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Spouses Need Not Apply: The Legality of Antinepotism and No-Spouse Rules

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I. INTRODUCTION

Over the last three decades, there have been significant increases in labor force participation by women.[1] Initially, this increase was fueled by the entry of single, childless women into the labor market.[2] Married women primarily dedicated their efforts to home care concerns. However, in recent years, a new trend has emerged as "the levels of market work undertaken by married women have increased relative to those of unmarried women."[3]

Explanations for the increase in labor force participation of married women are many and varied. Economic explanations often focus on

1. *See generally* Francine D. Blau & Marianne A. Ferber, *Occupations and Earnings of Women Workers, in* WORKING WOMEN: PAST, PRESENT AND FUTURE 37, 37–41 (Karen Shallcross Koziara et al. eds., 1987) (describing changes in the sex composition of professions in the 1970s).

2. *See* Ray Marshall & Beth Paulin, *Employment and Earnings of Women: Historical Perspective, in* WORKING WOMEN: PAST, PRESENT AND FUTURE 15 tbl.4 (Karen Shallcross Koziara et al. eds., 1987) (describing the marital status of women workers before, during, and after World War II).

3. John H. Pencavel, *The Market Work Behavior and Wages of Women: 1975–1994*, 33 J. HUM. RESOURCES 771, 792 (1998) (describing the demographic changes that have occurred in the composition of the U.S. labor force during the last several decades).

trends in men and women's real earnings. During the 1970s and 1980s there was a decline in men's real earnings.[4] At the same time, women's real earnings increased due to both larger amounts of and higher returns on their investments in human capital.[5] Increased proportions of women have attended and completed college and, upon graduation, have pursued careers in traditionally male-dominated markets.[6]

The combination of the countervailing trends in men's and women's earnings, along with increases in the cost of living, have led to greater dependence on women working in modern families, and thus have increased the percentage of dual-earner families in the United States.[7] Not surprisingly, these trends have been accompanied by an increase in the "number of paired employees, defined as a husband and wife who work for the same organization."[8] As noted elsewhere, the incidence of romantic relationships at work, some of which may lead to marriage, will likely increase as more women enter fields dominated by men.[9]

The increase in married women's labor force participation and the resulting increase in dual-earner families have had major public policy implications. Employers have been required to establish new policies regarding the employability of married and related individuals. Legislatures have been asked to consider a whole new set of policies intended to allow employees to respond to family responsibilities without fear of losing their jobs.

While considerable attention has focused on family-friendly practices

4. *See generally* Annette Bernhardt et al., *Women's Gains or Men's Losses? A Closer Look at the Shrinking Gender Gap in Earnings*, 101 AM. J. SOC. 302 (1995); June O'Neill & Solomon Polachek, *Why the Gender Gap in Wages Narrowed in the 1980s*, 11 J. LAB. ECON. 205 (1993).

5. O'Neill & Polachek, *supra* note 4, at 225.

6. *See* Sharon K. Houseknecht & Graham B. Spanier, *Marital Disruption and Higher Education Among Women in the United States*, 21 SOC. Q. 375, 375 (1980).

7. *See* Dian L. Seyler et al., *Balancing Work and Family: The Role of Employer-Supported Child Care Benefits*, 16 J. FAM. ISSUES 170 (1995). In 1980, there were approximately twenty-two million dual-earner households comprising 46.4% of total married households. U.S. Dep't of Commerce, Bureau of the Census, *Household and Family Characteristics: March 1980*, CURRENT POPULATION REP., Ser. P-20, No. 366 (Sept. 1981), *available at* http://www.census.gov/prod/3/98pubs/p20-515u.pdf. By 1998, the number of dual-earner households had increased to approximately twenty-nine million (53% of total married couple households). U.S. Dep't of Commerce, *supra*, at 133.

8. James D. Werbel & David S. Hames, *Are Two Birds in Hand Worth More than One in the Bush: The Case of Paired Employees*, 2 HUM. RESOURCE MGMT. REV. 318 (1992).

9. *See* Gary N. Powell & Sharon Foley, *Something to Talk About: Romantic Relationships in Organizational Settings*, 24 J. MGMT. 421, 424 (1998).

like family leave, little attention has been paid to other family-unfriendly employment practices, such as the use of "antinepotism" or "no-spouse" rules.[10] These rules, under which restrictions are placed on the ability of spouses or other family members to work together, either in the same department or company, have long been common in the U.S. workplace, and are notable because they run contrary to the current emphasis on accommodating working families.[11]

Legal challenges to no-spouse rules began to surface at a time when women were first moving into what was primarily a male-dominated workplace. Employees (both men and women) who had been affected by the implementation of these rules sought relief in state and federal courts, arguing that they had been discriminated against based on marital status ("Marital Status Discrimination" or "MSD"). Challenges to antinepotism and no-spouse rules occurred under Title VII of the Civil Rights Act[12] or as constitutional challenges under the Due Process Clause[13] and the Equal Protection Clause of the Fourteenth Amendment.[14] These claimants confronted several obstacles. First, while federal antidiscrimination law protected individuals against discriminatory practices based on sex,[15] "marital status" is not a

10. *See* Julius M. Steiner & Steven P. Steinberg, *Caught Between Scylla and Charybdis: Are Antinepotism Policies Benign Paternalism or Covert Discrimination?*, 20 EMPLOYEE REL. L.J. 253, 254–56 (1994) (describing antinepotism rules). See definitions of antinepotism and no-spouse rules discussed *infra* Part II.B.

11. *See* Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 56–63 (1997) (describing the various state's statutes protecting marital status); H. Elizabeth Peters, *The Role of Child Care and Parental Leave Policies in Supporting Family and Work Activities*, *in* GENDER AND FAMILY ISSUES IN THE WORKPLACE 280 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997) (describing the various policies adopted in the 1980s and 1990s to facilitate women's participation in both work and family activities).

12. *See, e.g.*, Equal Employment Opportunity Comm'n v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986) (holding that employer's no-spouse rule had a disparate impact upon women and was not justified by business necessity); *cf.* Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977) (holding that employer's no-spouse rule had a disparate impact on women, but finding that employer's policy was job related and thus not a violation of Title VII).

13. *See, e.g.*, Wright v. Metrohealth Med. Ctr., 58 F.3d 1130 (6th Cir. 1995) (holding that a public hospital's nepotism policy, which required transfer of one spouse to a different unit upon marriage of co-workers, did not directly and substantially interfere with fundamental right to marry and, thus, was subject only to rational basis scrutiny).

14. *See, e.g.*, Parsons v. County of Del Norte, 728 F.2d 1234 (9th Cir. 1984) (holding that county's no-nepotism rule, prohibiting spouses from working as permanent employees in the same department, did not violate Equal Protection or Due Process Clauses since it bore a rational relationship to county's interest in avoiding conflicts of interest, favoritism in employee hiring, supervision, and allocation of duties).

15. Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (1994).

protected category. Second, in general, courts have been reluctant to extend protection against sex discrimination to include discrimination on the basis of the plaintiff's marital status. Third, even in jurisdictions where marital status was a protected category, as occurs in many states, courts adopted a narrow definition of the term, substantially limiting the protection afforded to spouses.

As it became apparent that many employers were confronting problems associated with the increased number of dual earning families, judges and commentators recognized the need for guidance on this issue. For example, judges confronting some of the first challenges to no-spouse rules noted that the actual effects of no-spouse rules were unclear.[16] Several commentators pointed to the fact that no-spouse rules, while couched in sex-neutral terms, were likely to affect women more than men.[17] Unexplained, however, was why such rules were expected to have a disparate impact on women and the actual dimensions of such a negative impact.

Also, little was known about the nature and impact of state marital status discrimination legislation. A review of state laws revealed sharp differences in terms of the scope of protection afforded under such laws. Some states adopted a "narrow" definition of marital status (referring only to the condition of being married or not), while other states adopted a "broad" definition (including not only the condition of being married, but also the identity of the employee's spouse).

It has been over thirty years since the first MSD cases appeared on the judicial landscape and close to twenty years since some of the major legal scholarship in this area was produced. During that time, our understanding of the implications of the demographic changes that began in the late 1960s and early 1970s has improved due to new research on the economics of family decisions regarding work, and more experience has been gained regarding the application of existing legislation to MSD claims. A reevaluation of the evidence and experiences during the last thirty years could help provide a more

16. *See, e.g.*, Thomas v. Metroflight, Inc., 814 F.2d 1506, 1510–11 (10th Cir. 1987) (finding against the plaintiff, but noting the lack of clear understanding on the factors affecting employment decisions by married employees).

17. *See* Leonard Bierman & Cynthia D. Fisher, *Antinepotism Rules Applied to Spouses: Business and Legal Viewpoints*, 35 LAB. L.J. 634, 637 (1984); Joan G. Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 B.U. L. REV. 75, 79, 92 (1982); Comment, *(Mrs.) Alice Doesn't Work Here Anymore: No-Spouse Rules and the American Working Woman*, 29 UCLA L. REV. 199, 201–02 (1981).

informed understanding of the impact of antinepotism and no-spouse rules on employment outcomes and of how the courts have dealt with employee challenges to such employment practices.

We begin this analysis in Part II with a brief discussion of employment policies that have been adopted to meet the unique needs of working families. Interestingly, these practices often exist contemporaneously with policies that restrict employment opportunities for dual-earner couples, namely antinepotism and no-spouse rules.[18] In Part III, we present the results of our comprehensive analysis of case law in this area to show the nature of legal challenges to antinepotism and no-spouse rules and how they have been decided by the courts. In Part IV, we describe the legislative framework under which MSD claims have been raised and identify the various issues considered by courts in addressing these complaints. In Part V, we identify and critique (1) the tendency of courts to view antinepotism and no-spouse rules as sex neutral, and (2) the concern that a liberal interpretation of MSD could interfere with the ability of employers to effectively manage the workplace. Part VI concludes the Article.

II. EMPLOYERS' RESPONSES TO WORK AND FAMILY DEMANDS IN THE WORKPLACE

As often occurs in conjunction with demographic changes in the labor force, the increase in dual-earner families affected the employment practices of U.S. firms. In order to attract, motivate, and retain quality employees, many employers adopted what might be termed family-friendly policies. Nonetheless, the response of the business community to dual-earner families has been varied, as other employers have either failed to accommodate dual-earner families or have adopted policies that actually harm them. In the following Sections we briefly review both sets of policies.

A. Family-Friendly Employment Practices

A significant number of employers have adopted family-friendly employment policies. Most popular in this group are policies that allow employees to attend to the needs of family members in addition to their own personal needs.[19] Child-care benefits are probably the most common.[20] For example, in addition to basic forms of sick leave

18. *See infra* Part II.

19. *See* BURTON T. BEAM, JR. & JOHN J. MCFADDEN, EMPLOYEE BENEFITS 402 (5th ed. 1998).

20. *See* Peters, *supra* note 11, at 280–81 (describing the various policies directed

associated with the Family and Medical Leave Act,[21] some organizations offer family-oriented leave benefits to care for ill children both at home and in the hospital.[22] Organizations might also provide day care centers, financial aid for outside child-care services, referral services for child-care facilities, on-site education for children, educational assistance for children, and help with child adoptions.[23] In addition to policies designed specifically for working parents, many firms provide dependent care assistance plans, eldercare programs, spousal transfer support, employee assistance plans, and wellness programs to all members of an employee's family.[24]

Similarly, many organizations offer a variety of alternative work arrangements that enable employees to attend to family and personal needs, including flextime,[25] telecommuting,[26] permanent work-from-home arrangements,[27] a compressed workweek, job sharing, and permanent part-time work.[28] These programs represent a shift from longer work hours to more productive work hours and recognition by employers that various flextime options may help balance work and family conflicts.

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towards providing or subsidizing the cost of child care).

21. 29 U.S.C. §§ 2601–2654 (1994 & Supp. V 1999).

22. *See* David E. Gundersen et al., *Family Supportive Organizational Benefits as Influences on Entry Level Job Preferences: An Empirical Analysis Using a Policy Capturing Methodology*, BENEFITS Q., First Quarter 1995, at 58, 60; Jennifer J. Laabs, *Schools at Work*, PERSONNEL J., Nov. 1991, at 72, 76.

