RESTRICTIONS ON WORKPLACE ROMANCE AND CONSENSUAL RELATIONSHIP POLICIES

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Concerns about unwelcome sexual attention, the aftermaths of "soured" office romance, and especially "quid pro quo" abuse of management power, have led a number of employers to implement policies prohibiting or restricting workplace romance. Some courts have warned that "employers who do not have coworker dating policies leave themselves vulnerable to Title VII sexual harassment charges." *Broderick v. Ruder*, (D., D.C). However, restrictive policies have generated lawsuits over constitutional rights, invasion of privacy, and have even been found to be discriminatory themselves.

BALANCING THE INTERESTS

Anti-discrimination/anti-harassment advocates have often strongly urged employers to adopt no fraternization/no office romance policies as effective tools to prevent sexual harassment.

Individual rights/civil rights advocates have often argued that these policies violate constitutional and personal privacy rights and are improper.

Unions have sometimes split the issue saying "it's fine to have a policy telling management to keep its hands off workers, but don't tell us we can't mess around with our own members."

Finally, even the anti-discrimination laws can seem to be in conflict, with findings that these proactive anti-harassment policies can be discriminatory themselves on the bases of sex, race, or marital status.

Welcome Attention

In general, the law does not place restrictions on consensual workplace romance. Unwelcome attention can violate sexual harassment and other legal prohibitions. However, many people meet, fall in love and have ongoing welcome relationships. The law also does not give others a general right to complain about the welcome connections between their co-workers.

Exposure To Affectionate Behavior Is Not Sexual Harassment. In *Kummerle v. EMJ Corp.* (N.D. Tex., 2012), the court dismissed the case of an employee who sued over having to observe affection between her supervisor and another employee. The supervisor and employee had a consensual romantic relationship off the job but expressed affection at work. Several times a day he would stroke her back, touch her neck and "engage in intimate conversation." The plaintiff alleged that this "created an offensive sexually charged atmosphere" that she and other employees, male and female, had to endure. She also alleged that a reasonable woman would find having to observe this behavior to be offensive "based on the long history of subjugation of women in the workplace and the implication that a female has to subject herself to such behaviors to succeed in the workplace, even if such subjection . . . is consensual." The court declined to base any decision upon the "nuanced interpretation" of historic social dynamics and declined to apply that generic interpretation to a specific workplace. Further, the plaintiff, herself, was not the object of any behaviors or attention. Also, both men and women were exposed to the affectionate behavior and male witnesses also stated that it was inappropriate. There was no more effect on one gender than upon the other. Finally, the behavior itself did not rise to the level generally necessary for a sexual harassment case. Title VII is not a code of decorum. The standard requires "more egregious" and more sexually focused behavior than overt affection between a consenting couple.

Even Sexual Favoritism May Not be Against the Law

The Law May Even Protect Sexual Favoritism. In *DeCintio v. Westchester County* (2nd Cir., 1986), the court ruled that a male supervisor's favoritism in a promotion toward his female subordinate was not discrimination. It affected both male and female candidates for promotion, equally, in *McSpurum v. Penn. Dept. of Environmental Protection* (M.D. Pa., 2013), the court ruled that a male supervisor's preference for his male romantic interest also had an equal effect on both female and other male employees. Thus, the plaintiff could not show sexual discrimination. (Several states do allow "sexual favoritism discrimination" cases, so check your state laws.)

But sexual favoritism which allows harassment of others is a violation. A manager's "hands-off" approach in regard to enforcement of standards, work rules or discipline for one's favored lover, spouse or family member creates liability.

Family Business Entanglements Have Perils:

Court Permanently Bans Ex-Manager From Entering Store; Owner Reacted To Complaints By Crying. A jury found a grocery store liable for allowing a manager to engage in years of harassing young adult and teenage female employees. The harassment included overt verbal propositions and touching. The manager was the live-in boyfriend of the store owner and father of the owner's child. When complaints were made about the harassment, the owner's reaction was to burst into tears and accuse the complainants of making unfounded accusations. The harassing boyfriend/manager was then allowed to fire employees who complained. A jury awarded $1.25 million. Then the EEOC requested an injunction. The facts showed that, when the manager was eventually placed on suspension, he continued to come into the store and approach employees on a regular basis. Due to his relationship with the owner, it was unlikely

that he would be controlled, and employees would not be effectively protected without a permanent court order banning him from the property and imposing penalties for violation. The court agreed. *EEOC v. Karen Kim, Inc.* (2nd Cir., 2012).

Mom Of CEO – Employee Fired For Rejecting Meddling Mothers Matchmaking Machinations. A TV station employee was supervised by the mother of the station's Chief Executive Officer. The mother became fixated on the desirability of her son marrying the employee and began a campaign to accomplish that mission. The employee did not want to be involved with the CEO and stated so. Mom persisted, making statements like, "I'm going to be your mother, one way or another;" "marry him now or you'll be old and your babies will be retarded." When the employee continued to resist, the mother engaged in what was described by the court as "mercurial, volatile, disruptive and abusive behavior," and began an effort to get the employee fired. When the employee complained to the CEO about his mother's efforts to couple them, and rumors spreading about their romance, his reaction was "at least the rumors make me look good." Complaints to HR and the Chief Financial Officer also got no result. The employee was fired. She sued under Title VII, and the court found a valid basis for sexual harassment and retaliation claims. The court rejected the company's defense that Mom, herself, was not seeking a sexual relationship with the employee, therefore the situation was not sexual harassment. The court ruled that the employee was subjected to severe and persistent negative attention because of her gender when she resisted a romantic relationship. She had an adverse employment decision based on rejection of romantic advances; regardless of who instigated the advances it fits the *quid pro quo* mold. She was fired in retaliation for complaining about the harassment. *Allen v. TV One LLC* (D. Md., 2016). [Even if family members are not supervisory employees, their acts can still generate liability for family-owned or closely-held companies. Non-employee board members and influential family often have great influence and are able to engage in improper acts toward employees, thus creating cases. For more information, see the articles Son of CEO and/or The Undefendable by Boardman & Clark.]

