on April 16, 2018, Truitt emailed Raymond and Cahill a letter "regarding [his] candidacy in this November's elections." Although the letter stated he was not yet an official candidate on the ballot for the Assembly seat for the 106th District, it explained that he was "on the path" to becoming one, and that he was "officially endorsed" by the Dutchess County Republican Committee. The letter described the part-time nature of the position, included a copy of the "New York State Legislative Session Calendar for 2018," and attached a link to the state's "Standards of Conduct Relating to Outside Employment or Business Activity." Truitt's letter also explained that he had spoken "with numerous state elected officials and other experienced individuals that are familiar with working in the State Assembly," and that they "made very clear that [he] w[ould] be able to maintain full-time work and be very successful in [his] role as a Mortgage Loan Originator [at] [the] [B]ank while serving as Assemblyman." He also said that, if elected, he planned to no longer serve as a county legislator and would instead dedicate that role's time to his positions as an assemblymember and at the Bank.

The Bank apparently construed Truitt's notification of his candidacy as a request for approval for outside employment. Raymond, Cahill, and the Bank's CEO, Richard Cantele, reviewed Tru-

itt's submission and determined that he would be unable to work both as an assemblymember and a mortgage lending officer. They were concerned that: (1) if Truitt was elected, he would have to be in Albany two to four business days per week during the six-month legislative session; (2) he had only 21 days of paid time off per year; (3) the Riverside Division that Truitt was hired to serve was an emerging residential lending market that would require a significant time commitment; and (4) residential lenders like Truitt often worked more than 50 hours per week. In short, Raymond, Cahill, and Cantele concluded that Truitt could not devote sufficient hours to his future Bank position if he were elected as an assemblymember. Despite these concerns relating to the demands that would be made on Truitt's time if he *served* as a member of the Assembly, Cantele did not have any information that Truitt's *campaign* was or would be interfering with Truitt's ability to do his job at the Bank. Nor did Cantele receive any information suggesting that Truitt's campaign would affect his working hours.

On or around April 26, 2018, Cahill met with Truitt to discuss his campaign. During the meeting, Cahill explained that "the Bank was concerned that [Truitt] could not effectively fulfill the requirements and responsibilities of his future [mortgage lending officer] position as well as the requirements and responsibilities of a State Assembly seat and, therefore, the Bank's management would not provide [him] an exception to

the Bank's policy on outside employment." Cahill then told Truitt that "he needed to make a decision on whether he was going to run or not and [to] let [the Bank] know" by May 1, 2018.

The next day, on April 27, 2018, the Bank's Board of Directors met. According to the meeting notes, Cantele reported that an employee "hired as a Mortgage Originator for the Riverside Division" and "currently serving as a Dutchess County Legislator" had "announced his campaign" for a State Assembly seat. The notes stated that the Bank's management "had determined that this position [the Assembly seat] pays approximately $80,000 per year and requires approximately 65 days per year in Albany." Accordingly, management "intend[ed] to speak with the employee and advise him that this would be a conflict of interest and [that] he must make a decision whether to run for office or to continue employment with the Bank." A memorandum also dated April 27 from Cahill to the Bank's "HR/Compensation Committee," which includes Bassin and other members of the Board of Directors, identified Truitt as the employee.The memorandum stated that the Bank's management was "reviewing whether a conflict of interest exists with the State Assembly campaign and position."

Three days later, on April 30, 2018, Truitt met with Cantele to reiterate his desire to campaign and serve as an assemblymember while he worked for the Bank. Cantele told him that the Bank "did not believe that Truitt would be able to fulfill his position as a residential originator given the responsibilities … relative to the Assembly position." Cantele suggested that Truitt and

the Bank consider the period from May to November 2018 as a "`time-out' period," and told Truitt that he hoped Truitt would apply for a position with the Bank in the future if he were not elected.

The next day, on May 1, 2018, Truitt emailed Cahill with the subject heading "Decision." Truitt's email stated, in part,

> I did deeply consider and weigh my options over this past weekend, and came to the conclusion that I cannot give up on a once in a lifetime opportunity such as the one that has presented itself before me. The chance to tie Teddy Roosevelt as the youngest State Assemblyman in NY history is one I cannot give up, nor can I let down my community who has asked me to run.
>
> I have learned a tremendous amount during my short two months at Salisbury Bank, and I truly appreciated how quickly everyone welcomed me into the family. I want to especially thank you Doug, for our initial interview and for your help along the way, and also Rick for his leadership and his willingness to meet with me yesterday.
>
> I have a few items that I need to return, including a laptop, a key-f[o]b and a Poughkeepsie parking garage badge. Let me know how you would like me to return those in to you, and I will bring them as soon as possible.

Less than an hour later, Truitt sent another email, with the subject heading "Update," to Raymond and Andrea MacArthur, his supervisors. It began by stating that "it has been confirmed" by Cahill and Cantele that Truitt's "employment with Salisbury Bank w[ould] not be continued if [he] pursue[d] election to the New York State Assembly." *Id.* at 179. Truitt's email identified as the Bank's "main concern" that "if elected, [he]

would not have the necessary time it takes" to be successful at the Bank, but it stated that he "disagree[d] with th[at] sentiment entirely." Further, the email noted that he had "thought deeply" about the decision but that running for the Assembly was a "once in a lifetime opportunity." The email concluded by thanking his supervisors and noting the possibility of returning to the Bank as an employee if his campaign was not successful.