23. *See* Ellen Galinsky & Peter J. Stein, *The Impact of Human Resource Policies on Employees: Balancing Work/Family Life*, 11 J. FAM. ISSUES 368, 372–77 (1990); Gundersen et al., *supra* note 22, at 59; Laabs, *supra* note 22, at 72; Miriam B. Scott, *Work/Life Programs Promote Productivity*, EMPLOYEE BENEFIT PLAN REV., Sept. 1997, at 22, *available at* http://www.dbs.cdlib.org/mw/mwcgi.mb; *Employer's Family Benefits Attract Workers*, EMPLOYEE BENEFIT PLAN REV., Mar. 1992, at 20, *available at* http://www.dbs.cdlib.org/mw/mwcgi.mb. Interestingly, despite their increased popularity, recent literature has emphasized a "backlash" against family-friendly policies related to child care. *See* Lisa Jenner, *Family-Friendly Backlash*, MGMT. REV., May 1994, at 7, *available at* http://www.dbs.cdlib.org/mw/mwcgi.mb. Others "suggest that family-friendly backlash may be more a media-sensationalized issue than a real one." Teresa J. Rothausen et al., *Family-Friendly Backlash—Fact or Fiction? The Case of Organizations' On-Site Child Care Centers*, 51 PERSONNEL PSYCHOL. 685, 701 (1998).

24. *See* BEAM & MCFADDEN, *supra* note 19, at 418–22; Scott, *supra* note 23, at 22–23.

25. *See* Gundersen et al., *supra* note 22, at 59; Kim L. Sommer & Deborah Y. Malins, *Flexible Work Solutions*, SMALL BUS. REP., Aug. 1991, at 29.

26. *See* Alan R. Earls, *True Friends of the Family*, COMPUTERWORLD , Feb. 17, 1997, at 83, 83–84.

27. *Id.*

28. *See* Scott, *supra* note 23, at 23.

In total, these policies illustrate that the separation between family and work, which was an essential component of the traditional workplace of the first half of the last century, need no longer occur. Both employers and employees recognize possible benefits associated with developing a family-friendly atmosphere at work.[29] Employers have found family-friendly benefits to improve employee recruitment, retention, job satisfaction, productivity, and absenteeism rates.[30] Moreover, such policies increase morale, reduce stress, and lead to greater organizational commitment among employees and a competitive advantage within their industry.[31]

B. Family-Unfriendly Employment Practices

Despite the increase in adoption of policies and benefits that are family friendly and clearly meet the unique needs of dual-earner households, many companies remain much less open to having both members of a dual-earner family working at their organization. This is clearly reflected in the continued popularity of antinepotism policies and no-spouse rules, which prior research found present in over forty percent of business organizations.[32]

Antinepotism policies limit the number of family members working for an employer or the capacity in which family members work for an employer. No-spouse rules, on the other hand, prohibit only spouses from working for the same employer. Consider the following three examples:

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29. For example, a recent survey finds that 85% of men and women in dual career households want flexible hours, 74% want family leave, 63% want a formal flexible work program and 53% want company-supported child care, among others. *See* Robert Bellinger, *Dual-Career Couples Crave Flexible Hours and Jobs*, ELECTRONIC ENGINEERING TIMES, Oct. 5, 1998, at 121, 121. *See generally* Galinsky & Stein, *supra* note 23, at 377–78.

30. *See* Tracey L. Honeycutt & Benson Rosen, *Family Friendly Human Resource Policies, Salary Levels, and Salient Identity as Predictors of Organizational Attraction*, 50 J. VOCATIONAL BEHAV. 271, 274 (1997); V. K. Narayanan & Raghu Nath, *A Field Test of Some Attitudinal and Behavioral Consequences of Flexitime*, 67 J. APPLIED PSYCH. 214, 214 (1982); J.L. Pierce & J.W. Newstrom, *The Design of Flexible Work Schedules and Employee Responses: Relationships and Process*, 4 J. OCCUPATIONAL BEHAV. 247 (1983); Karol L. Rose, *The Business Case for FLEX*, HRFOCUS, Aug. 1998, at S1–S2.

31. *See* Steven L. Grover & Karen J. Crooker, *Who Appreciates Family-Responsive Human Resource Policies: The Impact of Family-Friendly Policies on the Organizational Attachment of Parents and Non-Parents*, 48 PERSONNEL PSYCHOL. 271, 271–72 (1995).

32. *See* Robert Ford & Frank McLaughlin, *Nepotism: Boon or Bane*, PERSONNEL ADMIN., Nov. 1986, at 78, 80–81; James D. Werbel & David S. Hames, *Antinepotism Reconsidered: The Case of Husband and Wife Employment*, 21 GROUP & ORG. MGMT. 365, 365–66 (1996).

> [1] Members of the immediate family, spouse, parent, child, of a present employee are not to be considered for employment by [the employer].[33]
>
> [2] EMPLOYMENT OF RELATIVES—No husband and wife nor any relatives (natural or through marriage) may work in the same restaurant. As past experience has proven, this causes undue strain on all parties concerned.[34]
>
> [3] It shall be the policy of the [employer] not to employ the combination of husband and wife . . . where a conflict of interest could arise; said policy is to apply to the following:
>
> 1. Administrator–Teacher relationship
> 2. Husband and Wife combination in the same building
> 3. All other situations where a conflict of interest occurs.[35]

As illustrated by these examples, some antinepotism and no-spouse policies are broadly worded, as they apply to all relatives of the employee and prohibit the employment of relatives anywhere in the organization. Other policies are more narrowly worded, applying only to spouses, or restricting the employment of spouses or relatives only in cases where they will be in supervisor-subordinate roles.

Antinepotism and no-spouse rules are often justified on the grounds that they address a number of problems associated with the presence of paired employees. For example, it has been argued that antinepotism and no-spouse rules reduce conflicts of interests that might result from having married employees supervising each other's work. Moreover, these policies are believed to reduce the likelihood that employees receive favorable treatment based on familial relationships with other members of the organization, thus ensuring fairer treatment among all employees when making employment decisions. Antinepotism and no-spouse rules also prevent employees from bringing domestic problems into the workplace. At a more practical level, employers have argued that such rules facilitate the administration of work and vacations scheduling.[36]

Less recognized, however, are the costs that these rules impose on employers, employees, and society at large. For example, antinepotism and no-spouse policies may significantly limit the applicant pool in smaller communities where only one or two major employers are

33. Espinoza v. Thoma, 580 F.2d 346, 347 (8th Cir. 1978).
34. Miller v. C.A. Muer Corp., 362 N.W.2d 650, 651 (Mich. 1984).
35. Keckeisen v. Indep. Sch. Dist. 612, 509 F.2d 1062, 1063 (8th Cir. 1975).
36. *See* ALFRED G. FELIU, PRIMER ON INDIVIDUAL EMPLOYEE RIGHTS 249–51 (2d ed. 1996); Wexler, *supra* note 17, at 134–39.

present.[37] Additionally, they fail to capitalize on retention benefits associated with hiring paired employees, they result in lost investments in human capital if employees choose to marry (and one is forced to resign his or her position), and they fail to take advantage of reductions in inter-role conflicts[38] that may occur when employees work in the same organization.[39]

From the perspective of individual employees, no-spouse and antinepotism policies have several effects. These policies often limit employment opportunities for dual-earner couples.[40] This is especially true for individuals who possess very specific skills and abilities, for which there might be limited employment opportunities, or for individuals in rural areas, where employment opportunities are generally limited.[41] Even where employment opportunities are plentiful, such policies could prevent a person from being employed to his or her full capacity. Employees not satisfied with the limited options caused by antinepotism policies and no-spouse rules might choose to make longer commutes or to live apart from one another in order to pursue their chosen occupations. In extreme cases, employees might choose to terminate their employment and take a job elsewhere to enhance the opportunities of family members, representing a cost to both the employer and the employee.

What makes these policies interesting from a legal perspective is that their effects are unlikely to be felt equally by all employees. Two significant differences are especially relevant when reviewing the legal treatment of these policies. First, the intent of these policies is to avoid the employment of married employees, specifically dual-earner couples. Accordingly, they are not implemented to exclude those employees that are not married, nor targeted at employees that might be in a romantic relationship but are not married. Indeed, it is instructive to note that antinepotism and no-spouse rules are rarely linked with strict policies against workplace romance, which themselves are fairly rare.[42] Yet

37. Dennis Alerding, Note, *The Family that Works Together . . . Can't: No-Spouse Rules As Marital Status Discrimination Under State and Federal Law*, 32 J. FAM. L. 867, 869 (1993–94).

38. "Inter-role conflicts" refers to conflicts between roles as a wife or mother and an employee or as a husband or father and an employee. *See* Werbel & Hames, *supra* note 8, at 320.

39. *See* Werbel & Hames, *supra* note 8, at 319–20.

40. *See* Christine M. Reed, *Antinepotism Rules and Dual Career Couples: Policy Questions for Public Personnel Administrators,* 17 PUB. PERSONNEL MGMT. 223, 223–28 (1988).

41. Alerding, *supra* note 37, at 867, 869–70.

42. *See* Andrea Warfield, *Co-Worker Romances: Impact on the Work Group and on Career-Oriented Women*, PERSONNEL, May 1987, at 22, 26. A 1985 survey of Fortune 500 companies revealed that only 6% of the responding companies had formal

romantic relationships that occur outside of marriage are just as likely to cause work-related problems as those involving married employees, creating a double standard in the workplace that unfairly singles out married employees.[43] Second, to the extent that paired employment lessens work and family conflicts, it should be of greater value to women who, prior research suggests, may be more prone to experience work and family conflicts than men.[44] Therefore, antinepotism and no-spouse rules should create more significant obstacles to employment opportunities for married women than married men.

III. A SURVEY OF CASE LAW

Prior legal research examining marital status discrimination typically considered a few representative cases of the broader body of judicial decisions, focusing on the logic and consistency of court opinions interpreting various discrimination statutes.[45] While this approach is helpful, and indeed we adopt such an approach in the following section, at times this approach limits our ability to identify important patterns in the development of case law. Therefore, rather than simply study several marital status discrimination cases, we also conducted a content analysis of litigation alleging marital status discrimination resulting from antinepotism and no-spouse rules. Doing so enabled us to more fully exploit information provided in court decisions and thus provides a more comprehensive assessment of marital status discrimination litigation as applied to antinepotism and no-spouse rules. Before presenting these results, we first briefly describe our methodology in collecting and analyzing the cases.

A. Overview and Methods

We used the WESTLAW computerized legal reporting service to locate as many published federal and state court decisions as possible that involved claims of marital status discrimination. Our research produced thirty-four federal cases and thirty-five state cases related to

policies prohibiting workplace romance. *Id.*

43. *See* Wexler, *supra* note 17, at 138–39.

44. *See* Jeffrey H. Greenhaus & Nicholas J. Beutell, *Sources of Conflict Between Work and Family Roles*, 10 ACAD. MGMT. REV. 76, 83–84 (1985).

45. *See, e.g.*, Steiner & Steinberg, *supra* note 10, at 256. Wexler, *supra* note 17, at 79–80.

no-spouse and antinepotism rules, spanning the years 1975 to 1998.[46]

After the relevant court decisions were identified, each was analyzed using a survey form prepared by the authors based on their review of prior legal studies of marital status discrimination. The form, which was used to extract standardized information about the substance and disposition of each case, focused on four key sets of variables: characteristics of the complainant, characteristics of the employer, important aspects of the marital status discrimination claim, and the case determination.

Five characteristics of the complainant and employee were coded: sex, marital status, race, occupation, and union membership. Organizational characteristics of the employer comprised two categories: public versus private sector employer, and manufacturing versus service employer. The readers' ability to code each variable depended on the level of detail provided in the court opinion. In some instances, information not directly provided in the opinion could be inferred. However, when there was doubt, the variable was coded as "unknown."

Three aspects of the marital status discrimination claim were examined. These included the employment action being challenged (for example, discipline, discharge, or hiring), the alleged basis for the employment action (marriage to another employee or dating another employee for example) and the specific employment policy being challenged. The case determination section of the form examines four variables: the basis for the marital status discrimination legal challenge, the defense offered by the employer for the employment action that was taken, who won the case, and the basis for the court's decision. With regard to the latter, we attempted to determine whether the court applied a broad interpretation of marital status discrimination by considering the identity and occupation of the employee's significant other, or used a narrow interpretation of marital status discrimination, by examining only whether the action was taken because of the employee's marital status.[47]

By reviewing the complete population of MSD cases, we are able to describe the experiences of claimants who have alleged MSD under antinepotism or no-spouse rules at different levels of the judiciary (state and federal), as well as the degree of success of claimants under different regimes.