Company May Be Liable For Harassing Husband. A store supervisor's husband engaged in ongoing sexual harassment of a cashier. The cashier made several complaints. The supervisor (wife of the harasser), another supervisor and the store manager took no effective action, such as banning the husband from the store. The harassment continued and escalated to touching and groping private body areas. The cashier filed a criminal complaint (the husband was found guilty) and the cashier then sued the company. The company defended, claiming the husband was not an employee over whom it had control. The court found that the company had a duty of "ensuring a safe environment for customers and employees" and had failed to address harassment of an employee which it knew or should have known about. *Shatzer v. Rite Aid Corp.* (W.D. Pa., 2015).

"Neutral Outside Investigator." In *Salea v. Blackburn Building Services* (D. Conn., 2017), the court found that too much family involvement in a harassment situation could create liability. A male employee complained that a top manager of a family business, a son of the owners, had sexually harassed him, including touching of private areas. This was reported to another manager, also a family member. The top executive, the alleged harasser's mother, assigned an "outside investigator," the harasser's brother, to look into the matter. Though an "apology" was recommended, nothing happened. Instead, the complaining employee was disciplined for having raised the issue and telling other co-workers about the incident. The court found that the company's process was defective. It was tainted by conflict of interest. It failed to provide

employees any meaningful avenue to raise complaints or receive real action. There was no effective alternative which would provide a fair and objective process, in compliance with the law.

RESTRICTIONS

The law does allow employers to restrict or even prohibit welcome romantic relationships. The degree to which an organization can do so depends on factors such as whether one is a public sector or private sector employer, and the various federal or state laws which may apply.

Constitution
(Public Sector Employment)

The First, Fourth, Fifth, and Fourteenth Amendments create basis for privacy, freedom of association, equal protection challenges to government intrusion into personal decisions concerning procreation, marriage, and family relationships. *Loving v. Virginia*, 388 U.S. 1 (1967); *Carey v. Population Services Int.*, 431 U.S. 678 (1977). These constitutional provisions apply to public sector employment.

These provisions also protect against "associational" discrimination in both the public and private sector.

White Man Cannot Be Fired For Engagement To Black Woman. A white county employee was harassed by co-workers and managers, and then discharged, due to his engagement to an African-American woman. He filed and won a case under 42 U.S. Code §1983 and state law for violating his First Amendment right of freedom of association, which includes the right to intimate association. There was a lack of any legitimate interest for a public sector employer to interfere with that relationship. The employer was found liable under §1983. Managers, including a Human Resources Coordinator, were found personally liable under state law for either participating in the harassment or for failing to adequately address it to prevent harm to the employee. *Matusick v. Erie County Water Authority* (2nd Cir., 2014).

Prison Guard Couple Harassed For Interracial Relationship. Two Maryland correctional officers, a White female and an African-American male, began dating and established a romantic relationship. Their supervisors apparently were offended. The evidence was that the couple were suddenly getting special scrutiny and subjected to negative action for "infractions" that no other guards received. They were denied breaks and prohibited from seeing each other at lunch. Managers made comments such as "It's disgusting that you two are together;" "You know if your White a—gets pregnant, he's just going to leave you and the kid – that's what Black men do." A Captain yelled at the woman, "Get your White a—out of my office!" Then later the Captain locked her into a restroom and said she would not let her out until she understood, "How the real world works when dealing with a Black man." When the couple complained, the female officer's shift schedule was suddenly changed so that she could no longer care for her child. The couple filed state and Federal harassment charges. The court found ample evidence to support the claim of racial harassment. The court also found grounds for a retaliation case on the part of the female officer. Actions against the male officer were sufficiently harassing but not severe enough to create a retaliation claim (counseling and reprimands but without formal transfers or

suspensions or actual loss of pay). *Antrey v. State of Maryland* (D. MD, 2016).

Restrictive Policies (Public Sector)

A restriction on workers' romances should be "narrowly tailored" and is likely to be subject to a strict scrutiny test requiring strong evidence of a "meaningful nexus" between the restrictions and the government employers' interest in imposing the policy. *Briggs v. North Muskegan Police Dept.*, 746 F.2nd 1475 (6th Cir. 1984), cert. denied 473 U.S. 909 (1985).

The courts have certainly found a "compelling interest" to restrict sexual and romantic contacts where there are vulnerable people involved. Thus, prohibitions on teachers or school staff relations with students, or staff-client relationships in social services or corrections settings are seen as essential to protect the integrity of the operation and welfare of the students or clients. The courts have also consistently upheld the right of state licensing agencies to prohibit sexual or romantic contact between doctor-patient, social worker/counselor-client, etc. In *Lewis v. Smith* (E.D. La., 2019), a sheriff's deputy was validly fired under the policy prohibiting relationships with "known felons" or ex-felons. His claim for violation of his constitutional rights of intimate association was outweighed by the department's compelling interests.

