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When Darts of Love Land in the Workplace.

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Stupid Cupid? When Darts of Love Land in the Workplace.

by

Nancy Williams and Thomas Affolter

I. INTRODUCTION

Suppose the Chief Financial Officer of your mid-size company becomes attracted to a newly hired accountant. You notice him spending an ever-increasing amount of time at her cubicle and soon they are fast friends. Their friendship turns into an intimate relationship, and despite their best efforts to keep the relationship confidential, it becomes public knowledge. As the Human Resources director, you begin receiving complaints from the accountant's coworkers that she has been getting all of the good assignments since she started dating the CFO. The coworkers are restless and unhappy. The situation is compounded by a recent visit by the CFO, who asks you to process the paperwork to promote his paramour to a coveted position, ignoring the applications submitted by the accountant's coworkers. What should you do as a Human Resources professional? What are your obligations to the company, to the employees? Should such a relationship be stopped? Why? Has the CFO, by his actions, put the company at risk for a sexual harassment claim? What are the ramifications of the proposed promotion?

Such scenarios are becoming more and more common given the changing nature of the workplace and the increasing amount of time people spend at the office. Virtually everyone knows someone who has dated a coworker at one time or another. Many employees have even dated their supervisors. Others find their spouses in the workplace.

Consensual workplace romances between employees or between a supervisor and a subordinate can be disruptive and disheartening to the paramour's work group and can negatively affect group morale. Where the relationship is between a supervisor and an employee, it may also lead to allegations of sexual harassment and conflicts of interest. Moreover, when interoffice relationships end, as many do, there is an additional, enhanced risk of sexual harassment if the jilted paramour retaliates against the other out of anger or makes unwelcome sexual advances in some misguided attempt to start the relationship again.

These issues can be largely addressed through consistent application of well-drafted employment policies governing consensual office relationships. This paper, and accompanying presentation, will address the legal risks and other issues presented by consensual office relationships and suggest practical ways in which to minimize those risks and address other problems associated with such relationships.

II. RISKS ASSOCIATED WITH WORKPLACE RELATIONSHIPS

A. Supervisor/Subordinate Relationships

In the realm of workplace romances, those between supervisors and their subordinates create the most difficult and troublesome issues for employers. Supervisors typically have control over the subordinate's employment conditions, including job assignments, discipline, promotions, working hours, and in many cases, even termination or wages. The situation is ripe with potential for conflict of interest. When a supervisor engages in a romantic relationship with a subordinate employee in the same work group, it can create both legal and practical problems that range from negatively affecting the morale of the work group to allegations of sexual harassment.

1. Legal Risks—Sexual Harassment Claims

Under certain circumstances, a supervisor's consensual romantic relationship with a subordinate employee may give rise to a sexual harassment claim by the subordinate employee or his or her coworkers.

Equal Employment Opportunity Commission (EEOC) regulations, Washington State Human Rights Commission regulations, and court decisions define sexual harassment as "unwelcome sexual conduct." It may include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. The law recognizes two types of sexual harassment: "quid pro quo" and hostile work environment.

(a) "Quid Pro Quo" Harassment

Quid pro quo ("something for something") harassment occurs when submission to unwelcome sexual conduct is made a term or condition of employment, or when submission to or rejection of unwelcome sexual conduct is used as the basis for employment decisions affecting the individual. A single sexual advance may constitute quid pro quo harassment if it is linked to granting or denying employment benefits. For example, quid pro quo harassment occurs when a supervisor pressures an employee for sex in exchange for a promotion, raise, favorable performance appraisal, superior job assignment, or other condition of employment.

(b) "Hostile Work Environment" Harassment

The "hostile work environment" theory encompasses conduct that does not necessarily cause a tangible job detriment, but that "has the

purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 29 C.F.R. § 1604.11(a) (1980). It is now widely recognized that a sexual harassment claim is stated where unwelcome sexual conduct is "sufficiently severe or pervasive to alter the conditions of a victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)); *Glasgow v. Georgia Pacific Corp*., 103 Wn.2d 401 (1985).

