CHAPTER 3

ROMANCE IN THE WORKPLACE

I. AN OVERVIEW OF THE PROBLEM OF WORKPLACE ROMANCES

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Sexual harassment requires proof of conduct that is unwelcome. But, as we all know, what is welcome today may not be welcome tomorrow, or may be alleged never to have been welcome at all. It is understandable that with the dramatic rise of sexual harassment claims and jury verdicts averaging approximately $250,000, employers are looking for ways to limit their exposure to sexual harassment claims. One way they are attempting to do so is by placing limits on workplace romantic relationships or by prohibiting them outright.

Employers in the past have used, and to some extent now more than ever are using, antifraternization policies or antinepotism rules to nip workplace romances in the bud or to keep employees from having romantic relationships. One of the most recent twists in this area of the law is the rise of workplace romance agreements. Employers are asking employees to come forward to identify that they have a relationship, that it is consensual, that it is welcome, that they are familiar with the company's sexual harassment policies, and that either has the absolute right to end the relationship at any time.

This is, in my opinion, really quite interesting. One of the perhaps more interesting aspects of workplace romance agreements is what an employer expects to happen when one of the employees involved in the relationship is already married. Clearly, the expectation that somebody would come forward and in writing state that they have such a relationship is unrealistic.

I would like to discuss the magnitude of the entire subject matter and some of the thorny issues that arise. It is commonly known that the number of hours worked by most Americans is rising. More

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people than ever before are holding two jobs. More people are working longer hours to make ends meet. Forty-five percent of the working population work more than 40 hours per week; 10 percent work more than 60 hours.

It should come as no surprise that one-third of all romances start at work when one considers the high stress of long hours, people working intimately on a project, people traveling together, and being forced to spend more time with one another as a result of the requirements of the job. This is a problem that is not going to go away—in fact it may not even be considered a problem. Consider that 70 percent of executives polled nationwide believe that office romances between unmarried employees are none of the company's business. We have some well-publicized workplace romances: Bill Gates, Microsoft, wound up marrying Melinda French who was product manager at Microsoft; John Smith, the chair of General Motors, in what is perhaps a more common scenario, wound up marrying his secretary.

It may come as no surprise that 72 percent of all employers polled have no written policy about workplace romances. Of those that do have policies, only half are written. For the half that are unwritten, quite often the company seems to make them up only when real problems are encountered. Fifty-five percent of employers permit but discourage, without limitation, workplace romances; 32 percent permit workplace romances outright; and only 7 percent of employers polled do not permit a workplace romance between co-employees.

Looking at the issues involved analytically, I think that there are good reasons why an employer would want to have some boundaries on workplace romances. One obvious one is the attempt to limit the exposure of sexual harassment claims when a relationship goes bad. Another common complaint, or common reason, given by employers for having policies is to avoid complaints of favoritism by other employees who are not involved in the relationship.[1] It

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[1]*See, e.g., King v. Palmer,* 778 F.2d 878, 39 FEP Cases 877 (D.C. Cir. 1985) (promotion of co-worker based upon her relationship with supervisor violated Title VII); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 70 FEP Cases 1008 (W.D. Va. 1996) 1008 (plaintiff stated claim for quid pro quo harassment where she showed that employees who went on dates with supervisors received promotions while she did not); *Dirksen v. City of Springfield*, 842 F. Supp. 1117, 64 FEP Cases 116 (C.D. Ill. 1994) (plaintiff stated claim for quid pro quo sexual harassment where she showed it was generally necessary for women seeking advancement to grant sexual favors to the police chief); *Broderick v. Ruder,* 685 F. Supp. 1269, 46 FEP Cases 1272 (D.D.C. 1988) (plaintiff stated prima facie case of hostile environment sexual harassment where she showed that her supervisors bestowed prefer-

seems only natural that employees who are not within the relationship, or who are excluded and see a fellow employee getting the best assignments, pay raises, or promotions as a result of a romantic relationship will obviously have feelings that they are not being judged on their merit. This may indeed lead to morale problems within the workplace.

Another common reason given for having policies that would limit relationships is the decrease in productivity. Two employees who are infatuated with each other are likely to go out for long lunches perhaps and concentrate less on the work at hand and more on the relationship. Another reason is that once the relationship goes bad, it may be difficult for the two employees, who previously had been able to have a very good working relationship, to be able to continue that relationship. Even worse, it may result in workplace violence.