Restrictions between adult co-workers have been subject to more scrutiny. Curtailing supervisor-supervisee relations is unusually seen as reasonable. The less there is a direct power relationship, the closer the courts will look, and the less likely a restriction is to pass muster.

Constitution - *Police Officers Have Constitutional Right To Have Affairs*. In *Perez v. City of Roseville* (9th Cir., 2018), the court ruled that a police department could not discharge officers who engaged in an off-duty extra-marital affair. A public employer may not take adverse action due to an employee's private sexual conduct unless it demonstrates that the conduct affected the employee's job performance or created public controversy. Both officers were married but separated. They were discreet and the relationship created no disruption to the department. It came to light when reported to the Chief by one of the officer's spouses. The Constitution protects rights of privacy and freedom of association from undue governmental scrutiny and interference.

All courts will allow enforcement of rules of behavior. So romantic couples can be told to curtail their overt behaviors and save them for off-the-job. A public sector employer could have toned back the office behaviors of the two people in the previously-described *Kummerle* case.

Private Sector

Private sector employees have fewer protections. Courts have generally upheld employers' restrictions on romance as long as there was some reasonable basis, and they did not intrude too far into an employee's relationships with nonemployees. There are some grounds for challenging a private sector employer's workplace restrictions on employee romance.

Privacy

Several states have "privacy" statutes. These generally give a cause of action for "unreasonable intrusion into private life." One has to have a reasonable expectation of privacy that was unreasonably intruded upon.

A stated policy may take away the expectation.

Be careful. Publicly revealing what you find out when enforcing a romance policy *may be* breach of confidentiality - invasion of privacy.

Public Policy

A few state courts have granted a "public policy" (protection of the romantic/marital/ family relationship) cause of action. A no-romance policy that is too broadly worded may run afoul of those rulings. However, most states have not recognized this sort of challenge, as long as the organizations restrictions are narrowly stated, and only restrict romance that is work-related (co-worker, customers, suppliers, etc.).

Marital Status

Many states prohibit "marital status" discrimination, with the general caveat that it is not discrimination to prohibit an individual from directly supervising or being supervised by their own spouse.

Under versions of this law in some states, except for the direct supervision situation, an employer cannot refuse to hire someone who is already a spouse, or in some states a domestic partner. However, nothing prohibits stopping romances before they develop to that point.

Personal Identity. Other states' versions of marital status discrimination do allow an employer to prohibit the hiring into any positions of a person who is already married to or in a romance with an existing employee (and to reject all other close relatives as well). The interpretation of these laws hold that the law only prohibits discrimination on the status of being married, single or divorce, but not on the "identity" of being married to a particular person. So, as long as the employer does not refuse to hire a particular class of people, i.e., "no divorced people need apply," there is no discrimination. Once can focus on the specific people at issue and ban hiring of specific people due to their personal relationship with an existing employee.

Extra Marital Status

In *Federated Electric v. Kessler*, the court held that a company rule prohibiting romantic association of any employee with a married employee did not violate marital status discrimination prohibitions. It kept both married and single employees from being part of such a relationship and "pursuing extra-marital relationships is not a protected right, the denial of that ability is not a denial of equal opportunity in employment."

Most states have followed with decisions stating that a company policy prohibiting dating among employees does not violate the marital status laws if it applies to both married and single employees, and it effects only their relations with work-related people, not their relations with non-employees.

FEDERAL DISCRIMINATION LAWS

These laws apply to both public and private sector employers. Courts have generally upheld the validity of consistently enforced policies which have some sort of business relatedness. However, under the 1991 Amendments to the Civil Rights Act of 1964, an employer should be prepared to show "job relatedness" and "business necessity" if the restrictive policy is alleged to have any form of disparate impact (discriminatory effect).

Inconsistent Enforcement of workplace romance policies has given rise to Title VII (race and sex) and ADEA cases for discrimination. *Sarsha v. Sears Roebuck Co.*, 3 F.3d 1035 (7th Cir. 1993); *Zentiska v. Pooler Motel, Ltd.*, 708 F.Supp. 1321 (S.D. Cal., 1988).

Non-Fraternization Policy Must Be Enforced Equally – Not Just Against Women. A female HR Manager was fired after she married a Plant Manager. The company policy forbade Managers from engaging in intimate relationships. The male Plant Manager was not discharged. Further, another male Manager had also violated the policy, and continued to be employed. The HR Manager sued under Title VII. The different treatment of men for the same violations creates a prima facie discrimination case. *Collins v. Koch Foods, Inc.* (N.D. Ala., 2019).

***Correction Counselor Fired For Having Sexual Relations In The Office Can Still Sue For Sex Discrimination – But Not For Hostile Environment Due To Other Employee's Similar Use Of Her Office*.** A substance abuse counselor in a prison had a sexual relationship with the prison's Major in charge of custody. It was carried out in the facility. Her counseling office was one of the few places in the prison with a private area, where curtains could be drawn to block security cameras. When the behavior was discovered, she was fired. However, the male Major was moved but allowed to continue to work for the corrections department. She filed a Title VII sex discrimination suit for unequal discipline. She also alleged a charge of harassing hostile work environment, because a number of other correction employees were also having sexual relations at work – in her office, thus creating an ongoing disturbing environment; her desk and personal space had been used by others for this purpose and she was humiliated because everyone knew about it. The court found ample evidence of sex discrimination in the unequal discipline given to her, compared to the man. In fact, the higher ranking Major should probably have been held more responsible for conduct violations. As to the office use by others, though, the court dismissed. First, her office was not being "violated due to her gender", as required by Title VII. Instead, it was simply the only private place available which was blocked from the security videos. Second, it is difficult to maintain a hostile environment case when complaining that others are doing exactly what the plaintiff had been engaged in herself. *Orton v. Indiana* (7th Cir., 2014).