Repeated and offensive sexual teasing or jokes, pressure for dates or sex, sexual touching, cornering, or pinching, and sexually demeaning comments—which may occur in the context of a relationship—may constitute hostile environment harassment.

To establish a claim for hostile environment sexual harassment, a claimant must prove five elements:

1. The claimant is a member of a protected class;

2. The claimant has been subjected to unwelcome harassment;

3. The harassment was "because of" a claimant's sex;

4. The harassment was severe or pervasive enough to affect a term, condition, or privilege of employment; and

5. The employer knew or should have known of the harassment, but failed to take prompt remedial action.

Notably, the harassing *conduct* does not necessarily have to be sexual in nature to create a hostile work environment, though it often is. Rather, the harassing conduct merely must be "because of" sex. Thus, for example, where an individual repeatedly uses slurs and epithets of a non-sexual nature to denigrate another individual, this conduct *still* may result in the existence of a hostile work environment if the harassing conduct occurs "because of" the victim's sex.

Where an employee prevails in a hostile work environment claim, the damages incurred by the employer can be significant. In addition to the damages that are ordinarily available to such a plaintiff, limited punitive damages are available under Title VII in extreme cases where an employer "engage[s] in a discriminatory

practice . . . with malice or reckless indifference . . . ." 42 U.S.C. § 1981a(b)(1). Moreover, at least one federal circuit court has held that such punitive damages may be awarded to a prevailing plaintiff in a hostile work environment case even in the absence of an award of actual or nominal damages. *See Cush-Crawford v. Adchem Corp.,* 271 F.3d 352 (2d Cir. 2001).

2. "Reverse Quid Pro Quo" Claims Related to Consensual Workplace Romance

(a) Usually No Liability for Favoritism

As a general rule, in the absence of coercion, a supervisor's decision to grant or deny an employment benefit to a subordinate paramour (or for that matter a spouse or a friend) does not constitute illegal sex discrimination or sexual harassment. While isolated instances of such conduct may be a bad business practice, appear unfair, and affect the morale of the employees, it is generally not considered to be illegal sex discrimination because such favoritism does not discriminate against men or women in particular. For example, a woman who is denied an employment benefit solely because of such favoritism would not have been treated more favorably had she been a man nor was she necessarily treated less favorably because she was a woman. *See* EEOC Policy Guidance on Employer Liability Under Title VII For Sexual Favoritism, EEOC Notice No. 915-048 (Jan. 12, 1990).

Ayers v. American Tel. & Tel. Co., 826 F. Supp. 443, 445 (S.D. Fla. 1993), provides an interesting example. In *Ayers*, the plaintiff alleged that she was transferred to a less lucrative store and that her supervisor hired a younger, less qualified woman with whom he had previously had sexual relations. There, it was undisputed that the supervisor and the new hire resumed their sexual relationship after her transfer was completed. However, the court held that there was no evidence that she was required to submit to the supervisor's sexual advances to get the position. Because there was no element of coercion, the *Ayers* court found this behavior more akin to nepotism than sexual harassment, confirming that favoring a paramour—without an element of coercion to the relationship—does not constitute a violation of Title VII.

Similarly, in *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986), seven male employees sued their employer,

claiming that a woman was selected for a promotion because she was involved in a sexual relationship with the head of their department. The court held that the selection of a woman for the desirable promotion, based on a consensual romantic relationship with the department head, did not state a claim under Title VII. The court explained that the seven male plaintiffs were in exactly the same position as other women who might have applied for the promotion. The seven men were disfavored not because of their sex, but because of the decisionmaker's preference for his paramour. *Id*. Courts considering similar issues have reached the same result. *Womack v. Runyon*, 147 F.3d 1298, 1300 (11th Cir. 1998) (promotion of paramour not actionable sex discrimination); *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369-70 (10th Cir. 1997) (promotion based on voluntary romantic affiliation does not state a Title VII claim); *Becerra v. Dalton*, 94 F.3d 145, 150 (4th Cir. 1996) ("We find that even accepting as true the fact that the commanding officer was accepting sexual favors from [a coworker promoted over plaintiff], this conduct does not amount to discrimination . . . ."), *cert. denied*, 519 U.S. 1151 (1997); *Bellissimo v. Westinghouse Elect. Corp.*, 764 F.2d 175 (3d Cir. 1985).

