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Disciplining Employees for Off-Duty Conduct

By Richard K. Zuckerman[1]

I. Introduction

Employers have a clear right to discipline employees for many types of conduct in which they engage during work time or on the employer's premises. Normally, if the discipline does not violate any contractually or statutorily afforded rights, it is upheld. Discipline for conduct occurring *off-duty* is another matter. Arbitrators and courts uniformly require that some type of nexus exist between the employment and the conduct for which the employee was disciplined.

This nexus varies by situation. Whether the employment is public or private, and the type of employment involved, each factors into how closely the misconduct must be related to the employment. In the private sector, employers are generally required to demonstrate that there is an *actual* connection between the conduct and the business. In the public sector, discipline will usually be upheld if the conduct has the *potential* to harm the employer or its ability to deliver its services.

Additionally, many states have enacted laws that limit the extent to which employers may take adverse action against employees for off-duty conduct.[2] A section of the New York Labor Law[3] does just that, and must be taken into account if an employer is considering disciplining an employee for conduct that occurs off work time and/or off work place grounds.

This article will examine case law, administrative decisions, arbitrators' decisions and statutory law pertaining to discipline based upon off-duty conduct. It will also consider how the nexus between the conduct and employment varies depending upon the factors discussed above.

II. Public Employees

Public employees' off-duty conduct is often more closely scrutinized than that of private employees. Both courts and arbitrators tend to consider the effect that the off-duty conduct has on the reputation and integrity of the public employer. Thus, even if there is no apparent relationship between the off-duty misconduct and the employment, discipline may still be upheld if the conduct tends to cast a negative light on the employer, or if the conduct is inconsistent with the employee's duties as a public servant. This is distinguishable from private employment, where a more concrete nexus is required between employment and conduct. This section will examine how decision makers treat teachers, law enforcement personnel and other public employees in considering whether to uphold discipline for off-duty conduct.

A. Teachers - Education Law Section 3020-a

Education Law Section 3020-a provides the procedural mechanism by which tenured teachers and administrators of school districts may be disciplined. Teachers and administrators may only be disciplined for "just cause." That cause may be based upon off-duty conduct.

Teachers are held to a higher standard than other types of employees because of their obligation to act as role models for students. Even if there is no direct connection between the conduct and the employment, discipline may still be upheld if the conduct affects the teacher's ability to set a good example for students. Discipline for off-duty conduct will most likely be upheld if it either directly affects the performance of the employee's duties, or has become the subject of "such public notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of the position."[4] Also factored into the analysis is whether the conduct affects the teacher's status as a role model for students or directly affects the legitimate interests of the school district.

In *Goldin*, *supra*, the court found that disciplinary proceedings could be brought against a guidance counselor for spending the night at the home of a former student who had graduated only two months prior. Her parents were not home. The court found that the period of time between the student's graduation and the misconduct was short enough to allow for the possibility that misconduct could have occurred while she was still a student, thus linking the misconduct to the teacher's responsibilities as a guidance counselor.[5]

In another case, however, the Commissioner of Education found that a public school teacher who was also employed as a teacher at a private school was *improperly* disciplined for maintaining a relationship with a former private school student two or three years *after* the teacher ceased being the student's teacher. There was insufficient evidence, the court decided, showing that the conduct directly affected the performance of the teacher's responsibilities.[6]

Even if a teacher's off-duty conduct does not necessarily directly impact his or her teaching responsibilities, discipline may still be imposed if the conduct impacts upon the example that is to be set by a teacher. For example, a hearing officer imposed a one-year suspension without pay upon a teacher who was twice convicted of driving while intoxicated, and then engaged in the same conduct a third time. The hearing officer found that a nexus was established between the conduct and the employment because teachers teach by example as well as through the presentation of course material.[7]

Along similar lines, a court upheld a two-year suspension without pay of a teacher convicted of criminally negligent homicide due to an automobile accident in which he hit a teenager on a bicycle. The court found that, "[t]he adverse effect of this particular notorious conviction and sentence on a teacher's legitimate function as a wholesome object of student emulation is so self evident" as to make unnecessary any showing of some actual impairment of teaching duties.[8]

Likewise, another teacher with multiple convictions for driving while intoxicated was suspended for two years without pay.[9] In that case, the Commissioner focused on the facts that the teacher had failed to serve as an appropriate role model and that he had also compromised the school district's positions on educating students about the risks of drunk driving.