There are a number of discrimination cases in which a higher ranking man was retained, while the lower positioned woman discharged. The employer often claims that the higher ranking

person is "more valuable" to its operation. This argument has little weight with the courts. In fact, higher ranking people should be held to a higher standard. However, when the more senior person is fired, and the lower position person stays, the courts have often found that corporate ethics, rather than discrimination, validly justified the discharge.

On the other hand, male employees have won discrimination cases because anti-harassment policies were unequally enforced against men yet female employees were held to a lesser standard.

Many harassment policies and consensual relationship policies here resulted in liability due to a discriminatory focus. Though they were designed to stop discrimination, they, in fact, resulted in merely different forms of the same evil. Policies stereotypically defined some sorts of people as the victims and others as the perpetrators. They ignored the reality that people of all races, genders and ethnicities can be both recipients or perpetrators of the unwelcome attention. A large number of sexual harassment cases are filed by men, and women can be the aggressors. People of all races and ethnicities are harassed. So policies which stated the intent to protect "women" from harassment by men and imposed *greater restrictions* on men in consensual relationships automatically violated the discrimination laws and the Equal Protection Clause.

You Probably Did It -- Because You're Male! The Second Circuit Court of Appeals ruled in favor of a man who was fired due to *gender stereotyping*. A female co-worker accused him of harassment. He denied the harassment he claimed that any interaction was consensual. The company did no investigation whatsoever. The employer was afraid of being sued by the woman so informed the male employee he was being fired because "she knows a lot of attorneys and you probably did what she said you did because you're male!" The court ruled that this gender stereotyping is illegal sex discrimination under Title VII. An employer may not stereotype men as having an innate propensity to harass and discharge a man on that "invidious" presumption. *Sussman v. Gamache* (2nd Cir., 2009).

Among the most famous of these biased policies were the "Successive Stages of Permission Policies" adopted by a number of universities. On a date or romantic event, male students were required to ask, step by step (up to ten steps), for the woman's permission from hand holding to kissing to touching to removal of each piece of apparel, to wherever this all led. Skipping any step of asking permission violated the policy and could result in discipline or expulsion. No requirement was made of the women. Women had no policy restrictions and no penalty for proceeding without any asking at all. Obviously, these policies also perpetrated stereotypes of men as brutish aggressors and women as vulnerable, innocent, passive victims – "the Weaker Sex."

Requiring Romance

Requirement To Date Customer Was Quid Pro Quo Harassment. Usually, quid pro quo sexual harassment involves a manager's attempt to have a personal sexual relationship with a subordinate. In this case the manager wanted no relationship. Instead, the company was luring a big customer. The customer expressed an attraction for an office employee. So the company urged her to date the customer, and promised "big bonuses" if she did so. She then allegedly was denied any bonus when she refused. The court found that even though the supervisor did not seek a personal relationship, he was nonetheless the sexual harasser, because he pressured the employee on behalf of a third party. But the court granted summary judgment against the employee on other grounds because she failed to properly include key elements in her EEOC filing and thus failed to meet the administrative requirements. *Davenport v. Edward D. Jones & Co.* (5th Cir., 2018).

The Perils Of A Romance Gone Wrong

Workplaces which do allow co-worker romance often see relationships start, and end. Most people keep their emotions off the job, and maturely handle breakups. Some do not, and the aftermath results in litigation. A good example is *Turner vs. The Saloon Ltd*. (7th Cir. 2010), in which a male waiter sued for sexual harassment based on his female manger's post-breakup continuing advances. The advances were overt and included touching. The court found that though these attentions may once have been mutual and welcome, once the relationship ended, they were unwelcome sexual harassment. The company can be liable for failure to address and stop these aftermath behaviors.

In *Rhode v. K.O. Steel Casing, Inc.*, 649 F2d 317 (5th Cir. 1981), a female employee was fired after she broke off a relationship with her supervisor/boyfriend. The court found the company liable for failure to control (and discipline) the supervisor after the harassment was reported. So there was precedent established to find that harassment existed, even though the complainant at first voluntarily entered into a relationship with the harasser. However, the party charging harassment from conduct in which he or she initially voluntarily participated, must clearly notify the other party that the behavior is no longer welcome before a harassment claim can be effective.

Breakup Results In Discharge. A manager broke off a two-year consensual romantic relationship with her supervisor. Within a few months she went from excellent evaluations to being placed on a Performance Improvement Plan for a $250 expense overage, and then being fired. She filed Title VII *quid pro quo* harassment and retaliation complaints. The court found valid evidence to support the case. The timing, so soon after the breakup, was suspicious ("temporal proximity"). Several other employees had frequent and larger expense overages with no critique at all. The supervisor had expressed a great deal of upset over the breakup, and when asked by others about why he criticized her work, stated "Why shouldn't I, after the hell she put me through this summer" (during the breakup). *Pung v. Regus Mgt. Group LLC* (D. Minn., 2018).