The Bank recorded Truitt's last date of employment as April 30, 2018. Truitt did not win the election.

B. Proceedings Below

On August 24, 2018, Truitt filed this action in state court against the Bank and its parent company, defendant-appellee Salisbury Bancorp, Inc., alleging that he had been discharged by the Bank in violation of New York Labor Law § 201-d. The Bank then removed the action to federal court on diversity jurisdiction grounds.

On January 28, 2020, following discovery, the Bank moved for summary judgment. The district court granted the motion on July 21, 2020. The court concluded that "even when drawing all inferences from the record in [Truitt]'s favor, his departure from the Bank [wa]s best classified as a resignation." Further, the court concluded that the resignation did not amount to a constructive discharge because the Bank did not subject Truitt to intolerable working conditions and "[t]here [wa]s no indication that [Truitt]

would be fired no matter what he decided," or that the Bank "forced him to decide between termination or resignation." Judgment was entered on July 21, 2020.

Two weeks later, on August 4, 2020, Truitt timely moved for reconsideration of the district court's July 21, 2020, order. The court denied the motion on March 22, 2021. The district court did not reach the issue of whether Truitt was discharged for his political activity because it concluded that he voluntarily resigned and thus was not subjected to an adverse employment action and, in any event, he was "at the beginning stages of his campaign."

This appeal followed.

Discussion

B. Applicable Law

Under New York Labor Law § 201-d, an employer may generally not refuse to hire, discharge, or otherwise discriminate "in compensation, promotion or terms, conditions or privileges of employment" against an employee for, among other things, engaging in "political" or "recreational" activity if such activity is legal and occurs outside of working hours. N.Y. Lab. Law § 201-d(2). The statute expressly provides that an employee may sue an employer who violates the statute for "equitable relief and damages."

Section 201-d was enacted in 1992 to "prohibit employers from discriminating against employees for engaging in certain off-duty activities," including "political or recreational activity, use

of legal consumable products[,] or union activities." The bill, commonly referred to as the "Legal Activities Bill," sought, for instance, to protect those who smoked and used tobacco products outside of working hours "against the extensive vigilantism" of their employers.

This case involves "political activities," which the statute defines as "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group."

C. Application

On appeal, Truitt makes two principal arguments. First, he contends that the Bank unlawfully "forced" him to decide between "termination or his protected political activity" and that, as a result, his departure from the Bank was involuntary. Second, he argues that the Bank has only proffered as a reason for its actions his statutorily "protected political activities." The Bank responds that Truitt "*chose* to resign" and "therefore did not suffer an adverse employment action." The Bank also argues that, even assuming Truitt had suffered such an adverse action, its reason for denying his request was legitimate, non-discriminatory, and not pretextual.

Two issues are thus presented: whether Truitt presented evidence from which a reasonable jury could find that he suffered an adverse employment action, and, if so, whether the Bank demonstrated, as a matter of law, that it had a legitimate, non-discriminatory reason for its employment decision.

1. Did Truitt Suffer an Adverse Employment Action?

Whether Truitt suffered an adverse employment action hinges on whether the Bank could lawfully require him to choose between his political campaign and his job. Section 201-d makes it unlawful for "any employer ... to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against any individual in compensation, promotion or terms, conditions or privileges of employment because of" an employee's political activities. Although the district court recognized that adverse employment actions may take many forms, it granted summary judgment on the basis that Truitt could not demonstrate that he had been constructively discharged.

The district court concluded that Truitt was not discharged because he voluntarily resigned after his request to engage in outside employment was denied. This was error, for a reasonable jury could find that the Bank discriminated against Truitt when it forced upon him an impermissible choice between keeping his job and engaging in statutorily protected political activity. Courts have held that offering this type of impermissible choice can constitute a discriminatory adverse employment action. On this basis, a reasonable jury could find that the Bank subjected Truitt to an adverse employment action when it forced an ultimatum upon him "because of" his political activities. A reasonable jury could also find that, in requiring Truitt to abandon his cam-

paign as a condition of retaining his employment, the Bank "discriminate[d]" against him in the conditions of his employment, in violation of the terms of the statute.

Truitt began campaigning for the Assembly seat, and his campaign was not interfering with his work. The managers at the Bank were not aware of any complaints from his colleagues that he was unable to perform his work responsibilities because of the campaign. Nevertheless, he was given less than a week to decide between continuing his campaign *or* continuing to work for the Bank. It was apparent that the Bank was not going to permit him do both. Cahill and Cantele made clear that "if [he] was running [he] could no longer continue working for the bank." As Truitt's May 1 email noted, Cahill and Cantele both "confirmed" that his employment with the Bank would "not be continued" if he pursued the campaign. And that "ultimatum," Truitt explained, made him understand that he "had to pick one or the other." Thus, a reasonable jury could find that he was given an illegal choice between continuing his employment and exercising his right to engage in statutorily protected political activities, and that he was discharged "because of" his choice to continue his campaign.