B. Results

Our search identified sixty-nine cases challenging antinepotism and

46. *See infra* app. tbl.4.
47. *See infra* Part IV.C.4.

no-spouse rules, of which thirty-five were decided in federal courts and thirty-four in state courts. As shown in Table 1,[48] the vast majority of the seventy-nine alleged victims were married employees (84%), most often women (71%).[49] Our results also indicate that a majority of cases originated in the service sector (88%) and were slightly more likely to involve public sector (53%) as opposed to private sector (47%) employers. These findings are consistent with recently published commentary on the negative effects of marriage on women's employment outcomes, particularly the tendency of them to suffer most when career conflicts occur within the family and the relatively high concentration of women in service sector jobs.[50]

As summarized in Table 2,[51] a review of published court decisions also revealed that most cases involved challenges to antinepotism rules, which generated more than twice the number of lawsuits as no-spouse rules. Although a wide range of employment actions were challenged by employees who alleged unfair treatment under various restrictive employment policies, the most common were cases involving hiring decisions (nineteen), followed by forced resignations (fifteen), employee discipline or discharge (fifteen), and forced transfers (fourteen). The common link shared by these cases is that they usually represent threats to a person's potential or continued employment rather than merely changes in one's employment conditions (for example, wages or insurance coverage).

Interestingly, these simple descriptive results mask important differences between women and men in terms of the types of employment actions challenged. Results indicate that women were most likely to claim victimization related to hiring decisions (29%), while for men it was forced transfers (35%). The second most commonly challenged employment action by women was forced resignation (23%) while for men it was disciplinary action (26%). In short, the loss of employment opportunities appears more likely for women than men under these employment policies.

Perhaps not surprising given the demographic characteristics of

48. *See infra* app. tbl.1.

49. Some cases allege victimization of multiple persons, thus causing the number of alleged victims to exceed the number of cases.

50. *See* Barbara R. Bergmann, *Work-Family Policies and Equality Between Women and Men*, *in* GENDER AND FAMILY ISSUES IN THE WORKPLACE 277, 278–79 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997).

51. *See infra* app.

plaintiffs and the nature of the policies being examined, these cases almost exclusively challenge employment actions that are taken due to the employee being married. Moreover, in sixty-one of the sixty-nine cases (88%), there was a direct working relationship between family members, often in the same department or division, that led to the employment action. However, only 19% of the cases actually involved a supervisor-subordinate relationship—the type of employment relationship involving the greatest opportunity for conflicts of interest.

As for the legal basis for challenging the employment action, results shown in Table 2 indicate that at the federal level constitutional challenges and suits based under Title VII of the Civil Rights Act were the most common causes of action (twenty-one and thirteen cases respectively). In contrast, twenty-four of the thirty-five actions brought to state courts were based on the state's civil rights or antidiscrimination law, owing to the more direct treatment of marital status discrimination under state law. Consistent with previously published commentary on antinepotism and no-spouse related lawsuits, employers typically defended their actions citing the presumed harm associated with having married employees working together; however, only a few provided actual evidence of business necessity.

Employees were generally unsuccessful when challenging antinepotism and no-spouse rules, winning only 29% of the time.[52] However, employees were more likely to succeed in state court (49%) than in federal court (9%), perhaps reflecting the existence of state legislation prohibiting marital status discrimination.

The three federal court cases won by employees involved challenges under Title VII.[53] Two of these cases involved a disparate treatment claim, wherein the employer had either applied a no-spouse rule only to female employees,[54] or made comments that the court found to be evidence of disparate treatment.[55] The remaining case, *Equal Employment Opportunity Commission v. Rath Packing Co.*,[56] involved a disparate impact claim. The *Rath Packing* case is notable because it is the only case in which a federal court of appeals ruled that a no-spouse rule amounted to disparate impact discrimination. Interestingly, employees never prevailed in federal court cases when the case involved a

52. *See infra* app. tbl.3.

53. *See* Equal Employment Opportunity Comm'n v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986); George v. Farmers Electric Coop., 715 F.2d 175 (5th Cir. 1983); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971).

54. *Sprogis*, 444 F.2d at 1196.

55. *George*, 715 F.2d at 177 (finding that a statement that wife was chosen for termination under antinepotism policy because husband was head of household could be interpreted as meaning that husband was retained because he was a man).

56. 787 F.2d 318 (8th Cir. 1986).

constitutional challenge.

With regard to the disposition of state court cases involving legal challenges to antinepotism and no-spouse rules, our review focused on the distinction between the courts' application of a narrow as opposed to a broad interpretation of marital status discrimination. Our findings, reported in Table 3, indicate that state courts were nearly evenly split in terms of their use of narrow and broad definitions of marital status. However, our results suggest that employees are more likely to prevail when marital status discrimination is broadly defined by the court (67% of the time), as opposed to narrowly defined (38% of the time).

C. Summary

Our analysis identifies several interesting trends. First, women are more likely than men to claim victimization based on MSD. Of the seventy-nine alleged victims of MSD, fifty-six (71%) were women. Moreover, the manner in which women and men are affected by antinepotism and no-spouse rules differs significantly. Compared to men, women are much more likely to experience loss of employment opportunities, making the impact of such policies more severe for women than men. Finally, we find that plaintiffs alleging MSD due to the application of antinepotism or no-spouse rules rarely prevail in court. The burden of proof difficulties inherent in these types of legal challenges are rooted in the legislative frameworks that guide judicial decision making in this area at the federal and state levels. A review of this legislation and a more in-depth analysis of judicial decisions better explain the difficulties confronting plaintiffs who challenge antinepotism or no-spouse rules.

IV. THE LEGISLATIVE SCHEME

A. Title VII

Under Title VII,[57] individuals challenging a no-spouse rule can base their claims on either disparate treatment or disparate impact theories. Disparate treatment cases in this area are rare because they require the plaintiff to establish that the employer's no-spouse policy is discriminatory on its face, as for example, a rule that requires spouses of one sex either

57. 42 U.S.C. § 2000e-2(a) (2000).

to quit, transfer, or be fired, without placing the same burden on the other sex spouse.[58] Plaintiffs are more likely to succeed if they can present evidence that the employer intended to discriminate on the basis of sex. In *George v. Farmers Electric Cooperative*,[59] the plaintiff was terminated on the grounds that her continuing employment violated an antinepotism policy adopted by her employer.[60] After both the plaintiff and her husband refused to voluntarily decide who was going to leave, the employer decided to terminate the plaintiff.[61] In explaining the termination decision, the plaintiff's supervisor noted that the decision was made because the "[the plaintiff's husband] was the head of the household."[62] The United States Court of Appeals for the Fifth Circuit upheld a lower court finding that the statement by the employer implied that the husband was retained because he was a man and the plaintiff was a woman.[63] Accordingly, the Fifth Circuit held that the lower court was correct in finding that the plaintiff's termination constituted impermissible discrimination under Title VII.[64]

Disparate impact cases, on the other hand, require the plaintiff to prove that a facially neutral policy has a disproportionate effect on the basis of race, color, religion, sex, or national origin.[65] The plaintiff must convincingly demonstrate that the specific employment practice caused the disparity[66] and that it has a significant disparate impact on employment opportunities.[67] If the plaintiff establishes a prima facie case of disparate impact, the burden shifts to the employer to justify the

58. *See, e.g.*, *Sprogis*, 444 F.2d at 1194 (holding that a no-marriage rule for flight attendants violated Title VII); *see also* Alerding, *supra* note 37, at 871 (noting that to establish a prima facie case of disparate impact discrimination, "the plaintiff must show that the facially neutral standard in question tends to disfavor a particular class").

59. 715 F.2d 175 (5th Cir. 1983).

60. *Id.* at 177. The policy provided: "[W]hen any two employees become 'close relatives' [as defined in II(c) to include spouses] by marriage or otherwise, one of them will be required to terminate his/her employment with the Cooperative. The determination as to which employee shall terminate will be made by the affected employees." *Id.* (alteration in original).

61. *Id.*

62. *Id.*

63. *Id.* at 177–78.

64. *Id.*

65. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

66. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 446 (1982); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986–87 (1988).

67. Fudge v. City of Providence Fire Dept., 766 F.2d 650, 658 (1st Cir. 1985). While the Supreme Court has not required the use of sophisticated statistical techniques to demonstrate the existence of disparate impact, lower courts have required plaintiffs to establish statistical significance in order to make out a prima facie case of disparate impact. "We think that in cases involving a narrow data base, the better approach is for the courts to require a showing that the disparity is statistically significant, or unlikely to have occurred by chance, applying basic statistical tests as the method of proof." *Id.*

employment practice. Under the "business necessity" defense, the employer needs to show that the challenged practice is job related for the position in question and that it is consistent with business necessity.[68] Finally, if the employer can establish a business necessity defense, the plaintiff may still prevail by showing that there existed an alternative employment practice that would meet the employer's interests with less discriminatory impact.[69]

While the U.S. Supreme Court has not decided any marital discrimination cases under Title VII, various courts of appeals have confronted the question. In *Yuhas v. Libbey-Owens-Ford Co.*, the Seventh Circuit ruled on a disparate impact challenge to a no-spouse policy.[70] *Yuhas* involved a challenge to an employer's rule prohibiting employment of spouses of currently employed hourly employees. In *Yuhas*, the plaintiff contended that the employer's rule had a discriminatory impact because application of the rule caused seventy-one women, compared to three men, to be denied employment because their spouses were already employed as hourly employees.[71]

The district court found that although the no-spouse rule was neutral on its face, it had "a greatly disparate impact,"[72] shifting then the burden of proof to the employer to establish that the rule served a legitimate, business related function. The employer attempted to meet its burden of proof by first arguing that hourly workers who were married to each other were absent from work or tardy more often than other workers.[73] Second, the employer posited that the employment of both marriage partners led to problems scheduling vacations and work assignments.[74] Finally, the employer argued that "the employment of both spouses undermined employee morale and efficiency because the relationship between the spouses interfered with ordinary relationships workers have with each other and with their supervisors."[75] The district court rejected

68. 42 U.S.C. § 2000e-2(k)(1)(A)(i).
69. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *see also* Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1112 (11th Cir. 1993) (describing an alternative employment practice as "alternative policies with lesser discriminatory effects that would be comparably as effective at serving the employer's identified business needs").
70. Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 497 (7th Cir. 1977).
71. *Id.*
72. *Id.*
73. *Id.*; *see also* Mahroom v. Alexander, 22 Empl. Prac. Dec. (CCH) ¶ 30,580 (N.D. Cal. 1979).
74. *Yuhas*, 562 F.2d at 497.
75. *Id.*

the employer's arguments, enjoining the defendant from continuing to maintain its no-spouse rule.[76]

While the court of appeals agreed with the district court's finding that the rule had a disparate impact, it rejected the court's finding that the employer had failed to advance a legitimate nondiscriminatory reason for the no-spouse rule.[77] Relying on the employer's argument regarding the morale and efficiency problems created by employing both partners in a marriage, the court of appeals provided a number of reasons why employers might assume that allowing married couples to work together is a "bad idea."[78] First, the court noted that the "marital relationship often generates intense emotions which [could] interfere with a worker's job performance," and which the typical employee might be unable to put aside at work.[79] Second, employing both spouses could have detrimental effects on hiring decisions (for example, where an already employed spouse intervenes on behalf of his or her spouse to the detriment of the employer or any more qualified persons who did not obtain the job because of this intervention), and could unnecessarily complicate the employment process (the perverse incentives that might be generated, for example, in resolving a work grievance when the two spouses are involved).[80] The court also noted problems related to effective supervision when an employee acquires a supervisory position over his or her spouse.[81]

In analyzing these reasons, the court recognized that there was no specific evidence to prove that the no-spouse rule had a positive effect on production, or as the court noted, "without the rule, production would fall."[82] On the other hand, the court noted that these reasons were "far from frivolous,"[83] and that the reasons supporting the no-spouse rule corresponded to reasons which had led a number of institutions in society to conclude that family members should not work in the same environment. Finding that the no-spouse rule plausibly improved the work environment and that the rule did not penalize women on the basis of their environmental or genetic background, the court concluded that the rule was job related and therefore in compliance with Title VII.[84]

The United States Court of Appeals for the Eighth Circuit also confronted a challenge to a no-spouse rule in *Equal Employment Opportunity*

76. *Id.*
77. *Id.* at 498–99.
78. *Id.* at 499.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 500.