(b) Exception: Where a Sexual Relationship Becomes a Condition of Receiving Job Benefits

While the general rule is that an isolated instance of favoring a paramour engaged in a consensual relationship does not constitute quid pro quo sexual harassment, where such conduct is more widespread, or where there is a broader pattern of inappropriate behavior towards women, courts have held that quid pro quo sexual harassment claims may succeed when a paramour of the offending supervisor is rewarded with a job benefit. There, given such conduct, courts have held that employees fairly believed that a sexual relationship with a supervisor was a condition precedent to receiving certain employment advantages.

For example, in *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199-1201 (D. Del. 1983), a supervisor, Jesus Segovia, engaged in what the court described as "increasingly unprofessional behavior." Segovia made inappropriate telephone calls to employees at home, he made frequent sexual advances to women employees under his supervision, and, during work hours, placed his hands on plaintiff and other coworkers in a suggestive manner. *Toscano*, 570 F. Supp. at 1199-1200. In the midst of such conduct, Segovia developed an

admittedly consensual relationship with one of plaintiff's coworkers. When this coworker was promoted into a position for which plaintiff applied and was qualified, plaintiff brought suit alleging sexual harassment in violation of Title VII.

The court essentially disregarded the consensual nature of the relationship and held that "when placed in the perspective of [Segovia's] total pattern of conduct towards women employees," submission to Segovia's advances was a condition precedent to receiving a desired promotion. The court reasoned that this conduct violated Title VII because submission to sexual favors was not a condition required of men. *Id.* at 1199.

NOTE: As a practical matter, it is extremely difficult for employers to police the line between a supervisor's occasional or incidental instance of favoritism to a paramour and a more widespread pattern of conduct that would allow an individual employee to argue that submission to sexual advances is a condition to receiving job benefits. It would be unwise for an employer to tolerate, without some very careful consideration, a given act of paramour favoritism on the grounds it is only "incidental" and not discriminatory. Indeed, the EEOC advocates that even where a third-party female cannot "establish that sex was generally made a condition for the benefit in question," women who were passed over for that benefit "have standing to assert a quid pro quo action on the grounds they were discriminated by the employer's favoritism." EEOC Policy Guidance No. 915-048 (January 12, 1990). Though there is minimal legal support for this novel proposition, employers should remain cautious.

As suggested below, on pages 11-13, it will almost always be advisable for employers to avoid the problem entirely, by prohibiting relationships between supervisors and subordinates or, at least, prohibiting such relationships when the employees work in the same group or area.

3. Coworker Hostile Work Environment Claims Arising From Consensual Workplace Romance

An employee's consensual romantic involvement with a supervisor does not, by itself, create a hostile work environment for that employee's coworkers. *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992). In *Candelore*, plaintiff filed a lawsuit claiming, among

other things, that her coworker's romantic relationship with a supervisor created a "sexually charged" atmosphere that caused a hostile work environment. *Id.* at 590-91. *Citing Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990) (no hostile work environment where romantic relationship between coworker and supervisor did not prevent plaintiff from being evaluated on grounds other than her sexuality), the Ninth Circuit dismissed plaintiff's claim because she failed to identify instances where less qualified employees received benefits in exchange for sexual favors and because the isolated incidents of inappropriate behavior she identified did not create a hostile or abusive environment. *Id.* at 590. *See also Williams v. City of Kansas City, Mo.*, 223 F.3d 749 (2000) (evidence that supervisor had once had an affair with a coworker was inadmissible as evidence of a hostile work environment); *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501-02 (W.D. Pa. 1988) (consensual sexual relationship with supervisor insufficient to constitute hostile work environment).

Where some employees engage in consensual sexual relations in exchange for tangible employee benefits, they may contribute to a sexually hostile working environment for others. In *Broderick v. Ruder*, 685 F. Supp. 1269, 1280 (D.D.C. 1988), plaintiff, a female attorney at the Securities and Exchange Commission, maintained that a sexually hostile work environment existed in her division during her five-year employment. The alleged work environment harassment was not directed specifically at plaintiff, but involved a pattern of sexual favoritism within the division. Plaintiff alleged that two female secretaries benefited from sexual relationships with male supervisors and a female attorney apparently benefited from a relationship with another male supervisor.