We are not persuaded by the Bank's argument that it gave Truitt a genuine choice and that he voluntarily resigned. The Bank determined that a job as an assemblymember was incompatible with Truitt's job as a mortgage lending officer and that it would "not provide [Truitt with] an exception to the Bank's policy on out-side em-

ployment." The Bank therefore asked Truitt, on or around April 26, 2018, to decide by May 1 whether he "wanted to continue with his ... campaign for the Assembly." The Bank asserts that it "may have had to make a decision whether to terminate Truitt's employment if his campaigning interfered with his employment ... or if Truitt was elected to office" but that it made no such decision before "Truitt resigned from his position." Even though the Bank claims that it had not decided to discharge Truitt when it learned of his "Decision," on this record a reasonable jury could find that the Bank had already concluded that Truitt would be discharged if he did not give up his campaign.

For these reasons, a reasonable jury could find that Truitt suffered an adverse employment action by being forced to choose between his campaign and his job in violation of New York Labor Law § 201-d.

2. Was There a Legitimate, Non-Discriminatory Basis for the Bank's Adverse Employment Action?

Next, we turn to whether the Bank's argument that it demonstrated a legitimate, non-discriminatory reason for the adverse employment action. With respect to Truitt's campaigning for office, we conclude that it did not.

The district court chose not to proceed to the second step of a *McDonnell Douglas*-style burden-shifting framework because it held Truitt had "failed to establish that he was terminated." It concluded that summary judgment was warranted because executives of the Bank had "proffered significant testimony and evidence that es-

tablishe[d] that the basis for their decision was that management did not feel that [Truitt] could handle the rigors of his job and a campaign for, and potential elected position within, the New York State Assembly." The district court erred, as a matter of law, in granting summary judgment on this basis.

A reasonable jury could find that the Bank failed "to come forward with admissible evidence showing that [Truitt's] political... activities did not play a substantial part in its decision" subjecting Truitt to an adverse employment action. The district court erred because it erroneously conflated evidence concerning the possibility Truitt might *serve* as an assemblymember with evidence concerning his *campaign* for the Assembly. The district court disregarded this distinction because it did not "see how [it] [wa]s relevant." But, as explained above, the distinction is relevant because New York law specifically protects employees running for political office from discrimination. Moreover, even assuming the Bank might have had a legally permissible reason to bar Truitt from serving as an assemblymember while employed at the Bank, terminating his employment if he won election would not have required the Bank to bar him from campaigning for office.

To be sure, the record does include evidence that the Bank considered the time commitment required to *serve* as an assemblymember. Likewise, the Bank argues before us that its executives were primarily concerned about the time Truitt would have to commit to his duties as a member of the Assembly. Truitt, contrariwise,

argues that he would have been able to serve as an assemblymember outside of his working hours at the Bank. We need not address that factual dispute because, regardless of whether Truitt could have served in the Assembly without interference with his working hours or performance, the record does not include evidence that the Bank had any reason to believe that Truitt's campaign would cause such interference.

The Bank points to Truitt's deposition testimony, claiming that he "acknowledged that, prior to the election, he would engage in a campaign for the seat and that his campaigning would continue even after he would be elected." But, as the Bank conceded at oral argument, no evidence in the record suggests that Truitt was campaigning during working hours. The Bank also points to the four months Truitt took off to campaign from a job as a finance officer at a construction company, which he secured *after* his employment with the Bank ended. The record, however, does not show that Truitt had requested, or that the Bank determined that he would need, time off to campaign while working at the Bank.

While the Bank's evidence includes some stray references to campaigning, most of these references concern not the campaigning process itself but rather the desired effect of campaigning, *i.e.,* winning the election; other references concern whether Truitt could handle additional, future campaigns if he was elected to office. For instance, Cahill testified during his deposition that his concern with Truitt "run[ning] for the Assembly" was that Truitt would "potentially be away from the bank anywhere from two to four

days a week for six months of the year, essentially 60 days that it's in session." Cantele testified during his deposition that if Truitt were to "take this other job which required him to be out of the bank for at least sixty days a year," then "common sense would say, given this job, that there would be campaigning to be done."

For these reasons, a reasonable jury could find that the Bank's actions violated New York Labor Law § 201-d because the bank failed to demonstrate a legitimate, non-discriminatory reason for the adverse employment action it took against Truitt. We conclude that the district court erred in granting summary judgment dismissing Truitt's New York Labor Law § 201-d claim.

Brunner v. Al Attar

786 S.W.2d 784 (Tex. App. 1990)

SAM BASS, Justice.

Farouk Al Attar and Rima Al Attar are husband and wife, and partners in a general partnership, known as Apollo Paint & Body. Brunner states that Farouk's actions are the basis of this suit, and that Rima and Apollo are vicariously liable. Brunner alleged that Farouk terminated her, because he feared that she would catch and spread the Acquired Immune Deficiency Syndrome (AIDS) to employees. Appellees urged that Brunner was terminated because of her refusal to work during the hours required, her request to be terminated, and her failure, inability and/or refusal to perform the work expected of her.

Brunner stated that she had neither contracted AIDS, nor been infected with the human immunodeficiency virus which causes AIDS.

