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Political Discrimination in New York Workplaces

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As Election Day approaches, conversations about politics take place with increasing frequency in many workplaces. As managers and employees learn each others' political views, some employees may get the impression - rightly or wrongly - that their employers are discriminating against them because of political disagreements.

Sometimes, political discrimination can be overt. In the 2004 presidential campaign, there was a well-publicized incident in which an employer in Alabama told an employee that she was being discharged because she had a John Kerry bumper sticker on her car.[1] But even when the employer does not expressly state why it has taken an adverse action against an employee, the circumstances may support an inference that the reason was political.[2]

Employers and employees often assume that employment discrimination on the basis of political beliefs is unlawful. After all, discrimination on the basis of such obscure categories as marital status and genetic predisposition is unlawful,[3] and human resources professionals constantly stress that all personnel decisions should be based on merit. However, surprising as it may seem, federal and New York law do not generally prohibit political discrimination in the private sector. The First Amendment restricts governmental action against political dissenters, but it does not restrict action by private actors. An employer that fires an employee because of a political bumper sticker may well be acting within its legal rights, reprehensible as such an action may seem.

This article examines the types of political discrimination that are plainly unlawful, as well as legal theories that can be argued when none of the well-established prohibitions applies.

Political Discrimination in Public Sector

It is well-established that public employers (e.g., federal, state, and local governments, school districts, public authorities, etc.) may not discriminate against their employees on the basis of their political beliefs or affiliations. The U.S. Supreme Court, in *Elrod v. Burns*[4] and *Branti v. Finkel*,[5] has held that such discrimination violates the First Amendment rights of the employees, and may be challenged under 42 U.S.C. §1983. A major exception to this rule provides that policy-making employees may be lawfully subjected to political discrimination, so that the will of the people as expressed at the ballot box can be carried out by officials who are loyal to the political agenda of elected officials.[6]

The *Elrod/Branti* rule has generated a complex body of case law. A discussion of the intricacies of First Amendment law under 42 U.S.C. §1983 as applied to public employees is beyond the scope of this article. It is sufficient for our purposes to state that public sector employees have a great deal of protection against political discrimination.

N.Y. 'Political Activities' Law

In 1992, the New York Legislature added §201-d to the Labor Law. This statute is best known for its prohibition against employment discrimination on the basis of off-duty "recreational activities" such as smoking and skiing.[7] Less well-known is the statute's prohibition of discrimination on the basis of an employee's "political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property."[8]

The statute's definition of "political activities" is relatively narrow. It covers "running for public office," "campaigning for a candidate for public office, or participating in political fund-raising activities.[9] It does not include mere political belief or an expression of political views. Thus, an employer would violate the statute if it were to discharge an employee because she handed out leaflets for a candidate at a train station in her spare time, but would be in compliance with the statute if it were to discharge an employee because she expressed dislike for a particular candidate, or simply because it suspects that the employee favors a particular political philosophy.

The statute does not define "campaigning" and there is no reported case law interpreting that word in this context. For this reason, it is uncertain whether the statute would protect an employee who has a political bumper sticker on her car. The employee's rights would depend in part on whether the display of a bumper sticker is considered "campaigning," as opposed to simple expression. If the bumper sticker favors a party or a cause instead of a particular candidate, the statute would almost definitely not apply, since the only kind of campaigning that is protected is "campaigning for a candidate for public office." For the same reason, a bumper sticker that opposes a candidate would also not appear to constitute "campaigning" within the meaning of the statute. Only a bumper sticker that favors a particular candidate would clearly invoke the statute's

protection.

The question would also arise whether driving a car with a political bumper sticker is conduct "off of the employer's premises."[10] If the employer owns the parking lot where the bumper sticker is displayed, the statute arguably would not apply. Only conduct that takes place off of the employer's premises, outside of work time, is protected by the statute.

The "political activities" clause is not the only provision of §201-d that can be used by a putative victim of political discrimination. The statute also prohibits discrimination on the basis of what an employee chooses to read or watch in her leisure time.[11] Thus, an employer may not treat an employee adversely because she reads the Daily Worker instead of the Wall Street Journal, or because she watches "Norma Rae" instead of "Sleeping Beauty."