Commission v. Rath Packing Co.[85] While the court's opinion is not explicit as to whether the no-spouse rule resulted in the denial of employment opportunities to women more often than men, the court found that the employer had by other means discriminated on the basis of sex in violation of Title VII.[86] Regarding the no-spouse rule, the question for the court of appeals was whether the employer had advanced a legitimate business reason in support of the rule.[87] In dealing with this issue, the district court applied the *Yuhas* standard.[88] According to the district court, while Rath had been "unable to statistically corroborate its contention that production was adversely affected" by permitting the hiring of spouses, it had demonstrated "an acceptable business-related basis for the rule," and established that the "anti-spousal policy was enacted to achieve the interrelated business objectives of optimum production and employee performance."[89]

The Eighth Circuit, however, rejected the *Yuhas* standard and held that the employer must affirmatively show legitimate, nondiscriminatory reasons for not hiring or discharging the spouse of an employee.[90] The court stated that a "compelling need" for the no-spouse rule must exist, that the rule must be aimed at a problem that is "concrete and demonstrable, not just 'perceived,'" and that "the rule must be essential to eliminating the problem, not simply reasonable or designed to improve conditions."[91] Having established the proper standard, the court of appeals evaluated the employer's stated reasons for the no-spouse rule.[92] The employer's reasons, which paralleled those advanced in *Yuhas*, were all dismissed. According to the court, the employer failed to establish that either absenteeism, or scheduling of vacations and work assignments, or even potential problems associated with employees supervising their spouses, had any demonstrable effect on safety and efficiency in the workplace.[93]

Thus, whether plaintiffs are successful in challenging no-spouse rules depends to a large measure on whether the court applies the *Rath* or the

85. 787 F.2d 318 (8th Cir. 1986).
86. *Id.* at 328.
87. *Id.* at 331.
88. *Id.*
89. *Id.*
90. *See id.* at 332.
91. *Id.*
92. *Id.* at 332–33.
93. *Id.*

Yuhas standard. The *Yuhas* analysis does not require the employer to offer specific evidence of problems caused by having spouses working together. The employer need only articulate reasonable presumptions adequate to prove a business necessity. On the other hand, under *Rath,* in order for an employer's no-spouse rule to prevail, the employer must establish that the problem to be remedied is concrete and demonstrable by showing that spouse-related personnel problems have resulted in reduced productivity, decreased job efficiency, or more dangerous working conditions. The *Rath* standard makes it more difficult for employers to raise the business necessity defense because they must then set forth specific, concrete evidence of the justifications for imposing the no-spouse rule. Notice that the Civil Rights Act of 1991 is consistent with the *Rath* analysis in that the Act codifies the concepts of "business necessity" and job relatedness as initially set forth in *Griggs v. Duke Power Co.*[94] and later followed in *Rath.*[95]

Of course, the benefits of the *Rath* standard are only realized if the plaintiff can establish a prima facie case of disparate impact. This often proves difficult due to the lack of hard statistical evidence.[96] The Tenth Circuit Court of Appeals' decision in *Thomas v. Metroflight, Inc.* is illustrative.[97] In *Thomas*, the plaintiff was fired after she married a fellow employee who worked in the same department.[98] The no-spouse rule in place when the plaintiff was hired prohibited any two married persons from working in the same department.[99] The rule allowed the married couple to decide which spouse would quit.[100] If neither quit, the rule provided that the company would then fire the employee with lesser seniority.[101] Since neither the plaintiff nor her husband quit, the employer fired the plaintiff because she had less seniority than her spouse.[102]

The plaintiff challenged the no-spouse rule based on disparate impact.[103] The plaintiff introduced evidence showing that there had been eight other instances of intrafirm marriage at the particular location.[104] In seven of the previous instances, either the no-spouse rule was not violated because the spouses worked in different departments, or

94. 401 U.S. 424, 431 (1971).
95. *See* Steiner & Steinberg, *supra* note 10, at 261.
96. *See id.*; *see also* Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975) ("[S]tatistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded.").
97. 814 F.2d 1506 (10th Cir. 1987).
98. *Id.* at 1508.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*

accommodations were made to retain both employees by reclassifying one spouse's work assignment or simply allowing the violation.[105] In one other instance the rule was enforced, also by firing the female employee.[106] The plaintiff also introduced expert testimony showing that, considering all possible marriages between two employees in the same department at the employer's workplace and that the decision of who would quit was made either on the basis of preserving the higher salary or on the basis of seniority, a substantially larger number of women than men would be terminated.[107]

The court of appeals affirmed the district court's finding that the no-spouse rule was "a good policy, a proper company business decision," and "not discriminatory."[108] The court of appeals ruled that the plaintiff's evidence—that female employees were fired in the only two instances in which the employer enforced the no-spouse rule—was insufficient to prove a violation of Title VII.[109] According to the court, "a sample of two is too small to make even a 100% impact rate significant."[110] Regarding the expert testimony presented by the plaintiff, the court of appeals noted that the testimony was flawed in that it assumed that either salary differential or seniority was the deciding factor in a couple's decision.[111] The court emphasized that the employer's rule did not require that the lower wage spouse be terminated and only used seniority as the deciding factor when the couple failed to decide on their own who would quit.[112] Accordingly, concluded the court, the plaintiff failed to prove that the rule had a disparate impact.[113]

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105. *Id.*
106. *Id.*
107. *Id.* at 1510. "From a universe of 3687 possible marriages, . . . [the expert] found that in 62.1% of the marriages the woman would have the lesser salary." *Id.* The expert also found that in 52.4% of the cases, the woman would have the lesser seniority. *Id.*
108. *Id.* at 1508.
109. *Id.* at 1509.
110. *Id.* A similar argument was accepted by the Eighth Circuit Court of Appeals in Harper v. Trans World Airlines, 525 F.2d 409, 412 (8th Cir. 1975) (pointing out the fact that out of the five couples to which a no-spouse rule had been applied, four cases resulted in the wife leaving employment voluntarily, and therefore did not amount to persuasive statistical proof of discrimination). *See also* Tuck v. McGraw-Hill, Inc., 421 F. Supp. 39, 44 (S.D.N.Y. 1976) (ruling that testimony, in all but one case where the no-spouse rule was applied to two employees who married, stating that it was the women who left the employment did not meet plaintiff's burden of proof).
111. *Thomas*, 814 F.2d at 1510–11.
112. *Id.*
113. *Id.* at 1511–12.

The argument that no-spouse rules do not generally require the spouse with less seniority or lower salary to terminate his or her employment and, therefore, that women are not necessarily the ones to leave, has proven decisive in other cases.[114]

B. Constitutional Challenges

No-spouse rules have also been challenged under the Civil Rights statute, 42 U.S.C. § 1983.[115] In two recent cases, the Court of Appeals for the Sixth Circuit addressed the issue of whether no-spouse rules violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[116] In *Wright v. MetroHealth Medical Center*,[117] the employer, a public hospital, ordered the transfer of a spouse to a different location, under the employer's no-spouse rule.[118] The no-spouse rule in dispute prohibited members of the immediate family from "being in positions which are of such close proximity that they would necessarily interact with each other in the performance of their duties."[119]

Plaintiffs argued that the employer's no-spouse rule violated their fundamental right to marry, and thus, when reviewing the rule, the court should apply a strict standard of scrutiny.[120] While the court of appeals agreed that the right to marry is a fundamental right, the court disagreed on the standard of scrutiny applicable in evaluating no-spouse rules.[121] According to the court, not every state action that affects a fundamental right must be subjected to rigorous scrutiny.[122] Only those regulations that significantly interfere with the right to marry must be reviewed under the heightened standard of scrutiny.[123] The court proceeded to determine whether the employer's no-spouse rule significantly interfered with the right to marry.[124] On this issue, the court noted that the no-spouse rule did not create a legal obstacle preventing a class of people from marrying; it did not require that a person be terminated, merely that

114. *See, e.g., Harper*, 525 F.2d 409, 412.
115. 42 U.S.C. § 1983 (1994 & Supp. V 1999); *see also* Wexler, *supra* note 17, at 115–24 (discussing constitutional claims against antinepotism rules based on the fundamental right to marry).
116. U.S. CONST. amend. XIV, § 1.
117. 58 F.3d 1130 (6th Cir. 1995).
118. *Id.* at 1132.
119. *Id.* at 1132–33.
120. *Id.* at 1134.
121. *Id.*
122. *Id.*
123. *Id.* at 1134–35.
124. *Id.* at 1135–36.

one spouse be transferred to a different department.[125] The court concluded that the employer's rule did not directly and substantially interfere with the fundamental right to marry, and thus, when evaluating the rule, a court must not apply the stricter standard of review, but instead must use the less demanding rational basis test.[126]

In reviewing the district court's application of the rational basis test, the court had the opportunity to comment on the justifications for adopting no-spouse rules.[127] These were similar to those found in cases under Title VII, namely the avoidance of "potential conflicts that might arise when two closely related persons allow their personal lives to impinge on their professional lives, and [preventing] morale among other [employees] from deteriorating due to the unique relationship between the married co-workers."[128] The court concluded that these reasons provided a rational basis for the employer's no-spouse rule that furthered legitimate government interests.[129]

In *Montgomery v. Carr*,[130] the Sixth Circuit Court of Appeals again confronted a constitutional challenge to a no-spouse rule. In *Montgomery*, the plaintiffs argued that the employer's rule preventing a married couple from working together as teachers on the same campus violated their First Amendment associational rights to marry.[131] Similar to its analysis in *Wright*,[132] the appeals court first inquired into whether the no-spouse rule imposed a direct and substantial burden on the right of marriage.[133] The court recognized that the no-spouse rule imposed "some costs and burdens on marriage," but such costs were not so direct or substantial as to warrant a heightened standard of scrutiny.[134]

125. *Id.*
126. *Id.* at 1136.
127. *Id.*
128. *Id.*
129. *Id.*; *see also* Parks v. City of Warner Robins, 43 F.3d 609, 615 (11th Cir. 1995) (upholding under rational basis scrutiny an antinepotism policy as a means of "avoiding conflicts of interest between work-related and family-related obligations"); Keckeisen v. Indep. Sch. Dist. 612, 509 F.2d 1062, 1066 (8th Cir. 1975) ("We have no doubt that in many cases where husbands and wives are employed in supervisor-supervisee capacities, the married couple makes an exemplary effort to maintain fairness, but we cannot say that a policy based on the assumption that married couples are susceptible to the natural prejudices of their relationships is irrational, arbitrary or capricious.").
130. 101 F.3d 1117 (6th Cir. 1996).
131. *Id.* at 1118.
132. *Wright*, 58 F.3d at 1134–35.
133. *Montgomery*, 101 F.3d at 1124.
134. *Id.* at 1125.

Accordingly, the court proceeded to evaluate the no-spouse rule under the rational basis test, finding that the justifications for adoption of the rule represented a legitimate government interest and that the rule amounted to a rational means for securing those government interests.[135]

C. State Law

While there is no federal legislation specifically addressing marital status discrimination, twenty-five states and territories have enacted such legislation, providing better opportunities to challenge antinepotism and no-spouse rules.[136] Generally speaking, these laws prohibit MSD by all private sector employers and labor unions,[137] though a few states' laws

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135. *Id.* at 1130. The employer advanced eight justifications for the no-spouse rule:

> (1) avoiding friction and possibly violence in the workplace if a marriage between [the employees] broke down, (2) preventing one spouse from prejudging students that the other spouse had already experienced difficulties with, (3) cutting down on social fraternization that can hinder [job performance], (4) minimizing the friction caused by married teachers who have a "you and I against the world" mentality, . . . (5) promoting collegiality among teachers, (6) minimizing lost productivity among married couples and other teachers, (7) easing the task of managing teachers . . . (8) avoiding the "total chaos" that would result from the disruption of other unwritten personnel policies that might be violated if the [employer] allowed its [no-spouse rule] to be ignored.

Id.; *see also* Parsons v. County of Del Norte, 728 F.2d 1234, 1237 (9th Cir. 1984) ("The [employer] asserts justification for the rule in that it avoids conflicts of interest and favoritism in employee hiring, supervision, and allocation of duties. The structure of the rule bears a rational relationship to this end and therefore passes constitutional muster."); Cutts v. Fowler, 692 F.2d 138, 141 (D.C. Cir. 1982) ("Antinepotism 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.").

