Regulating Consensual Relationships in The Workplace - Are "Love Contracts" The Answer?

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In this regard, the Court deferred to state law in finding there was a
ingbinding contractual obligation to redeem the stock from Bleunt's estate,
despite the fact that the buyout agreement was held invalid for purposes of
valuing the corporation for estate tax purposes.

In arriving at this conclusion, the Eleventh Circuit cited as precedent an
opinion of the Ninth Circuit and an earlier decision of the Tax Court:
Cartwright v. Comm'r, 183 F.3d 1034, 1038 (9th Cir. 1999) and Huntsman

IRC § 2042.

Treas. Reg. § 20.2042-1(c) (as amended in 1979).

Treas. Reg. § 20.2042-1(c)(6).


Treas. Reg. § 20.2042-1(c)(6).

See True v. Comm'r, 390 F.3d 1210, 1239-41 (10th Cir. 2004) (collecting
cases that both support and disregard provisions in buyout agreement
setting value).

Under the "rule of the circuit," the Tax Court is required to follow the
rule of the circuit court in which the litigation arose (i.e., where the taxpayer
resides). See Golsen v. Comm'r, 54 T.C. 742 (1970). Consequently, the
circuit courts could split with respect to a particular issue. In such event,
the United States Supreme Court might hear the case in order to resolve the
issue.

With the entrance of woman into the workplace and the
current American trend to spend more time at work, office
dating is on the rise. Vault's 2005 Office Romance Survey
revealed that fifty-eight percent of employees have been
involved in an office romance, up from forty-six percent in
2003. Another survey found that ninety-two percent of over
31,000 men and women questioned admitted to finding a
coworker attractive and flirting with him or her.

While the office may be evolving into the hottest
singles scene, these statistics give employers plenty of reasons
to fear potential lawsuits. Completely prohibiting dating
among co-workers has proven impractical and difficult to
enforce. One major concern is a sexual harassment claim
following a bad breakup between two employees. Legal
Assistant, Kramer Levin Naftalis & Frankel LLP, NYC
In light of the inevitability of romance in the workplace, many
employers are experimenting with "love contracts" to protect
themselves from potential sexual harassment claims.

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Employees wishing to date one another must first sign a written contract that the relationship is in fact consensual, and that they are willing to therefore waive their right to bring a sexual harassment claim in court. This appears to be a safe compromise for employers, offering their workers the freedom to date but preventing possible liability. To date, such contracts have not been tested in court, but they are likely to raise a variety of problems. Invasion of privacy, actual validity as a contract, and exposure to other forms of liability are only a few of the reasons that love contracts are not the best way to handle the rise in office dating.

This paper will first review the background case law on sexual harassment that formed the basis for the Equal Employment Opportunity Commission’s (EEOC) guidelines regarding sexual favoritism and consensual relationships in the workplace. Secondly, the authors will discuss recent state and federal cases involving paramours and failed consensual relationships between co-workers. The authors then will explain why love contracts may not be the most effective method by which to address the changing norms of fraternization on the job and will offer management suggestions for a more practical and lawful way to avoid the negative fall-out of consensual relationships in the workplace.

**TITLE VII AND SEXUAL HARASSMENT DISCRIMINATION**

**A. Quid Pro Quo and Hostile Environment Claims**

In the 1986 decision, *Meritor Savings Bank v. Vinson*, the Supreme Court provided distinct definitions of the two existing forms of sexual harassment: quid pro quo and hostile work environment.² Quid pro quo is the clear situation where plaintiff’s submission to or rejection of unwelcome sexual conduct is the basis for employment decisions affecting the plaintiff. Secondly, the Court held that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment... [and that in order for] sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”² *Meritor* held that discrimination under Title VII is not limited to a tangible loss. “The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women in employment.’”² Though the Court did not determine the standard for liability, it agreed with the EEOC that courts should look to agency principles for guidance. The Court explained that while employer liability is not strict, employers are not immune simply because they have policies prohibiting sexual harassment. Rather, liability will depend on the adequacy, timing, and effectiveness of their remedial action.²