Discipline is likely to be upheld where the conduct results in adverse publicity. For example, a court upheld the dismissal of a guidance counselor who was involved in three incidents of shoplifting. The court found that, given the counselor's reputation in the community as a criminal, the conduct justified dismissal even though it was not directly related to the performance of his duties.[10]

Courts and administrative officials also consider whether the behavior has an effect on the legitimate interests of the school district. For example,

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the Commissioner of Education upheld the imposition of discipline upon a teacher who followed the district's attorney off of school property and harassed her after a disciplinary hearing against him. The district's attorney had been prosecuting the teacher during that hearing and the Commissioner found that in doing so, the attorney was engaging in a legitimate school function. The teacher harassed the attorney *because* the attorney was pursuing this legitimate interest and the teacher thereby engaged in "conduct directly related to a legitimate school function." The teacher's behavior therefore warranted discipline.[11]

B. Other Public Employees

As with teachers, other types of public employees are held to a high standard regarding their off-duty conduct. Any sort of behavior that is inconsistent with a public employee's duties, or that has the potential to negatively affect the employer, may give rise to discipline. This is true particularly in the case of law enforcement personnel.

Civil Service Law Section 75 provides the procedural mechanism by which certain civil servants may be disciplined or removed from employment. It also provides that those employees may only be removed or disciplined for incompetency or misconduct.[12] When the basis for proffering Section 75 charges is misconduct that occurred off-duty, the employer will be required to show that the conduct bears a sufficient relationship to employment so as to justify the disciplinary action. Courts may additionally consider whether the conduct: (i) is likely to hold the employer up to public ridicule; (ii) conflicts with the employee's obligations as a public servant; and/or (iii) is likely to bring discredit upon the employer.

Off-duty conduct is often clearly related to employment. In *Hannigan v. Schlegle*,[13] for example, the court upheld the discharge of a sanitation worker for attacking his supervisor off work hours and off work premises, where the attack grew out of prior incidents which occurred on the job. Because the conduct was clearly related to the employment, it was a legitimate basis for discipline.

A good example of a case in which a police officer's discharge was upheld because the conduct brought discredit to and held the employer up to ridicule is *Shaya-Castro v. New York City Police Dep't.*[14] There, the court upheld the dismissal of a police officer who was terminated for posing nude with part of her uniform and her equipment. The court found that she had used her position for personal, private commercial gain in a manner likely to hold the department up to public ridicule.[15]

Similarly, in two cases arising out of related incidents, the First Department upheld discharges of police officers for, among other things, sliding down a hotel's escalator banister in the nude while attending memorial services for slain colleagues.[16] In one of these opinions, the court recognized that the officer's conduct could affect the public perception of the police department's integrity.[17]

In *Brooks v. Suardy*[18], a transit police officer was terminated for threatening to kill a civilian while he was off-duty and for pointing his off-duty gun at another civilian. He also possessed an unregistered gun, left both guns in his car, was convicted of menacing and made false statements to the Internal Affairs Unit, all in violation of the department's regulations. The court upheld his dismissal despite the fact that the officer's record was otherwise clean, because the conduct in which he engaged tended to "undermine the integrity and fitness of the . . . Department and posed a serious threat to the discipline and efficiency of the operation."[19]

Even behavior that does not seem as flagrant as that in the cases described above may be grounds for the discipline of law enforcement employees. In *Sheehan v. Kelly*[20], the court upheld the forfeiture of ten vacation days imposed upon police officers for obstructing traffic on a bridge while they were off-duty and participating in a union demonstration.

These decisions may be contrasted with one involving non-police personnel. In *Villanueva v. Simpson*[21], the court reinstated a transit authority conductor who had been discharged for assaulting someone while off-duty with a knife. The court found that, because the incident occurred while the employee was off-duty, and off transit authority property, it did not interfere with the efficiency or discipline of the transit system and was, therefore, unrelated to employment.

