LIMITED LICENSE TO FISH OFF THE COMPANY PIER: TOWARD EXPRESS EMPLOYER POLICIES ON SUPERVISOR-SUBORDINATE FRATERNIZATION

Gary M. Kramer

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INTRODUCTION

Co-workers very often enter romantic relationships with each other.¹ Employers cannot effectively prohibit that, and should not try. However, certain office romances—between supervisors and subordinates who are in a direct reporting relationship or are otherwise on different hierarchical levels—are particularly troublesome for the employees involved, their co-workers, and the employer. Supervisor-subordinate relationships most often trigger negative reactions among employees, including perceptions of sexual favoritism and sexual harassment that damage morale and productivity. In addition, such relationships frequently result in sexual harassment litigation against the company by the participants or third parties.²

Because of the substantial risk of personnel disruption, litiga-

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¹ According to one survey, about one third of all romantic relationships may begin in the workplace. See Sheldon N. Sandler, Discouraging Sexual Harassment and Favoritism in the Workplace, DEL. EMPL. L. LTR., Nov. 1998, available in LEXIS, Human Resources Newsletters.

tion, and potential liability, employers should carefully examine the issue of office relationships and formulate an enlightened approach to properly manage these relationships. Many companies have “unwritten” policies on this matter as part of their corporate culture. However, in the last several years, a growing number of organizations, including large corporations, public employers, and even law firms, have adopted express written policies concerning office romance, especially between supervisors and those employees whom they supervise. An emerging consensus among business academics, labor and employment law attorneys, human resource management specialists, training consultants, and other personnel professionals encourages and recommends these policies. Employers who shun any kind of policy usually fear lawsuits by affected employees more than the frequent risk of litigation inherent in these relationships. However, since courts have almost universally upheld narrowly tailored and consistently enforced employer policies on this subject, their benefits generally outweigh the perceived risks. 3

The best approach to drafting an office romance policy requires striking an appropriate balance between the employees’ rights to privacy and employer noninterference in their personal off-duty behavior and the employers’ legitimate interests in preventing sexual harassment, avoiding or minimizing litigation and liability, and promoting a positive and conflict-free work environment with high morale and maximum productivity. A clear written policy on this subject, promulgated as an integral part of a general sexual harassment policy, should strongly discourage—but not explicitly prohibit—interoffice supervisor-subordinate relationships. Such a policy should mandate timely and confidential disclosure of the existence of these relationships to management. So advised, employers should solicit input from the employees involved to formulate an appropriate response. A well-drafted policy will, at a minimum, attempt to avoid any negative impact on either employee’s career, as well as on the company, while permanently discontinuing the decision-making authority of the supervisory employee over the subordinate employee.

This article will explore the phenomenon of office romances between employees in different levels of the corporate hierarchy, particularly among those employees in a direct supervisor-subordinate relationship within the same organization or department. Part I will examine the available empirical and anecdotal evi-

3. See infra Part III.
idence of how often such relationships occur, while Part II discusses why supervisor-subordinate relationships present a potentially difficult workforce problem that companies must address. Part III analyzes the courts' treatment of employee challenges to employer policies which address employee office romances. Part III concludes that courts will likely uphold employers' consistently applied rules which regulate only relationships between power-differentiated employees. Part IV discusses employers' broad considerations for drafting and implementing policies addressing such relationships, by examining employers' specific policy formulations and utilization of other human resource management tools. Finally, among employer policy options, Part IV identifies a growing progressive trend for employers to encourage affected employees to affirmatively and confidentially disclose their relationship to the company, and for employers to accommodate employees while minimizing any negative impact on the employees in the relationship and on the company itself.