Quick Action Is Required. In *Forrest vs. Brinker International Payroll Co., d/b/a Chili's Bar & Grill* (1st Cir., 2009), two Chili's restaurant employees, a waitress and a cook, had an on-and-off

"volatile" romance. When the romance finally ended, the cook continued to pursue the waitress and retaliate when she rejected his advances. He called her profane sexual names and sprayed her with hot water in the restaurant kitchen. Management disciplined the cook, and then discharged him when the behavior continued. The waitress sued for sexual harassment under Title VII. The court found for Chili's. It had a clear anti-harassment policy signed by all employees. It trained managers on harassment. The store manager took prompt corrective action, discipline, and then discharge to solve the problem.

Troubling Lack Of Maturity. Companies which employ a larger percentage of teens and young adults often remark that the workplace is full of *"ongoing drama."* There is a lot of flirting and romantic ins and outs, magnified emotions, cliques, rumors, side taking – drama. Even the U.S. Supreme Court (in the *Davis v. Monroe County Bd.* harassment case) ruled that "there are an amazing array of immature behaviors" among youth in an organization. (Though too many older adults can also engage in the same.) *McCullough v. Whitaker* (D.C. D.C., 2019) involved two such employees who dated, then he broke it off. He was then suspended for harassing and improper behavior. However, he filed a Title VII sex discrimination case alleging that he was the victim of harassment by his ex and her gang of female friends, yet he got disciplined and they did not. The court granted summary judgment against him. There was evidence that his ex and her friends did seek to shun him and talked negatively about him to other workers. However, his behaviors were over the top. He spread false rumors, made overtly graphic sexual comments to others, refused to work with his ex's friends, refused to participate in the investigation of the situation, and refused to acknowledge that his behaviors were inappropriate in any way. The court found "a troubling lack of maturity" in the workplace in general, but that the male employee's behaviors were much more egregious in comparison with others and warranted the discipline.

Jealous Girlfriend Gets Fired. Two airline employees dated then broke up. The jealous, angry ex-girlfriend then sought to destroy the employment and reputation of her former boyfriend. She forged a letter, appearing to be written by him, and placed copies in the work mailboxes of a number of their co-workers. The letter insulted flight attendants, bragged about physical abuse of prior girlfriends, implied that he was gay, had VD, and then made racist comments about two other co-workers. Employees reported the letter to management. The investigation revealed the forgery and the jealous girlfriend confessed. She was fired. She grieved, claiming that firing was excessive for a first offense and her 12-year good record as a flight attendant. The arbitrator upheld the discharge due to the outrageous conduct. A first offense and good record were outweighed by the intentional and severe behavior. *In re Transportation Workers of America, Air Transport Local 556 and Southwest Airlines* (2013).

Marijuana Paraphernalia Defeats Sex Discrimination Case. Two romantically involved Disneyland custodial employees had a falling out. They verbally argued through the day and sent upset texts. They engaged in a physical altercation at the end of the day. The female employee was fired; the male received a 15-day suspension. The female filed a sex discrimination case claiming that since she was "similarly situated" she should have received only suspension instead of discharge. The court, however, found the company had a valid reason for the different treatment. When the fight was broken up, marijuana paraphernalia was found on the female employee, in violation of the company drug policy. Further, the evidence showed

that she was the instigator and aggressor in the altercation and had inflicted physical injuries upon her boyfriend, while she suffered no damage. The court found the two were not similarly situated because their respective misconduct was not the same. *Castro v. Walt Disney Parks U.S.* (Ct. App. CA, 2020).

HR Manager Fired For Secret Romance. Employees complained that the company HR manager was exercising favoritism toward a new employee and believed she had hired the man she was living with. The company questioned her about whether there was a relationship and a conflict of interest in hiring a romantic partner. The HR manager adamantly denied any relationship. She also stated that being questioned about this was "borderline sexual harassment" of her. It then turned out that she and the new hire were indeed a couple and lived together. She had lied about not having a relationship. She was fired. She sued, claiming that the discharge was retaliation due to her having made the "sexual harassment" allegation. She also claimed that other managers, mostly male, had romantic relationships with employees and were not fired. The court ruled against the HR manager. Her harassment complaint was not the cause of discharge – her untruthful denials were a valid reason for discharge. All of the other managers had made advance disclosure of any relationships with employees and facilitated a transfer in the few instances the employee was under their supervision. None had attempted a deception and lied openly in answering any company inquiries regarding their relationship. *Owens v. Old Wisc. Sausage Co.* (7th Cir., 2017).

Looking Up Ex And His Wife. In *Grievant & City of Brooklyn Park, MN*, a discharge was upheld for abuse of position. A public employee used her special access to multiple public data sources to repeatedly get confidential information on her former husband and his new wife for her own personal purposes.

Family Matters (Also see prior section on favoritism)

Jealous Wife Insists That Dentist Fire Attractive Assistant. A dentist had an attractive assistant. His wife was not part of the office operation but read the dentist's emails. She believed emails between the dentist and assistant were becoming more personal. The dentist had even told others that he was attracted to the assistant and had thoughts of an affair. The wife ordered the dentist to fire the assistant before there was harm to their marriage. He did. The fired assistant sued, claiming her discharge was sex discrimination. The court ruled that the situation did not fall under the sex discrimination laws. The firing decision was based upon a personal relationship, not on the gender of the assistant. It was based on interpersonal conduct, or feared conduct, of the individuals rather than gender. (Attraction itself can be based on same gender or opposite gender; it was the attraction, and not the specific gender which was the critical factor.) Further, the court noted a recognized exception in the discrimination laws for a family member in small family or individually-controlled businesses. In this case, the pressure by a spouse could be given special consideration in employment decisions. Also, the replacement assistant was female, so gender itself was not a factor; it was the attractiveness and personal relationship of the particular assistant. *Nelson v. James H. Knight DDS* (Iowa S.Ct., 2012).