More recent Supreme Court decisions have increased the need for employers to be proactive in avoiding sexual harassment claims. Both *Faragher v. City of Boca Raton*³ and *Burlington Industries v. Ellerth*⁴ helped to clarify the extent of the employer’s liability, which the Court had failed to fully address in *Meritor*. Prior to the holdings in these two later cases, Title VII plaintiffs were encouraged to “state their claims in *quid pro quo* terms, which in turn put expansive pressure on the definition.”⁵

In *Burlington Industries* the plaintiff, Ellerth, was forced to endure remarks and gestures of a sexual nature, as well as threats to deny her tangible job benefits from an employee in a supervisory position. Although those threats were not carried out, and in fact Ellerth was promoted once, she chose to leave
her job, but did not report the abuse until after she had quit.10 Similarly, Faragher was subjected to physical and verbal harassment by her supervisors. She also chose not to voice her complaints to management.11

The Supreme Court sought to impose agency principles of vicarious liability for damages caused by the exploitation of supervisory authority and to encourage employers to prevent instances of sexual harassment. In both cases, the Court found that

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.12

Furthermore, the Court noted that the employer's vicarious liability can be limited if the employer is able to prove that "it acted reasonably in preventing or correcting sexual harassment, or that the employee acted unreasonably in failing to utilize the employer's preventive or corrective opportunities."13

B. Sexual Favoritism

The EEOC has also provided guidance for employers on what claims are cognizable under Title VII, and the Commission's guidelines are accorded deference in sexual harassment cases.14 In a 1990 policy document, the EEOC addressed the extent to which employers can be held liable for unlawful sex discrimination by persons who were qualified but were denied an employment opportunity or benefit because they did not submit to sexual advances or requests.15 Here the EEOC explored how three different manifestations of "sexual favoritism" in the workplace might adversely affect the employment opportunities of third parties in such a way as to create an actionable charge of either "implicit" quid pro quo harassment and/or hostile work environment harassment.16 First, the Commission looked at isolated instances of preferential treatment based on consensual romantic relationships. Though perhaps unfair and offensive, such favoritism does not discriminate against men or women in violation of Title VII because both are equally disadvantaged for reasons other than their genders.17 This principle has come to be known as the "paramour rule" because the non-paramour is disadvantaged simply because of the supervisor's romantic preferences, not because of any illegal discriminatory activity. Second, the Commission dealt with favoritism based on coerced sexual conduct. If the relationship at issue was not consensual, then other qualified men and women may be able to establish a Title VII violation by showing that in order to obtain a promotion, it would have been necessary to grant sexual favors. In addition, they would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination suffered by their co-worker.18 The third category is widespread favoritism of consensual sexual partners. The EEOC's position is that when such behavior permeates the workplace, those who do not welcome such conduct may have a cause of action based on the creation of a hostile environment.19

The memorandum heavily relied on the 1988 case of Broderick v. Rude20 to further explain how widespread sexual favoritism can violate Title VII. The case involved allegations
by Catherine Broderick, a staff attorney at the Securities and Exchange Commission (SEC), that two male supervisors had engaged in sexual relationships with secretaries who later received promotions, cash awards and other job benefits, and that the plaintiff herself had been subjected to isolated instances of unwanted sexual advances by her supervisor. One supervisor repeatedly pressured her to let him give her a ride home, and when she finally accepted, he barged into her apartment and toured the premises, including her bedroom. Though intrusive, there was no physical contact. The same supervisor regularly made crude jokes in the office and maintained a known and visible liaison with one of the secretaries. A different supervisor, the Regional Administrator, became drunk at an office party and untied the plaintiff’s sweater and kissed her and another female employee. Throughout her eight year tenure at the SEC, the plaintiff had demonstrated her capabilities as an attorney, but the friction with her supervisors escalated over the excessive socializing in the office and Broderick’s unwillingness to be a “team player.” Over time, the plaintiff’s performance ratings deteriorated as a result of upper management’s growing resentment of her refusal to “go along, in order to get along”.22

