1983 WL 182079 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
December 16, 1983

***1** Jack S. Mullins, Ph.D.
Director
State Personnel Division
1205 Pendleton Street
Columbia, South Carolina

Dear Dr. Mullins:
You have inquired whether a state agency may lawfully adopt and enforce an anti-nepotism policy that is more restrictive than Section 8-5-10, Code of Laws of South Carolina, 1976 ('the Code'). More specifically, you have asked whether a state agency may adopt a personnel policy that would (1) operate prospectively to bar the employment within the agency of persons related by blood or marriage within the sixth degree to persons already employed by the agency; (2) prohibit the promotion or transfer of a current employee into a position wherein he would either be supervised by or would supervise an employee related to him by blood or marriage within the sixth degree; and (3) require that, in the event two previously unrelated employees, one of whom exercises supervisory authority over the other, should marry, one of the employees would be transferred or demoted to break the supervisory link where practicable or would be dismissed if a transfer or demotion to a position outside that supervisory chain were impracticable. It is the opinion of this office that state agencies may lawfully adopt such a policy.

In order to answer your question, it is necessary to determine (1) whether, as a matter of state law, a state agency has the authority to adopt an anti-nepotism policy more restrictive than § 8-5-10 and (2) whether the specific anti-nepotism policy you propose contravenes any right guaranteed by the United States Constitution, specifically the right to marry. We shall examine the state law question first.

Section 8-5-10 of the Code provides:
It shall be unlawful for any person at the head of any department of this government to appoint to any office or position of trust or emolument under his control or management any person related or connected with him by consanguinity or affinity within the sixth degree.

This statute was enacted in 1896, see Act No. 60 of 1896, 22 STAT. 123. The ruling of the South Carolina Supreme Court in State v. Cumbee, 276 S.C. 207, 277 S.E.2d 146 (1981), as well as the many opinions of this office construing this statute indicate that the same applies only to the heads of the various agencies of the several branches of state government. See, e.g., 1964 Ops. Atty. Gen. 131; 1979 Ops. Atty. Gen. 158. Thus, the prohibition on nepotism prescribed by § 8-5-10 is extremely limited in both scope and effect.

In 1975, the General Assembly passed what has become commonly known as the State Personnel Act. This Act, Act No. 190 of 1975, 59 STAT. 212, codified as § 8-11-210-8-11-290, of the Code, created the State Personnel Division ('State Personnel') as an entity within the Budget and Control Board ('the Board') and vested the Board, through State Personnel, with broad authority to develop policies concerning conditions of employment for state employees. See § 8-11-230, Code. Paragraph 11 of § 8-11-230 authorizes the Board to '[d]elegate to the heads of State agencies served such . . . responsibilities [concerning conditions of employment] as may be appropriate in such form as the Board may determine.' Pursuant to this authority to delegate policy-making to the various state agencies, the State Personnel Division, through its regulations, has directed that '[a]ll agencies shall establish a nepotism policy in writing that is transmitted to all employees.' Regulation 19-707.02J (effective

June 1983). By reason of a proviso in the 1982-1983 Appropriations Act (Act No. 466 of 1982, 62 STAT. 2623, 2772), this regulation was promulgated pursuant to the regulation-making provisions of the Administrative Procedures Act. § 1-23-10 et seq., Code, as amended, and, thus, has been reviewed by the General Assembly. See § 1-23-120, id. The General Assembly apparently perceived no conflict between this regulation and § 8-5-10 because it did not exercise its prerogative under the Administrative Procedures Act to veto the regulation. In the face of this legislative assessment, we should not be quick to find a conflict. Cf. Sadler v. Lyle, 254 S.C. 535, 543, 176 S.E.2d 290 (1970) (legislative construction of a statute is presumed correct).

***2** It is an elementary rule of statutory construction that statutes relating to the same subject should be harmonized if reasonably possible. 2A Sands, Sutherland's Statutes and Statutory Construction, § 51.02 (4th Ed. 1973). The logic of this rule applies with equal force to a statute and a regulation relating to the same subject especially where, as here, the regulation has been scrutinized and tacitly endorsed by the General Assembly. See generally 73 C.J.S. Public Administrative Law and Procedure § 94 (1983). No reason appears why § 8-5-10 and that portion of Regulation 19-707.02J mandating the adoption of anti-nepotism policies cannot coexist. As noted earlier, § 8-5-10 applies only to the chief executive officers of the various state agencies. Under Regulation 19-707.02J, agencies may not authorize that which § 8-5-10 forbids; however, state agencies are authorized to adopt anti-nepotism policies more restrictive than § 8-5-10 if they choose. See Unpub. Op. Atty. Gen. of July 31, 1980 (copy attached). See also Unpub. Op. Atty. Gen. of June 23, 1981 (copy attached). Cf. 6 McQuillin, Municipal Corporations § 23.07 at 391 (3d ed. 1980) (municipal ordinance relating to offenses not necessarily inconsistent with state statute on same subject because it prescribes higher standards than statute).

