

Working Knowledge

Paul Castronovo and Wayne Positan untangle employment disputes from opposite ends

by AMY KATES

photography by LUIGI CIUFFETELLI

In a perfect world, employees and management are on the same page: Company handbooks are read cover to cover, thorough policies are implemented, and coworkers—or employees and their bosses—politely work through issues together. But reality proves that workplaces can be a breeding ground for messy emotions.

“It’s almost like a divorce in family law,” says Paul Castronovo. “If a [working] relationship has broken up, it can be very personal.”

When the pieces are shattered on the coffee-room floor, employment lawyers such as Castronovo, who works solely for plaintiffs, and Wayne Positan, who defends employers, are sent in to clean up the mess. Their paths crossed briefly early in Castronovo’s career, when he was a summer associate at Positan’s firm.

WAYNE POSITAN: Keeping Bosses Out of Trouble

Castronovo’s right. They are a happy bunch over at Lum, Drasco & Positan. It could have something to do with defense lawyer Wayne Positan, whose laughter booms through hallways adorned with photos of Cape Cod, Italy, the golden age of baseball, anything Boston or New York sports and ... actors from the original *Hawaii Five-0*. “I just love it,” Positan says. “I watch the new one every Monday night, and it’s just great to see the carryovers from the first time.” Positan is known to sign off on messages with phrases like: “Book ’em, Danno” or “Be there. Aloha.” “It’s fun,” he says. “What I try to convey is that lawyering is not a 9-to-5 profession; you are a lawyer 24 hours a day. Have a good time while you’re doing it.”

Of course, as an employment lawyer, he’s also able to pinpoint when the good time goes a little too far. Take *Mad Men*, for example, AMC’s ’60s drama about the business of advertising. “My wife is a huge fan,” he says. “But I watch it and I just have to laugh. I mean, would those guys be in trouble or what? The coffee-room shenanigans ... talk about a lawsuit. But all of that is accurate. That’s how the workplace was.”

Positan, 62, would know. He’s watched employment law evolve for three decades from the same office. “In the beginning of my career, labor lawyers did mostly traditional labor law,” he says, which involved unions. “Employment law was just starting at the time. In the mid- to late ’70s, employment litigation sprung forward and ulti-

mately overtook labor law as the predominant part of the practice. Then you had the whole area of discrimination litigation [in the ’90s], which evolved as an aftermath of a lot of things, like Hill-Thomas, for example. What you saw was how the workplace evolved, and what we did evolved—it became more of a concern about policies you have in place in the workplace, conduct in the workplace.”

Perhaps the biggest evolution in employment law was in technology. “When you do discovery about a case, someone says, ‘There’s a hostile work environment and someone has been saying bad jokes, sexual jokes and the like.’ Obviously one of the things I’m going to do is see what *your* e-mails look like—you’ve left a trail. I can’t tell you how many times the person complaining about conduct is in fact engaging in it.”

In Positan’s world, proper policies are A-Number One. “I always tell people an effective anti-harassment policy starts at the top. No point in having a policy in training if the boss isn’t going to pay attention to it,” he says. “A lot of times, the top doesn’t know what the middle is doing: You’re only as good as your first-ring supervisors. You need to train on these policies.”

Policies don’t prevent incidents, however. It’s how you deal with them that counts. “When bad does happen, approach it in a common-sense manner. Don’t bury your head in the sand: Deal with it. Be human. Fair. Fairness and credibility is what it’s all about. When you have a situation where [the policy failed] and the plaintiff didn’t complain and the policy was in place, I’m going to ask, ‘Why didn’t you complain?’”

Then there are the employees who have too much to say about harassment. “Plaintiffs have to choose which [actions] they’re going to pursue,” he says, echoing Castronovo. “You can’t have it every way. You just came up with five different actions.”

Positan knows it’s not always the employee who’s at fault, however. “Sometimes it is very obviously a bad boss,” he says. “And I’m going to try to settle that case early or get it dismissed on summary judgment. One of the things I always want to know as a defense lawyer is, ‘You say that this workplace has been harsh, hostile to you; are you one of the reasons it is that way?’ First thing I want to know is what’s going on in that workplace. I want to see the workplace. I want to understand the dynamic of it—who’s interacting with who, what’s the



Wayne Positan (left) and Paul Castronovo: different sides, same goal—workplace harmony.