On the other side of the coin, human resource managers agree that employee satisfaction and productivity are directly tied to satisfaction with human relationships that employees have with their co-workers. Another thing is that love is something that cannot always be regulated. It happens between two people without the expectation that it will occur. To then force one employee or both employees to leave the company may wind up causing the company to lose two of its best employees without having been aware of any of the possible symptoms of a romantic relationship that could cause problems.

Among the different kinds of claims that arise when an employer attempts to regulate workplace romances or selectively attempts to enforce its rules are laws that call into question the lawfulness of such policies. There are state statutes and municipal ordinances that prohibit discrimination on the basis of marital status.[2] So that

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ential treatment on those employees who submitted to sexual advances). *But see Becerra v. Dalton*, 94 F.3d 145, 71 FEP Cases 1236 (4th Cir. 1996) (rejecting male's claim of discrimination where woman from whom commanding officer was accepting sexual favors was promoted); *De Cintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 42 FEP Cases 921 (2d Cir. 1986) (employer's promotion, over seven men, of woman with whom department administrator was romantically involved was not sexual harassment because it was not on basis of gender, but the relationship itself); *O'Patka v. Menasha Corp.*, 878 F. Supp. 1202, 70 FEP Cases 11 (E.D. Wis. 1995) (male plaintiff failed to state claim under Title VII where he alleged that disparate treatment was based upon his gender rather than fact that his supervisor treated his paramour favorably); *Thomson v. Olson*, 866 F. Supp. 1267, 72 FEP Cases 24 (D.N.D. 1994) (Title VII does not apply to disparate treatment claim based upon romantic relationship).

[2]*See, e.g.*, New York Executive Law §296 (Human Rights Law) prohibiting marital status discrimination. *See also* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.4 (employer may not enact policy restricting employment of married persons of one

where you have two couples, one of which is cohabiting in a romantic relationship that is permitted and the other is married, and the rule is enforced only against the married couple, obvious discrimination issues arise. The same reasons would seem to apply to an employer's policy to limit or restrict workplace romance between married couples and unmarried, cohabiting couples.

It may also lead to allegations of discrimination on the basis of sexual orientation. There are state statutes and municipal ordinances protecting such status. There are issues that arise under common law as an unreasonable intrusion into a person's privacy. There are freedom of association issues that arise under the First Amendment if the employer is a public employer. For states that have an implied covenant of good faith and fair dealing, there are issues that arise if the employees involved in the same-sex romantic relationship are performing their jobs and doing them well. Why should it be a basis for dismissal if they are simply in a romantic relationship with none of the symptoms that an employer would consider to be the downside of such a relationship?

Finally, to the extent that an employer attempts to enforce its policy by causing one of the employees to leave the company, there are cases indicating that a claim of gender discrimination based on disparate impact would be a viable claim if it could be shown that one gender tended to suffer the termination more than another gender.[3]

So, as we can see, this is an issue that is going to remain with us. I think that all of us on this panel will agree that there are no right answers or wrong answers. It is something that all of us are going to have to feel our way through. My own belief is that people have the right to personal lives, they should be treated as adults, and an employer should treat the symptoms, not the relationship.

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sex but not the other). *Compare Kraft, Inc. v. Minnesota,* 284 N.W.2d 386, 30 FEP Cases 31 (Minn. 1979) (employer's antinepotism policy discriminated against female because of marital status) *with Manhattan Pizza Hut v. New York State Div. of Human Rights Appeal Bd.*, 51 N.Y.2d 506, 434 N.Y.S.2d 961 (1980) (although female employee terminated for working under her husband's supervision, she was not fired for being married, but rather for being married to her supervisor) *and Murphy v. Cadillac Rubber & Plastics,* 946 F. Supp. 1108, 76 FEP Cases 1295 (W.D.N.Y. 1996) (employer's dislike of spouses who work together not marital status discrimination).

[3]*See, e.g., Harper v. Trans World Airlines,* 525 F.2d 409, 11 FEP Cases 1074 (8th Cir. 1975) (rejecting challenge to policy prohibiting employment of spouses in same department, where couples given 30 days from their marriage to inform supervisor which would leave). *See also Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 43 FEP Cases 703 (10th Cir. 1987).