The District Court had little trouble finding that the conduct of Broderick’s supervisors created a hostile work environment, undermined the plaintiff’s motivation and work performance, and deprived her and other female employees of opportunities for job advancement.23 Any documented deficiencies in her work performance were directly attributable to the general atmosphere in which she worked.24 The defendant maintained that Broderick’s claims were really for quid pro quo harassment and that other than the two isolated situations described above, she was not sexually harassed. Any sexual misconduct by supervisory personnel was not directed at Broderick and was merely part of the “social/sexual interaction between and among employees.”25 The defendant argued that Title VII was not intended to regulate sexual morality in the workplace. The court readily dismissed these contentions. While consensual sexual relations in exchange for tangible employment benefits might not create a cause of action for the willing recipient, such advances, for those who do not find them welcome, do create and contribute to a sexually hostile working environment.26

The EEOC endorsed the court’s theory, but significantly, it noted that “these facts could also support an implicit ‘quid pro quo’ harassment claim (italics added) since the managers, by their conduct, communicated a message to all female employees in the office that job benefits would be awarded to those who participated in sexual conduct.”27 The Commission went on to state that in a situation where management personnel regularly solicited sexual favors from subordinate employees in return for job benefits, those who did not willingly consent or welcome this conduct might be able to establish that the conduct created a hostile environment, even if they were not directly solicited. Such conduct is actionable because it communicates a message to all employees that job benefits are conditioned on acquiescence to sexual relations.28 Facts such as those that arose in Broderick require an analysis that partially blurs the distinction between quid pro quo and hostile environment sexual harassment.

C. Consensual Relationships Gone Awry

The EEOC’s 1990 Policy Guidance has not been revised, and to date, no federal court of appeal has issued an opinion finding that the complained-of consensual favoritism was sufficiently widespread to create a hostile environment.29 Until this past year, no state supreme court had directly addressed the issue.30 Then in July of 2005, the California Supreme Court
ruled in *Miller v. Department of Corrections* that non-favored employees could bring such a claim. The conduct revealed in this case goes well beyond the SEC’s loose, fraternity party atmosphere under scrutiny in *Broderick*.

The co-plaintiffs in *Miller* were two female corrections employees, Edna Miller and her assistant, Frances Mackey, who claimed sex discrimination, harassment and retaliation by their supervisor, Kuykendall, and his three paramours (Brown, Bibb, and Patrick) who were also employed by the Department of Corrections. In soap opera fashion, the saga went on from 1991 until 1998 and was carried over to a second correctional facility as Kuykendall arranged transfers and promotions for his “women”. The three frequently squabbled over him, sometimes in emotional scenes witnessed by other employees, and they openly boasted to the plaintiffs about their ability to influence Kuykendall. Brown, in particular, flaunted her affair, and when vying for a promotion for which Miller was more qualified, Brown announced to Miller that Kuykendall would have to give it to her, otherwise she would “take him down with her knowledge of every scar on his body” (internal quotes omitted). The situation worsened when another female warden, Yamamoto, became close with Brown. It is not clear whether they were engaged in a lesbian relationship, but they teamed up against Miller to make her life miserable. The plaintiffs suffered verbal abuse, demotions, reduced pay, threats, and in one instance Brown physically assaulted Miller and held her captive for two hours. When plaintiff Mackey sought help to release Miller, Yamamoto would not intervene. Kuykendall refused to investigate Miller’s complaints of harassment, citing his relationship with Brown, and her relationship with Yamamoto. He told Miller that he should have chosen her, which she took to mean that he should have had an affair with her instead of Brown.

Finally, in 1998, Miller and three other employees filed a confidential complaint with Kuykendall’s supervisor, stating that the “institution was out of control.” Brown soon learned of Miller’s cooperation with the ensuing internal investigation, and Brown and Yamamoto began a campaign of ostracism against Miller and regularly interfered with her orders. Kuykendall withdrew accommodations that Miller received due to a physical disability. On one occasion, Brown had an angry confrontation with Miller and followed her home. Miller then obtained a restraining order against her, and the plaintiffs brought an action for sexual harassment pursuant to the California Fair Employment and Housing Act.

