

LOVE, LABOR, LOSSES

New rulings widen the workplace
impact of office romance.

by Al Slavin

► **The Backdrop:** The severity of office romance-related claims poses a costly risk for employers.

► **At Issue:** A wide pool of employees can bring claims related to office romance.

► **What It Means:** Risk managers and human resources offices need to be diligent and consistent in investigating complaints.

A decade ago, two female prison guards took a unique tack in their lawsuit against the California Department of Corrections.

The pair claimed they were victims of sexual harassment under state law because of favorable treatment given to several other women at the facility, who were having affairs with a warden.

Six years passed before the California Supreme Court reversed the case's earlier dismissal at the trial court level. The justices ruled that widespread sexual favoritism in the workplace may be demeaning to women and create an "actionable hostile work environment."

The decision served as a benchmark in employment discrimination law and has prompted employers to rethink the risks posed by office romance.

Adeola Adele, of Marsh, said the case sheds light on a reverse quid pro quo allegation: that other employees can be affected by office romance, as opposed to just those who are involved.

"They don't have the same benefits, terms or conditions of employment as the one who's involved in this relationship," said Adele, Marsh's national employment practices liability practice leader.

Employers have taken steps to minimize risks through non-fraternization rules that address interoffice dating. Some have even required co-workers who become involved to sign "love contracts" that define their relationship as consensual.

While such moves may help, the potential fallout from office romance-related claims can still spur costly litigation and extensive discovery, and drain workplace resources. There are also the ancillary impacts on employee morale and productivity.

Lax Attitudes

A 2008 survey by Spherion, a national staffing and recruiting firm, indicated that employees aren't too concerned about the professional risks posed by office romance. Only 30% of employed adults surveyed felt

Do's and Don'ts at the Workplace

Steps to achieving legally compliant employment practices:

Do:

1. Conduct regular harassment- and discrimination-prevention training.

- High-quality, legally defensible training should be held at least once a year. New hires and newly promoted managers should be trained upon hire or promotion.

2. Enforce your organization's anti-harassment policy.

- The U.S. Supreme Court gave employers an affirmative defense in harassment claims, but only if an organization "exercises reasonable care." This includes consistent enforcement of harassment prevention policies.

3. Insist your employees maintain professional boundaries.

- Most harassment situations arise because employees are not maintaining appropriate professional boundaries. Ensure that employees do not touch each other or engage in joking or conversations regarding sex, gender, national origin, race or religion.

Don't:

1. Fail to investigate potential harassment or discrimination claims.

- Harassment complaints come in many forms. Any comment that relates to any of the protected categories must be investigated.

2. Allow managers or co-workers to retaliate against a complainant.

- If an employee has brought a harassment or discrimination complaint, work closely with that worker's supervisor to ensure that no employment actions are taken that can be viewed as retaliation. Make sure co-workers don't retaliate by giving the complainant the "silent treatment."

3. Stop monitoring the workplace.

- Human Resources can be pulled in many directions, especially with layoffs, downsizing and furloughs. Continuous monitoring of employee behavior in the workplace is more important than ever.

Source: Workplace Answers

that openly dating a co-worker would jeopardize job security or advancement. That statistic was down from 41% a year earlier.

According to the survey, which polled nearly 1,400 employed adults, 57% of respondents said their employer did not have a policy on workplace romances. Nearly 30% said they weren't sure if a policy existed.

While written policies can minimize exposure to claims, they may not be enough to entirely negate potential liabilities.

"It's challenging because you're not only putting this legal rubric of rules on people, but you're putting it on them during a romance," said Lynn Lieber, an employment law attorney and chief executive of Workplace Answers, located in San Francisco. "It's a fascinating part of the human dynamic. Common sensibilities can disappear when sex, love and passion are involved."

Lieber's firm, founded a decade ago, provides online and onsite training for employers to help mitigate harassment and discrimination claims. Her experience as an attorney came at two management-side law firms.

"I think they're quite common, maybe more than we would know," Lieber said of workplace romance-related claims. "The thing is, so few of these would get to a jury or court trial. You wouldn't want to take the risk as an employer to air your dirty laundry like this because it could mean bad publicity."

Each case may have its own set of unique circumstances and affect employees in different ways. Maybe it's a jilted lover acting in retaliation, or an employee who feels pressured by what's perceived as unwelcome and pervasive sexual advances. Perhaps there are "jealous scenes" created by two co-workers in a consensual relationship that trouble

Regulatory/Law

other employees or make them feel uncomfortable.

While each scenario varies, it has the potential to generate a claim alleging a hostile work environment.

Not Easy to Bring a Claim

A failed relationship alone would typically not be enough to trigger coverage. Claims made under an employment practices liability policy must result from some sort of wrongful employment act that is tantamount to employment discrimination, harassment, a hostile workplace or some retaliatory action, according to Catherine Padalino, vice president and employment practices liability product manager for Chubb.

“If I feel, as an employee, that my manager is dating my co-worker, is that actionable on my part? No,” Padalino said. “I have to bring a legitimate employment claim.”