Appellees moved for summary judgment, alleging that Brunner did not state a cause of action, and could not amend her pleadings to state a cause of action.

Brunner testified by deposition that she was terminated from Apollo Paint & Body because she was a volunteer with the AIDS Foundation. Brunner had told Farouk that she would be volunteering in her free time on Saturdays and Sundays, and in the evenings. Brunner promised that her volunteer work would not interfere with her position at Apollo, and stated that there was no danger to the employees at Apollo Paint & Body, because Brunner could not catch AIDS from the patients' touching, sneezing, or breathing on her. She further stated that the only way to catch AIDS is through sexual contact or blood transfusions. Brunner told Farouk that his customers did not have to know about her volunteer work. Farouk responded by saying that he could not allow Brunner to perform volunteer work at the AIDS Foundation and work at Apollo. Farouk told Brunner that he did not want to place himself, his family, and the office workers in jeopardy. Farouk urged Brunner to resign, and she refused.

Rima told another supervisor not to let Farouk fire Brunner. In a later discussion, Farouk asked Brunner to reconsider, but she would not. Farouk then said that he would have to fire Brunner.

Brunner asserts that this Court should not permit her to be terminated for performing volunteer work for the AIDS Foundation because her termination violates the public policy exception to the employment-at-will doctrine.

Brunner does not allege that her employment was governed by a contract, or that it was for a definite term. The general rule is that employment for an indefinite term may be terminated at will and without cause. In *Sabine Pilot,* the Texas Supreme Court recognized a very narrow exception to the judicially-created employment-at-will doctrine. "That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act." The supreme court stated that where an employee sought to invoke the public policy exception, "it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act."In [*McClendon v. Ingersoll-Rand Co.,* the [Texas] supreme court announced another judicially-created exception to the employment-at-will doctrine, which permits recovery of lost future wages, mental anguish, and punitive damages, where the "plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund."] as long as they are performing satisfactorily and are willing to accept new challenges." While she worked at the data center in Philadelphia, she attended night school and earned a baccalaureate degree. She was promoted to equipment scheduler and not long after received her first merit award. The

company moved her to Atlanta, Georgia where she spent 15 months as a data processor. She was transferred to the office products division and was assigned the position of "marketing support representative" in San Francisco where she trained users (i.e., customers) of newly purchased IBM equipment. Respondent was promoted to "product planner" in 1973 where her duties included overseeing the performance of new office products in the marketplace. As a product planner, she moved to Austin, Texas and later to Lexington, Kentucky. Thereafter, at the urging of her managers that she go into sales in the office products division, she enrolled at the IBM sales school in Dallas. After graduation, she was assigned to San Francisco.

Her territory was the financial district. She was given a performance plan by her management which set forth the company's expectations of her. She was from time to time thereafter graded against that plan on a scale of one through five with a grade of one being the highest. After her first year on the job, she was given a rating of one and was felt by her manager to be a person who rated at the top of IBM's scale.

A little over a year after she began in San Francisco, IBM reorganized its office products division into two separate functions, one called office systems and another called office products. Respondent was assigned to office systems; again she was given ratings of one and while there received a series of congratulatory letters from her superiors and was promoted to marketing representative. She was one of the most successful sales persons in the office and received a

number of prizes and awards for her sales efforts. IBM's system of rewarding salespersons has a formalistic aspect about it that allows for subtle distinctions to be made while putting great emphasis on performance; respondent exercised that reward system to its fullest. She was a very successful seller of typewriters and other office equipment.

She was then put into a program called "Accelerated Career Development Program" which was a way of rewarding certain persons who were seen by their superiors as having management potential. IBM's prediction of her future came true and in 1978 she was named a marketing manager in the office products branch.

IBM knew about respondent's relationship with Matt Blum well before her appointment as a manager. Respondent met Blum in 1976 when he was an account manager for IBM. That they were dating was widely known within the organization. In 1977 Blum left IBM to join QYX, an IBM competitor, and was transferred to Philadelphia. When Blum returned to San Francisco in the summer of 1978, IBM personnel were aware that he and respondent began dating again. This seemed to present no problems to respondent's superiors, as Callahan confirmed when she was promoted to manager. Respondent testified: "Somewhat in passing, Phil said: I heard the other day you were dating Matt Blum, and I said: Oh. And he said, I don't have any problem with that. You're my number one pick. I just want to assure you that you are my selection." The relationship

with Blum was also known to Regional Manager Gary Nelson who agreed with Callahan. Neither Callahan nor Nelson raised any issue of conflict of interest because of the Blum relationship.

Respondent flourished in her management position, and the company, apparently grateful for her efforts, gave her a $4,000 merit raise in 1979 and told her that she was doing a good job. A week later, her manager, Phillip Callahan, left a message that he wanted to see her.

When she walked into Callahan's office he confronted her with the question of whether she was *dating* Matt Blum. She wondered at the relevance of the inquiry and he said the dating constituted a "conflict of interest," and told her to stop dating Blum or lose her job and said she had a "couple of days to a week" to think about it.

The next day Callahan called her in again, told her "he had made up her mind for her," and when she protested, dismissed her. IBM and Callahan claim that he merely "transferred" respondent to another division.