Despite the sexually charged atmosphere at the state prison and the events unleashed by Kuykendall’s multiple affairs, the trial court granted summary judgment in favor of the California Department of Corrections. The trial court and the Court of Appeals reasoned that the supervisor’s grant of favorable employment opportunities to the three women with whom he was having concurrent affairs did not constitute sexual harassment of non-favored employees because there had been no attempts to coerce sexual relations from them, and non-favored employees of both genders would be equally disadvantaged. Relying heavily on the EEOC memorandum, the California Supreme Court disagreed. It held instead that the facts of the case indicated that sexual favoritism in this workplace had indeed become so widespread that the message was that employees were sexual “playthings” for the boss. The situation could constitute an actionable hostile environment. The lower courts erred in refusing to let a jury consider the plaintiffs’ claims.

Certainly, the rather lurid facts in the *Miller* case are unusual. Nonetheless, it raises new concerns for management. Plaintiffs may now allege (and courts may allow juries to
decide) that consensual sexual behavior and fraternization among colleagues, particularly where there is a supervisor-supervisee relationship, creates a workplace that is permeated with widespread sexual favoritism and hence establishes a hostile environment.37

PARAMOURS AND PERSONAL ANIMOSITY

A. The Paramour Rule

In order to put Miller into perspective, it is worth returning to the case law that has developed under the well-established paramour rule and a corresponding line of cases that focuses on employment actions that are based on underlying personal animosity resulting from a failed romantic involvement. These cases demonstrate that the employer is generally insulated from liability for sexual harassment, as long as the initial relationship was consensual.

The chief case in point is Decintio v. Westchester County Medical Center, where seven male respiratory therapists claimed that they were denied a promotion that went to a woman with whom the Program Administrator was having an affair.38 The U.S. Court of Appeals for the Second Circuit clearly stated voluntary, romantic relationships cannot form the basis of a sex discrimination suit under either Title VII or the Equal Pay Act.39 “The proscribed differentiation under Title VII ... must be a distinction based on a person's sex, not on his or her sexual affiliations,” and there must be “a causal connection between the gender of the individual or class and the resultant preference or disparity.”40 For Title VII purposes, the court found no justification for defining “sex” so broadly as to include an ongoing, consensual romantic association. Any other interpretation “...would involve the EEOC and federal courts in the policing of intimate relationships.41"

State courts, in construing similar provisions against discrimination, have likewise held that as long as the favoritism is based on personal romantic preference, not coercion, there is no actionable discrimination on the basis of gender. For example, in Erickson v. Marsh & McLennan Co., the plaintiff, an at-will employee, sought relief for reverse sex discrimination under the New Jersey Law Against Discrimination, claiming that fabricated charges of sexual harassment were brought against him and that when he retained an attorney, he was discharged so that his supervisor's paramour could be promoted.42 The plaintiff was unable to produce any evidence that had he been a woman, he would not have been fired. Moreover, management had the right to fire an at-will employee for a false cause or for any cause, unless it violated public policy, and hiring an attorney is not a “protected activity.” The firing may have been unfair, but the court concluded that it was not illegal.43

Employers thus may find some comfort in Decintio and its progeny because employment decisions that are the result of isolated instances of favoritism will not give rise to successful discrimination charges. Employers should recognize, however, that even isolated acts of favoritism may nonetheless contribute to a general perception of unfairness and may lead to poor morale and distrust. Employers should also be concerned that such preferential treatment does not begin to permeate the workplace in a way that could later be deemed “widespread”. Along this spectrum, employers also need to worry about the flip side of romantic relationships in the workplace--those that go sour. Numerous cases address the problems of personal animus dictating employment decisions and/or negatively affecting the workplace following a failed relationship. While again, employers are protected from Title VII claims in these cases, the facts are often nasty and disruptive to the workplace.
B. Personal Animosity

In Succar v. Dade County School Board, the Eleventh Circuit Court of Appeals held that any analysis under a hostile environment theory must focus on whether the complaining employee was targeted because of his or her gender, and that personal feuds cannot be turned into sex discrimination cases. Plaintiff Succar, who was married, had carried on a year long affair with another teacher, Lorenz, when Lorenz began threatening Succar’s wife and son. Succar’s wife obtained a restraining order against Lorenz, and the extra-marital affair ended soon after. Lorenz was extremely bitter, and she began to verbally and physically harass Succar, publicly embarrassing him in front of colleagues and students. Succar claimed that the school principal took insufficient steps to remedy the situation, and he subsequently filed a complaint alleging hostile work environment sexual harassment. Agreeing with the district court, the Court of Appeals observed that “Title VII prohibits discrimination; it is not a shield against harsh treatment at the work place.” Lorenz’s harassment of the plaintiff was not due to his gender, but rather her anger and disappointment at having been jilted.