The court held that these relationships "created an atmosphere of hostile work environment offensive to plaintiff" and to the female employees who testified. *Id.* at 1275. It further stated that the preferential treatment of those who submitted to the supervisor's sexual advances undermined plaintiff's motivation and work performance and deprived her and other female employees of promotions and job opportunities. *Id.* at 1281. *See O'Patka v. Menasha Corp.*, 878 F. Supp. 1202, 1207 (E.D. Wis. 1995) (no hostile work environment claim where plaintiff failed to allege "widespread managerial favoritism for those who accept sexual advances" and where plaintiff failed to "allege that it was necessary for women or men to grant sexual favors to management for professional advancement").

In *Drinkwater*, 904 F.2d at 861, plaintiff complained that a sexual relationship between plaintiff's supervisor and plaintiff's subordinate

created a hostile work environment. In rejecting plaintiff's claim, the court found that there was no evidence that the supervisor and paramour flaunted their romantic relationship, nor was there any evidence that sexual relationships were generally prevalent in the workplace. *Id.* at 863.

4. Special Problem: Claims Arising From Termination of Relationship

The risk of a quid pro quo sexual harassment claim is heightened upon the termination of the intimate relationship between a supervisor and a subordinate. The reasons for this are obvious. Though the intimate relationship has ended, the two individuals are put into the untenable position of interacting on a business or professional level every day. Where the intimacy is terminated by the subordinate employee, there is a risk that the supervisor will take some negative employment action (such as assigning an undesirable assignment) against the former paramour either as angry punishment or for rejecting the supervisor's continued overtures. The nonconsensual nature of these advances and resulting retaliation creates a classic instance of quid pro quo sexual harassment. *See Burlington Indust. v. Ellerth*, 524 U.S. 742 (1998); *Thompson v. Berta Enters.*, 72 Wn. App. 531 (1994).

On the other hand, negative employment actions which follow the termination of a consensual relationship do not necessarily constitute quid pro quo sexual harassment unless they are linked in some way to additional unwanted sexual advances. The theory adopted by the courts is that the jilted supervisor is taking the negative employment action against the former paramour because of their terminated personal relationship, not because of the paramour's gender. *See Trautvetter v. Quick*, 916 F.2d 1140, 1147-48 (7th Cir. 1990); *Huebschen v. Department of Health & Social Serv.*, 716 F.2d 1167 (7th Cir. 1983); *Pipkins v. City of Temple Terrace*, 267 F.3d 1197 (11th Cir. 2001); *Campbell v. Masten*, 955 F. Supp. 526, 530 (D. Md. 1997). Thus, it is not necessarily the case that a supervisor, who takes some employment action after the termination of a consensual relationship, will be found to have committed quid pro quo sexual harassment. Practically, however, reliance on this legal theory is extremely difficult and fraught with peril, given the realities of litigation. Following receipt of a negative employment action, the paramour may change his or her mind and assert that the relationship was not consensual and that he or she expected some employment benefit in exchange for agreeing to the "consensual" relationship. In that case, evidence would focus on the justification for the employment action as well as details on the nature and scope of the relationship. *See, e.g., Pipkins,* 267 F.3d at 1189 (employee's negative performance evaluations from direct supervisor

and assistant city manager were attributable to "personal animosity" based on assistant city manager's disappointment in their failed relationship and the direct supervisor's friendship with the city manager's wife).

The ending of a consensual relationship raises other problems. It frequently hinders the evaluation and management of the former paramour after the relationship has ended. For example, even if a former paramour's performance warranted a negative appraisal following the termination of the relationship, the employee will often complain that the negative evaluation was instituted as a result of the termination of the relationship or, worse, will claim that the negative evaluation was a result of the paramour's rejection of the supervisor's continued advances or attempts to restart the relationship.

To avoid liability, many supervisors will go to the opposite extreme—rarely, if ever, disciplining or properly managing their former paramours. Other employees not treated with such kid gloves may be upset by the special treatment given to the paramour.