Discussion

Respondent's claims of wrongful discharge and intentional infliction of emotional distress were both submitted to the jury. Appellant argues that the jury should not have been permitted to consider the issue of wrongful discharge because as a matter of law the offer of reassignment cannot be considered a wrongful discharge. In developing this argument, IBM attempts to change the

nature of this case from one of wrongful termination into a debate about constructive discharge through an alleged administrative reassignment.

The initial discussion between Callahan and respondent of her relationship with Blum is important. When Callahan questioned her relationship with Blum, respondent invoked her right to privacy in her personal life relying on existing IBM policies. A threshold inquiry is thus presented whether respondent could reasonably rely on those policies for job protection. Any conflicting action by the company would be wrongful in that it would constitute a violation of her contract rights.

(1) Under the common law rule codified in Labor Code section 2922, an employment contract of indefinite duration is, in general, terminable at "the will" of either party. This common law rule has been considerably altered by the recognition of the Supreme Court of California that implicit in any such relationship or contract is an underlying principle that requires the parties to deal openly and fairly with one another. This general requirement of fairness has been identified as the covenant of good faith and fair dealing. The covenant of good faith and fair dealing embraces a number of rights, obligations, and considerations implicit in contractual relations and certain other relationships. At least two of those considerations are relevant herein. The duty of fair dealing by an employer is, simply stated, a requirement that like cases be treated alike. Im-

plied in this, of course, is that the company, if it has rules and regulations, apply those rules and regulations to its employees as well as affording its employees their protection.

As can be seen from an analysis of other cases, this is not in any substantial way a variation from general contract law in California, for if an employee has the right in an employment contract (as distinct from an implied covenant), the courts have routinely given her the benefit of that contract. Thus, the fair dealing portion of the covenant of good faith and fair dealing is at least the right of an employee to the benefit of rules and regulations adopted for his or her protection.

(2a/) In this case, there is a close question of whether those rules or regulations permit IBM to inquire into the purely personal life of the employee. If so, an attendant question is whether such a policy was applied consistently, particularly as between men and women. The distinction is important because the right of privacy, a constitutional right in California, could be implicated by the IBM inquiry. Much of the testimony below concerned what those policies were. The evidence was conflicting on the meaning of certain IBM policies. We observe ambiguity in the application but not in the intent. The "Watson Memo" (so called because it was signed by a former chairman of IBM) provided as follows:

> TO ALL IBM MANAGERS:

The line that separates an individual's on-the-job business life from his other life as a private citizen is at times well-defined and at other times indistinct. But the line does exist, and you and I, as managers in IBM, must be able to recognize that line.

I have seen instances where managers took disciplinary measures against employees for actions or conduct that are not rightfully the company's concern. These managers usually justified their decisions by citing their personal code of ethics and morals or by quoting some fragment of company policy that seemed to support their position. Both arguments proved unjust on close examination. What we need, in every case, is balanced judgment which weighs the needs of the business and the rights of the individual.

Our primary objective as IBM managers is to further the business of this company by leading our people properly and measuring quantity and quality of work and effectiveness on the job against clearly set standards of responsibility and compensation. This is performance — and performance is, in the final analysis, the one thing that the company can insist on from everyone.

We have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal.

When such situations do come to your attention, you should seek the advice and counsel of the next appropriate level of management and the personnel department in determining what action — if any — is called for. Action should be taken only when a legitimate interest of the company is injured or jeopar-

> dized. Furthermore the damage must be clear beyond reasonable doubt and not based on hasty decisions about what one person might think is good for the company.
>
> IBM's first basic belief is respect for the individual, and the essence of this belief is a strict regard for his right to personal privacy. This idea should never be compromised easily or quickly.
>
> /s/ Tom Watson, Jr.

It is clear that this company policy insures to the employee both the right of privacy and the right to hold a job even though "off-the-job behavior" might not be approved of by the employee's manager.

IBM had adopted policies governing employee conduct. Some of those policies were collected in a document known as the "Performance and Recognition" (PAR) Manual. IBM relies on the following portion of the PAR Manual:

> "A conflict of interest can arise when an employee is involved in activity for personal gain, which for any reason is in conflict with IBM's business interests. Generally speaking, 'moonlighting' is defined as working at some activity for personal gain outside of your IBM job. If you do perform outside work, you have a special responsibility to avoid any conflict with IBM's business interests.
>
> Obviously, you cannot solicit or perform in competition with IBM product or service offerings. Outside work cannot be performed on IBM time, including 'personal' time off. You cannot use IBM equipment, materials, resources, or 'inside' information for outside work. Nor should you solicit business or clients or perform outside work on IBM premises.

> Employees must be free of any significant investment or association of their own or of their immediate family's [*sic*], in competitors or suppliers, which might interfere or be thought to interfere with the independent exercise of their judgment in the best interests of IBM.

This policy of IBM is entitled "Gifts" and appears to be directed at "moonlighting" and soliciting outside business or clients on IBM premises. It prohibits "significant investment" in competitors or suppliers of IBM. It also prohibits "association" with such persons "which might interfere or be thought to interfere with the independent exercise of their judgment in the best interests of IBM."