136. *See* ALASKA STAT. § 18.80.220 (Michie 2000); CAL. GOV'T CODE § 12940 (West 1992); COLO. REV. STAT. ANN. § 24-34-402(1)(h)(II) (West 2001); CONN. GEN. STAT. ANN. § 46a-60 (West 1994); DEL. CODE ANN. tit. 19, § 711 (1995); D.C. CODE ANN. § 1-2512(a) (1999); FLA. STAT. ANN. § 760.10(1)(a), (3)(a) (West 1997); GA. CODE ANN. § 45-2-9 (Harrison 1998); HAW. REV. STAT. § 378-2(1) (1993); 775 ILL. COMP. STAT ANN. 5/1-103(Q) (West 1993); KAN. STAT. ANN. § 44-1009(a) (2000); ME. REV. STAT. ANN. tit. 5, §§ 7051(2), 4572(1)(A) (West 1964 & Supp. 2000); MD. ANN. CODE art. 49B, §16(a)(1) (1998 & Supp. 2001); MICH. COMP. LAWS ANN. § 37.2102 (West 1985); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 2001); MONT. CODE ANN. § 49-2-303 (2001); NEB. REV. STAT. § 48-1104 (1993); N.H. REV. STAT. ANN. § 354-A:7 (1995 & Supp. 2001); N.J. STAT. ANN. § 10:5-12 (West 1993); N.Y. EXEC. LAW § 296 (McKinney 2001); N.D. CENT. CODE §§ 14-02.4-03, 14-02.4-05 (1997); OR. REV. STAT. § 659.030 (1999); 29 P.R. LAWS ANN. § 146 (1995 & Supp. 1999); WASH. REV. CODE ANN. §§ 49.60.180, 49.60.190 (West 1990 & Supp. 2001); WIS. STAT. ANN. § 111.322 (West 1997).

137. *See* ALASKA STAT. § 18.80.220(1)–(2) (Michie 2000); CAL. GOV'T CODE § 12940(a)–(b) (West 1992); COLO. REV. STAT. ANN. § 24-34-402 (1)(h)(II) (West 2001); CONN. GEN. STAT. ANN. § 46a-60(a)(1), (3) (West 1994); DEL. CODE ANN. tit. 19, § 711(a)(1), (d) (1995); D.C. CODE ANN. § 1-2512(a)(1), (3) (1999); FLA. STAT. ANN. § 760.10(1)(a), (3)(a) (West 1997); HAW. REV. STAT. § 378-2(1)(A)–(B) (1993); 775 ILL.

apply to public sector employers.[138]

State marital status discrimination laws are quite varied in terms of how marital status is defined and which aspects of the employment relationship are regulated. In this Section, we briefly describe various state statutes prohibiting marital status discrimination, and review several state court decisions dealing with antinepotism and no-spouse rules.

1. Defining Marital Status

A review of state marital status discrimination laws suggests that there is significant variability in the way state laws define marital status. Eleven states or jurisdictions with marital status laws have legislation saying only that marital status is protected.[139] While it may be reasonable to assume that all forms of marital status are covered (e.g., being single, divorced, or widowed), that need not be the case; the laws leave considerable room for interpretation. The other fifteen states have adopted more precise definitions of marital status by specifying which type of marital status is covered by the legislation.[140] Four jurisdictions,

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COMP. STAT. ANN. 5/2-102(A) (West 1993); KAN. STAT. ANN. § 44-1009(a) (2000); MD. ANN. CODE art. 49(B), § 16(a)(1) (1998 & Supp. 2001); MICH. COMP. LAWS ANN. §§ 37.2202(1)(a)–(b), 37.2204(a) (West 1985); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 2001); MONT. CODE ANN. § 49-2-303(a)–(b) (2001); NEB. REV. STAT. §§ 48-1104, 48-1106 (1993); N.H. REV. STAT. ANN. § 354-A:7(1)–(2) (1995 & Supp. 2001); N.J. STAT. ANN. § 10:5-12(a)–(b) (West 1993); N.Y. EXEC. LAW § 296(1)(a), (c) (McKinney 2001); N.D. CENT. CODE §§ 14-02.4-03, 14-02.4-05 (1997); OR. REV. STAT. § 659.030(1)(a), (c) (1999); 29 P.R. LAWS ANN. §§ 146–147 (1995 & Supp. 1999); WASH. REV. CODE ANN. §§ 49.60.180, 49.60.190 (West 1990 & Supp. 2001); WIS. STAT. ANN. § 111.322 (West 1997).

138. GA. CODE ANN. § 45-2-9 (Harrison 1998); HAW. REV. STAT. § 76-44 (1993); ME. REV. STAT. ANN. tit. 5, § 7051(2) (West 1964); MONT. CODE ANN. § 49-2-301(1) (West 2001).

139. *See* ALASKA STAT. § 18.80.220 (Michie 2000); CAL. GOV'T CODE § 12940 (West 1992); CONN. GEN. STAT. ANN. § 46a-60 (West 1994); DEL. CODE ANN. tit. 19, § 711 (1995); ME. REV. STAT. ANN. tit. 5, § 7051(2) (West 1964); MD. ANN. CODE art. 49(B), § 16(a)(1) (1998 & Supp. 2001); MICH. COMP. LAWS ANN. § 37.2202(1) (West 1985); N.H. REV. STAT. ANN. § 354-A:7 (1995 & Supp. 2001); N.D. CENT. CODE §§ 14-02.4-03, 14-02.4-05 (1997); OR. REV. STAT. § 659.030 (1999).

140. COLO. REV. STAT. ANN. § 24-34-402(1)(h)(I) (West 2001); D.C. CODE ANN. § 1-2502(17) (1999); FLA. ADMIN. CODE ANN. r. 60Y-3.001(17) (1997); GA. CODE ANN. § 45-2-9(a) (Harrison 1998); HAW. REV. STAT. § 378-1 (1993); 775 ILL. COMP. STAT. ANN. 5/1-103(J) (West 1993); KAN. STAT. ANN. § 44-1009(a) (2000); MINN. STAT. ANN. § 363.01(24) (West 1991); NEB. REV. STAT. § 48-1102(12) (1993); 29 P.R. LAWS ANN. § 146(B) (1995 & Supp. 1999); WASH. REV. CODE ANN. § 49.60.040 (West 1990 & Supp. 2001); WIS. STAT. ANN. § 111.32(12) (West 1997 & Supp. 2001); Thompson v. Bd. of

Colorado,[141] Kansas,[142] New Jersey,[143] and Puerto Rico[144] provide that married employees not be treated differently than unmarried employees. Given that an individual is either married or not married (e.g., single, divorced, or widowed), this legislation covers all employees. Two states, Hawaii[145] and Nebraska,[146] define marital status as either being married or single. This might indicate that only these categories are covered by the legislation, or that everything other than married is single. Seven jurisdictions (District of Columbia,[147] Florida,[148] Illinois,[149] Montana,[150] New York,[151] Washington,[152] and Wisconsin[153]) distinguish among different forms of marital status, including married, single, divorced, widowed, and separated. Minnesota goes further by including remarried individuals and individuals cohabitating with others.[154] These eight states appear to cover most conventional forms of marital status, and thus protect most, if not all, employees. Finally, one state (Georgia) only provides protection to wives of service men.[155]

2. *Employment Actions Covered*

For the most part, the protections provided under state laws that prohibit discrimination based on marital status mirror those provided under Title VII and similar legislation for other forms of discrimination. Most jurisdictions prohibit tenure decisions, as well as decisions affecting other terms and conditions of employment, from being related to, or based upon, marital status.[156]

Trs., 627 P.2d 1229, 1231 (Mont. 1981); Thomson v. Sanborn's Motor Express, 382 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1977); Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd., 415 N.E.2d 950, 952 (N.Y. 1980).

141. COLO. REV. STAT. ANN. § 24-34-402(1)(h)(I) (West 2001). The statute makes it an unfair employment practice, "[f]or any employer to discharge an employee or to refuse to hire a person solely on the basis that such employee or person is married to or plans to marry another employee of the employer." *Id.*

142. KAN. STAT. ANN. § 44-1009(a) (2000).

143. *See Thomson*, 382 A.2d at 55–56.

144. 29 P.R. LAWS ANN. § 146(B) (1995 & Supp. 1999).

145. HAW. REV. STAT. § 378-1 (1993).

146. NEB. REV. STAT. § 48-1102(12) (1993).

147. D.C. CODE ANN. § 1-2502(17) (1999).

148. FLA. ADMIN. CODE ANN. r. 60Y-3.001(17) (1994).

149. 775 ILL. COMP. STAT. ANN. 5/1-103(J) (West 2001).

150. *See* Thompson v. Bd. of Trs., 627 P.2d 1229, 1230–31 (Mont. 1981).

151. *See* Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd., 415 N.E.2d 950, 952 (N.Y. 1980).

152. WASH. REV. CODE ANN. § 49.60.040(7) (West 1990 & Supp. 2001).

153. WIS. STAT. ANN. § 111.32(12) (West 1997 & Supp. 2001).

154. MINN. STAT. ANN. § 363.01(24) (West 1991).

155. GA. CODE ANN. § 45-2-9 (Harrison 1998).

156. *See, e.g.*, ALASKA STAT. § 18.80.220(a)(1) (Michie 2000); CAL. GOV'T CODE § 12940 (West 1992); CONN. GEN. STAT. ANN. § 46a-60 (West 1995); DEL. CODE ANN. tit.

3. Statutory Defenses

When reviewing the application of MSD legislation to antinepotism and no-spouse rules, it must be noted that some states' laws provide employers a number of defenses to challenges to such rules. For example, Florida,[157] Michigan,[158] Nebraska,[159] and New Jersey[160] exclude antinepotism rules that are applied in an evenhanded manner. Alaska,[161] California,[162] and Puerto Rico[163] allow antinepotism rules if a conflict of interest exists that necessitates the rule in the workplace. Finally, Minnesota,[164] New Hampshire,[165] and Washington[166] provide for a "bona fide occupational qualification" (BFOQ) defense to challenges to no-spouse rules.

4. State Court Decisions

Given the broad and sometimes imprecise definitions of marital status in many states' marital status discrimination legislation, a lot of discretion is placed in the hands of state courts to define marital status. A review of state court decisions suggests that two primary interpretations prevail, leading to either a narrow interpretation or a broad interpretation of MSD.

19, § 711(a) (1995); D.C. CODE ANN. § 1-2512(a) (1999); FLA. STAT. ANN. § 760.10(1)(a), (3)(a) (West 1997); HAW. REV. STAT. § 378-2(1) (1993); 775 ILL. COMP. STAT. ANN. 5/1-103(Q) (West 1993); ME. REV. STAT. ANN. tit. 5, § 7051(2) (West 1964); MD. ANN. CODE art. 49(B), § 16(a)(1) (1998); MICH. COMP. LAWS ANN. § 37.2202(1) (West 1985); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 2001); MONT. CODE ANN. § 49-2-303 (2001); NEB. REV. STAT. § 48-1104 (1993); N.H. REV. STAT. ANN. § 354-A:7 (1995 & Supp. 2001); N.J. STAT. ANN. § 10:5-12 (West 1993); N.Y. EXEC. LAW § 296 (McKinney 2001); N.D. CENT. CODE §§ 14-02.4-03, 14-02.4-05 (1997); OR. REV. STAT. § 659.030 (1999); 29 P.R. LAWS ANN. § 146 (1995 & Supp. 1999); WASH. REV. CODE ANN. §§ 49.60.180, 49.60.190 (West 1990 & Supp. 2001); WIS. STAT ANN. § 111.322 (West 1997).

157. FLA. STAT. ANN. § 760.10(8)(d) (West 1997).

158. MICH. COMP. LAWS ANN. § 37.2202 (West 1985 & Supp. 2001).

159. NEB. REV. STAT. § 48-1111(1)(b) (1993).

160. *See* Thomson v. Sanborn's Motor Express, Inc., 382 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1977).

161. ALASKA STAT. § 18.80.220(a)(1) (Michie 2000).

162. CAL. GOV'T CODE § 12940(a)(3)(A) (West 1992 & Supp. 2001).

163. 29 P.R. LAWS ANN. § 146 (1995 & Supp. 1999).

164. MINN. STAT. ANN. § 363.03(1)–(2) (West 1991 & Supp. 2001).

165. N.H. REV. STAT. ANN. § 354-A:7(I) (1995 & Supp. 2001).

166. WASH. REV. CODE ANN. § 49.60.180(1) (West 1990 & Supp. 2001).

a. Narrow Interpretation

Courts in some states have interpreted MSD narrowly.[167] Under the narrow interpretation, MSD is defined as discrimination on the basis of whether a person is married, single, divorced, or widowed.[168] The identity of one's spouse is not included in this definition.[169] When applying a narrow interpretation, the rationale of the courts is that marital status should be given its plain meaning; if a broader interpretation were intended by the legislature, the legislature would have either indicated its intent or chosen more specific language.[170]

For example, in *Miller v. C.A. Muer Corp.*,[171] the Michigan Supreme Court examined an employer's policy that required blood relatives and spouses of employees to quit, transfer, or be fired.[172] The court held that the state prohibition against marital status discrimination should be viewed narrowly, requiring an inquiry into whether the plaintiff "is married rather than *to whom* [he or she] is married."[173]

The New Jersey Supreme Court reached the same conclusion in *Thomson v. Sanborn's Motor Express, Inc.*[174] The court upheld an employer's policy excluding relatives from working together in the same department on the grounds that the policy was "not directed against married people."[175] In making this determination, the court narrowly interpreted marital status to mean only whether a person was married or single.[176]

Looking at challenges to no-spouse rules, the narrow definition implies

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167. *See* Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd., 415 N.E.2d 950, 953 (N.Y. 1980) (stating that "'marital status' is the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage").

