Can Private Employees Be Fired for Out-of-Office Political Speech?

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By Joseph Pace

Consider a few hypotheticals:

A shop clerk attends a Proud Boys rally and gets "doxxed" by activists who discover his place of work and demand he be terminated. Soon, a Twitter campaign emerges calling for a boycott until the demand is acceded to. The owner gives in and fires the clerk.

A food server attends a Black Lives Matter rally and gives a stirring speech that gets picked up by local media. The restaurant's clientele skews conservative and includes many police officers. Worried that the server's presence will alienate clients, the owner fires her.

Shortly after an individual receives a job offer at a bank, his prospective co-workers discover a string of posts on his social media accounts endorsing President Trump's Muslim ban and the policy of separating children at the border. Concerned that his presence will create tension in the work force and undermine productivity, the boss withdraws the offer.

Did any of these employers violate the law? Surprisingly, the answer is far from clear. While the First Amendment does not apply to private employers, New York has an "off-duty conduct" law, New York Labor Law Section 201-d, that bars private employers from firing (or refusing to hire) someone for certain "political" and "recreational" activities that take place outside the office. But the statute's language is remarkably vague and the courts have done little to clarify its key provisions.

Section 201-d was enacted in simpler times, when the barrier between an individual's office and personal life was less porous and political disagreements less toxic. But social media has demolished that barrier. Studies indicate that increased political polarization has undermined the ability of people on opposite ends of the political spectrum to form productive working relationships,[1] consumers are increasingly punishing businesses for their political commitments (or lack thereof)[2] and public calls for employers to oust politically "problematic" employees have become the norm.

Given the trend lines, we should expect to see an increase in New York employers retaliating against employees for political speech: if an employee's out-of-office activities engender hostility with his or her coworkers, employers may face pressure to terminate the employee in the interests of "protecting productivity." And if an employer finds themselves in the blast radius of public outcry about their employee's political offenses, they may feel pressure to terminate the employee to avoid alienating customers or stave off a boycott. Other states

have seen a rise in litigation brought under their "off-duty" conduct laws; a similar increase in claims brought under Section 201-d is also likely.

The scope of that law's protections, however, are remarkably uncertain.

Section 201-d provides that an employer may not fire, discriminate or refuse to hire someone based on that individual's "political activities outside of working hours," or their "legal recreational activities."[3]

The statute defines "political activities" as: "(i) running for public office, (ii) campaigning for a candidate for public office or (iii) participating in fundraising activities for the benefit of a candidate, political party or political advocacy group."[4] It defines "recreational activities" as including "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."[5]

The statute also contains an important safe-harbor provision: it allows an employer to take adverse action if the employee's speech "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest."[6]

Thus, the threshold question for anyone bringing a Section 201-d claim is whether the out-of-office conduct that led to the adverse employment action was a protected "political" or "recreational" activity. If the activity was protected, one must then determine whether the employer was empowered under the safe-harbor provision to take adverse action.

Were the Actions of Our Hypothetical Employees Even Protected?

At the outset, it is unclear whether any of the employees in the three hypotheticals engaged in protected activities. Participating in a Black Lives Matter or Proud Boys rally or tweeting in support of a politician's platform would seem to be quintessentially political activity. But the statute defines "political activity" as encompassing only three things: running for office, campaigning for a candidate, and participating in a fundraising activity for a political candidate, party or cause. Under the "expressio unius" canon of statutory interpretation, by listing those activities, the Legislature is presumed to have excluded all others from the statute's ambit.[7] There is also a rule that courts should strictly construe any law that interferes with an employer's right to terminate an employee at will, which might counsel against a judicial expansion of those categories.[8] One might argue that tweeting in support of a president's policies is akin to "campaigning for a candidate" (at least if the president was running for reelection), but it is hard to situate the rally attendance in any of the categories. Accordingly, there is a strong plain-text argument against extending the statute's protections to our hypothetical employees.

However, no court has actually held that the only protected "political activities" are the three delineated in the statute. The Appellate Division has permitted – albeit without any analysis – Section 201-d claims to be brought by individuals who were terminated because of a "political argument" at a restaurant[9] and for attending a vigil to memorialize the victim of a hate crime.[10] As for "expressio unius," that canon is "only an aid to statutory construction," not to be used to reach outcomes contrary to legislative intent.[11] In fact, the legislative history offers some support for the idea that the law's intent was to broadly "ensure that employers do not tell [employees] how to think and play on [their] own time."[12] And pitted against the presumption against interfering with the employer's right to terminate an at-will employee is the opposite principle that antidiscrimination statutes, being remedial in nature, must be liberally construed.[13]

Thus, whether any of our hypothetical employees actually engaged in protected political activity is largely an open question.

If the employee did not engage in protected political activity, might his or her conduct nonetheless constitute a protected "recreational activity"? Maybe. Tweeting and rally attendance are uncompensated activities, done in one's leisure time; for some, these are as recreational as playing a video game or attending a concert. But maybe

not. In 1995, the Third Department set an austere tone by rejecting the idea that "dating" qualified as "recreational."[14] Relying on that decision, courts have found that organizing and participating in "after-work celebrations with fellow employees"[15] and "picketing" were not recreational because they did not bear any resemblance to "sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."[16]

While those cases do not augur well for the rally-goers or tweeters, their durability is questionable. The foundational Third Department opinion about dating – on which all subsequent opinions were based – has been continually attacked, not just by the dissenting judge in that case but by Second Circuit judges who predict that the Court of Appeals will embrace a broader view of "recreational activity" if and when the chance comes.[17]

In short, there is no clear answer whether the employees' activities would be deemed protected. But that is only the first level of uncertainty.