Callahan based his action against respondent on a "conflict of interest." But the record shows that IBM did not interpret this policy to prohibit a romantic relationship. Callahan admitted that there was no company rule or policy requiring an employee to terminate friendships with fellow employees who leave and join competitors. Gary Nelson, Callahan's superior, also confirmed that IBM had no policy against employees socializing with competitors.

This issue was hotly contested with respondent claiming that the "conflict of interest" claim was a pretext for her unjust termination. Whether it was presented a fact question for the jury.

Do the policies reflected in this record give IBM a right to terminate an employee for a conflict of interest? The answer must be yes, but whether respondent's conduct constituted such was for the jury. We observe that while respondent was successful, her primary job did not give her ac-

cess to sensitive information which could have been useful to competitors. She was, after all, a seller of typewriters and office equipment. Respondent's brief makes much of the concession by IBM that there was no evidence whatever that respondent had given any information or help to IBM's competitor QYX. It really is no concession at all; she did not have the information or help to give. Even so, the question is one of substantial evidence. The evidence is abundant that there was no conflict of interest by respondent.

It does seem clear that an overall policy established by IBM chairman Watson was one of no company interest in the outside activities of an employee so long as the activities did not interfere with the work of the employee. Moreover, in the last analysis, it may be simply a question for the jury to decide whether, in the application of these policies, the right was conferred on IBM to inquire into the personal or romantic relationships its managers had with others. This is an important question because IBM, in attempting to reargue the facts to us, casts this argument in other terms, namely: that it had a right to inquire even if there was no evidence that such a relationship interfered with the discharge of the employee's duties *because* it had the effect of diminishing the morale of the employees answering to the manager. This is the "Caesar's wife" argument; it is merely a recast of the principal argument and asks the same question in different terms. The same answer holds in both cases: there being no evidence to support the more direct argument, there is no evidence to support the indirect argument.

Moreover, the record shows that the evidence of rumor was not a basis for any decline in the morale of the employees reporting to respondent. Employees Mary Hrize and Wayne Fyvie, who reported to respondent's manager that she was seen at a tea dance at the Hyatt Regency with Matt Blum and also that she was not living at her residence in Marin, did not believe that those rumors in any way impaired her abilities as a manager. In the initial confrontation between respondent and her superior the assertion of the right to be free of inquiries concerning her personal life was based on substantive direct contract rights she had flowing to her from IBM policies. Further, there is no doubt that the jury could have so found and on this record we must assume that they did so find.

State v. Wal-Mart Stores, Inc.

621 N.Y.S.2d 158 (N.Y. App. Div. 1995)

MERCURE, J.

In February 1993, defendant discharged two of its employees for violating its "fraternization" policy, which is codified in defendant's 1989 Associates Handbook and prohibits a "dating relationship" between a married employee and another employee, other than his or her own spouse. In this action, plaintiff seeks reinstatement of the two employees with back pay upon the ground that their discharge violated Labor Law § 201-d(2)(c), which forbids employer discrimination against employees because of their participation in "legal recreational activities"

pursued outside of work hours. Defendant moved to dismiss the complaint. [The trial court] denied the motion with regard to the first cause of action, concluding that "dating" while one is married "may well be 'recreational activities' within the meaning of [Labor Law § 201-d(2)(c)]", but granted the motion with regard to the second cause of action, predicated upon Executive Law § 63(12), which prohibits repeated or persistent illegality in the transaction of business. The parties cross-appeal.

We are not at all persuaded by [the] effort to force "a dating relationship" within the definition of "recreational activities" and accordingly reverse so much of its order as denied the motion to dismiss the first cause of action. Labor Law § 201-d(1)(b) defines "recreational activities" as meaning: "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". In our view, there is no justification for proceeding beyond the fundamental rule of construction that "[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation". To us, "dating" is entirely distinct from and, in fact, bears little resemblance to "recreational activity". Whether characterized as a relationship or an activity, an indispensable element of "dating", in fact its raison d'être, is romance, either pursued or realized. For that reason, although a dating couple may go bowling and under the cir-

cumstances call that activity a "date", when two individuals lacking amorous interest in one another go bowling or engage in any other kind of "legal recreational activity", they are not "dating".

Moreover, even if Labor Law § 201-d(1)(b) was found to contain some ambiguity, application of the rules of statutory construction does not support Supreme Court's interpretation. We agree with defendant that, to the extent relevant, the voluminous legislative history to the enactment, including memoranda issued in connection with the veto of two earlier more expansive bills, evinces an obvious intent to limit the statutory protection to certain clearly defined categories of leisure-time activities. Further, in view of the specific inclusion of "sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material" within the statutory definition of "recreational activities", application of the doctrine of *noscitur a sociis* compels the conclusion that personal relationships fall outside the scope of legislative intent.

Nor is there any realistic danger that this construction will permit employers to infringe upon the right of employees to engage in protected off-hours pursuits by wrongly characterizing dispassionate recreational activity as dating. To the contrary, recognition of the distinction between "dating" and "recreational activity" imposes upon the employer the enhanced burden of establishing not only joint activity of a recreational nature, but the employees' mutual romantic interest as well. Similarly, this construction in no

way diminishes the statutory protection afforded social relationships between unmarried employees or married employees having no romantic interest or involvement with one another.