Padalino said it’s possible to have a worker allege retaliation, but there could be a question as to whether a specific allegation meets the strict definition under the law and is covered

Loving Where They Work

Key findings from a survey of 1,391 employed adults on the issue of workplace romance:

Q: Would openly dating a co-worker jeopardize your job security or advancement opportunities?

	%
Would	30
Would not	40
Neutral/undecided	31

Percentages do not total 100 due to rounding.

Q: Does your employer have a policy regarding workplace romances?

	%
Does have	14
Does not have	57
Not sure	29

Source: Spherion



by the policy.

Melissa Mattioli, employment practices liability vice president for Liberty International Underwriters, said there’s a low frequency of office romance claims. But the severity of a

claim can pose a real issue, particularly when a supervisor is romantically involved with a subordinate.

“Usually when it’s involving a senior person in the organization, it can get pretty costly,” Mattioli said. “That’s been my experience.”

She described such claims as one-off and said it is difficult to identify any single trend. She recalled one claim in which a chief executive was “hitting on” an assistant in front of another subordinate. The subordinate subsequently filed a written demand that culminated with a claim.

Company culture, industry class and claims history can play critical roles in the underwriting process. Mattioli said a casino with a nightclub may have more exposure on these types of claims, yet also may have stronger guidelines, controls and training in place.

A claims history can provide an insurer with insight into how a company responded and handled past complaints.

“You’re seeing how they approached it, whether they used their own policy

Fallout Shelters

Some employers have used love contracts to mitigate exposure from any post-break-up fallout.

Such agreements strive to underscore the consensual nature of a romantic relationship between co-workers.

Lynn Lieber, founder and chief executive of Workplace Answers, said these contracts are usually put in place when a supervisor and a subordinate are dating, and can serve as an enhanced sexual harassment agreement policy. Each party acknowledges an understanding of the company’s sexual harassment policy and the protocol for reporting a complaint, and that the relationship won’t affect work performance.

“If the employer’s been prudent enough to provide the parties with that document and they signed it, I think that goes a long way to avoiding liability,” Lieber said.

Lieber recommends that the contract put the onus for reporting any perceived harassment on the employee. But she admits that even love contracts



Lynn Lieber



Adeola Adele

are not bulletproof.

If the relationship doesn’t work out, she said, a human resources official can check up periodically with the parties as a way to further mitigate exposure.

Adeola Adele, national employment practices liability practice leader at Marsh, said one element of a sexual harassment claim is that the behavior or advances allegedly made by one worker toward another were unwelcome. A love contract would make it difficult for consenting parties to later bring such a claim.

Some companies may also pursue policies that prohibit supervisors from dating a subordinate. Adele said the problem with this approach—along with love contracts—is that it may be illegal under state law. Monitoring an employee’s behavior outside of work may also pose invasion-of-privacy issues.

“We would advise clients to go to their employment law counsel before adopting any type of policy related to office romance,” Adele said.



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—Melissa Mattioli,
Liberty International Underwriters

and procedures and took a reasonable approach to get it to a positive result," said Carrie A. Brodzinski, Beazley Group's product manager for management liability products. "Those are all things that we look for."

Brodzinski said it's more common now than it was five years ago for underwriters to ask whether employers have a workplace dating policy. Brodzinski said it's crucial that companies provide multiple avenues for the reporting of sexual harassment complaints, and handle every complaint or allegation in a consistent manner.

"What happens at that stage can really make the difference in the quality of the claim that someone may end up having, if the romance ends up going in a bad direction," Brodzinski said.

Cases sometimes begin with a discrimination claim filed with the federal Equal Employment Opportunity

Commission. Sexual harassment discrimination claims increased nearly 11% to 13,867 in fiscal year 2008, its highest point in five years, according to the EEOC.

Those in employment practices liability believe that as more employees face the risk of losing a job, some may be more inclined to bring a complaint.

Adele also said the EEOC statistics are indicative of a future increase in lawsuits.

"It's going to take some time to start seeing those lawsuits," Adele said. "Once the underwriters start to see those claims, we expect the rates are going to increase even more."

She said the market started to harden in the first quarter of 2009, and that some employers who have had claims or layoffs are experiencing rate increases ranging from 10% to 25%.

"We don't expect that's going to

slow down any time soon," Adele said.

Both Lieber and Adele said the cost of mounting a legal defense in a sexual harassment case or an office romance-related claim can start at \$250,000.

Lieber said that insurers are inclined to settle these cases for what they consider to be nuisance value, often to the chagrin of employers.

The difficulty with these cases is that one person's version of events is pitted against someone else's, a circumstance which minimizes the potential for pretrial dismissal.

Another factor is that discoverable material is no longer limited to computer work files and e-mails. Now, even personal e-mails from a home account can be included.

"The scope of discovery is very broad," Lieber said. "It includes anything that could lead to admissible evidence. So the law tends to cast a wide net."

Lieber said juries can provide the biggest layer of uncertainty. She often takes cases before mock juries to give defendants a sense of how a trial may play out.

Juries "don't always follow the law as much as they should," Lieber said. "Insurance companies don't want to take the risk, especially in this economy, of getting involved and paying for a big protracted trial." **BR**

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