Associational Liability For Retaliation. An employer, who has a dispute with one person in a workplace romance, must also be careful in treatment of the other. The U.S. Supreme Court recognized a cause of action for "associated discrimination" for retaliation in *Thompson v. North American Stainless LP* (2011). The case involved two engaged co-workers. One filed a complaint of gender discrimination. The company then fired her fiancé, allegedly in retaliation, even though he had not personally engaged in any protected activity (making a complaint or openly supporting her complaint). The court found that his firing could have a chilling effect upon a discrimination complainant and allowed his own separate case of retaliation under Title VII. So, if one person in a workplace couple engages in a protected complaint, the employer should be careful about any adverse actions taken toward either. There is a potential doubling of the liability. See also *Lard v. Alabama Bev. Control Bd.* (M.D., Alabama, 2012) and *Hicks v. City of Tuscaloosa* (N.D. Ala., 2019) police officer passed over for promotion for supporting his wife's discrimination case against the Department.

Suit By Married Couple Seems to Be "Community Property." A company lost its attempt to force discrimination and retaliation claims by a married couple to be tried as two separate cases, before two juries. The court ruled against this sort of "divorce." The couple worked in the same mix/bake breakfast cereal facility. They complained that the wife was sexually harassed by a male co-worker. Both were suspended after reporting the harassment, and the harassment was not effectively addressed. When the harassment of the wife continued, the husband had an altercation with the offending co-worker, and was fired. The wife then was denied a request to transfer to a unit away from the harasser. She quit, claiming constructive discharge and both then sued the company. The company sought to have separate trials, claiming that the two claims together would "confuse the jury." The court found the cases were "properly joined" and had sufficient commonality of facts to warrant the efficiency of a joint trial. Juries are intelligent enough to not be confused in this situation. *Roman v. Kellogg Co.* ((D. Kan., 2017).

The Rumor Mill

You don't actually have to have a romantic relationship at work to be harmed by Workplace Romance. People love to talk! They love to gossip! Truth seems immaterial, as long as the story is entertaining. The results, however, can be harassing, defamatory and destroy not only careers but personal lives.

False Rumors Of Sleeping With Boss Creates Harassment Case. A female employee was promoted to Warehouse Assistant Manager. This did not please some men who did not get the job, nor the Warehouse Manager. So some men, including the Manager, circulated a false rumor that she got the promotion due to sex with a company executive. The rumors stated she "used her womanhood, instead of merit" and "seduced a promotion." This resulted in hostility and open disrespect toward her by those she supervised. The employee complained to HR. However, the result was negative focus on her, including the Manager slamming doors in her face to keep her out of staff meetings. The rumors continued. She was fired, and then filed a Title VII case. The court ruled that the rumors were clearly based on gender and gender stereotypes and created an ongoing hostile environment. *Parker v. Reema Consulting Serv.* (4th Circ. 2019).

The rumor mill can create amazing distortions. The more persistent the comments, the longer it is "kept alive" by other employees, the more energy people put into the topic, the more likely it is to go "over the line" and do harm to the person at issue.

Sex, sexual orientation, identity, and sexual relations are sensitive areas. It is not malicious gossip to mention the known fact that two people are dating or that someone is heterosexual or LGBT. The occasional innuendo or guess that people are seeing each other or conjecture about sexuality do not rise to the level of malicious gossip. However, consistent, on-going speculations and discussion about these issues do go over the line. Overt joking and overt descriptions about other people's sexual practices, partners and orientation are automatically offensive and hurtful; these actions can be predicted to do harm. These areas are "nobody else's business," and ongoing, overt discussions and comments can easily move into the privacy, defamation, or harassment areas.

Clearly managers should not promote or engage in vicious gossip, defamation, or invasion of privacy. However, it is not enough for a supervisor to just "stay out of it."

Management has an active obligation to stop "over-the-line" gossip. This is exactly the same sort of obligation that managers have to stop unwelcome harassment they "know or should know about" under the anti-discrimination laws; this just extends the obligation beyond discrimination into the realm of defamation, privacy and public humiliation.

Once you know your workplace is being used to spread ("to publish") invasive, humiliating, or defamatory information, there is a duty to act to stop the behavior. [For more information on this topic, request the article Office Gossip by Boardman & Clark.]

OSHA AND STATE SAFE PLACE ACTS

Sometimes workplace romance leads to violence. Workplace assaults and homicides have resulted from non-employee spouses who discover an extramarital workplace romance, enter the workplace, and attack one or both of the involved employees. Violence also results after the breakup of romance between two employees. There have also been assaults on same sex or bi-racial couples by intolerant co-workers.

As well as the discrimination laws, these assaults can violate the Federal Civil Rights Act, 42 U.S. C. § 1985 (depriving person of civil rights) and Safe Place Acts (OSHA and state safety laws), which require employers to have effective anti-violence policies and practices.

Employers should take prompt action to protect employees who report a fear of violence due to romance or break up. This includes discharge of employees who threaten violence (not the person who reports). In *Schaffer v. Potter* (8th Cir., 2007), the Court found the employer took the proper action by discharging the employee who threatened to kill her former lover, and not discharging him. Their relationship created a work safety concern, but only she engaged in threats. A similar decision was made in *Bond v. City of Bethlehem* (3rd Cir., 2012).