5. Practical Problems: Low Morale/Productivity Loss, Perceived Favoritism

In addition to the risk of sexual harassment claims identified above, employers who allow consensual intimate relations between supervisors and subordinates, especially those in their direct control, also create significant management problems, such as employee perception of conflict of interest and unfairness, that negatively affect morale in the work group. While such conflict of interest and unfairness carry no obvious legal liability, a significant morale issue like this may lead to discipline problems and even a loss of productivity. For many companies, gaining control over the practical considerations of allowing supervisor/subordinate relationships is even more important than any potential legal liability for sexual harassment.

In Section III, we discuss ways in which an employer can help protect itself from potential legal liability, while avoiding the appearance of favoritism or a conflict of interest caused by supervisor/subordinate relationships.

B. Consensual Relationships Between Coworkers

Consensual relationships between nonmanagement coworkers do not create the same risk of potential liability to the company as do the supervisor/subordinate relationships discussed above. Here, in most cases, neither of the parties is in a position to materially affect the working conditions nor provide an employment

benefit to the other. Nevertheless, the mere existence of such relationships can be a distracting and disrupting influence and affect a work group's productivity and morale. For those reasons alone, some employers attempt to control such relationships through nonfraternization policies.

The potential for workplace disruption is enhanced by a perception of unfairness where one of the parties holds a position of some responsibility, such as a lead employee who assigns work, or where one of the employees holds a position—even a tool clerk—in which they can provide some sort of tangible employment benefit to their partner, such as access to information or a better job, a better meal, or a better tool.

Consensual relationships between coworkers, however, become more problematic once they have ended. There, as with the supervisor/subordinate relationship, the termination of a coworker relationship may lead to unwelcome conduct by one former paramour to the other—out of either revenge, anger, or simply a misplaced desire to rekindle the relationship. As soon as the relationship ends, such conduct by one coworker towards the other therefore presumably becomes unwelcome and therefore, potentially, the basis for a sexual harassment claim. *See*, *e.g., Lipphardt v. Durango Steakhouse of Brandon,* 267 F.3d 1183 (11th Cir. 2001) (affirming jury verdict in favor of employee based on her objectively reasonable belief that a coworker with whom she had formerly been involved in a romantic relationship was sexually harassing her). Such conduct should therefore be addressed and investigated under the company's sexual harassment policy.

C. Married or Related Employees

Employees who are married, or otherwise related, and working in the same work group can cause the same conflict of interest, fairness, and favoritism concerns as would coworkers involved in a consensual intimate relationship. Where one is in a position of authority over the other, serious issues of conflict of interest and fairness are more pronounced.

III. WHAT CAN A WELL-MEANING EMPLOYER DO?

In light of the above risks, all employers should consider taking some simple meaningful steps to limit their legal liability and practical problems associated with workplace romances. The available options for employers differ depending upon the particular stage of the employees' relationship.

A. What Should the Employer Do Before a Relationship Starts?

1. Implementation of a Proper Sexual Harassment Policy

As a fundamental matter, all employers must implement a companywide policy prohibiting sexual harassment, which defines sexual harassment as including both quid pro quo harassment, harassment by supervisors, and offensive work environment harassment. The policy should:

- state that sexual harassment is unlawful and violative of company policy
- be applicable to both management and employees
- advise those subjected to conduct they believe constitutes sexual harassment to promptly report the conduct to a supervisor, HR manager, or other appropriate person
- contain a formal internal complaint procedure permitting bypass of the employee's immediate supervisor or other alleged harasser
- assure no retaliation upon complaint.

This policy should be publicized in every work unit throughout the workplace, and managers should be educated regarding the policy and sexual harassment laws. Employees should be encouraged to use the complaint procedure in the policy and the employer should promptly and thoroughly investigate any complaints received under the policy.

2. Nonfraternization or "No-Dating" Policies

To avoid the potential pitfalls from allowing such relationships, an employer has broad discretion to adopt a policy that prohibits romantic or sexual relationships between employees in the workplace. *See, e.g., Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1042 (7th Cir. 1993) (holding that an employer can enforce a no-dating policy); *Crosier v. United Parcel Serv., Inc.*, 198 Cal. Rptr. 361, 366 (Cal. Ct. App. 1983) (upholding discharge for violation of employer's nonfraternization rule based on employer's legitimate concerns of appearance of favoritism, possible sexual harassment claims, and coworker dissention).