An exception to the statute permits employers to take action against employees when their political activities create "a material conflict of interest related to the employer's . . . business interest."[12] Thus, a newspaper should be able to prohibit a journalist from campaigning for or against a candidate she covers, in order to protect the publication's business interest in appearing impartial. Using the same exception, an employer that sells goods or services to government agencies may be able to argue that it is permitted to discharge an employee who is running as a candidate against the executive of that agency, or who is campaigning for such a candidate.

Labor Law §201-d permits employers to restrict the outside paid political activities of employees who are contractually bound to devote their "entire compensated working hours" to the employer, as long as the employee is paid at least $50,000 in 1992 dollars[13] (approximately $78,050 in 2008 dollars).[14] Similarly, an employer may enforce a contractual restriction on the outside activities of an employee who has a professional services contract because of the "unique nature of the services provided."[15] For example, a celebrity who is engaged by a movie studio may be restricted from running for office or campaigning for a candidate, if the contract contemplates that such activities may diminish the celebrity's marketability.

New York Human Rights Law

The New York Human Rights Law, the state statute that prohibits most forms of unlawful employment discrimination, could perhaps be interpreted to cover political discrimination, but the courts have so far rejected such an argument.

Like most states, and like the federal government in Title VII,[16] New York does not include "political views" or "political activities" in its list of categories protected by discrimination laws.[17] However, the statute does prohibit discrimination on the basis of "creed."[18] Although the "creed" clause is most commonly invoked to prohibit discrimination on the basis of religion,[19] the word has a sufficiently broad dictionary definition to includ political beliefs as well.[20]

To date, the courts have insisted on restricting the word "creed" to religious beliefs, not political ones. The only reported case to squarely face the issue is *Keady v. Nike Inc.,* 116 F.Supp.2d 428 (S.D.N.Y. 2000).[21] Mr. Keady was an employee of St. John's University who claimed he was forced to resign from his employment because he protested the university's decision to accept endorsement money from Nike in light of its labor practices in Third World countries. The court held that the employee had no cause of action based on the Human Rights Law, because that law does not protect employees on the basis of their "ethical or sociopolitical views."

The court, however, failed to give convincing support for its holding. The only authority it cited other than the statute itself is *Avins v. Mangum*,450 F.2d 932, 933 (2d Cir. 1971). But *Avins* merely noted that the State Commission for Human Rights declined jurisdiction over a claim of political discrimination. The *Avins* court did not review that declination of jurisdiction, and it made no holding on the scope of the "creed" clause. Thus, there is still no reasoned decision that convincingly limits the "creed" clause to religious, as opposed to political, discrimination.[22]

Perhaps the best argument against extending the Human Rights Law's "creed" clause is the Legislature's passage of Labor Law §201-d, discussed above. If the Legislature had believed that political discrimination was already prohibited by the Human Rights Law, it would have had no need to prohibit "political activities" discrimination in the new statute.

Religious Discrimination

Another possible strategy for challenging political discrimination would be to take advantage of the broad definition of religious discrimination under Title VII, the federal anti-discrimination statute.[23] The Equal Employment Opportunity Commission (EEOC) has stated that "[r]eligion is very broadly defined under Title VII. Religious beliefs . . . include . . . nontheistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[24] This would seem to include at least some political beliefs, e.g., the belief that government should seek to maximize freedom, or the belief that government should seek to help the poor.

However, the EEOC goes on to state that "[s]ocial, political, or economic philosophies . . . are not 'religious' beliefs protected by Title VII."[25] This is a distinction that is difficult to define, and the EEOC makes no serious attempt to do so. If the facts presented in a particular case are favorable, it may be possible to convince a court that the distinction between protected nontheistic ethical beliefs on the one hand and unprotected political philosophies on the other is so untenable as to be arbitrary and capricious.

National Labor Relations Act

The National Labor Relations Act (NLRA)[26] primarily involves union relations, but it also grants rights to employees in a nonunion setting. Specifically, it grants employees the right to "engage in . . . concerted activities . . . for the purpose of . . . mutual aid or protection."[27] The Supreme Court has held that this right extends to at least some political activities, as long as they have a connection to the workplace.[28]

In July 2008, the NLRB's general counsel released an official memorandum exploring the distinction between protected and unprotected political

activity.[29] The memorandum concluded that in order for political activity to be protected, there must be a "direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees."[30] The general counsel found that such a nexus existed when employees participated in demonstrations against proposed immigration laws that would have made it more difficult for aliens to obtain work in the United States.[31]

By analogy, it could be argued that the NLRA protects employees who seek to persuade other employees to vote for a political candidate who will work for improved family leave laws, or to support a political party that promises to raise the minimum wage. Like the immigration concerns discussed by the general counsel, these causes are directly linked to employees' interests as employees.