168. *Id.* at 952; *see also* Muller v. BP Exploration (Alaska) Inc., 923 P.2d 783, 788 (Alaska 1996) (defining "marital status" as "the condition of being married or unmarried"); Blackwell v. Danbury Hosp., No. 321561, 1996 WL 409370, at *3 (Conn. Super. Ct. 1996) ("[T]he definition of 'marital status' can only be the condition of being single, married, separated, divorced or widowed."); Miller v. C.A. Muer Corp., 362 N.W.2d 650, 653 (Mich. 1984) ("The relevant inquiry [in defining marital status] is *if* one is married rather than *to whom* one is married.").

169. *See Manhattan Pizza Hut, Inc.*, 415 N.E.2d at 952 (rejecting the New York Human Rights Division's position that marital status should be construed broadly to embrace the identity or situation of the individual's spouse).

170. *See id.* at 953 ("[T]he plain and ordinary meaning of 'marital status' is the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage.").

171. 362 N.W.2d 650 (Mich. 1984).

172. *Id.* at 651.

173. *Id.* at 653.

174. 382 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1977).

175. *Id.*

176. *Id.*

that plaintiffs claiming MSD under such policies will be unlikely to succeed unless the employer denies employment to every married person. Thus, an employee who loses her job because her spouse was an employee, but would not have lost it if her spouse worked somewhere else, would not be protected under statutes or by courts applying the narrow definition. This interpretation results in the apparent anomaly of protecting spouses that do not work together to a larger extent than protecting spouses that work together.

This narrow construction of the term "marital status" appears to result, in part, from court concerns with the implications of adopting a contrary policy. As the Alaska Supreme Court noted recently: "The more expansive interpretation of the term 'marital status' does not protect the members of the class, but instead effectively enlarges it to include all persons wishing to work with their spouses, thus invalidating any relevant anti-nepotism policies."[177] Similarly, the Michigan Supreme Court noted: "To include the identity, occupation, and place of employment of one's spouse within the definition of 'marital status' might enlarge the protected class to include all married persons who desire to work with their spouse. Such a construction would invalidate most antinepotism policies."[178]

b. Broad Interpretation

Courts in other states have interpreted their marital status discrimination laws more broadly. Under the broad interpretation of marital status, not only the actual state of being married, single, divorced, or widowed is examined, but also the identity and occupation of the individual's spouse.[179]

177. Muller v. BP Exploration (Alaska) Inc., 923 P.2d 783, 790–91 (Alaska 1996).

178. Miller v. C.A. Muer Corp., 362 N.W.2d 650, 654 (Mich. 1984). The court went on to point out that under such an "expansive construction," an employee "whose wife is the chief executive officer of his employer's major competitor," would also be a member of the protected class. *Id.* at 654 n.10.

179. Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1041 (Haw. 1994) (rejecting a restrictive reading of the statute under which the identity of an employee's spouse would not have been included in the definition of marital status); Kraft, Inc. v. Minnesota, 284 N.W.2d 386, 388 (Minn. 1979) (rejecting the view that marital status "does not embrace the identity or situation of one's spouse"); Thompson v. Bd. of Trs., 627 P.2d 1229, 1231 (Mont. 1981) (defining marital status under state law to include "the identity and occupation" of an individual's spouse); Wash. Water Power Co. v. Wash. State Human Rights Comm'n, 586 P.2d 1149, 1153–54 (Wash. 1978) (finding that antinepotism employment practices which are based on the identity of an employee's or applicant's

For example, in *Thompson v. Board of Trustees*, the Montana Supreme Court confronted a challenge to a policy adopted by a school district forbidding school administrators from having a spouse employed in any capacity by the school system.[180] The school board had taken adverse employment actions against two administrators whose wives were employed as teachers.[181] The Montana Supreme Court reversed the trial court's conclusions that held that marital status meant only whether an individual was married or not.[182] According to the Montana Supreme Court, although the employer in *Thompson* did not discriminate against the administrators because they were married per se, the board discriminated against them because they were married to particular teachers within the school system.[183]

Washington's Supreme Court has adopted a similar approach. In *Washington Water Power Co. v. Washington State Human Rights Commission*,[184] the power company challenged a regulation promulgated by the Commission, which generally prohibited marital status discrimination.[185] Subsequent to the adoption of the Commission's regulation, Washington Water Power Company brought suit to test the regulation's validity and challenge its no-spouse policy, which forbade hiring spouses and required the discharge of an employee whose spouse was already an employee.[186] Noting that the state's legislature included a section in the statute calling for a "liberal construction" of the statutory antidiscrimination provisions, the court upheld the Commission's regulation.[187] The court reasoned that the state's statute,[188] which prohibits discrimination based on "marital status," is "broad enough in its import"[189] to cover the situation at bar where the employer's no-spouse policy is enforced without regard to "the actual effect of the marital relationship upon the individual's qualifications or work performance."[190] The court also noted, regarding the business necessity defense, that the Commission had made an exception to the prohibition of no-spouse policies "where one spouse supervises the other, or audits his or her work, or where the

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spouse were within the scope of the state's antidiscrimination laws); *see also* Alerding, *supra* note 37, at 876.

180. *Thompson*, 627 P.2d at 1230.

181. *Id.*

182. *Id.* at 1230–31.

183. *Id.* at 1231.

184. Wash. Water Power Co. v. Wash. State Human Rights Comm'n, 586 P.2d 1149 (Wash. 1978).

185. *Id.* at 1151.

186. *Id.*

187. *Id.* at 1152–54.

188. WASH. REV. CODE ANN. § 49.60.180 (West 1990 & Supp. 2001).

189. *Wash. Water Power Co.*, 586 P.2d at 1154.

190. *Id.* at 1151.

spouses are in direct or potential competition with each other."[191]

In a more recent case, the Hawaii Supreme Court also interpreted marital status broadly. In *Ross v. Stouffer Hotel Co.*,[192] the court interpreted the state's statute defining marital status as "the state of being married or being single."[193] The plaintiff had been cohabiting with his co-worker for almost one year when he was hired.[194] He married his co-worker soon thereafter.[195] A couple of weeks later, the hotel came under new management that decided to implement and enforce its no-relatives policy which prohibited persons related by blood or marriage from working in the same department.[196] The plaintiff challenged the no-spouse rule as a violation of the state's antidiscrimination laws.[197] In finding the no-spouse rule to violate state law, the Hawaii Supreme Court reasoned that public policy arguments encouraging marriage called for a broad interpretation of marital status.[198] In particular, the court noted that in a small community, no-spouse rules would require a couple to choose between marriage and employment in a chosen field.[199] Furthermore, even though the statute defined marital status as the "state of being married or being single," in practice this language covers the identity of one's spouse.[200]

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191. *Id.* at 1153. In 1993, the Washington Legislature amended the law against discrimination to define marital status as "the legal status of being married, single, separated, divorced, or widowed." Act of July 25, 1993, ch. 510, § 4, 1993 Wash. Laws 2331, 2334 (codified as amended at WASH. REV. CODE § 49.60.040(7) (1996 & Supp. 1997)). In *Magula v. Benton Franklin Title Co.*, 930 P.2d 307 (Wash. 1997), the state's supreme court was confronted with the issue of whether the 1993 amendment to the definition of marital status required the court to abandon the broad definition adopted in *Washington Water Power Co.* The court avoided the issue since the plaintiff in *Magula* was fired before the amendment became effective. *Id.* at 312–13. The dissent argued, however, that the change in the statute should narrow the interpretation of marital status to exclude the identity and actions of an employees' spouse. *Magula*, 930 P.2d at 315–17; *see also* Katrina R. Kelly, Note, *Marital Status Discrimination in Washington: Relevance of the Identity and Actions of an Employee's Spouse*, 73 WASH. L. REV. 135, 146–48 (1998) (challenging the dissent's view that the 1993 amendment changed, rather than clarified, Washington's existing law).

192. 879 P.2d 1037 (Haw. 1994) [hereinafter *Ross II*].

193. HAW. REV. STAT. § 378-1 (1993).

194. *Ross II*, 879 P.2d at 1039.

195. *Id.*

196. *Id.*

197. *Id.*

198. Ross. v. Stouffer Hotel Co. (Hawaii) Ltd., Inc., 816 P.2d 302, 304 (Haw. 1991) [hereinafter *Ross I*].

199. *Id.*

200. *Ross II*, 879 P.2d at 1041 ("One does not 'marry' in some generic sense, but

In short, the broad interpretation leads to consideration not only of whether an employee or applicant is married, but also to the identity, occupation, and employer of the employee's spouse. The use of this broad definition requires the courts to also inquire into the possible effects on the workplace of having the spouses working together. The issue is not just the marital status of an employee or applicant, but whether working for his or her spouse, or having his or her spouse as a potential competitor or client, might lead to a conflict of interest. In states adopting this interpretation, the outcome of MSD cases often hinges on an employee's ability to do the job without jeopardizing the business or the employment opportunities of other workers.[201] Because of these business concerns, courts using a broad interpretation have ruled that to whom one is married, such as a supervisor, competitor, or client, indicates a potential need to examine the effects of marital status.[202] If the situation could lead to a conflict of interest, then the concern might be considered legitimate.[203] However, the employer must demonstrate that the decision was based on business necessity or a BFOQ, rather than simply marital status.[204] In short, employers cannot simply assume that problems might exist, they must produce evidence that a problem has existed in the past.[205]

D. Summary

At the federal level, Title VII and constitutional protections provide fairly weak foundations from which to challenge antinepotism and no-spouse policies. While the Eighth Circuit's 1986 decision in *Rath* required the employer to present specific evidence of legitimate business reasons for the implementation of a no-spouse rule, other courts have accepted the employer's business justifications absent specific proof of business necessity. Even when evidence of business necessity is required, employees find it difficult to prove disparate impact. Likewise, when ruling on constitutional challenges to antinepotism and no-spouse rules, courts have relied on the rational basis test, making it much easier for employers to justify the use of such employment policies.

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marries a *specific person*. . . . [T]he 'identity' of one's spouse . . . is implicitly subsumed within the definition of 'being married.' The two cannot be separated.").

201. *See, e.g.*, River Bend Cmty. Unit Sch. Dist. No. 2 v. Human Rights Comm'n, 597 N.E.2d 842 (Ill. App. Ct. 1992) (considering whether the employer's argument that the conflict of interest likely to arise if a principal was allowed to supervise his spouse justified the adoption of a no-spouse rule).

202. *Id.* at 844.

203. *Id.*

204. *Id.*

205. *Id.*

Plaintiffs seeking to challenge antinepotism and no-spouse rules using state MSD legislation confront similar difficulties. Although state legislation prohibiting marital status discrimination provides a more direct path by which to challenge antinepotism and no-spouse rules, the success of such claims varies considerably depending on whether the state courts adopt a broad or a narrow definition of marital status.

V. CONFRONTING CHALLENGES TO MARITAL STATUS DISCRIMINATION CLAIMS

The reluctance of courts to fully embrace MSD claims appears to be rooted in two basic arguments. First, proponents of the unfettered use of antinepotism and no-spouse rules argue that such rules are not only sex neutral, but that there is no ex ante reason to believe that they affect women more drastically than men. This sentiment is clearly reflected in the Seventh Circuit's *Yuhas* decision, where the court noted:

> The no-spouse rule in this case does not operate as a "built-in headwind" for women. It is unlike the requirement in *Griggs* that an employee have a high school diploma, or a rule that only the top-ranking contestants on a standardized test will be selected for employment, . . . or the rule in *Dothard* that only people of a certain size may be hired. These employment tests all had a discriminatory impact because they focused on personal characteristics which members of a minority group were not as likely to possess, given their environmental or genetic background, as other job applicants. The no-spouse rule, on the other hand, does not place women at a disadvantage because they failed to develop certain personal characteristics as a consequence of their environmental or genetic backgrounds.[206]

This argument, which we label the "sex-neutral" rationale, implies that there is no reason to believe that women, when confronted with the application of these rules, will be more likely than men to lose or quit their jobs. Thus, courts have concluded that such rules should not be covered by antidiscrimination legislation.