Public employees are often disciplined for off-duty conduct found to be inconsistent with their duties. In *Coppola v. Polan*[22], for example, a sanitation worker was dismissed for engaging in illegal dumping activities at a private landfill at which he was employed during off-duty hours. The court upheld his dismissal, "[i]n light of the adverse environmental impact of petitioner's participation in the illegal dumping . . . and the conflict between such activities and [his] obligation as an employee [of the sanitation department] to see to the proper disposal of waste."[23]

Conduct that would seem to be completely private and unrelated to employment may lead to discipline where law enforcement personnel are involved. In *Stiles v. Phelan*[24], the court upheld the suspension of an employee for threatening his wife and children with bodily harm and death. The hearing officer had found that the conduct was job-related due to the employee's position in law enforcement.[25]

In *City of St. Paul Minnesota*,[26] however, an arbitrator annulled the discharge of a police officer who had been convicted for engaging in off-duty sexual misconduct with his fourteen year old babysitter. The arbitrator noted that the officer had frequent contact with juveniles and vulnerable adults, and had been alone at night with juvenile females. Because there had been no incidents involving on-duty sexual misconduct, though, the arbitrator ordered reinstatement.

An employee's status as a supervisor may also factor into the decision as to whether to uphold discipline. In one case, an employee of a county security division was disciplined for engaging in "pranks" upon on-duty employees while he was off-duty. The court noted that the discipline was appropriate especially given the employee's status as a supervisor.[27]

Two cases involving the same incident of misconduct, but different employees, illustrate that different decision-makers can come to different conclusions about the relatedness between off-duty misconduct and employment. In *Zazycki v. City of Albany*,[28] the court upheld the suspension of a fire department employee for making false statements about a co-employee during part-time employment with a police department. Although the conduct did not directly involve the employee's employment with the fire department, the court upheld the suspension because the employee's lack of integrity had a direct bearing on his duties with the fire department.

The opposite result was reached in *City of Albany and Albany Permanent Professional Firefighters Assn.*[29] There, an employee who had conspired with the petitioner in *Zazycki* chose to arbitrate his discipline. The arbitrator reversed the suspension and the court upheld the arbitrator's decision, which found that the conduct had no direct relationship to his employment with the fire department.

Discipline for off-duty misconduct may be upheld, as in *Zazycki*, where a public employee's conduct is perceived as reflecting upon the integrity of the employer. In *City of Las Vegas*,[30] an arbitrator sustained the discharge for a second shoplifting arrest of a firefighter with an excellent twenty-four year record. The arbitrator stated that the employee should have known that his conduct was likely to tarnish the fire department's reputation, and that despite the lack of media coverage, it was likely that word would get out that the firefighter had been involved in the incident. He also found that the public had the right to expect that members of its fire department would abide by the law.[31]

Similarly, in another shoplifting case, an arbitrator found that a county had properly suspended a jail nurse for shoplifting. The arbitrator based his decision on the fact that the employer was responsible for law enforcement, as well as the potential harm to the employer's

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reputation of employing a known shoplifter. [32]

Sometimes it is simple common sense that dictates a decision to uphold discipline for off-duty misconduct. In *North Oakland Medical Center*,[33] an arbitrator sustained the discharge of a hospital food service worker who had been convicted of stabbing his former wife's boyfriend, off-duty and off premises. The arbitrator astutely noted that the kitchen was not the most appropriate place of employment for a person with a propensity for using sharp objects to harm others.

III. Private Sector Employees

Slightly different standards are used in the private sector to judge the legitimacy of discipline for off-duty misconduct. Generally, discipline will be upheld if the conduct: (1) harms the company's reputation or product; or (2) renders the employee unable to perform his or her duties at work; or (3) leads to a refusal or reluctance on the part of co-workers to work with the employee.[34] Moreover, the connection between the conduct and the harm to the employer, its business or other employees must be readily discernable, rather than merely speculative. The conduct must also be reasonably likely to cause some adverse effect on the employer.[35]

With these standards in mind, whether discipline will be upheld in connection with off-duty misconduct often depends upon the type of position involved. In any case, it appears that discipline for off-duty misconduct in the private sector is far less likely to be upheld than in the public sector. As one arbitrator put it:

It is commonly accepted that unless the grievant's off-duty misconduct places the employer in an unfavorable light with the public and has a potential for negative impact on the employer's business, the off-duty misconduct should not be considered as a factor for the employee's continued employment. The reasoning behind this logic is that in an industrial setting, a single employee's off-duty misconduct should have little direct relationship to the company's reputation or ability to produce a product.[36]

A major difference from the public sector is that, in the private sector, arbitrators almost always require the employer to demonstrate that there has been actual harm to the business or its reputation, or that such harm is reasonably likely to occur, in order to justify discipline for off-duty conduct. In the public sector, the *possibility* for such harm is usually sufficient.