The following year, the same court applied the reasoning in Succar to a claim arising out of a consensual relationship in the quid pro quo context. In Pipkins v. City of Temple Terrace, Florida, plaintiff Houldsworth engaged in a consensual relationship with Klein for approximately one year. Klein continued to romantically pursue Houldsworth after she ended the affair. Although Klein had a supervisory position in Houldsworth’s department, her immediate supervisor was Florence Lewis-Begin, a friend of Klein’s wife. Houldsworth’s job evaluations began to deteriorate once she terminated the relationship, and when the City Manager learned of the problems he commenced an investigation and Klein was ordered to seek other employment. Nonetheless, Houldsworth continued to receive poor evaluations from Lewis-Begin, and Houldsworth ultimately resigned, claiming constructive discharge. Citing Succar, the Court ruled that any harassment Houldsworth suffered was attributable to her failed consensual relationship with Klein and the feeling of enmity it engendered in both Klein and Lewis-Begin. She did not meet the Title VII requirement of a showing that the altered terms and conditions of employment were “because of... sex.”

New York’s prohibition against discrimination on the basis of sex pursuant to Executive Law Sect. 296(1)(a) tracks the language of Title VII. The statutory term “sex” has likewise been interpreted to be synonymous with “gender,” and does include variants of sexual activity, liaisons, or attractions. Thus, in Mauro v. Orville, a legal secretary who had an intimate relationship with her boss, an attorney, could not sustain a claim of discrimination due to her sex when he discharged her in order to reconcile with his wife. A plaintiff would need to demonstrate that there were unwelcome sexual advances after termination of the consensual relationship in order to support a claim that the discharge was motivated by gender.

The foregoing cases establish that employees will not succeed in a Title VII suit when the complained of employment actions were taken to alleviate strained relations following the breakup of a consensual union. They also illustrate, however, how uncomfortable such situations may become, and how they may draw other members of the work force into the fray. Much like any acrimonious divorce, the resulting fall-out is divisive as co-workers take sides, and at a minimum, such intrigue is a distraction most employers would rather avoid.
EMPLOYER COMPLIANCE WITH EEOC GUIDELINES

While case law shows that sexual favoritism as a result of a consensual relationship and allegations of sexual harassment in the form of personal animosity are extremely difficult cases for a plaintiff to make out, sexual harassment suits are still something to be feared by employers. In 2005 the EEOC reported that 12,679 charge receipts were filed and resolved under Title VII claiming sexual harassment discrimination as an issue. Costs are high for businesses fighting these serious allegations, and companies paid a total of $47.9 million in monetary benefits. (This figure does not include damages awarded from litigation.)

What can employers glean from these decisions? It is essential to develop and to uphold a strict sexual harassment policy in the workplace. Without one a company will be unable to defend itself against sexual harassment claims that may arise. Aside from potential financial losses, these statistics prove that sexual harassment continues to be a problem in the workforce, and employers must be proactive in protecting their employees. Furthermore, companies need to be aware of how the national rise in office dating may affect their operation, and they should familiarize themselves with the different options for handling consensual relationships so that they can become equipped to deal with the ramifications of a traumatic break-up in the workplace.

Before employers look for ways to completely eliminate the possibility of a romance budding between two co-workers (instilling a simple non-fraternization policy), they should consider how the relationship will affect the business if it goes well. Depending on the size and nature of a company, office relationships can have a positive influence.

Having a love interest at the office can make employees overall more content in life. Being happy is proven to make people more motivated, productive, and physically healthier than those who are unhappy. Employees may be less likely to rush home at the end of the day if they know that staying late to finish their assignments means that they can take a dinner break in the cafeteria with their significant other. In addition, the couple will share a common interest: their line of work. This could lead to job related brainstorming outside of the office. Couples may also feel the desire to impress each other, and work to their highest ability in order to appear smart and competent in the eyes of their loved one. By allowing people to date each other at work, employers have the potential to gain more hours, enthusiasm, motivation, and productivity from their employees all while making their staff happier in life.