Second, at least part of the reluctance of courts to liberally construe antidiscrimination statutes (even those statutes specifically prohibiting marital status discrimination) appears to be due to a kind of "ability to manage" concern. That is, courts appear concerned that opening the door to MSD claims will signal the death knell for antinepotism and no-spouse rules. This is particularly troubling to some courts because such

206. Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 500 (7th Cir. 1977) (citations omitted).

rules are sometimes deemed necessary for employers to effectively manage the workplace. In this Section, we argue that both of these concerns are unwarranted.

A. The "Sex-Neutral" Argument

One of the major roadblocks experienced by plaintiffs, particularly women plaintiffs, in challenging no-spouse rules, is the underlying assumption that these rules are sex neutral and thus should affect men and women in the same way. Accordingly, federal judges have been reluctant to accept challenges to no-spouse rules under Title VII unless specific evidence of discriminatory intent is presented.[207] Even in jurisdictions in which marital status is a protected class, judges have refused to broadly interpret the term, again based on the assumption that such rules are sex neutral and thus nondiscriminatory.[208] The problem with the sex-neutral argument is that it is fundamentally inconsistent with the employment experiences of dual-earner couples, especially those of married women, and it is inconsistent with our comprehensive review of the data analyzed earlier.

Our argument is twofold. First, while antinepotism and no-spouse rules are sex neutral on their face, women are more likely to be negatively impacted by such rules. When making determinations regarding employment decisions (for example, hiring and retention) between spouses, employers will be significantly more likely to choose the husband. Second, there are a number of reasons to believe that if the husband and wife were forced by a no-spouse or antinepotism policy to decide who should remain with an employer, they would more likely choose the husband. To understand why these outcomes are expected, one only need review social science research examining the effects of marriage on employment outcomes for women and men.

Social science research finds that marriage often has negative effects on working women's employment outcomes and, when wives work outside the home, on their husbands' employment outcomes. For example, a study involving 368 female and male college students who were asked to evaluate applications for employment, found that the competence of women was devalued regardless of their marital or parental status.[209] Looking specifically at marriage, "married males were judged to be more dedicated to their profession than married

207. *See supra* Part IV.A.

208. *See supra* notes 171–83 and accompanying text.

209. *See* Claire Etaugh & Helen Czachorski Kasley, *Evaluating Competence: Effects of Sex, Marital Status, and Parental Status*, 6 PSYCHOL. WOMEN Q. 196, 197–202 (1981).

females."[210] Similar results have been obtained in studies examining the effects of employee characteristics on performance evaluations. Specifically, the attributions made for a person's poor performance varied depending on the person's marital or parental status.

> The married male's performance, relative to the single male's, was attributed to low effort resulting from a Nonchallenging Job, Temporary Low Job Interest, and Marital/Family activity. The married female's performance, relative to the single female's, was attributed more to low effort resulting from Marital/Family Activity and Family/Self Illness, and less to Laziness.[211]

Because women generally have primary responsibility for household and childrearing chores, attributing poor work performance to such responsibilities may make employers reluctant to hire and invest in the careers of married women, particularly those with children.

Studies specifically addressing the impact of family structure on earnings provide additional evidence of the differential employment outcomes experienced by married men and women. Although studies examining the impact of family structure on wages generally find no significant effects of marriage on women's wages,[212] there appears to be a marital wage premium for men, which depends on whether or not his wife works outside the home. Namely, having a working wife diminishes the marriage wage premium for men. The working wife penalty has been found to exist for a broad range of occupation and employment categories,[213] but has been found to be larger for managers and professionals than for blue-collar workers.[214]

Given these findings, it should come as no surprise that female employees often fear that the burden of dealing with dual-earner career

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210. *Id.* at 202.

211. Joyce E. A. Russell & Michael C. Rush, *The Effects of Sex and Marital/Parental Status on Performance Evaluations and Attributions*, 17 SEX ROLES 221, 231 (1987).

212. A recent study examining the effects of marital (and childbirth) delay on wages, found that such delays significantly increase women's wages. *See* Timothy D. Chandler et al., *Do Delays in Marriage and Childbirth Affect Earnings?* 75 SOC. SCI. Q. 838, 838 (1994).

213. *See* Joyce P. Jacobsen & Wendy L. Rayack, *Do Men Whose Wives Work Really Earn Less?* 86 AEA PAPERS & PROC. 268, 268 (1996).

214. *See* Jeffrey Pfeffer & Jerry Ross, *The Effects of Marriage and a Working Wife on Occupational and Wage Attainment*, 27 ADMIN. SCI. Q. 66, 75 (1982). In fact, a recent study finds that once the endogeneity of nonmanagers' wives' labor supply decisions are taken into account, nonmanagers do not suffer a working spouse penalty. Julie L. Hotchkiss & Robert E. Moore, *On the Evidence of a Working Spouse Penalty in the Managerial Labor Market*, 52 INDUS. & LAB. REL. REV. 410 (1999).

conflicts will fall disproportionately on them. A few very high profile couples, such as Bill and Hillary Clinton and Bob and Elizabeth Dole, reflect the career tensions that exist in professional couples,[215] and they are far from alone. In dual-earner households, women are more likely than men to be involved in dependent moves, that is, moves for the sake of their spouses' careers.[216] In dual-career couples, seventy-five to eighty percent of husbands earn more than their wives,[217] and the highest paid job usually leads in family career decisions.[218]

There is no reason to expect the underlying factors that cause men and women to be treated differently in hiring decisions, performance evaluation, and compensation not to be present during an employer's application of antinepotism and no-spouse rules. Nor is there any reason for this state of affairs not to be recognized by dual-earner couples. Consequently, either through the enforcement of such rules by an employer, or the married couple's response to such rules, married women are more likely than married men to be adversely affected. Indeed, this is supported by our survey of the marital status discrimination cases brought in courts across the U.S. As discussed earlier, women were more likely than men to bring MSD claims and experienced more severe penalties than men from the application of antinepotism and no-spouse rules.

To summarize, existing empirical research examining the effects of marriage on employment outcomes and our survey of MSD litigation supports the conclusion that antinepotism and no-spouse rules should be added to the list of institutional factors used to discriminate unfairly and invalidly, most often against married women. Careful consideration of these policies within the broader dynamics of the employment relationship and the cultural attitudes underlying employment practices belies the "sex-neutral" interpretation given to them by the courts.

B. The "Ability to Manage" Argument

The other argument advanced by courts reluctant to fully embrace MSD claims is a concern with the effect of such claims on the ability of

215. *See* Owen Ullmann & Mike McNamee, *Couples, Careers, and Conflicts: Washington's Debate over Power Partnerships*, BUSINESS WEEK, Feb. 21 1994, at 33.

216. *See* Anne E. Winkler & David C. Rose, *Career Hierarchy in Dual-Earner Families*, *in* 19 RESEARCH IN LABOR ECONOMICS: WORKER WELL-BEING 147, 151–53 (Solomon W. Polachek ed., 2000); A.E. Green, *A Question of Compromise? Case Study Evidence on the Location and Mobility Strategies of Dual Career Households*, 31 REGIONAL STUD. 641, 643 (1997).

217. *See* Anne E. Winkler, *Earnings of Husbands and Wives in Dual-Earner Families*, 121 MONTHLY LAB. REV. 42, 46 (1998).

218. *See* Winkler & Rose, *supra* note 216, at 149–50.

employers to effectively manage their businesses. As discussed earlier, when defending the implementation of antinepotism and no-spouse rules, employers have argued that the rules are necessary to avoid a number of problems that will occur if married couples are allowed to work together. For example, employers have argued that employing married couples makes it more difficult for employers to arrange work and vacation schedules.[219] Employers have also argued that the employment of married couples is likely to produce a conflict of interest between the spouses and management, as well as between the spouses and other employees.[220] For instance, an employee who serves in a supervisory capacity, and who must make decisions involving his or her spouse, is likely to confront an unavoidable conflict.[221] A decision that favors the spouse might bring resentment among other employees, and there is no guarantee that such a decision will not be motivated by the supervisor's self-interest (maximizing the couple's economic interests), as opposed to the best interests of the employer.[222] Finally, employers have pointed out that, in some instances, spouses who are confronting domestic difficulties will bring them into the workplace to the detriment of the employer.[223]

These concerns are misplaced. MSD claims raised under federal or state law often involve disparate impact type claims. Under both Title VII as well as a significant number of state statutes, employers can respond to a disparate impact claim by arguing that their practices do not cause a disparate impact,[224] or by raising the business necessity defense.[225] We argue that this framework safeguards an employer's ability to manage the workplace while at the same time protecting employees from the discriminatory effects of antinepotism and no-spouse rules.

Under Title VII, for example, after the plaintiff has made a showing of disparate impact by relying on national data, or data derived from the use of the challenged practice by other employers, the defendant can

219. Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 497 (7th Cir. 1977).
220. *Id.*
221. *Id.* at 499.
222. *Id.*
223. *Id.*; *see also* Espinoza v. Thoma, 580 F.2d 346, 347 (8th Cir. 1978) (stating that excluding spouses may "eliminate the potential for serious conflicts that might affect job performance"); Wexler, *supra* note 17, at 134–39 (reviewing the various arguments employers have raised in support of no-spouse rules).
224. *See* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 3.35 (2001).
225. *Id.*

respond by establishing that the challenged practice did not cause a disparate impact.[226] The employer can then use data from its own workplace to rebut the plaintiff's claim.[227]

Alternatively, the business necessity defense allows the employer to come forward with evidence that the "challenged [employment] practice is job related for the position in question and consistent with business necessity."[228] While courts interpreting the business necessity defense have generally adopted a fairly strict interpretation,[229] the defense is available and has been successfully raised in a number of cases.[230] Thus, we would expect that under the business necessity standard, employers will be able to successfully apply a no-spouse rule to avoid a situation where, for example, an employee will serve in a supervisory position vis-à-vis his or her spouse.

Moreover, the legal arguments aside, our data suggests that MSD claims are not likely to substantially interfere with the ability of employers to manage their workplace. First, since the first MSD claims were brought three decades ago, there has not been an avalanche of claims in this area. Our sample, which we think represents the "universe" of cases, includes only sixty-nine MSD claims involving antinepotism or no-spouse rules. While it may be that the small numbers of claims are due to the fact, at least at the federal level, that MSD claims are not actionable unless connected to sex discrimination, our sample also includes state level cases. Furthermore, as mentioned earlier,[231] more than half of the states have some form of marital status discrimination legislation.

VI. CONCLUSION

Despite its critics, antidiscrimination legislation has tremendously improved the work prospects and working conditions of millions of women and minorities. Such legislation has largely eliminated overt discriminatory practices, such as the employer's actions in *Sprogis v. United Air Lines*, where female flight attendants, but not male attendants,

226. *See* Michael J. Zimmer et al., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 421–22 (5th ed. 2000).

227. *See id.* at 442.

228. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).

229. *See, e.g.*, Lanning v. S.E. Pa. Transp. Auth., 181 F.3d 478, 489 (3d Cir. 1999) ("[A]n employer must demonstrate that its cutoff measures the minimum qualifications necessary for successful performance of the job in question.").

230. *See, e.g.*, Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993) (upholding a fire department's beard ban despite its acknowledged disproportionate adverse impact on black employees).

231. *See supra* notes 136–38 and accompanying text.

were required to resign their position if they decided to get married.[232] Unfortunately, other employment practices continue to present significant obstacles for women seeking to enter and establish their place in the workforce. Particularly problematic have been those policies that, while neutral on their faces, significantly burden women to a larger extent than men. Antinepotism and no-spouse rules are an example of these practices.

Antinepotism and no-spouse rules have become increasingly popular at the same time as the labor force participation rates of women and the presence of dual-earner couples have increased in the U.S. The continued use of antinepotism and no-spouse rules by employers is somewhat paradoxical given that many U.S. employers have also begun to recognize the importance of accommodating work and family conflicts.

Perhaps because of this inconsistency, courts have been ambivalent about the treatment to be afforded to MSD claims. In particular, courts continue to treat these rules as sex neutral, and deny employees affected by them any form of relief. In this Article, we argue that courts should take a more aggressive approach to MSD claims, recognizing that even though employers have done a lot to accommodate work and family conflicts, severe institutional obstacles remain which are particularly problematic for women.