Although an employer may argue that an employee's off-duty misconduct has a detrimental effect on its business, discipline will not be upheld unless the employer can show that the impact is more than speculative. In *Iowa Public Service Co.*,[37] the arbitrator ordered the reinstatement of an employee who had been discharged after he was sentenced to a prison term for a domestic violence incident. The company argued that the employee worked independently with the public and under minimal supervision, retaining an employee with a propensity towards violence would harm its reputation, and the potential publicity would harm its business. However, the arbitrator found that the criminal activity was not a matter of widespread publicity, any detrimental effect on the company's customers or business was purely speculative and, other than the victim's brother-in-law, there was no evidence that the employee's co-workers would be reluctant to work with him.

Even where drug use is involved, employers are still required to demonstrate an effect upon their business that is more than merely speculative. In *Warner-Lambert, Inc.*,[38] the arbitrator overturned the discharge of a drug manufacturer's employee who pled guilty to possession of a loaded handgun and cocaine, because the employer was unable to demonstrate that the conduct "negatively affected plant operations in a reasonable discernible way."[39] The arbitrator found that the company could not show that the conduct actually affected plant operations or morale or that it would have jeopardized its business of manufacturing controlled substances.

Likewise, in *W.R. Grace & Co.*,[40] an arbitrator overturned the discharge of an employee convicted of possession of cocaine with intent to sell, and ordered reinstatement conditioned upon the employee passing a drug screen. The arbitrator found that there was neither evidence of adverse publicity nor proof that the employee's presence in the plant would induce others to use drugs, and that the chemical manufacturer's safety concerns were no greater than those of any manufacturing business.

By way of contrast, in *Trane Co.*[41], the arbitrator *sustained* the discharge of a manufacturing company assembly line worker who was convicted of *dealing* cocaine due to the real and corrupting influence of a drug *dealer*, as opposed to a drug *user*. The arbitrator found that there was a clear nexus between the conviction and the employer's need to keep a drug dealer from working among its employees.

If an employee is in a position of trust, and off-duty conduct in which he or she engages would tend to undermine that trust, discipline may be upheld. In *CSX Hotels*[42], the arbitrator upheld the termination of an employee who pled guilty to stealing four tires off of a truck at a service station. The employee was responsible for repairing air conditioning units in hotel rooms and was left alone in guests' rooms. The arbitrator focused on the fact that the case arose in the service industry. He concluded that the discharge was justified, even though hotel guests were unaware of the employee's activity, because the nature of the employee's position provided him with the opportunity to again commit theft.

This decision may be contrasted with the decision in *Iowa Public Service Co., supra*, where the company had argued that the employee had to work with the public under minimal supervision. There, though, the arbitrator found insufficient contact with the public to warrant termination.[43]

As in the public sector, discipline for conduct clearly connected to the employment is likely to be upheld. In *Central Illinois Public Service Co.*[44], the arbitrator reduced but upheld the suspension of a union member who started a fight in a bar with a non-union employee. The arbitrator found that, although the incident had occurred off-duty, it had a discernible effect on the employer because it was likely to affect the company's labor-management relations.

It is important to note that, as with discipline imposed for any type of misconduct, employers should be consistent in applying disciplinary policies in connection with off-duty conduct. In *City Utilities of Springfield*[45], an arbitrator refused to uphold the discharge of an employee who had stolen railroad ties while off-duty. The arbitrator found that there was no publicity surrounding the incident and thus little effect upon the employer's business. The arbitrator also noted, however, that other employees had received lesser forms of discipline for engaging in similar misconduct.