Employers should weigh the costs and benefits of allowing consensual relationships to take place at work, but they cannot ignore the fact that in today’s work environment officemates are probably already dating. A more recent approach to handling this challenging situation is the development of the love contract.

REVEALING ALL—LOVE CONTRACTS AND PRIVACY

A. Creation of the Love Contract

Looking for an innovative approach to accommodate office romances and worried employers, the San Francisco firm of Littler Mendelson developed the first love contract in 2000. Since then the firm has completed hundreds of contracts for clients over the past few years. In a 2005 article published by Stephen Tedesco, a partner at Littler, he recommends love
contracts to employers as a means of protecting employers from both sexual harassment claims and sexual favoritism disputes. He states that a love contract "documents that the employee's relationship is consensual, they are aware of the company's sexual harassment policies and agree to maintain proper, professional office behavior and, if the employees are in a supervisor-subordinate working relationship, both parties agree that one will transfer to another department or work group."

There are several apparent benefits to enforcing the use of these contracts. First, it confirms in writing that the relationship is in fact voluntary. Furthermore, it ensures that the involved parties are aware of the company's policies towards consensual relationships and sexual harassment. Some practitioners recommend holding a separate discussion with each employee to ensure that the relationship is truly consensual, and using this meeting as an opportunity to review the company's sexual harassment policy and complaint procedure. Employees should also be advised that signing the agreement is not a condition of employment and that they may want to consult with counsel before signing. A key component of the contract is that employees should be required to notify the employer if and when the relationship ends and the employer should closely monitor the post-dating situation for problems. Finally, it guarantees that if the relationship falls through, any potential disputes will be handled through mediation or binding arbitration. Advocates of love contracts argue that these methods will be more time and cost effective for all of the involved parties, and will not tie up the court system.

B. Off-hours Dating and Privacy

Perhaps the biggest concern with love contracts is that they have yet to be tested in the courts. Though they borrow concepts from contract and employment law, it is possible that they could lead to claims of invasion of personal privacy. Employees asked to sign such an agreement might feel compelled to reveal an extramarital affair or a homosexual relationship. A few states, including New York, Colorado, North Dakota, and California have privacy protection statutes that afford employees some degree of protection for non-employment related activities.

Though several cases have been filed in New York in both state and federal court questioning whether personal employee relationships are protected "recreational activities," no clear consensus has yet emerged, and love contracts were not at issue. The reasoning in these cases is nonetheless interesting and instructive for employers considering the introduction of the rather intrusive love contract.

In pertinent part, New York Labor Law §201-d states that:

2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

   c. an individual’s legal recreational activities outside work hours, off of the employer’s premises and without use of the employer’s equipment or other property.
The statute defines “recreational activities” as:

any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.64

The key case that examined the language and purpose of the statute is New York v. Wal-Mart Stores, in which Wal-Mart had discharged two of its employees for violation of its “fraternization” policy that prohibited a “dating relationship” between a married employee and another employee other that his or her own spouse.65 In a somewhat convoluted opinion, the majority held that “dating” was distinct from a “recreational activity” because its key component was “amorous interest,” and as such, it could not be included in the statute’s clearly delineated categories of leisure-time activities.66 Since the indispensable element of dating, “in fact its raison d’etre, is romance, either pursued or realized,” it could not be counted as an activity within the purview of the statute.67 Judge Yesawitch, in a strong dissent, argued that the statute encompasses all social activities, whether or not they have a romantic element, “for it includes any lawful activity pursued for recreational purposes and undertaken during leisure time.”68 The majority’s holding gave no protection to social relationships that might contain a romantic aspect, regardless of the participants marital status, or the impact of their relationship on their capacity to perform their jobs.69 Judge Yesawitch urged instead that the statute be read broadly to effect its remedial purpose:

...given the fact that the Legislature’s primary intent in enacting Labor Law Sec. 201-d was to curtail employers’ ability to discriminate on the basis of activities that are pursued outside of work hours, and that have no bearing on one’s ability to perform one’s job, and concomitantly to guarantee employees a certain degree of freedom to conduct their lives as they please during non-working hours, the narrow interpretation adopted by the majority is indefensible.70