I. POWER-DIFFERENTIATED OFFICE ROMANCES
FREQUENTLY DEVELOP

Any precise figure on the frequency of supervisor-subordinate intimate relationships remains elusive. Evidence of these relationships certainly does not abound in reported court decisions of sexual harassment lawsuits. Notably, the United States Supreme Court's first case addressing the issue of sexual harassment involved an allegedly consensual sexual relationship between power-differentiated employees.4 The Court, in *Meritor Savings Bank, FSB v. Vinson*,5 discussed the possibility that a "voluntary" sexual relationship in the workplace may not in fact be a "welcome" one, thus requiring an inquiry into the circumstances and conditions surrounding the relationship.6 Courts will consider whether an employee has submitted to an apparently voluntary sexual relationship because of physical, psychological, or economic duress.7 In addition, although the common paradigm involves a male as the supervisor, there are an increasing number of reported cases where a male subordinate alleges sexual harassment at the hands of his for-

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6. See id. at 68.
mer female supervisor.  

What little actual data is available documenting the incidence of supervisor-subordinate office romances comes mostly from business researchers. The reported numbers fluctuate wildly. In a fax poll of 485 corporate managers and executives conducted by the American Management Association ("AMA") in December 1994, 25% of respondents said they had engaged in at least one romance with a co-worker. Of the 25% who had office romances, 33% of men (8.25% total) and 15% of women (3.75% total) said it was with a subordinate. However, results can be inaccurate due to significant under-reporting. In February 1998, an Internet survey of nearly 7,000 subscribers of America Online, called Love@Work, produced a much higher figure: 71% of respondents reported that they had dated someone at work and 50% of the managers said they had dated a subordinate. Survey results suggest that office romances generally occur more frequently among the younger generation of employees. AMA figures state about 38% of those under 35 report at least one romance with either a peer or a subordinate, compared to 22% of those who are 35 or older.

8. For example, a former postal supervisor was recently prosecuted for perjury in a deposition in a federal sexual harassment lawsuit by a subordinate employee. She was untruthful concerning "her close personal relationship" with the subordinate. See Al Kamen, New Aide Leaves White House in the Dark, WASH. POST, Oct. 12, 1998, at A19.

9. See Lesley Alderman, Surviving an Office Romance Without Jeopardizing Your Job, MONEY, Feb. 1995, at 37 (the AMA conducted the fax poll for Money magazine, hereinafter referred to as the "1994 AMA/Money Poll").

10. See Steve Berg, The Workplace: Employers Struggling with Office Romances, STAR TRIB. (Minneapolis-St. Paul), Feb. 24, 1998, at 1D (citing the 1994 AMA/Money Poll). Note the differences between the figures for men and women, which might be attributed to the fact that fewer women are in positions of authority where they supervise male subordinates and thus have less opportunity generally to become romantically involved with men who report to them.

11. A spokesman for the AMA said the 1994 AMA/Money Poll, supra note 9, was taken in fun for a Valentine's Day issue of Money magazine, but some of the executives objected to being asked questions about such matters and "didn't want to hand the survey to their secretaries to put it on the fax." Del Jones & Stephanie Armour, Romance at Work Tricky to Manage, USA TODAY, Jan. 23, 1998, at 2B.

12. See Charlene Marmer Solomon, The Secret's Out, WORKFORCE, July 1998, at 42. The definition of "subordinate" is unclear here, and may include direct-reporting relationships as well as other differences in levels of authority, even across departments.

13. See Carol Hymowitz & Ellen Joan Pollock, Corporate Affairs: The One Clear Line in Interoffice Romance Has Become Blurred, WALL ST. J., Feb. 4, 1998, at A1. Again, it is unclear what fraction of these figures represents relationships with subordinate employees and whether they involve direct reporting roles or a wider divergence in levels of authority or company "rank." One explanation for the different figures based on age might be that employees under the age of 35 are more likely to be single.
Other anecdotal evidence from practitioners reflects these widely divergent figures, but generally corroborates that supervisor-subordinate relationships are relatively common and may result in complaints and attendant litigation. Therefore, employers have a strong interest in taking measures to avoid such problems.