We argue that claims that antinepotism and no-spouse rules are sex neutral ignore the real-life employment experiences of married women. These rules are antiquated policies based on a traditional, conservative view of appropriate gender roles. Their implementation is likely to disproportionately burden women who are most likely to be seen by employers as less committed to their jobs and careers, since they tend to bear a larger burden of family responsibilities. Legal treatment of cases challenging these rules should not ignore reality.

The practical implications of our argument are twofold. First, our review of case law in this area, as well as prior research on the impact of marriage on employment outcomes, makes clear that antinepotism and no-spouse rules have a disparate impact on women. Plaintiffs challenging these rules should be able to meet their initial burden of proof by relying on this kind of evidence. Second, while courts should continue to allow employers to raise a business necessity defense against MSD claims, they should likewise require employers to provide real proof of business necessity. Broad generalizations regarding the behaviors of married

232. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1196 (7th Cir. 1971).

couples should not be the basis for employers to justify the significant constraints that antinepotism and no-spouse rules have on women.

APPENDIX

TABLE 1
CHARACTERISTICS OF ALLEGED VICTIMS AND EMPLOYERS*

	FEDERAL APPEALS COURT	FEDERAL DISTRICT COURT	STATE COURT	TOTAL
ALLEGED VICTIMS				
Marital Status				
Single	1	4	7	12
Married	19	18	28	65
Divorced	0	0	0	0
Widowed	0	0	0	0
Never stated	1	0	1	2
Sex				
Male	4	6	13	23
Female	17	16	23	56
Never stated	0	0	0	0
Employer				
Public	9	9	18	36
Private	7	8	17	32
Manufacturing	3	1	4	8
Service	13	16	31	60
Indeterminate	0	0	0	1

*Some cases alleged victimization of multiple persons, thus causing the number of alleged victims to exceed the number of cases.

TABLE 2
CHARACTERISTICS OF CASES

	FEDERAL APPEALS COURT	FEDERAL DISTRICT COURT	STATE COURT	TOTAL
EMPLOYMENT POLICY INVOLVED:				
Antinepotism rule	7	7	23	37
No-spouse rule	6	4	6	16
No-fraternization rule	1	2	0	3
Other	2	5	6	13
EMPLOYMENT ACTION CHALLENGED:				
Discipline or Discharge	2	5	8	15
Forced resignation	4	5	6	15
Demotion	0	0	1	1
Promotion	0	1	1	2
Hiring	5	2	12	19
Transfer	5	4	5	14
Other	0	1	2	3
ACTION TAKEN IN RESPONSE TO:				
Marriage	15	14	28	57
Cohabitation	1	0	1	2
Dating	0	2	2	4
Adulterous relationship	0	0	1	1
Other	0	2	3	5

NATURE OF WORK RELATIONSHIP LEADING TO EMPLOYMENT ACTION				
Co-workers in same department or division	12	10	19	41
Employed in separate department or division	0	3	4	7
Supervisor-subordinate relationship	2	1	10	13
Other	1	1	1	3
No work relationship	1	3	1	5
LEGAL BASIS FOR MARITAL STATUS DISCRIMINATION CLAIM:				
Right to privacy (no constitutional challenge)	0	0	1	1
Constitutional challenge	10	6	5	21
Title VII of Civil Rights Act	6	7	5	15
State Human or Civil Rights Act	0	5	24	29
EMPLOYER'S DEFENSE OF EMPLOYMENT ACTION:				
Evidence of business necessity and BFOQ	3	3	3	9
Presumed harm from employee's actions	12	9	23	44
Other	1	6	9	16

TABLE 3
OUTCOMES OF CASES

	FEDERAL APPEALS COURT	FEDERAL DISTRICT COURT	STATE COURT	TOTAL
COURT RULED IN FAVOR OF:				
Employer	13	15	18	46
Employee	3	1	17	21
Other	0	2	0	2
BASIS FOR COURT DECISION:				
Narrow definition of marital status discrimination	1	3	13	17
Broad definition of marital status discrimination	2	1	12	15
Constitutional balancing test	10	5	2	17
Failure to establish discriminatory treatment	3	9	8	20
BASIS FOR COURT DECISIONS WHICH FAVORED EMPLOYEES:				
Narrow definition of marital status discrimination	0	0	5	5
Broad definition of marital status discrimination	1	0	8	9
Constitutional balancing test	0	0	1	1
Established discriminatory treatment	2	1	3	6

BASIS FOR COURT DECISIONS AGAINST EMPLOYEES:				
Narrow definition of marital status discrimination	1	3	8	12
Broad definition of marital status discrimination	1	1	4	6
Constitutional balancing test	10	5	1	16
Failure to establish discriminatory treatment	1	8	5	14

TABLE 4
CASES INCLUDED IN THE PRESENT STUDY

CASE NAME	CITE
1. Blackwell v. Danbury Hosp.	1996 WL 409370 (Conn. Super. Ct. 1996).
2. Boaden v. Dep't of Law Enforcement	664 N.E.2d 61 (Ill. 1996).
3. Bradley v. Stump	971 F. Supp. 1149 (W.D. Mich. 1997).
4. Bretz v. City of Center Line	276 N.W.2d 617 (Mich. Ct. App. 1979).
5. Campbell Plastics, Inc. v. N.Y. State Human Rights Appeal Bd.	440 N.Y.S.2d 73 (App. Div. 1981).
6. Coyle v. Health Care & Ret. Corp. of Am.	1994 WL 928880 (W.D. Mich. 1994).
7. Cutts v. Fowler	692 F.2d 138 (D.C. Cir. 1982).
8. Cybyske v. Indep. Sch. Dist. No. 196	347 N.W.2d 256 (Minn. 1984).
9. EEOC v. Rath Packing Co.	787 F.2d 318 (8th Cir. 1986).
10. Espinoza v. Thoma	580 F.2d 346 (8th Cir. 1978).
11. European Health Spa v. Human Rights Comm'n of Mont.	687 P.2d 1029 (Mont. 1984).
12. Fitzpatrick v. Duquesne Light Co.	601 F. Supp. 160 (W.D. Pa. 1985).
13. George v. Farmers Elec. Coop., Inc.	715 F.2d 175 (5th Cir. 1983).
14. Harper v. Trans World Airlines, Inc.	525 F.2d 409 (8th Cir. 1975).
15. Hill v. Human Rights Comm'n	735 F. Supp. 255 (N.D. Ill. 1990).
16. Houck v. City of Prairie Village	977 F. Supp. 1128 (D. Kan. 1997).
17. Hulett v. Bozeman Sch. Dist. No. 7	740 P.2d 1132 (Mont. 1987).
18. Johnson v. Bozeman Sch. Dist. No. 7	734 P.2d 209 (Mont. 1987).
19. Jurinko v. Edwin L. Weigand Co.	12 Fair Empl. Prac. Cas. (BNA) 203 (W.D. Pa. 1974).
20. Kastanis v. Educ. Employees Credit Union	859 P.2d 26 (Wash. 1993).
21. Keckeisen v. Indep. Sch. Dist. 612	509 F.2d 1062 (8th Cir. 1975).
22. Keeney v. Heath	57 F.3d 579 (7th Cir. 1995).
23. Klanseck v. Prudential Ins. Co. of Am.	509 F. Supp. 13 (E.D. Mich. 1980).
24. Kovich v. Mansfield State Coll.	478 A.2d 950 (Pa. Commw. Ct. 1984).
25. Kraft, Inc. v. Minnesota	284 N.W.2d 386 (Minn. 1979).

26. Longariello v. Sch. Bd. of Monroe County	987 F. Supp. 1440 (S.D. Fla. 1997).
27. Lowry v. Sinai Hosp. of Detroit	343 N.W.2d 1 (Mich. Ct. App. 1983).
28. Magula v. Benton Franklin Title Co., Inc.	930 P.2d 307 (Wash. 1997).
29. Mahroom v. Alexander	22 Empl. Prac. Dec. ¶ 30,580 (N.D. Cal. 1979).
30. Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd.	415 N.E.2d 950 (N.Y. 1980).
31. Md. Comm'n on Human Relations v. Baltimore Gas & Elec. Co.	459 A.2d 205 (Md. 1983).
32. McCabe v. Sharrett	12 F.3d 1558 (11th Cir. 1994).
33. Meier v. Evansville Vanderburgh Sch. Corp.	416 F. Supp. 748 (S.D. Ind. 1975).
34. Miller v. C.A. Muer Corp.	362 N.W.2d 650 (Mich. 1984).
35. Montgomery v. Carr	101 F.3d 1117 (6th Cir. 1996).
36. Moore v. Honeywell Info. Sys., Inc.	558 F. Supp. 1229 (D. Haw. 1983).
37. Muller v. BP Exploration (Alaska), Inc.	923 P.2d 783 (Alaska 1996).
38. Murphy v. Cadillac Rubber & Plastics, Inc.	946 F. Supp. 1108 (W.D.N.Y. 1996).
39. Murray v. Silberstein	702 F. Supp. 524 (E.D. Pa. 1988).
40. Nat'l Indus., Inc. v. Comm'n on Human Relations	527 So. 2d 894 (Fla. Dist. Ct. App. 1988).
41. Noecker v. Dep't of Corr.	512 N.W.2d 44 (Mich. Ct. App. 1993).
42. Parks v. City of Warner Robins	43 F.3d 609 (11th Cir. 1995).
43. Parsons v. County of Del Norte	
44. River Bend Cmty. Unit Sch. Dist. No. 2 v. Human Rights Comm'n	728 F.2d 1234 (9th Cir. 1984). 597 N.E.2d 842 (Ill. App. Ct. 1992).
45. Rosenbarger v. Shipman	857 F. Supp. 1282 (N.D. Ind. 1994).
46. Ross v. Stouffer Hotel Co. (Hawaii) Ltd., Inc.	879 P.2d 1037 (Haw. 1994).

47.	Sanbonmatsu v. Boyer	357 N.Y.S.2d 245 (App. Div. 1974).
48.	Sears v. Ryder Truck Rental Inc.	596 F. Supp. 1001 (E.D. Mich. 1984).
49.	Sebetic v. Hagerty	640 F. Supp. 1274 (E.D. Wis. 1986).
50.	Sioux City Police Officers' Ass'n v. Sioux City	495 N.W.2d 687 (Iowa 1993).
51.	Slohoda v. United Parcel Serv., Inc.	475 A.2d 618 (N.J. Super. Ct. App. Div. 1984).
52.	Southwestern Cmty. Action Council v. Cmty. Servs. Admin.	462 F. Supp. 289 (S.D. W. Va. 1978).
53.	Sprogis v. United Air Lines, Inc.	444 F.2d 1194 (7th Cir. 1971).
54.	St. Petersburg Motor Club v. Cook	567 So. 2d 488 (Fla. Dist. Ct. App. 1990).
55.	State Div. of Human Rights v. Vill. of Spencerport	434 N.Y.S.2d 52 (N.Y. App. Div. 1980).
56.	Thomas v. Metroflight, Inc.	814 F.2d 1506 (10th Cir. 1987).
57.	Thompson v. Bd. of Trs., Sch. Dist. No. 12	627 P.2d 1229 (Mont. 1981).
58.	Thomson v. Sanborn's Motor Express, Inc.	382 A.2d 53 (N.J. Super. Ct. App. Div. 1977).
59.	Townshend v. Bd. of Educ.	396 S.E.2d 185 (W. Va. 1990).
60.	Tuck v. McGraw-Hill, Inc.	421 F. Supp. 39 (S.D.N.Y. 1976).
61.	Voichahoske v. City of Grand Island	231 N.W.2d 124 (Neb. 1975).
62.	Waggoner v. Ace Hardware Corp.	953 P.2d 88 (Wash. 1998).
63.	Wagher v. Guy's Foods, Inc.	885 P.2d 1197 (Kan. 1994).
64.	Wash. Water Power Co. v. Wash. State Human Rights Comm'n	586 P.2d 1149 (Wash. 1978).
65.	Waters v. Gaston County	57 F.3d 422 (4th Cir. 1995).
66.	Whirlpool Corp. v. Civil Rights Comm'n	390 N.W.2d 625 (Mich. 1986).
67.	Winrick v. City of Warren	299 N.W.2d 27 (Mich. Ct. App. 1980).
68.	Wright v. Metrohealth Med. Ctr.	58 F.3d 1130 (6th Cir. 1995).
69.	Yuhas v. Libbey-Owens-Ford Co.	562 F.2d 496 (7th Cir. 1977).