The New York Court of Appeals has never addressed the issue, and the Wal-Mart decision has been followed in numerous cases. For example, in Bilquin v. Roman Catholic Church, the plaintiff, a Pastoral Associate for Faith Formation, had no cause of action under Labor Law § 201-d(1)(b) for wrongful termination when she was not renewed for employment due to her cohabitation with the husband of a parishioner.71 Likewise, in Hudson v. Goldman Sachs & Co., plaintiff had no cause of action when he was dismissed for having an extramarital affair with a co-employee.72 Nor did he have a cause of action for any form of discrimination on the basis of sex or marital status, because his female paramour was single, and she was also terminated.73

The only federal case to date, however, may be most predictive of the future of privacy claims that arise out of consensual office romances. In McCavitt v. Swiss Reinsurance America Corp., the plaintiff, an officer of the company, was romantically involved with another officer. Despite the fact that the company had no written anti-fraternization policy, the plaintiff was passed over for promotion and ultimately fired because of their dating.74 The U.S. Court of Appeals for the Second Circuit reluctantly agreed with the district court that its
The decision was governed by the Third Department’s decision in Wal-Mart, and thus it dismissed McCavit’s complaint on the grounds that dating is not a protected recreational activity. Absent persuasive evidence that the New York Court of Appeals would reach a different conclusion regarding the scope of “recreational activity” under the statute, the Court felt bound to apply the interpretation of New York’s intermediate appellate court. Circuit Judge McLaughlin, in his concurring opinion, urged that the New York Court of Appeals, if given the chance, should reach the opposite conclusion. Endorsing Judge Yesawich’s reasoning quoted above, Judge McLaughlin added a common sense, reality check: “Romance has a distinctly distinguished history of originating in office contacts. It is one of the most clichéd of movie plots... (and quoting Justice Frankfurter), “There comes a point where this Court should not be ignorant as judges of what we know as men.”

CONCLUSIONS AND RECOMMENDATIONS TO EMPLOYERS

A. Avoid Using Love Contracts

The rise in office dating is clearly a sticky situation for employers to handle. Trying to find a balance between turning a blind eye and ruling the office romance scene with an iron fist is more difficult than it sounds. It is not surprising that the safety net love contracts appear to cast for employers has become so popular. However, it is unlikely that these contracts will be of any real use to the employer, and they are not worth the attorney fees it would cost to have them drafted.

Forcing employees to sign one of these so-called “love” contracts places them in a very awkward and unnatural position. It’s doubtful that two people will decide to consult with the Human Resources department before they even go out to dinner with one another. Signing an agreement turns the casual date into a big commitment, and couples are far more likely to simply hide their relationship.” Furthermore, since these contracts have yet to be tested in court, their validity may not hold up. Employees who feel pressured to sign such agreements could later argue that the circumstances were coercive in that the employer gave the tacit message that signing (and waiving certain rights to sue) was an implied condition of continued employment. Thus love contracts may “poison the waters” and leave the employer wide open to other potential forms of liability. Once the employees have signed the agreement, there is a written record that the employer is aware of the relationship. It is likely that such admissions will reveal relations between employees that may be homosexual, inter-racial, mixed religions, extramarital, etc. If one or both members of the couple later suffer a tangible employment loss, they may be able to make out a discrimination case against the employer on the basis of grounds other than sex. Finally, love contracts send the negative message to the employees of the firm that their employer is limiting their rights to their own privacy, as well as limiting their protection from sexual harassment if that situation does arise.

B. Protecting Employees While Protecting the Company

To create the most productive work atmosphere, employers should be focusing on making their employees feel safe and content. Instead of limiting the rights of their workers, companies should focus their efforts and legal resources on drafting strong policies against sexual harassment, should educate their employees on how to follow them, and should regularly monitor and consistently enforce such policies. Statistically it is inevitable that consensual relationships will occur at most operations. Employers need to achieve a balance between decorum in the work place and the
extremely offensive behavior exhibited in Miller, and to a lesser extent, in Broderick. Employment law practitioners have offered the following advice to navigate this terrain:

