

EMPLOYMENT & IMMIGRATION LAW

Avoiding Liability for Workplace Courtships

Office romances lead employers to test the use of love contracts

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As employees spend more time at work, office romances remain a strong presence in companies throughout the United States. A 2006 Workplace Romance Study by the Society for Human Resource Management and CareerJournal.com found that 40 percent of employees polled had been romantically involved with another employee at some time during their employment. Despite the strong prevalence of office romances, the same study revealed that more than 70 percent of companies did not have a formal policy regarding workplace romances; only 9 percent of responding companies banned relationships among its employees outright.

The numbers reported in the study illustrate the dilemma faced by employers. Short of banning office romances entirely, which is a difficult policy to enforce and undesirable in

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most workplaces, employers that become aware of an office romance might still need to take steps in an attempt to avoid liability. Clearly, the greatest concern arises when there is a relationship between a supervisor and a direct subordinate. But even a consensual affair between individuals without such reporting relationships can lead to claims of sexual harassment and unlawful retaliation. Such claims typically arise after a relationship goes sour and one party is no longer interested in amorous attention or the anger of a scorned lover. Thus, employers must engage in a balancing act: acknowledging that social relationships between employees inevitably occur and recognizing its legal accountability for preventing unlawful sex discrimination and harassment in the workplace.

In response, some employers are relying on consensual relationship agreements known as love contracts to achieve that balance. While some might question the practical application of this response, many are concluding that it is beneficial to have such agreements in the litigious workplace environment of corporate America. In executing a love contract,

the employees engaged in an office relationship voluntarily sign a written agreement acknowledging that their relationship is consensual and unrelated to their employment at the company. They typically acknowledge their awareness of the company's policies and procedures for reporting claims of discrimination. The agreements serve to educate human resource personnel and line management of their continuing obligation to stay alert for instances of sexual harassment or favoritism and to remind the romantically involved employees that their relationship cannot impact the professional atmosphere of the office. As such, even if the agreements cannot preclude a claim of discrimination or unlawful retaliation, love contracts provide employers with an additional layer of protection against liability.

Several cases demonstrate the potential exposure to liability resulting from office romances. In *Stepheny v. Brooklyn Hebrew School for Special Children*, 356 F. Supp. 2d 248 (E.D.N.Y. 2005), two co-workers of the school met, married and performed their jobs at first without incident. Subsequently, the husband had an affair with another employee. Despite the employer's repeated warnings that the parties keep their personal lives outside of the office, the trio's intertwined relationships continued to negatively impact the work environment. After all three were fired, the husband and wife sued the employer, alleging in part that it failed to remedy the hostile work environment. Although the court ultimately rejected plaintiffs'

claims, the case demonstrates that an employer can be vulnerable to a sex discrimination claim for workplace relationships over which it has little control.

In addition, an employer can be held liable if one employee engages in workplace favoritism toward the other employee because of the budding romance. In *Miller v. Department of Corrections*, 115 P.3d 77 (Cal. 2005), two former employees claimed the warden treated the employees with whom he was having affairs more favorably than other employees as the basis for a sexual harassment claim. The court found for the plaintiffs and held that where "sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment for others." Thus, an employer can be sued by an employee who is not even a party to the romantic relationship when it permits the existence of a hostile and discriminatory workplace.

Although untested in the courts, love contracts address the areas of liability faced by employers by including provisions that address the nature of the employees' relationship. The contracts also put the employees and managers on notice regarding what constitutes acceptable office behavior. The agreement typically indicates that the employees read and understood the company's workplace harassment and discrimination policy. This makes it clear that the employees have a copy of the policy, and are at least on constructive notice of its contents. Similarly, it includes a provision stating that the company reminded the employees of its antiharassment policy, and made the employees aware of their rights and obligations under the policy.

These provisions have the salutary effect of prompting a conversation between human resource personnel and the amorous employees about the company's antiharassment policy, confirming the voluntary nature of the relationship. Employees acknowledge in writing that the employer discussed its antiharassment policy with them, allowing the employer to rely on the

document to indicate that it took reasonable steps to maintain a work environment free from sexual harassment upon learning of the relationship.

Love contracts can also lessen the potential for favoritism among the employees that could give rise to a claim by an employee not involved in the romantic relationship, as illustrated by the *Miller* case. The agreement should inform the employees that the company intends to treat claims of favoritism as seriously as other forms of sexual harassment, and will conduct a prompt and thorough investigation into such claims. The employees should also agree not to participate in company decision-making processes that could affect the other employee's pay, promotional opportunities, performance reviews, hours, shifts or career.

While seemingly at odds with employee privacy, love contracts can establish basic ground rules for a workplace romance where employers have seen real liabilities. In the face of such exposure, employees are simply asked to agree to maintain professional behavior while at work. The agreement can also inform the employees of prohibited actions should the relationship sour. Pursuant to the agreement, employees are typically required to state that they will respect the other's decision to end the relationship and not engage in any conduct that could violate the company's anti harassment policy. Whatever criticisms might exist, employers have a right to attempt to prevent the spillover over liabilities from the relationships that form at work.

Some employers seek to utilize love contracts even for those relationships between supervisors and subordinates. In the supervisor's agreement, the supervisor states that he has been informed of the personal legal liability that could be associated with romantic involvement with a subordinate. The agreement should also indicate that the supervisor did not engage in quid pro quo sexual harassment by having the supervisor acknowledge that he did not make the relationship a condition or term of the subordinate's employ-

ment.

Counsel then tailor the subordinate's agreement to demonstrate that the subordinate understands his rights under the company's antiharassment policy, as well as state and federal law. The agreement should explain the meaning of quid pro quo sexual harassment such that the subordinate admits that entering into the relationship with the supervisor was not made a condition or term of employment. The subordinate should also agree to inform the employer if he experiences any negative consequences so that the employer may take corrective action; if acted upon, this clause can help provide an affirmative defense to vicarious liability under the Supreme Court's *Faragher/Ellerth* holdings.

Finally, in any situation involving an office romance, the agreement should contain other clauses that would assist the employer should it subsequently face adversarial action stemming from the romantic relationship. The agreement can provide that any issue related to the office romance must be submitted to alternative dispute resolution. The agreement should clearly state that it is not to be construed as the employer's approval or sanctioning of the relationship. It is also wise for the employer to reserve the right to make all appropriate and necessary decisions regarding the company's reporting structures to prevent any real or perceived impropriety or conflicts of interest.

In essence, love contracts can provide employers with a new way to protect against exposure to unlawful discrimination, harassment and related claims. The agreements provide employers with a reasonable basis to argue that they took appropriate steps to provide a workplace free of discrimination in any future legal proceedings. As suggested, the agreements should be presented for signature on a voluntary basis. While a love contract is no substitute for vigilance in upholding the company's antiharassment policy, the agreement can help maintain a professional office environment while safeguarding against future liability. ■