II. SUPERVISOR-SUBORDINATE ROMANCES REQUIRE CAREFUL MANAGEMENT

Relationships between power-differentiated employees can cause many difficulties for employers. They can negatively impact morale, group cohesion, productivity, and spark potentially costly litigation. Effective human resource management should try to foresee and prevent these “people” issues from arising and affecting employers’ bottom lines.

A. Interoffice Romantic Relationships Are Generally Viewed Negatively by Other Employees

Most companies and their employees view hierarchical personal relationships quite negatively and much differently than dating among co-employees. A study by the Society for Human Resource Management (“SHRM”), in March 1993, found almost 80% of the more than 460 respondents said employers should have the right to prohibit an employee from dating a supervisor, but less than 10% said that the employers should be able to prohibit em-


15. See Berg, supra note 10 (describing a Minneapolis lawyer who defends corporate executives accused of sexual harassment and who estimates that 40% of her growing caseload stems from soured consensual office romances); see also Patricia Konstam & Vicki Vaughan, Clinton-Lewinsky Affair Highlights Problems in the Workplace, SAN ANTONIO EXPRESS-NEWS, Sept. 20, 1998, at J1 (interviewing a San Antonio employment lawyer who has handled 157 sexual harassment cases since early 1993 and who stated that about half of her cases had their beginning in office romances that fell apart).
ployees from dating co-workers who are not their supervisors. Similarly, in the 1994 AMA/Money Poll, approximately 75% said it is not "okay to date" a subordinate or a superior, while approximately 75% said it is okay to date a co-worker. Academic research on workplace romances demonstrates that the phenomenon results in unique negative organizational consequences, including role conflict, reduced productivity, increased chance for intra-group conflict, and increased possibility of favoritism (real or perceived).

Employees who observe relationships between their supervisors and co-workers may perceive an appearance of impropriety. In fact, some employees may view these relationships as a form of or indicative of sexual harassment. Whether accurate or not, subsequent litigation may arise to settle the issue. These relationships may be compared to problematic romances in other disciplines,


No matter whether you are a secretary, a middle manager, or busy corporate executive, one principle about office romance should be inviolate: Romantic relationships between hierarchical levels should be avoided. All of the risks . . . [such as] career threats, performance declines, lost objectivity, conflicts of interest, ruined professional relationships—apply most directly to boss-subordinate romances.

. . . Boss-subordinate romances are very disruptive—for coworkers, for other subordinates, for the couple, and for the total welfare of the firm.

Id. at 130-31.
20. Because "[c]onfusion arises when office romance shifts the balance of power," it may "look like sexual harassment. That's why dating between supervisors and subordinates is supervisory suicide." Mary Stanton, Courting Disaster, GOV'T. EXECUTIVE., Oct. 1998. "[Y]ou never really know why the romance is occurring. Is it love or is it an abuse of power?" Silverstein, supra note 14 (quoting Jane Bright, a human resources consultant in Los Angeles). The perception may even have a touch of truth to it, because of the inherent ambiguity of the power context. See id. Lewis Maltby, director of the American Civil Liberties Union's national task force on workplace issues, says subtle coercion in these cases is inevitable, "'even if the boss wouldn't dream of firing his secretary for turning him down for a date.'" Id. Indeed, a prominent feminist law professor has argued that the power imbalances between men and women reflected in traditional sex roles are carried over into the employment context and that "women do what those in power expect, indeed demand, of them." Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 859 n.173 (1991). The latter argument begins to ring hollow, how-
such as between doctors and patients, lawyers and clients, and educators and students. In addition, an apparent double standard often views women participants in such relationships more negatively than the men. Consequently, even those who do not disfavor office romances counsel strict avoidance of relationships between supervisors and subordinates to avoid such perceptions.

B. Interoffice Romantic Relationships Cause Disruptive Perceptions of Sexual Favoritism

Perceptions of favoritism in the workplace are particularly disruptive, causing uncomfortable working relationships, reduced morale and productivity, and feelings of jealousy and suspicion among employees. Ideally, employees would not concern themselves with their co-workers' personal lives, especially absent actual favoritism to their own detriment. Unfortunately, a less "mature" reaction generally dominates the landscape in these matters, resulting in much gossip and negative feelings and a general breakdown of ever, as more and more women succeed in the workforce. Hopefully, as we enter the 21st century, such a protectionist philosophy will not be prominent.