YESAWICH JR., J. (dissenting).

I respectfully dissent, for I find defendant's central thesis, apparently accepted by the majority, that the employment policy at issue only prohibits romantic entanglements and not other types of social interaction, to be wholly without merit. While the majority encumbers the word "dating" with an "amorous interest" component, there is nothing in defendant's fraternization policy, its application — defendant does not allege that its two former employees manifested an intimate or amatory attitude toward each other — or even in defendant's own definition of a "date", "a social engagement between persons of opposite sex" (Webster's Ninth New Collegiate Dictionary 325 [1988]), that leads to such a conclusion.

More importantly, I do not agree that "dating", whether or not it involves romantic attachment, falls outside the general definition of "recreational activities" found in Labor Law § 201-d(1)(b). The statute, by its terms, appears to encompass social activities, whether or not they have a romantic element, for it includes *any* lawful activity pursued for recreational purposes and undertaken during leisure time. Though no explicit definition of "recreational purposes" is contained in the statute, "recreation" is, in the

words of one dictionary, "a means of refreshment or diversion" (Webster's Ninth New Collegiate Dictionary 985 [1985]); social interaction surely qualifies as a "diversion".

Moreover, while the majority assures that the construction it adopts "in no way diminishes the statutory protection afforded social relationships between unmarried employees", I am less sanguine, because the majority's holding implies that the statute affords no protection to any social relationship that might contain a romantic aspect, regardless of the marital status of the participants, or the impact that the relationship has on their capacity to perform their jobs.

In my view, given the fact that the Legislature's primary intent in enacting Labor Law § 201-d was to curtail employers' ability to discriminate on the basis of activities that are pursued outside of work hours, and 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, the narrow interpretation adopted by the majority is indefensible. Rather, the statute, and the term "recreational activities" in particular, should be construed as broadly as the definitional language allows, to effect its remedial purpose.

And while it is true that, as a general rule of statutory construction, the breadth of an inclusory phrase is to be considered limited by the specific examples accompanying it, this principle must yield where necessary to carry out the underlying purpose of the enactment. Addition-

ally, it is only applicable when the examples fall into a single, well-defined class, and are not themselves general in nature. Here, the list, which includes vast categories such as "hobbies" and "sports", as well as very different types of activities (e.g., exercise, reading), appears to have been compiled with an eye toward extending the reach of the statute. This, coupled with the explicit directive that the definition is *not* to be limited to the examples given, provides further indication that the term "recreational activities" should be construed expansively. Accordingly, I would affirm [the trial court's] denial of defendant's motion to dismiss the first cause of action.

Use of Lawful Products

Smith v. Manheim Remarketing, Inc.

No. 5:19-CV-00086-KDB-DSC (M.D.N.C. Nov. 26, 2019)

David S. Cayer, United States Magistrate Judge

I. Factual and Procedural Background

Taking the facts of the Second Amended Complaint as true, Plaintiff is a fifty-four year old woman who worked for Defendants in their motor vehicle auction business for over fourteen years. She was terminated in February 2019. At

the time of her termination, Plaintiff was a Total Resource Auction supervisor and managed seven employees. She was a loyal, reliable and respected employee.

During the last several years before her termination, Plaintiff developed chronic pain and related anxiety. A year before her termination, she was diagnosed with fibromyalgia and referred to a rheumatologist who put her on prescription medication. Those medications and their side effects are detailed in the Second Amended Complaint. Plaintiff was open with her supervisors about her health problems, including her medications and their side effects.

With her rheumatologist's knowledge and agreement, Plaintiff began using CBD oil as an alternative therapy. The oil provided Plaintiff with significant pain relief, reduced her anxiety and improved her sleep without the side effects of her prescription medications. Plaintiff bought a stronger version of the same brand CBD oil, made under the same state and federal standard of 0.3% THC or less. She would take seven or eight drops at home in the morning and enjoy significant pain relief for twenty-four hours. Plaintiff was able to wean off her prescription medications completely by early February 2019.

On February 13, 2019, Plaintiff was injured at work when a windstorm blew an open truck door against her hand. She thought her thumb was broken. Plaintiff reported the injury and went to a local medical facility for treatment. Pursuant to Defendants' drug policy related to workplace injuries, Plaintiff was required to sub-

mit to a drug screen. Plaintiff does not use illegal drugs and had tested negative throughout her employment. She was shocked to learn that she tested positive for THC at the level of 20 ng/dl and faced possible termination. The threshold level for a positive THC test under Federal Department of Transportation regulations is 50 ng/dl. Plaintiff learned that some users of CBD oil test positive for low levels of THC.

Her direct supervisor as well as the Assistant General Manager and Human Resources representative wanted Plaintiff to remain employed and urged the corporate office not to terminate her. Plaintiff provided her managers with information about the CBD oil as well as her doctor's agreement that she take it to treat her fibromyalgia. Plaintiff also offered to discontinue the CBD oil and resume her prescription medication. Defendants' corporate officials rejected that proposal and insisted she be terminated. Plaintiff's appeal to the corporate office for reinstatement was denied.