Accordingly, it is our opinion that as a matter of state law, state agencies subject to the State Personnel Act may lawfully adopt anti-nepotism policies that are more restrictive than § 8-5-10 of the Code. That brings us to the question of whether the particular proposal posited by you on its face violates may right guaranteed by the United States Constitution. We perceive no such facial conflict.

The federal constitutional rights that are implicated by the policy you propose are the right to marry and the right to the equal protection of the laws. To date, challenges to anti-nepotism policies, regulations, and statutes on these two grounds have been rejected.

In Keckeisen v. Independent School District 612, 509 F.2d 1062 (8th Cir. 1975), cert den. 423 U.S. 833, 96 S.Ct. 57, 46 L.Ed.2d 51, the Court of Appeals for the Eighth Circuit upheld a school district's policy prohibiting the employment of both husband and wife in the schools within the district where a conflict of interest could arise. The policy specifically prohibited the employment of husband and wife where the professional relationship between the spouses was administrator-teacher. The policy provided that where the employment of husband and wife created a conflict of interest or where husband and wife were employed within the same building or in an administrator-teacher relationship, one of the parties to the marriage had to resign; if neither resigned, the school board determined which employee would be terminated. A former principal of one of the schools within the district who was terminated pursuant to this policy upon his marriage to a teacher at his school challenged the constitutionality of the policy. He claimed that the policy infringed his constitutional right to marry. The Eighth Circuit, though recognizing that the right to marry is a fundamental constitutional right, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), nevertheless rejected the former principal's argument saying:

***3** The policy, in question does not deny to people the right to marry; it only prohibits the employment of married couples in administrator-teacher situations.

Keckeisen, 509 F.2d at 1065. That court also disagreed with the former principal's contention that, since the right to marry was implicated by the policy, the school board should be permitted to terminate one of the parties to the marriage only after an actual conflict of interest arose. After recounting numerous areas in which conflicts of interest might arise as a result of one teacher's being married to the principal of the school at which she is employed, the court said:

The court does not feel that where such definite possibilities of conflict exist, the Board should be placed under a constitutional burden of having to wait until a conflict of interest becomes a problem situation before it can take any action. The law should not block legitimate measures taken to anticipate problems and avert them.

Id., at 1066.

In Cutts v. Fowler, 692 F.2d 138 (D.D.C. 1983), the U.S. Court of Appeals for the District of Columbia sustained the constitutionality of the anti-nepotism provision of the Civil Service Reform Act, 5 U.S.C. § 2302(b)(7) which provides:
(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

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(7) appoint, employ, promote, advance, or advocate for appointment, employment promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official[.]

The plaintiff in Cutts was an employee of the Federal Communications Commission who, pursuant to the above provisions of law, was transferred to a different office with different responsibilities but at the same rate of pay when her husband was named as the head of her former office. She asserted that her transfer pursuant to this statute was unconstitutional because the transfer burdened her constitutional right to marry. Judge Bazelon, for a unanimous panel, disagreed. Like the Eighth Circuit in Keckeisen, the D.C. Circuit acknowledged that the right to marry is a fundamental constitutional right; however, the D.C. court added, the Supreme Court itself has also stressed that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." Cutts v. Fowler, supra, 692 F.2d at 141, quoting Zablocki v. Redhail, 434 U.S. 374, 386, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Anti-nepotism regulations, the Cutts court held, fall within the category of regulations recognized as constitutionally permissible in Zablocki. Judge Bazelon explained:
***4** Anti-nepotism rules play a legitimate and laudatory role in preventing conflicts of interest and favoritism in the working environment. At the same time, the burden on the 'right to marry' is attenuated and indirect. The anti-nepotism policy of the FCC did not prohibit the Cutts's marriage; it only prevented the employment of Mrs. Cutts in a situation in which she would necessarily have been subject to the supervision of her husband. That aspect of this case distinquishes it from cases in which direct burdens on the right to marry have been struck down as unconstitutional.

Id., 692 F.2d at 141.

Additionally, the Cutts court rejected the plaintiff's argument that the statute could be read as constitutional only if it were interpreted to prohibit actual nepotistic acts. Agreeing with the Eighth Circuit in Keckeisen, the D.C. Circuit held that, given the definite potential for conflicts of interest where one spouse supervises the other, the public employer should not have the burden of waiting until an actual conflict arises before it can take action. Moreover, the court noted, 'anti-nepotism policies not only address the problem of actual favoritism, they also alleviate the deleterious effect on morale that an apparently prejudiced arrangement can have on other employees.' Id.

Thus, the case law in this area appears clear: As long as an anti-nepotism policy does not purport to deny employees the right to marry one another, it will not be deemed to unconstitutionally infringe the right to marry. Accord, Southwestern Community v. Community Services, Etc., 462 F.Supp. 289 (N.D.W.Va. 1979). Your proposed policy does not purport to deny employees the right to marry; rather, it only prohibits the simultaneous employment of husband and wife where one would be subject to the supervision of the other and would be in a position to influence personnel decisions affecting his or her spouse. Therefore, your proposed policy would not, in our opinion, unconstitutionally infringe an employee's right to marry.