Employer Electioneering

A little-known provision of the Election Law makes it a misdemeanor for employers to place political messages in "pay envelopes," or, within 90 days of a general election, to place political signs or placards in the workplace containing express or implied threats "calculated to influence the political opinions or actions of . . . employees."[32] For example, an employer may not post a sign within the 90-day period stating that if a particular candidate is elected, there will be layoffs or reduced compensation.[33] It is unclear if a direct deposit confirmation slip constitutes a "pay envelope" within the meaning of this statute. Not only can an employer be found guilty of a misdemeanor if it violates this provision of the Election Law; it can also forfeit its corporate charter.[34]

Conclusion

Contrary to the assumptions of many employers and employees, there is no law clearly prohibiting most forms of political discrimination in the private sector in New York. The New York Labor Law prohibits discrimination on the basis of active political "campaigning" or engaging in fund raising, but discrimination on the basis of mere political belief or expression is not prohibited. Creative plaintiffs may attempt to base claims on other legal theories, but so far such attempts have been successful only in narrow circumstances. Employees should beware of a gap in their legal rights, and employers should beware of the restrictions that do exist.

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Endnotes:

1. Timothy Noah, "Bumper Sticker Insubordination," www.slate.com/id/2106714 (9/14/04). The discharged employee was later hired by the Kerry campaign. Id.

2. *Branti v. Finkel,* 445 U.S. 507, 512 n.6, 100 S.Ct. 1287 (1980).

3. New York Executive Law §296.1(a).

4. 427 U.S. 347, 96 S.Ct. 2673 (1976).

5. 445 U.S. 507, 100 S.Ct. 1287 (1980).

6. *Elrod; Branti* supra.

7. New York Labor Law §201-d.2(b).

8. New York Labor Law §201.d.2(a). This statute has also been applied to public sector employees. *McCue v. County of Westchester,* 18 A.D.3d 830, 796 N.Y.S.2d 384 (2d Dep't 2005).

9. New York Labor Law §201-d.1(a).

10. New York Labor Law §201-d.2(a).

11. New York Labor Law §201-d.1(b); 201-d.2(c).

12. New York Labor Law §201-d.3(a).

13. New York Labor Law §201-d.3(e).

14. U.S. Bureau of Labor Statistics CPI-U figures, showing 1992 average to be 140.3, and August 2008 to be approximately 219, when from 1982 to 1984 the average per year was 100.

15. New York Labor Law §201-d.5.

16. 42 U.S.C. 200e et seq.

17. New York Executive Law §296.1(a). Cf. District of Columbia Human Rights Act, 2 D.C. Code, Title 2, Ch. 14, §2-1401.01 (including "political affiliation" in list of protected categories).

18. New York Executive Law §296.1(a).

19. See *Eastern Greyhound Lines v. NYS Div. of Human Rights,* 27 N.Y.2d 279, 317 N.Y.S.2d 322 (1970).

20. The American Heritage Dictionary defines "creed" not only as "[a] formal statement of religious belief," but also as "[a] system of belief, principles, or opinions."

21. At p. 438.

22. Cf. *Cummings v. Weinfield,* 177 Misc. 129, 30 N.Y.S.3d 36 (N.Y. County Sup. Ct. 1941) (restricting the "creed" clause in the Public Housing Law to religious, as opposed to political, discrimination).

23. 42 U.S.C. §2000e, et seq.

24. EEOC Compliance Manual §12-I(A) (2008) (quoting 29 CFR §1605.1).

25. EEOC Compliance Manual §12-I(A) at n. 28 (2008).

26. 29 U.S.C. §§151 et seq.

27. 29 U.S.C. §157.

28. *Eastex Inc. v. NLRB,* 437 U.S. 556, 565 (1978).

29. GC Memorandum 08-10 (July 22, 2008).

30. Id., at n. 24.

31. Id., at n. 26.

32. New York Election Law §17-150.3.

33. Id.

34. Id.