concerned about the degree of relationship between them. For example, if it is a nepotism policy, is the employer talking grandparents and granddaughters? If the issue is fraternization, maybe the employer will not be concerned about a social relationship, on the one hand, but, perhaps will be concerned if the relationship becomes intimate. But those are the types of things that have to be dealt with in the policy.

Finally, there is something that is known as a romance agreement. It is literally a contract—almost like a prenuptial agreement. It has the party of the first part, the party of the second part, and the employer has the right to details. There are a lot of fill in the blanks. Once the employer becomes aware of the relationship, the employer then can sit down with the people involved, particularly when it is a supervisor-subordinate, and say, "We want to be certain that you folks have a wonderful time together, enjoy yourselves, but if things go south we do not want to have to deal with it, at least not before an arbitrator or a court of law." The employer literally encourages people, on a voluntary basis, to fill in the blanks, sign the document, have it notarized 15 times. That way the employer has tried to do something to ensure that both sides knew what their rights and responsibilities were.

Those are at least four different types of ways that employers deal with these situations. Of course, where there are violations or breaches, grievances or lawsuits are filed and you get to hear those cases.

III. STATUTES LIMITING REGULATION OF WORKPLACE ROMANCES

SHARON STILLER *

Let us say that you are a forward-thinking employer and you really want to do something about this issue. How far can you go in regulating this relationship? As if it was not difficult enough, the issue becomes a lot more complicated because of the different kinds of statutes that began to be enacted in the early 1990s. These kinds of statutes were advocated by the cigarette and smoking lobbies and were essentially intended to preclude employers from discriminating against employees who were smokers but not smoking at work.

---

*Partner, Underberg & Kessler, Rochester, New York.

These are the lawful activities laws and now there are about 30 states that have them. Some of them, about eight states, protect the use of consumable products. But there are three states that have lawful activities laws prohibiting discrimination based upon off-duty conduct. The three states are New York,[1] North Dakota,[2] and Colorado.[3] The North Dakota and Colorado statutes are much more broad than the New York statute. They prohibit discrimination based upon any lawful activity occurring off premises during nonworking hours.

New York's statute is a little bit more restrictive—it prohibits certain kinds or classes of activities, the use of consumable products, some political activities, and, what I am going to focus on, recreational activities. There was a case in New York that started in 1993 when Wal-Mart fired two employees.[4] Wal-Mart had a policy that prohibited married employees from engaging in relationships with other employees who were not their spouses. Two employees fell in love and had a relationship. Wal-Mart, not wanting to run afoul of any of the discrimination laws, fired both of them.

The New York State Attorney General's office and the individuals brought suit claiming that this relationship constituted a lawful activity and that use of Wal-Mart's policy to terminate these individuals violated the lawful activities law. The lower court agreed in part but the higher court said no, there is no way that New York's lawful activities statute was intended to protect recreational activity that goes beyond bowling, or tennis, or swimming together. Only this type of recreational activity was intended to be protected.

The answer was very simple and very clear—for about 6 months. Then there was the *Pasch*[5] case that was brought in the Southern District of New York. That case involved two long-term employees who had also had a relationship for a long period of time. The male employee was terminated, after which he went to work for a competitor. The woman continued to work at the company, but, ultimately, she was terminated. She claimed she was terminated because of her lawful activity of cohabiting with the other individual. The Federal District Court judge determined that the New York court had decided *Wal-Mart* incorrectly and held that the New York lawful activities act was intended to protect this lawful act. The

---

[1]New York Labor Law §201-d.
[2]N.D. Cent. Code §14-02.4-03.
[3]Colo. Rev. Stat. Ann. §24-34-402.5.
[4]*State v. Wal-Mart Stores,* 207 A.D.2d 150, 621 N.Y.S.2d 158, 10 IER Cases 255 (1995).
[5]*Pasch v. Katz Media Corp.*, 1995 WL 469710 (S.D.N.Y. 1995).

judge decided that the New York Court of Appeals would not construe the statute so narrowly as to exclude cohabitation from the class of recreational activities protected by the statute and held that it was a protected activity.

I think one of the ways that you can look at the cases is that the more related the activity is to employment the more the employer can regulate it. In *Wal-Mart*, they were both employees. In *Pasch*, only one was an employee. The closer it is to something that is relevant to the workplace, the more chance there is that the conduct will not run afoul of the lawful activities law. But there are significant issues about how far you can go in regulating conduct, how much you can make it a company town.

New York's cases, confused as they may be, are a lot tamer than the cases in North Dakota and Colorado. The case involving the lawful activities law in Colorado had to do with an associate in a law firm who, after coming into work one day announcing that his partner had AIDS and he was concerned about his situation, was fired.[6] The Colorado Supreme Court held that the jury verdict on the attorney's wrongful discharge claim could not be supported by the Colorado Lawful Activities Statute. The court explained that the jury had not been instructed on the element of the statute requiring an employee to have been discharged because he or she had engaged in lawful activity away from the employer's premises during nonworking hours. Rather, the jury had only been instructed to determine whether the attorney had been discharged due to his sexual orientation.

The North Dakota case involved an ordained minister who was caught masturbating in a Sears public restroom, but in a private stall.[7] He was arrested and the case was dismissed. However, the minister was terminated from his job in an aged persons home. The minister argued that his conduct constituted a lawful activity and the trial court granted the home's motion for summary judgment. Reversing, the North Dakota Supreme Court held that the minister had failed to make a prima facie case of sex discrimination under the North Dakota Human Rights Act. However, the court held that material issues of fact existed as to whether the home terminated the minister's employment for participating in a lawful activity off the employer's premises, during nonworking hours, that was not in direct conflict with the home's essential business-related issues or

---

[6]*Ozer v. Borquez*, 940 P.2d 371, 12 IER Cases 1665 (Colo. 1997).
[7]*Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812 (N.D. 1998).

whether the minister's actions were contrary to a bona fide occupational qualification that reasonably related to the minister's employment activities and responsibilities. The factual issue precluded summary judgment for the home.

These cases demonstrate that we have created a whole other class of protected individuals and protected conduct, which are lawful activities occurring off work premises, without using work equipment, and not during work hours.