Employers should keep in mind the key factors behind the Miller court's decision (and the EEOC's policy) in order to evaluate the legal risk to the company, including, (1) the number of employees with whom the supervisor had sexual relationships, (2) the number of supervisors engaged in sexual relationships with subordinates, (3) how public the relationships are in the office and the interaction between the employees who are the supervisor's paramours and the supervisor, (4) whether the employees having these relationships are receiving benefits that other employees are not receiving and which are not justified by performance or other merit-based reasons, (5) whether the employees that are having these relationships with supervisors wield power over the employees who are not in such relationships; and (6) whether the overall feeling in the workplace is that in order to be promoted or receive equal treatment, an employee must have sexual relations with the supervisor.78

To date, the case law indicates that it is extremely difficult for employees to successfully claim discrimination on the basis of sex if they are discharged because of either an ongoing consensual union or because of strained relations following a breakup. Nonetheless, employers who insert themselves in their workers' private lives by either imposing unrealistic non-fraternization policies or requiring workers to voluntarily come forward and to sign love contracts, may ultimately find themselves sued in privacy actions. Given these multiple constraints, an employer's best option is to emphasize a strict sexual harassment policy and to require a professional atmosphere in the work place. This method will provide support for employers in court, but more importantly, it will send a positive message to employees that management wants to protect their rights, not to restrict them.

ENDNOTES

3 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)
4 106 S.Ct. 2406
5 106 S.Ct. 2404.
7 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643 (1998)
8 24 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634 (1998)
9 118 S.Ct. at 2260
10 Ellerth supra, 118 S.Ct. at 2257
2007 / Regulating Consensual Relationships / 52

11 Faragher, supra, 118 S.Ct. at 2280.
12 Ellerth, supra, 118 S.Ct. at 2261.
13 Id.
14 See Meritor, supra note 3 and Drinkwater v. Union Carbide Corp., 904 F.2d 853, 859 (3d Cir. 1990).
16 1990 WL 1104702 (E.E.O.C. Guidance)
17 Id.
18 1990 WL 1104701 at 8 (E.E.O.C. Guidance)
19 1990 WL 1104702 at 2 (E.E.O.C. Guidance)
21 Id. at 1272.
22 Id. at 1278.
23 Id. at 1280.
24 Id.
25 Id.
26 1990 WL 1104702 (E.E.O.C. Guidance)
27 Id.

53 / Vol. 17 / North East Journal of Legal Studies

40 30 Cal. Rptr. 3d 797, 36 Cal. 4th 446 (Cal. 2005).
41 Id. at 453.
42 Id. at 456.
43 Id.
44 Id. at 457.
45 Id.
46 Id. at 468-469. But also see Drinkwater, supra note 14, finding that plaintiff's allegations of an open sexual relationship between her supervisor and one of her co-workers was insufficient to establish an oppressive, hostile work environment, and plaintiff could not survive a motion for summary judgment on that count.
47 Douglas, supra note 28.
48 807 F.2d 304 (2nd Cir. 1986).
49 Id. at 308.
50 Id. at 307.
51 Id at 561.
52 Erickson, supra note 29.
53 Id at 561.
54 229 F.3d 1343 (11th Cir. 2000).
55 Id at 1345.
56 Id.
57 267 F.3d 1197 (11th Cir. 2001).
The Tedesco, Fortado, F. Id. dismissing May 93. See also Rey, Your Wife. See also Niforatos, Workplace 'Love Contracts' On the Rise. NAT'L LAW J. 2/21/2005.


EMINENT DOMAIN AFTER KELO V. NEW LONDON: IS CHANGE IMMINENT?

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I. INTRODUCTION

The United States Supreme Court has historically played the critical role of hearing and deciding cases that ultimately define our society as one of law. Many of the Court’s decisions have been handed down with little fanfare, and any national publicity and debate faded soon thereafter. Sometimes, however, the Court renders a landmark decision which involves such a fundamental right and has such immediate and long-term implications that a firestorm of national publicity and debate continue long after the decision date. One June 23, 2005, the Supreme Court decided such a case, Kelo v. New London, an eminent domain decision, and the firestorm of publicity and debate continues. In Kelo, the Court dramatically expanded the eminent domain power of government to take private property for “public purposes” rather than “public use.” The Court reasoned that a Connecticut city could constitutionally take private property in the name of economic development by a private developer.

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