BASIC TYPES OF RESTRICTIVE POLICIES

In recommending policies, BE CAREFUL in pushing too hard. Pushing too hard for a no fraternization policy was alleged to have caused harm to one in-house legal counsel's career. She sued and lost. *Carpenter v. Federal National Mortgage Assoc.*, 165 F.3d 67 (D., D.C. 1999). "Espousal of views for or against fraternization is not a surrogate for male or female," and is not a stand against a discriminatory practice since the policy prohibits not just "unwelcome" discriminatory romantic associations, but all romantic associations. "A position on either side of this issue is in no way a proxy of gender bias."

There is no requirement to have a policy on office romance. Most employers do not. (Be sure you do have an anti-harassment policy so employees can report unwelcome office advances.) If you choose to have a policy, there are four basic types:

1. No Fraternization. Prohibits all romantic advances, overtures, relationships by anyone toward anyone in the organization.

2. Power Model. Prohibits any romantic overtures, advances, relationships by supervisors toward anyone they have authority over. Some policies prohibit these behaviors toward anyone at a lower level in the organization, whether or not they are in one's direct line of supervision.

3. No Extra Marital Model. Prohibits anyone from being part of a relationship where one of the parties (or both) is married to someone else.

4. Consensual and Personal Relationships. Prohibits nothing. You just have to inform the organization of any romantic relationship with another employee, so it can be confidentially verified that the relationship is "welcome/consensual," or does not create unfair favoritism in decision making. The policy also can cover non-romantic conflicts of interest.

Managing a Policy

Having a workplace romance policy, just as having a general anti-harassment policy, requires monitoring, and investigating issues. This can be a more sensitive topic than monitoring and investigating the usual work rule compliance or violation issues. Careless or improper process can result in liability for invasion of privacy, defamation, discrimination, violation of constitutional rights, and more.

A clear written policy is key to establishing management's rights to monitor and investigate workplace romantic involvement. A policy decreases anyone's expectation of privacy regarding relationships arising from the workplace. So, there is an established foundation for addressing any concerns, and employees should not be surprised if their relationships are questioned.

Another powerful protection from liability is the Qualified Privilege. This concept provides a framework for validly looking into sensitive issues, gathering factual information and taking action on inappropriate behaviors or policy violations. The Qualified Privilege provides a legal

defense. The Qualified Privilege or "conditional privilege," as it is sometimes termed, enables managers to gather and discuss this sensitive information without liability as long as one stays within the scope of the privilege.

Qualified Privilege

The requirements one has to show to establish Qualified Privilege are:

1. The information is reasonably necessary for the protection of the interests of one of the parties. This criterion is automatically met by a current issue affecting someone in the scope of the organization's activities (substantially job related). The organization has a valid "interest" in finding out about and solving work-related problems or rule violations by its employees.

2. The scope of the inquiry is limited to what is reasonably necessary to protect the interest. This also means keeping the inquiry within the limits of job relatedness. Once the topic goes too far into family, religion, sexuality, politics, or other non-directly related areas, it has left the scope and protection of the defense, and the Qualified Privilege disappears. So inquiry as to whether a workplace romance is consensual is proper. Going beyond that, into the details of what the couple is doing is over the line. The "limited" issue is did they violate the policy or not? The details or "degree" to which they went are not necessary for that decision and should not be explored.

3. The information is communicated on a proper occasion. This means it is a current issue within the time frames recognized by state and federal law or by internal procedures. Old, "stale" issues are not within the Qualified Privilege. Similarly, where an employer is on a fishing expedition to dig up dirt on employees for office politics or gossip, there is no Qualified Privilege. Also be careful about making unfounded presumptions. Just because a man and a woman have a close friendship, does not mean one can read-in a romantic connection. Jumping too quickly to investigate upon a stereotypical presumption can violate the "proper occasion" requirement.

4. The information is given to and confined to proper parties only. "Proper parties" means the small group that must process that particular issue. It can include the HR manager, and top management who have a direct role in the decision making. It can include the employees and witnesses who are directly involved (with advice about their duty to maintain confidentiality). Information about workplace romance should be handled similarly to personal identity and medical information under the ADA or HIPAA and kept securely and with a higher degree of confidentiality.

5. The process is conducted in a proper manner.

6. The entire process is characterized by good faith.

Can an Organization Avoid Having to Explore the Sex/Romance Issue and Still Have a Policy?

To a certain degree, yes. One can broaden the scope into a conflicts of interest policy. Instead of just focusing on romance, it can include a variety of other issues which create conflicts of interest, ethics concerns, dangers of favoritism or loss of objectivity in decision making. Such a policy statement might be:

Consensual and Personal Relationship Policy

> *The policy on consensual and personal relationships is written to protect employees. It is designed to ensure that power is not abused and to maintain an environment that is free of sexual harassment, favoritism and conflicts of interest, rather than to discourage constructive interpersonal relationships.*
>
> *Consensual Relationships: Consensual relationships of concern are those of a romantic or sexual nature, entered into by an employee in which the parties involved have consented, but where there is or appears to be a conflict of interest or a power differential.*
>
> *Personal Relationships: Personal relationships of concern can be close social friendships, family relationships, personal business or financial involvements, or other personal connections which could affect decision-making or create a conflict of interest.*
>
> *To Whom the Policy Applies: This consensual relationship policy exists for employees when the interrelationship of employees or employees with customers or suppliers or others presents the appearance of a conflict of interest.*

Under this policy, management could look at a close friendship (if it created a potential conflict) without having to explore whether it was romantic. The sex/romance details could be avoided. This is not the perfect cure. There are still times in which the romance (and whether it is welcome or a violation of the anti-harassment policy) is going to be the key issue. Most close friendships at work do not trigger a "conflict of interest" concern, so the only reason to explore some relationships may be the workplace romance a personal friendship favoritism factor.