On May 22, 2019, Plaintiff filed a wrongful discharge claim in Iredell County Superior Court alleging that she was terminated for using CBD oil outside of work, in violation of the public policy set forth in N.C.Gen. Stat. §95-28.2.

Defendants removed the case to this Court on July 1, 2019 and moved to dismiss Plaintiff's [...] Complaint.

III. Discussion

A. Wrongful Termination for Use of Lawful Product Claim

Plaintiff alleges that Defendants terminated her employment for using a lawful product, CBD oil, outside of work in violation of the public policy of North Carolina set forth in N.C. Gen. Stat. §95-28.2. Defendants move to dismiss this claim by arguing that the THC in CBD oil remains illegal. Defendants further argue that Plaintiff was not meeting the reasonable expectations of her employer by having "high levels" of THC at work and failing to comply with their valid workplace drug policy.

In order to adequately plead a wrongful discharge claim under this Act, Plaintiff must show that: (i) she was using a lawful product, (ii) her use of that product was lawful, and (iii) Defendants' restriction of her use did not relate to a bona fide occupational requirement reasonably related to employment activities.

Since 2015, North Carolina has legalized "industrial hemp." N.C. Gen. Stat. § 106-568.51. This statute allows for the cultivation and sale of products made from a variety of Cannabis sativa (L.) with a THC1 concentration of not more than 0.3 percent on a dry weight basis, and specifically includes "seed oil" as one type of "hemp" product. The statute defines THC,(8), and legalizes "propagules" or seeds that have THC levels below the federal standards for legal THC. The Leg-

The NC industrial hemp statute expired in 2022. Hemp cultivation is now governed by the federal Agriculture Improvements Act of 2018, discussed in the opinion below. See N.C. Dept. of Agriculture & Consumer Services, Hemp in North Carolina

islature also amended the list of Controlled Substances to exclude industrial hemp as legalized in N.C. Gen. Stat. § 106-568.51 from the definition of "marijuana."

The federal standards for hemp mirror North Carolina's standards. In the Agriculture Improvement Act of 2018, Congress defined "hemp" as any part of the Cannabis sativa L. plant "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." This legislation also removed "hemp" from the Schedule I definition of "marijuana" under the Controlled Substances Act. Marijuana remains a Schedule I controlled substance under 21 U.S.C. § 812(c)(c)(10). THC also remains on schedule I, "except for tetrahydrocannabinols in hemp (as defined under section 1639o of Title 7)."

Defendants argue that Plaintiff's use of CBD oil is still unlawful under state law because THC remains a Schedule VI substance under N.C. Gen. Stat. § 90-94(2). Plaintiff argues that Defendants reading of N.C. Gen. Stat. § 90-94(2), would nullify the statutes legalizing hemp with THC of less than 0.3 percent by dry weight.

Statutes pertaining to the same subject matter.

It is a well-established principle of statutory construction that statutes in pari materia must be read in context with each other. Plaintiff argues that the hemp statutes would not make sense if the THC allowed by those statutes remained illegal under § 90-94(2). And statutes specific in nature control over more general legislation. "Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation

controls over the statute of more general applicability." Based upon these principles, the Court concludes that the specific legislative exceptions legalizing CBD oil derived from industrial hemp made from cannabis with 0.3% or less of THC control over the general prohibition in § 90-94(2).

Under these nearly identical state and federal provisions, the Court finds that hemp-based CBD oil made from Cannibis sativa L. containing less than 0.3% THC by dry weight is not an illegal drug but a lawful commercial product. In Plaintiff's Second Amended Complaint, she alleges that the CBD oil she used was manufactured and labelled under the lawful 0.3 percent standard. Therefore, Plaintiff has alleged that she was she was using a lawful product and that her use of that product was lawful.

Defendants also argue that Plaintiff used a commercial CBD oil that exceeded the state and federal THC standards for industrial hemp products and that use of the higher concentrated THC was unlawful under N.C. Gen. Stat. § 90-94.1. At this stage of the proceedings, the Court must construe Plaintiff's factual allegations in the light most favorable to her. The Court cannot find from the face of the Second Amended Complaint that Plaintiff purchased and used CBD oil that exceeded the 0.3 percent THC level for industrial hemp. Plaintiff has expressly pled that the label of the product she used stated that it was manufactured under the industrial hemp standard and was a lawful product.

Defendants argue that even if Plaintiff was engaged in the lawful use of a lawful product, her wrongful discharge claim must still be dismissed because her use of CBD oil with detectable levels of THC conflicted with the bona fide occupational requirement of their drug testing policy. The Court disagrees. Defendants' drug testing policy states that "testing positive for substances that are illegal under state or federal law ... may result in corrective action, up to and including separation from employment." Plaintiff has alleged that she did not test positive for an illegal substance in violation of that policy, but for the legal substance of CBD oil made from Cannibis sativa L. containing less than 0.3 percent THC by dry weight. Plaintiff has further alleged that the threshold level for a positive THC test under Federal Department of Transportation regulations is 50 ng/dl and that she tested positive for THC at the level of 20 ng/dl.

Accordingly, the undersigned respectfully recommends that Defendants' Motion to Dismiss Plaintiff's wrongful termination for use of a lawful product claim be denied.