21. See Marilyn Moats Kennedy, Romance in the Office, Across the Board, Mar. 1992, at 23 ("Most harshly punished is the powerful woman who dallies with a younger male who reports to her directly. The term 'stud farming' echoes in the boardroom. If the male lover is more powerful than she is, a woman is branded with the scarlet 'A' for 'adventuress.' Management wants to believe she seduced him.").

22. See Barbara Kitchen, True Love and Work Go Hand in Hand, Newsday, Feb. 15, 1998, at F11 ("[S]ome of the basics of office romance: A) you can never, never go trolling at work for a fling; B) you never ever so much as wink at anyone you supervise or who supervises you . . . ."); Carol Memmott, If You Must Fall in Love at Work, Do It Right, USA Today, Oct. 12, 1998, at 15B ("Don't date the boss. Considered the most disruptive of all work relationships, it's the one most likely to create hostility among co-workers who worry about favoritism."). (quoting Dennis M. Powers, The Office Romance: Playing with Fire Without Getting Burned (1998)).


- 28% reported complaints of favoritism from co-workers;
- 24% reported decreased vs. increased (3%) productivity by those involved in the romance;
- 11% reported decreased vs. increased (<1%) productivity by co-workers;
- 8% reported decreased vs. increased (5%) morale of those involved in the romance;
- 16% reported decreased vs. increased (1%) morale of co-workers.

Of those companies that had some type of policy on office romance (27%), those that discourage or do not permit office romances cited concerns about the morale of co-workers (60%) and concerns about lowered productivity of those involved in the romance (46%) as reasons. See id.

24. Researchers found the most negative reactions to office romance when a per-
productivity, morale, and office structure.\textsuperscript{25} Employees may also allege an unfair work environment.\textsuperscript{26} Despite their best efforts, couples often fail to keep their relationship strictly "personal" by disclosing or otherwise unintentionally and inadvertently revealing their intimacy to co-workers. This may aggravate negative consequences, confirming for some employees their impressions of "undue" personal familiarity between the participants.\textsuperscript{27} Perhaps worse, employees unhappy with their co-worker's affair with the boss may simply register their objection with their feet, by leaving the company.\textsuperscript{28}

Some suggest that perceptions of sexual favoritism are no different than those of non-sexual favoritism, and that the latter is at least as pervasive and problematic in the workplace.\textsuperscript{29} Employees in the workforce are generally more upset if they believe that a co-worker is having a romantic relationship with the boss than when son in a low-status job was involved with a person in a high-status job, particularly if the subordinate was female. See Krista Martin Klaus, \textit{On-the-Job Love Affairs Are Heart Work}, KAN. CITY BUS. J., Feb. 11, 1994, at 3 ("For some reason, the relationship was viewed as sinister," said Chris Segrin, associate professor of communications studies at the University of Kansas).

\textsuperscript{25} A survey of 43 attendees at a 1988 seminar sponsored by the Association of Trial Lawyers of America showed more than one-third believed that this breakdown "was fueled by increased time spent gossiping about the affair, time spent avoiding one of the co-workers rather than working cooperatively, lowered concentration, increased preoccupation and slowed decision-making." Carrie McCrea Hanlon, \textit{"Love" in the Workplace}, NEV. LAW., Feb. 1996, at 22; see also V. Hale Starr & Marigrace H. Powers, \textit{Office Romance}, LEGAL MGMT., Mar.-Apr. 1989, at 43.

\textsuperscript{26} See Hallinan, \textit{infra} note 158, at 454-55.

\textsuperscript{27} As one employment lawyer put it: "After they've been in the bedroom, how can they have a businesslike talk in the boardroom?" Kirstin Downey Grimsley, \textit{Romances with the Boss Raise Red Flags}, WASH. POST, Jan. 29, 1998, at E1.