These policies—which may be adjuncts to existing harassment or conflict-of-interest policies—are valuable because they provide employees with clear guidance regarding permissible and impermissible conduct as well as

the penalties for misconduct. This clarity may help prevent future management problems created by the ambiguities inherent in informal policies. Such policies may also help prevent potential sexual harassment claims and other management problems because they often mandate that one of the individuals in a relationship be transferred to a different work group or location, thereby reducing the possibility of unwelcome sexual contact and the conflicts of interest inherent in a direct supervisory relationship.

(a) Draft and Use With Care

Though it is tempting to simply ban all interoffice relationships in an attempt to minimize any of the headaches discussed above, employers should realize that nonfraternization policies may alienate valuable employees who wish to have the freedom to date whomever they choose. These policies also often offend potential employees who view them as draconian.

The key, then, to drafting a nonfraternization policy is to make it as least restrictive as possible as it relates to employee privacy while still sufficient to meet the employer's needs. There are several alternatives less restrictive than a broad policy prohibiting all interoffice dating. These include policies that prohibit employees from dating only the employees in their work group, prohibiting supervisors from dating employees, or prohibiting supervisors from dating only their own direct subordinates.

Depending on the size of the organization, a policy that prohibits supervisors from dating their direct subordinates, or employees from dating someone in their own work group, will usually be the least restrictive alternative, providing the greatest protection for the least restriction. In smaller companies, however, the distinction between work groups and different supervisory relationships may be blurred for purposes of sorting out potential conflicts of interest. In those cases, an employer's flexibility is more limited.

(b) Enforcement of Nonfraternization Policies

Nonfraternization policies are enforceable, and an employee may be disciplined for violating such a policy so long as the employer enforces the rule consistently for all employees and equally between the sexes. *See, e.g., Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496, 498 (7th Cir. 1977); *Mercer v. City of Cedar Rapids,* 308 F.3d 840 (8th Cir. 2002); *Karp v. Fair Store, Inc.*, 709 F. Supp. 737, 741

(E.D. Tex. 1998), *aff'd without op.*, 914 F.2d 253 (5th Cir. 1990) (holding that a company's discharge of a male employee for violating a company policy against sexual involvement between employees did not constitute sex discrimination); *Acred v. Motor Convoy, Inc.*, 1988 U.S. Dist. LEXIS 15974, at *14 (W.D. Tenn. 1988), *aff'd*, 877 F.2d 62 (6th Cir. 1989) (summary judgment granted where a female employee was discharged for violating an unwritten policy against sexual relationships between coworkers, where no evidence that male employees were *not* disciplined for same violation); *Ward v. Frito-Lay Inc.,* 290 N.W.2d 536 (Wis. Ct. App. 1980) (upholding employer's dismissal of employees romantically involved because of legitimate interests in preventing dissention). Thus, employees may be prohibited from dating each other or dating supervisors, and employees who violate the policy may be disciplined as would an employee violating any other company policy. *See Waggoner v. Ace Hardware Co.*, 134 Wn.2d 748, 756-57 (1998).

Mercer v. City of Cedar Rapids provides an interesting example of an employee challenging the enforcement of a nonfraternization policy. In that case, a female police officer was discharged for engaging in a workplace romance, just days before completing her one-year probationary period. She sued under Title VII, alleging that she was the victim of sex discrimination because in another instance, the employer had not disciplined a male police officer who also had relationship with a coworker. The court affirmed the dismissal of the female officer's complaint, finding that there was no evidence of discrimination because the male police offer had not, like the female officer, merely been a probationary employee. The court held that the employer therefore had the right to treat the two employees differently because they were not similarly situated. The court also cautioned, however, that "[i]t may well be that an employer who always fires the woman when two employees engage in an office romance would be guilty of discrimination." *Id.* at 845. In so stating, the court implicitly (and correctly) noted that, had the officers been similarly situated in their employment status, such differential treatment would be unlawful under Title VII.