Does the Safe-Harbor Provision Apply?

For simplicity's sake, let's stipulate that the rally-goers and the tweeters engaged in protected activity. Might they nonetheless be fired (or have an offer rescinded) on account of that activity? That depends on whether their conduct created a "material conflict of interest related to the employer's . . . business interest."[18]

But what that means is anyone's guess. On one end of the extreme, the law might give the employer latitude to terminate an employee if that employer subjectively believes that doing so is necessary to mitigate a risk of harm to the business. Under such a rule, the restaurant manager could fire the Black Lives Matter protester based on the fear conservative diners *might* find out about the server's activities and *might* respond by taking their business elsewhere. The employer in our third hypothetical could withdraw the offer due to concerns about *potential* inner-office strife that *might* harm productivity. One quickly seeks how such a safe harbor would swallow the rule: just about any employer can construct a plausible yarn as to how employing a politically "problematic" individual might damage office morale, undermine productivity or turn away customers.

At the other extreme, the law might only excuse a firing upon proof that the employee's out-of-office conduct had actually blown back on the business and cost sales or severely undermined office cohesion in a way that resulted in a measurable reduction in productivity. Under this reading, an actual boycott would free the employer's hand, but a handful of tweets calling for a boycott would not. Actual evidence that worker productivity was declining because of interoffice strife might suffice, but the grumblings or resentments of the employee's coworkers would not.

Here, again, there is little in the text, legislative history or case law to light the way. The "material conflict" language was added to the law after Governor Cuomo vetoed the first incarnation of the bill. In his veto memorandum, he warned that the bill, as written, would leave employers without recourse if the employee were to "moonlight with a supplier, customer, or even a competitor" or "endorse a competitor's product."[19] The possibility that an employer might need to protect the business from a public backlash or fire an employee to maintain interoffice cohesion does not appear to have been front of mind.

As for case law, there is only one opinion addressing the "material conflict" provision: a two-paragraph Appellate Division order affirming a judgment that allowed the German National Tourist Office to fire an employee after it emerged that he had translated Holocaust revisionist articles.[20] But the order is easily cabined to its facts: an obvious conflict of interest arises when an organization responsible for promoting German culture is forced to employ an apologist for the most shameful episode in German history (denial of which is a crime in Germany). No equivalent conflict presents itself when a banker tweets in support of Trump or a food server attends a Black Lives Matter rally.

These layers of uncertainty persist because Section 201-d has largely been confined to employment law's backwaters, rarely invoked by plaintiffs. Rising political temperatures, social media and a rise in consumer activism – and the corresponding pressures that employers will feel to oust politically troublesome employees – are likely to breathe new life into this once obscure statute.

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[1] Martin Reeves, Leesa Quinlan, Mathieu Lefevre and Georg Kell, *How Business Leaders Can Reduce Polarization*, Harvard Business Review, Oct. 8, 2021, https://hbr.org/2021/10/how-business-leaders-can-reduce-polarization.

[2] Tamara Holmes, *38% of Americans Are Currently Boycotting a Company*, Lending Tree, July 20, 2020, https://www.lendingtree.com/credit-cards/study/boycotting-companies-political-pandemic-reasons.

[3] Labor Law Section 201-d(2)(a) & (c).

[4] Labor Law Section 201-d(1)(a).

[5] Labor Law Section 201-d(1)(b).

[6] Labor Law Section 201-d(3)(a).

[7] *Colon v. Martin*, 35 N.Y.3d 75, 78 (2020).

[8] *McCavitt v. Swiss Reinsurance Am. Corp.*, 89 F. Supp. 2d 495, 497 (S.D.N.Y. 2000).

[9] *Cavanaugh v. Doherty*, 243 A.D.2d 92, 100 (3d Dep't 1998).

[10] *El-Amine v. Avon Prods., Inc.*, 293 A.D.2d 283 (1st Dep't 2002).

[11] *Westnau Land Corp. v. United States Small Bus. Admin.*, 1 F.3d 112, 116 (2d Cir. 1993).

[12] *See Pasch v. Katz Media Corp.*, 1995 U.S. Dist. LEXIS 11153, at *13 (S.D.N.Y. Aug. 4, 1995).

[13] *See, e.g., Wetherill v. Eli Lilly & Co.*, 89 N.Y.2d 506, 514 (1997).

[14] *State v. Wal-Mart Stores, Inc.*, 207 A.D.2d 150 (3d Dep't 1995).

[15] *Delran v. Prada USA Corp.*, 2004 WL 5488006 (N.Y. Sup. Ct. Aug. 2, 2004).

[16] *Kolb v. Camilleri*, 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1, 2008).

[17] *McCavitt v. Swiss Reinsurance Am. Corp.*, 237 F.3d 166, 168-69 (2d Cir. 2001) (McLaughlin, J., concurring).

[18] Labor Law Section 201-d(3)(a).

[19] *Pasch v. Katz Media Corp.*, 1995 U.S. Dist. LEXIS 11153, at *11 (S.D.N.Y. Aug. 4, 1995).

[20] *Berg v. German Nat'l Tourist Office*, 248 A.D.2d 297 (1st Dep't 1998).