IV. New York's Lawful "Outside Activities" Law

When imposing discipline for off-duty conduct, employers should keep in mind that many states have laws restricting the rights of employers to take adverse action against their employees for lawful activity which occurs off the clock and/or employer's premises.[46] New York's law forbids employer discrimination because of an employee's participation, outside of working hours, off the employer's premises and without use of the employer's equipment property, in: (i) legal political activities; (ii) the legal use of consumable products; (iii) legal recreational activities; and (iv) union activities. The law excludes from protection conduct that: (i) creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary business interest; or conflicts with (ii) certain specified employers' published restrictions on outside employment; (iii) a public sector collectively bargained code of ethics or conflict of interest provision; or (iv) a contractual exclusive or best efforts provision.[47]

In *State v. Wal-Mart Stores, Inc.*,[48] the court dismissed an action that sought reinstatement of two employees who had been discharged for violating the employer's non-fraternization policy (which prohibited a married employee from dating another employee who was not his or her spouse). The court found that dating was not included in the activities that the law was designed to protect.

In *Pasch v. Katz Media Corp.*,[49] however, the court came to the opposite conclusion, and refused to dismiss an action seeking damages for the demotion and constructive discharge of an employee for maintaining a personal relationship with a *former* co-worker. The distinction between the two cases may be explained by the fact that, in *Pasch*, the relationship involved a former co-worker and therefore did not affect the employer's business, whereas in *Wal-Mart* the two employees worked for the employer at the same time.

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Most recently, in *McCavitt v. Swiss Reinsurance America Corp.*,[50] the Court of Appeals for the Second Circuit disagreed with *Pasch*, agreed with *Wal-Mart*, and found that dating was *not* a protected activity under §201-d. There, the Court upheld the dismissal of a senior-vice president's complaint alleging that the employer had violated §201-d when it discharged him for dating another senior vice president. *See also Bilquin v. Roman Catholic Church*, No. 2000-10205, 2001 WL 939090 (N.Y.A.D. 2d Dept Aug. 20, 2001); *Hudson v. Goldman Sachs & Co., Inc.*, 283 A.D.2d 246 (1st Dep't 2001), which concur with *Wal-Mart* and *McCavitt* and hold that §201-d does not protect romantic activity.[51]

V. Conclusion

Regardless of whether an employer is public or private, there must be a nexus between off-duty misconduct and the employee's employment in order to justify discipline in connection with that misconduct. Courts and arbitrators are more likely to find this nexus in the public sector, based upon the chance that the conduct could be harmful to the employer. In the private sector, by contrast, there must be more than mere speculation that the conduct will negatively impact upon the employer. If an employee is in a position where trust is involved, the effect need not be as readily discernible as in other types of positions where trust is not an issue. Adverse publicity is frequently viewed as an important factor in reviewing disciplinary action In any case, every New York employer should be mindful of the state's Lawful Outside Activities law when imposing discipline for off-duty conduct.

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2. *See* Ariz. Rev. Stat. Ann. § 36-601.02; CA Labor § 96; Colo. Rev. Stat. Ann. §§ 24-34-401, *et seq*; Conn. Gen. Stat. Ann. § 31.40s; D.C. Code. Ann. § 6-913.3; ILCS 55/1, *et seq;* Ind. Code. Ann. § 22-5-4-1, *et seq*; Ky. Rev. Stat. Ann. § 344.040; La. Rev. Stat. Ann. §§ 23-966; Me. Rev. Stat. Ann. tit. 26, § 597; Minn. Stat. Ann. § 181.938; Miss. Code Ann., §§ 71-7-23, 71-7-25, 71-7-33; Mo. Ann. Stat. § 290.145; Mont. Code Ann. §§ 39-2-313, 314; Nev. Rev. Stat. Ann. § 613.333; N.H. Rev. Stat. Ann. § 275:37-a; N.J. Rev. Stat. Ann.§§ 34:6B-1, *et seq*; N.M. Stat. Ann. §§ 50-11-1, *et seq*; N.C. Gen. Stat. § 95-28.2; N.D. Cent. Code §§ 14-02.4-03, *et seq*; N.Y. Lab. L. §201-d; Okla. Stat. Ann. tit. 40, §§ 500, *et seq*; Or. Rev. Stat. § 659.380; R.I. Gen. Laws §§ 23-20.7-1-23-20.7-7; S.C. Code Ann. § 41-1-85; S.D. Codified Laws § 60-4-11; Tenn. Code Ann. § 50-1-304; Va. Code Ann. § 15.2-1504; W.Va. Code § 21-3-19; Wis. Stat. Ann. §§ 111.321, 111.35; Wyo. Stat. Ann.§ 27-9-105.