Where the nonfraternization policy calls for the transfer of one of the employees in the relationship—as they typically do—employers should be cautious not to automatically transfer the subordinate employee. Studies have shown that subordinate employees are more likely to be women. Thus, a policy—even an informal one—of

always transferring the subordinate employee might have an impermissible, disparate impact on female employees.

(c) Legal Challenges to Nonfraternization Policies

Employees who have been transferred, disciplined, or even discharged under nonfraternization policies or as a result of their violation, have attempted numerous legal challenges to the policies, asserting theories such as disparate treatment, freedom of association, violation of privacy, intentional infliction of emotional distress, and wrongful termination. These challenges have had little success.

For example, employees have asserted that nonfraternization policies violate their right to privacy. A California court held that when an employer discharged an employee for dating a coworker who later became a competitor, the employer violated the employee's right to privacy. *Rulon-Miller v. International Bus. Mach. Corp*, 208 Cal. Rptr. 524, 530 (Cal. Ct. App. 1984). The principles of *Rulon-Miller*, however, have not been adopted outside California. *See*, *e.g.*, *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1116-17 (Md. Ct. Spec. App. 1986) (holding that off-the-job privacy exists but employer did not improperly invade it because employer observed employee's extramarital affair in a public place); *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975) (upholding right to privacy but finding employer's invasion justified). No reported Washington case addresses whether employees have a right to privacy in their consensual workplace romances.

In any event, the *Rulon-Miller* court noted that employers have the right to invade employee privacy when they can show legitimate business reasons, such as to prevent a conflict of interest. 208 Cal. Rptr. at 530. Employers who draft narrowly tailored policies designed to address potential conflicts of interest (such as a supervisor and direct subordinate dating) will likely avoid liability for privacy claims in Washington even if such a claim exists.

3. Married and Related Employees

Many employers have policies designed to prevent a sensitive conflict-of-interest situation from developing when the employment of married or other related employees is involved. While employers may generally enforce restrictions regarding relatives working together, employers who institute nepotism policies governing the working relationship between

married individuals should be aware of the prohibition of marital status discrimination under Chapter 49.60 RCW.

Washington State law specifically prohibits discrimination on the basis of marital status. RCW 49.60.180. The definition of marital status was revised in 1993 as the "legal status of being married, single, separated, divorced, or widowed." RCW 49.60.040. Though no Washington courts have directly applied the revised definition of marital status, the court recently confirmed that an employer may prohibit employee dating or cohabitation without violating the Act. *Waggoner*, 134 Wn.2d at 756-57. Thus, nepotism policies that specifically prohibit employees who are cohabitating (or simply dating) from working together do not constitute marital discrimination, even where the same prohibition does not exist for married couples.

An employer should not bar a husband and wife from working together simply based on the fact they are married to each other if it permits individuals in other family relationships to work together (e.g., fathers and sons, siblings). Instead, employers should think through their business needs for such limitations. In any event, most anti-nepotism policies are narrowly tailored to prevent conflicts of interest, such as where one spouse supervises the other or where one spouse works in a confidential position for a direct competitor.

B. What Should the Employer Do to Address Known or Suspected Relationships?

If an employer learns of a consensual romantic relationship between a supervisor and subordinate or between coworkers, the employer should do what is necessary to ensure that the relationship is consensual and is not coerced. United States Supreme Court decisions confirmed that employers are subject to vicarious liability for hostile environment situations contributed to by supervisors and that a plaintiff's failure to avail herself of an established harassment complaint procedure is a valid defense. *See Ellerth*, 524 U.S. 742 (holding that an employer is presumptively liable for a supervisor's harassment of a lower-level employee unless the company can show that it had a good complaint procedure in place that the plaintiff unreasonably failed to use); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (holding that an employer can be liable for sexual harassment by a supervisor even if the employer lacks actual notice of the supervisor's conduct).

An employer will be held strictly liable for quid pro quo harassment by a supervisor, even in the absence of "knowledge" by the employer of such conduct. *Ellerth*, 524 U.S. 742.