Wayne Positan

- ▶ Chair of Lum, Drasco & Positan's labor, employment and government group
- ▶ *New Jersey Super Lawyers*: 2005-2011
- ▶ Top 10 *New Jersey Super Lawyers*: 2007 (#2); 2008; 2009 (#2); 2010
- ▶ Top 100 *New Jersey Super Lawyers*: 2005-2011
- ▶ Fellow, The College of Labor and Employment Lawyers
- ▶ Past president, New Jersey State Bar Association

level of conduct, was it someplace where [management] wasn't paying attention and a lot of hijinks were going on in a corner? I want to know if the plaintiff is someone who was really a victim or were they what I like to call a 'gleeful participant.' These come down to credibility. Can the plaintiff credibly establish that something bad happened to them? The bottom line is: Were you a victim or not? If you're a victim, OK, then I've got a much different problem to deal with, and people might be getting disciplined or discharged."

Positan got into employment law much the same way that he got Castronovo into it: filling an empty spot. "I was with the firm for two years and there was a situation where the labor lawyer was out on vacation and a strike arose," Positan says. "So the managing partner went around asking if anyone knew anything about labor law, and I said I took it in law school." The strike centered on picketing going on at an importer of handbags. "I managed to resolve the situation down at the National Labor Relations Board," he says. "When [the labor lawyer] came back, he said, 'You did a great job. Interested in doing this?'"

Positan would go on to be involved in another case that dealt with picketing, this time on a construction site. The case, *Baliko v. Stecker*, involved alleged sexual harassment. "We represented two individual defendants who were picketers. Three [female] plaintiffs were construction workers working on a job [who] alleged that they had been exposed to a variety of speech and lewd behavior on the picket line," he says. "Ultimately we had a whole series of appellate decisions on whether or not it was a free speech protection issue, and whether or not there was liability under the law for a variety of legal defenses."

Positan went to trial in Morris County for two weeks. "We got a directed verdict on behalf of one client; the other went to the jury and "no cause of action against" was found. My two guys were very happy." Due to the case, a variety of issues arose in terms of individual liability under the New Jersey Law Against Discrimination and whether free speech applied to picket lines. "This was a nontraditional workplace, not in an office," Positan says. "And in terms of what you might expect to experience when you're going through a picket line,

that's different than what you'd expect in a typical workplace. We talked a lot about the language that went on in the job: It's a construction site. The language on a construction site in general is maybe a little different than what you'd expect in an office. I think [the case] was certainly, no pun intended, groundbreaking at the time."

Then there was the lawsuit filed by Carl Williams, then-superintendent of the New Jersey State Police, which reads like a legal "who's who" on both sides of the aisle. "[Williams] resigned in February 1999 in the midst of the racial-profiling debate," Positan says. "He filed suit against Peter Verniero, attorney general, and the governor [Christine Todd Whitman] for reverse discrimination. I represented Verniero. During the pendency of the suit, Verniero became an associate justice of the New Jersey Supreme Court. Rosemary Alito represented Whitman. Our motion to dismiss the case was ultimately granted and upheld on appeal. The case was obviously very high-profile at the time, in the midst of that [racial-profiling] debate. Representing the AG, especially one who was serving on the [state] Supreme Court as the case was litigated, and working with Rosemary, was a tremendous honor."

Positan's clients range from closely held small-family businesses to large businesses, public sector clients, various departments of the state of New Jersey, Essex County and the New Jersey Devils. "There are a lot of clients I can't tell you about," he says. "Most employment lawyers do their best work and you never find out about it."

The differences between Castronovo and Positan go beyond the courthouse. Castronovo leans Mets; Positan goes Sox (Red). Castronovo may crack open a book about the war in the Pacific; Positan would rather settle in with *Hawaii Five-0*. But on one critical point, they agree: No matter what side you're on, common sense could keep you out of the courtroom.

"This whole notion that everyone is an employee at will, yeah, that's true," Positan says. "But guess what? You'd better have a reason to do what you're doing. Treat people fairly. The jury wants to see you did that. You have to do these things right." ◀