3. N.Y. Lab. L. § 201-d.

4. *Goldin v. Board of Educ. of Central School Dist. No. 1 of the Towns of Brookhaven and Smithtown*, 35 N.Y.2d 534, 544 (1974).

5. *Id.*

6. *Appeal of the Bd. of Educ. of the Washingtonville Central School Dist.*, 31 Ed. Dep't Rep. 371 (1992).

7. Jeffrey Handleman, *Off-duty misconduct leads to one-year suspension, 3020-a Update*, New York School Boards, March 31, 1997, *citing*, decision of hearing officer Stuart M.Pohl, and *quoting Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

8. *Ellis v. Ambach*, 124 A.D.2d 854, 856-57 (3d Dep't 1986).

9. *Appeal of the Board of Education of the Warsaw Central School District*, 34 Ed. Dep't Rep. 226 (1994).

10. *Caravello v. Board of Educ.*, 48 A.D.2d 967 (3d Dep't 1975).

11. *Board of Educ. of the South Huntington Union Free School Dist.*, 31 Ed. Dep't Rep. 371 (1992).

12. N.Y. Civ. Serv. L. §75.

13. 86 A.D.2d 667 (2d Dep't 1982).

14. 233 A.D.2d 233 (1st Dep't 1996).

15. *Id.*

16. *Hagmaier v. Bratton*, 245 A.D.2d 147 (1st Dep't 1997); *Morrow v. Safir*, 242 A.D.2d 217 (1st Dep't 1997).

17. *Morrow*, 242 A.D.2d at 218.

18. 222 A.D.2d 502 (2d Dep't 1995).

19. 222 A.D.2d at 503.

20. 215 A.D.2d 171 (1st Dep't 1995).

21. 109 A.D.2d 880 (2d Dep't 1985).

22. 177 A.D.2d 398 (1st Dep't 1991).

23. 177 A.D.2d at 399.

24. 111 A.D.2d 591 (3d Dep't 1985).

25. 111 A.D.2d at 592.

26. 101 LA 265 (Neigh 1993).

27. *Sguanci v. Commissioner of Public Works of Broome County*, 158 A.D.2d 788 (3d Dep't 1990).

28. 94 A.D.2d 925 (3d Dep't 1983).

29. 99 A.D.2d 602 (3d Dep't 1984).

30. 105 LA 398 (Robinson 1995).

31. *Id.* at 404.

32. *Genesee County*, 90 LA 48 (House 1987).

33. 106 LA 488 (Daniel 1996).

34. *W.E. Caldwell Co.*, 28 LA 434 (Kesselman 1957).

35. *Inland Container Corp.*, 28 LA 312, 314 (Ferguson 1957).

36. *CSX Hotels*, 93 LA 1037, 1040 (Zobrak 1989).

37. 95 LA 319 (Murphy 1990).

38. 89 LA 265 (Sloane 1987).

39. *Id.* at 267.

40. 93 LA 1210 (Odom 1989).

41. 96 LA 435 (Reynolds 1991).

42. 93 LA 1037 (Zobrak 1989).

43. 95 LA 319 (Murphy 1990).

44. 105 LA 372 (Cohen 1995).

45. 92 LA 515 (Erbs 1989).

46. *See supra*, note 1.

47. N.Y. Labor L. § 201-d.

48. 207 A.D.2d 150 (3d Dep't 1995).

49. 1995 WL 469710 (S.D.N.Y. Aug. 8, 1995).

50. 237 F.3d 166 (2d Cir. 2001).