It is more important now than ever for an employer not to minimize the potential for an employee's claim of sexual harassment because the employer believes that the relationship has been consensual. If the relationship was never consensual or if the character has changed and the employer has reason to believe the relationship is now nonconsensual, the employer should investigate and take prompt remedial action. Though some employers may think it burdensome and overly intrusive, it is prudent, given the state of the law, for the employer to periodically meet with the employees to address issues raised by of the relationship.

1. Meet and Confer

One way to maintain this dialog is through a "meet and confer" process. During the course of a suspected consensual relationship, an employer should consider meeting with the individuals in the relationship separately and in private, not to discuss details of the relationship, but to indicate the employer's policy against nonconsensual relationships. This is particularly important where one of the parties is a supervisor and the other a subordinate or where the relationship has had some adverse effect on others in the workplace. In this meeting, the employer should remind the employee of the company's pertinent policies, including the sexual harassment policy. As appropriate, the employer may address the potential legal and practical issues that may arise from their relationship. Finally, the employer should encourage the individuals to notify the employer if either of them believes there has been a violation of employer policy. It would be wise to document this conversation and retain such notes in the company records.

2. "Date and Tell" Policy

Another approach, which might be labeled a "date and tell" policy, would require disclosure of romantic interoffice relationships to the employer. An employer could choose to impose such obligations only on supervisors or managers. A "date and tell" policy theoretically provides an employer with notice and the ability to intervene quickly when inappropriate behavior is observed. Such a policy, however, is extremely difficult to enforce given the inherent problems in defining the type of relationship that would trigger the policy and establishing evidentiary proof in the event that the employer suspected that employees were not complying. While such a policy, if followed, provides helpful information and some proof of a consensual relationship, many employers believe it would create an unwarranted intrusion into their employees' personal lives. On that basis, "date and tell" policies are not widely used.

A more limited policy that requires only supervisors to disclose when they begin a sexual relationship with a company employee has the attraction of being more narrowly tailored and appearing less draconian. It would monitor only the riskiest relationships and affect primarily the individuals presumably in the weakest position to object to the company's intrusion.

3. Written Confirmation of Consensual Nature of Relationship

Perhaps the most aggressive step an employer could take is to require employees to execute a written statement affirming the consensual nature of their relationship. In general, such a "love contract" is an informed consent agreement, signed by each party acknowledging the employer's policy against sexual harassment in the workplace and affirming that the present relationship is consensual. Specifically, the agreements usually stipulate that both employees wish to undertake a consensual relationship that is mutual and not business-related or in violation of the company harassment policy.

As a practical matter, such contracts may create more problems than they are worth. Employers often find out about such relationships through other employees, creating the potential for defamation claims. Moreover, many employees will be unwilling to voluntarily disclose a workplace relationship or to sign a document to that effect. Indeed, where the employees have some personal reason to keep the relationship discreet, a requirement to sign a contract document would certainly be a perceived as highly offensive to the subject employees.

C. What Should the Employer Do Once the Relationship Is Over?

Once the employer is aware or suspects that a consensual romantic relationship has ended, it is incumbent upon the employer to carefully monitor the situation to ensure that neither former paramour is engaging in inappropriate workplace conduct toward the other and, specially if one is a supervisor, that he or she is not retaliating against the other. In this situation, it is particularly important to ensure that the supervisor does not make any sexual overtures to the former paramour. Even casual attempts to "talk about the relationship" can create a hostile environment if such conduct is repeated and unwelcome.

Following the relationship's end, the employer should again "meet and confer" with each individual involved, and again remind them of their obligations and rights under the sexual harassment policy—specifically discussing the policy's complaint procedure.

Supervisors should be reminded of their obligations under state and federal law as well as under company policy. They also should be reminded of their obligation to avoid retaliation and be given examples of retaliation or harassing conduct. As a practical matter, it is wise for the supervisor to be excluded from decisions involving employment benefits or detriments to the former paramour. Where not possible, all such decisions should be reviewed and approved by higher management or the employer's Human Resources department.

Employers conducting post-relationship meetings should make and retain notes of the conversation. Documentation will be useful in the event that the employee files a sexual harassment claim on the grounds that he or she was harassed or coerced into the relationship by the former supervisor.