In conclusion, there is no general legal requirement to have a workplace romance policy. Many organizations do not. One can just individually address the instances which surface as concerns.

The law allows one to have a policy. Each organization's operations and experiences should dictate which policy, if any, is appropriate. A policy does let employees know that workplace romances are a matter which can create issues; that they should not engage in personal behaviors which create negative effects for the workplace. A policy establishes the fact that management has the right to investigate any relationship which is of concern. This eliminates any expectation of privacy and establishes management's right to investigate. The least restrictive policy is consensual relationships or personal relationships. It does not prohibit romance, but it accomplishes the above objectives.

BOUNDARIES POLICIES

There are organizations in which the romance issues go beyond employee with employee, or even the standard conflict of interest scope. The organizations mission is to provide services to vulnerable people and there is a special duty of care to not abuse or profit from this relationship.

Schools, social workers, physicians, etc., relationships with students or patients, are usually covered by state laws. However, other service organizations also have a Duty of Care, sometimes extending beyond the direct client to their family and others. These concerns also may extend to the volunteers who work with the organizations' recipients, and who may have more contact and more opportunity to take advantage than the regular employees.

These policies usually go beyond sex/romantic involvement and establish conflict of interest boundaries in a number of areas relevant to the organization. In addition to sexual or romantic involvement then boundaries policies may cover:

- Physical. Issues of hugs, touch, closeness. What is OK and what is not OK.
- Verbal. Language, topic areas and how to and not to address issues.
- Economic. Can the volunteer hire the teenager to mow his lawn, wash her car, and do odd jobs? Can the volunteer market their own business services to the client's family?
- Gifts. Can the volunteer give or receive gifts from others in the scope of the services?
- Conflicts of Interest. What would create a conflict of interest between the employee/volunteer, the client, or the organization?
- Contacts Outside the Scope of Services. Are there boundaries regarding client visits, activities, calls, texting and friending on social media which occur outside the scope and hours of employment or volunteering. Is this extracurricular activity a good thing? Or can it create problems of enticement, favoritism, conflict of interest, etc.?
- Photos. Are there rules about taking and posting pictures of the organization's operation, activities, the staff, the clients, or other volunteers? Unauthorized posting can create serious liability.
- Confidentiality. Employees and volunteers may have clients' personal information about health, finances, legal issues, and other highly personal matters. They must understand confidentiality obligations.
- Alcohol Use or Medical Marijuana Use. The employee or volunteer at the organization's wine tasting fund raiser may be in a different scope regarding alcohol than the Scout leader on a camp out. What are the boundaries?
- Electronic System. If volunteers use the organization's electronic system, they need to have the same cautions and protocols as do employees regarding proper use and avoiding abuse and understand that the organization owns and may review all content.

Special Issues and Circumstances. There are so many organizations and missions that this article cannot envision the variety of special boundaries policies which may also be appropriate or necessary. One example is the playhouse or community theater in which employed actors or volunteer actors play romantic roles or had to recite inflammatory or offensive lines from the play. Where is the boundary between stage kissing and hugging or offensive and inappropriate harassing conduct? Does everyone understand the boundaries?

One example of a Boundaries Policy is: (This is just one example, it is not designed to fit your specific organization or operation.)

RELATIONSHIPS WITH PARTICIPANTS

[Company] exists for the purpose of providing a safe caring environment for our participants. The staff-participant relationship is a key in meeting our objectives. All staff members and volunteers have a special duty of care toward participants and will be held to a higher standard of behavior in interactions with participants. Staff and volunteers are responsible for establishing and maintaining professional boundaries, including physical, emotional, and economic boundaries with participants.

No romantic advances or relationships. [Company] prohibits engaging in sexual contact, sexual conduct, or any other behavior with a client which could reasonably be construed as seductive. For purposes of this rule, a person shall continue to be a client for two years after the termination of professional services. No staff member or volunteer should ever engage in sexual banter, sex jokes, or any comment which can reasonably be interpreted as sexual in nature toward a participant. If a staff member or volunteer becomes aware that someone with whom they have an existing or past romantic or sexual relationship becomes a participant, that staff member or volunteer must immediately inform management of the relationship, and must not participate in the supervision of, nor decisions about, that participant.

SOCIALIZING WITH PARTICIPANTS

Except for official [Company] functions, no staff member will establish or engage in an off-work social relationship with a participant. If a staff member becomes aware that someone with whom they have an existing or past social relationship becomes a participant, that staff member must immediately inform management of the relationship, and that staff member must not participate in the supervision of, nor decisions about, that participant.

CONFLICTS OF INTERESTS

No staff member or volunteer will establish an economic relationship with a participant, or with the family of a participant, without the written approval of the Executive Director. This includes hiring participants for "odd jobs," trading or purchasing items from participants or their families, trading or selling items to participants or their families, soliciting donations from participants or their families, and lending money to participants or their families. For purposes of this rule, a person continues to be a participant for one year after termination of our services. If a staff member becomes aware that someone with whom they have an existing or past economic relationship becomes a participant, that staff member must immediately inform management of the relationship, and that staff member must not participate in the supervision of, nor decisions about, that participant.