Anti-nepotism rules proscribing the simultaneous employment of both husband and wife have also been sustained when challenged under the Equal Protection Clause of the Fourteenth Amendment. See Espinoza v. Thomas, 580 F.2d 346 (8th Cir. 1978). In Espinoza, the plaintiff was denied employment by a municipal transit authority solely because her spouse was already employed by the transit authority and the transit authority had a 'no-spouse' rule absolutely prohibiting the employment of spouses of current employees. The plaintiff challenged this rule claiming that the employer's differential treatment of spouses of employees, as opposed to all other candidates for employment, violated the Equal Protection Clause of the Fourteenth Amendment. In addressing this claim the Espinoza court noted that 'no-spouse' rules are predicated on the assumption that it is imprudent to have both partners to a marriage working together. Id., 580 F.2d at 348. Such an assumption is plausible, the court noted, for a number of reasons:

***5** 'First, the marital relationship often generates intense emotions which would interfere with a worker's job performance. The typical employee is often able to temporarily put aside these emotional feelings when he or she goes to work because the work environment is sharply differentiated from the home environment. This distinction becomes impossible if the employee's spouse is also his or her coworker.

'Second, if an employee who works with his or her spouse became involved in a grievance with the employer or another worker, the two spouses might be expected to take the same side in the dispute. This factor could hamper the expeditious resolution of grievances.

'Third, if both partners in a marriage were employed together, and one spouse was promoted to a supervisory position, numerous problems could arise. One spouse might resent the other's promotion, preventing the promoted worker from efficiently performing his or her new job. The person in the supervisory position might have a great deal of difficulty in imposing discipline on or otherwise exercising authority over his or her spouse. Moreover, the other workers who were placed under the authority of the higher-ranking partner might resent the 'advantage,' which his or her spouse received, whether or not the supervisor in fact favored his or her spouse.

'Finally, a no-spouse rule eliminates the possibility of the already-employed marriage partner intervening in the hiring process on behalf of his or her spouse, to the detriment of the employer and any more qualified persons who did not obtain the job because of this intervention.'

Id., quoting Yuhas v. Libby-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977).

The Court of Appeals concluded that these reasons were sufficiently substantial to demonstrate the reasonableness of a public employer's treating spouses of employees differently—by absolutely barring their employment—from all other candidates for employment. Id., 580 F.2d at 349. These same considerations likewise are sufficient to support the reasonableness of treating employees who marry one another differently from other employees after their marriage, as your proposed policy would do. Therefore, it is our opinion that this policy, on its face, is not contrary to the Fourteenth Amendment's guarantee to all persons of the right to the equal protection of the laws. [1]

Finally, we do not believe that your policy on its face offends Title VII of the Civil Rights Act of 1964, as amended, insofar as that Act prohibits discrimination on the basis of sex by a state employer. As long as the employer does not single out one partner to a marriage between previously unrelated employees for transfer, demotion, or dismissal because of that partner's sex or because of sexually stereotyped assumptions (e.g., the male is the provider for the family, therefore he should keep his job [2]), a valid claim of sex discrimination will not lie as a result of the transfer, demotion, or dismissal of one of the marital partners. See Southwestern Community v. Community Services, Etc., supra, 462 F. Supp. at 292. The employer, of course, may allow the married employees to decide among themselves which of them will be transferred, demoted, or dismissed if such resolution is practical, subject, of course, to the right of the employer to make the decision for the employees if they refuse to do so. Alternatively, the employer may reserve unto himself the right to decide this matter based on circumstances

prevailing at the time that such a decision becomes necessary. Unless both employees are equally qualified for a demotion or transfer, the employer would probably want to reserve to himself the decision as to which of the partners to the marriage will be transferred or demoted. In any event, as long as the criteria for transfer, demotion, or dismissal are sex-neutral, the employer will not be susceptible to a charge of sex discrimination as a result of the enforcement of a provision mandating the transfer, demotion, or dismissal of one partner to a marriage between previously unrelated employees to break a supervisory link between the employees.

***6** In conclusion, it is the opinion of this Office that state law permits state agencies to adopt anti-nepotism policies more restrictive than that embodied in § 8-5-10. Further, it is our opinion that a policy like that described by you in your letter requesting this opinion would not on its face violate any right guaranteed by the United States Constitution.

Sincerely,

Vance J. Bettis
Assistant Attorney General

Footnotes

1 This is not to say that the policy might not be applied in such a manner as to violate the Equal Protection Clause. For instance, an employer could not, consistent with the guarantee of equal protection, apply the proposed policy in a sexually discriminatory manner. That is, the employer could not constitutionally adopt a practice of always transferring, demoting, or firing the female partner to a marriage consummated after both partners were employed by the public employer. Not only would such a practice violate the Equal Protection Clause, it would likewise violate Title VII's prohibition of sex discrimination in employment.

2 See George v. Farmers Electric Cooperative, Inc., 715 F.2d 175 (5th Cir. 1983), where because the employer did base his decision to terminate the female partner to a marriage between employees on the sexually stereotyped assumption that the man was the head of the household, the employer was found to have violated Title VII.

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