51. *See also* Richard K. Zuckerman and Sharon N. Berlin, *Romance in the Workplace: To What Extent Can Employers Dictate the Rules?*, New York State Bar Association, Labor and Employment Law Section Newsletter (June 1998); Sharon Stiller and Richard K. Zuckerman, *Romance in the Workplace: Are Pasch and Wal-Mart Truly Incompatible or Can They Reconcile?*, New York State Bar Association, Labor and Employment Law Section Newsletter (June 1997); Alyce H. Rogers, *Employer Regulation of Romantic Relationships, The Unsettled Law of New York State*, 13 Touro L. Rev. 687 (1997); *Romance in the Workplace: In Search of a Workable, Enforceable Policy*, by Donald L. Sapir, published in Proceedings of New York University's 49th Annual Conference on Labor Law (Kluwer Law International 1997) (edited by Samuel Estreicher).

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Correction to General Municipal Law §207-c Eligibility: What's Changed Since *Balcerak*?

By Richard K. Zuckerman and
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The article that appeared in the September/October 2001 issue of the "Municipal Lawyer" incorrectly stated that both houses of the New York State legislature passed bills that "would effectively overrule the *Balcerak*[2] decision by eliminating the intentional statutory distinction between entitlement to workers' compensation benefits and General Municipal Law Section 207-c."[3] The article referenced Senate Bill No. 5279 and Assembly Bill No. 8587, which empowered the Workers' Compensation Board to make controlling determinations for benefits pursuant to Section 207-c.[4] However, the legislature passed an amended bill, Senate Bill No. 5279-A, that eliminated all references to benefit determinations by the Workers' Compensation Board.

The amended Senate bill, which also replaced Assembly Bill No. 8587, amends General Municipal Law Section 207-c by changing "is injured in the performance of his *duties* or who is taken sick as a result of the performance of his *duties*" with "is injured during the performance of his or her *tour of duty* or who is taken sick as a result of the performance of his or her *tour of duty*"[5] (emphasis added). This change significantly broadens a covered employee's entitlement to Section 207-c benefits because it requires only that an injury or illness be sustained during the time that the officer is working his or her tour of duty without consideration of the activity in which the officer was engaged at the time of the injury. In other words, the bill overrules *Balcerak's* reasoning that "General Municipal Law § 207-c benefits were meant to fulfill a narrow and important purpose. The goal is to compensate . . . employees for injuries incurred in the performance of special work related to the nature of heightened risks and duties. These functions are keyed to 'the criminal justice process, including investigations, presentencing, criminal supervision, treatment and other preventative corrective services.'"[6] Under this proposed legislation, Section 207-c benefits will be available as long as a covered employee is injured during his or her "tour of duty," regardless of the activity that caused the injury.

The amended bill would also add the following to the statute:

"Where the injury or sickness which results in a claim for benefits provided by this section occurred during, or as a result of, the immediate and actual performance of a public duty and such public duty was performed for the benefit of the citizens of the community wherein such public duty was performed, the benefits provided by this section shall not be denied on the basis that the injury or sickness did not occur during, or as a result of, their performance of his or her tour of duty."[7]

This language appears to address the factual scenario in a post-*Balcerak* decision of the Appellate Division, Second Department. In *Wynne v. Town of Ramapo,*[8] the court affirmed the denial of a police officer's application for Section 207-c benefits where the officer, while off-duty and on vacation outside of his department's jurisdiction, injured his hand while breaking a window to free a child from a car. Because the officer was off-duty when he sustained his injury, the court determined that Section 207-c benefits were unavailable. Under the proposed legislation, a similarly situated police officer would appear to be eligible for Section 207-c benefits because the off-duty injury occurred in the "actual performance of a public duty and such public duty was performed for the benefit of the citizens of the community wherein such public duty was performed."

Senate Bill No. 5279-A was formally presented to the Governor for signature on December 31, 2001. In the event the bill becomes law, a follow-up article will be prepared for publication in an upcoming issue of the *Municipal Lawyer*.

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2.*Balcerak v. County of Nassau*, 94 N.Y.2d 253 (1999).

3. New York State Senate Bill No. 5279 and Assembly Bill No. 8587.

4.*Id.*

5.New York State Senate Bill No. 5279-A.

6.Balcerak, 94 N.Y.2d at 259 (citation omitted).

7.New York State Senate Bill No. 5279-A.

8.728 N.Y.S.2d 785 (2d Dep't 2001).