\textsuperscript{28} This may actually be a "bigger expense to employers" than the risk of sexual harassment litigation from soured office romances. See Solomon, \textit{supra} note 12.

\textsuperscript{29} “[T]op management tends to be averse to all types of personal relationships, including very close friendships (even more difficult to fight than romance, since companies can’t establish policies against friendship).” Kennedy, \textit{supra} note 21.

Another commentator noted:

Long before women entered the work force and romance became an issue, . . . [f]avoritism and hidden agendas were established parts of the office scene. Deep friendships and old loyalties have led to many a questionable promotion or inflated annual raise. Female employees have long contended that promotions are handed out on the golf course, and that fraternal bonding over happy-hour beers excludes women who are trying to find equal footing on the corporate escalator.

The reality . . . is that there are 'all sorts of political and personal alliances in the corporate power structure that are untinged by sex.'

the co-worker is merely close friends with the boss. 30 Recent research corroborates that romantic relationships fundamentally differ from other kinds of relationships, such as friendships. 31 Certainly, friendships regularly occur between two or more individuals, including between leaders and subordinates or mentors and protégés; however,

[what these relationships have in common is that they are organizationally sanctioned (i.e., they are supposed to exist) . . . . In contrast, romantic relationships in work settings are not organizationally sanctioned . . . . [S]uch relationships often have an effect on the conduct of work by the partners involved . . . . In addition, outsiders are likely to react to workplace romances differently . . . . [N]o one questions whether organizationally sanctioned relationships should exist. This is not the case for workplace romances . . . . [Furthermore], relationships characterized by physical intimacy may provoke more intense reactions from observers and, thus, have greater consequences for individuals and organizations. 32

30. While acknowledging that there are "many different types of power-dependency relationships in everyday organizational life," Dr. Mainiero argues that "once a sexual dimension is added . . . . the standard balance of power in the task and/or career domain is threatened. [This is why] boss-subordinate romances are so upsetting . . . ." MAINIERO, supra note 18, at 137-38. Nancy Woodhull, president of Gannett New Media, and Marcy Crary, associate professor of management at Bentley College, stated:

[T]wo co-workers (or even supervisors and subordinates) of the opposite sex dating has about the same effect on an office as two male co-workers (or supervisors and subordinates) being close friends, or having what Crary termed a 'mentor/golden boy' relationship. In all such situations, they said, the two people share confidences, spend time together outside of work, and sometimes help each other at work. The only difference, according to Woodhull, is that the male friends have no sexual relationship. [Both] said co-workers get more upset and jealous when two co-workers are dating than when two male co-workers are close friends.


32. Id. The authors exhaustively reviewed the entire body of scholarly research existing to date on this issue which revealed that "[r]omances between job-motivated participants are likely to stimulate more negative gossip [among co-workers], especially if the romance is between a superior and subordinate." Id. (emphasis added) (citing James P. Dillard, Close Relationships at Work: Perceptions of the Motives and Performance of Relational Participants, 4 J. SOC. & PERS. RELATIONSHIPS, May 1987, at 179-93; Charles A. Pierce et al., Attraction in Organizations: A Model of Workplace Romance, 17 J. ORGANIZATIONAL BEHAV. Jan. 1996, at 5-32). Likewise,

[C]oworkers were expected to respond . . . most negatively when the female participant had a higher-status position than the male participant. Overall, hierarchical romances (especially when the woman is at the higher level),
Given this analysis, employers should pay particular attention to the matter of office romances between power-differentiated employees in order to avoid the perception of sexual favoritism in the workplace. Effective human resource management strives to maintain morale and productivity by avoiding negative feelings among employees whenever possible. Since hierarchical office romances pose a special threat to workplace discipline and workforce effectiveness, employers should explore and adopt effective mechanisms to prevent or discourage them.

C. Interoffice Romantic Relationships Often Cause a Variety of Sexual Harassment and Other Discrimination Claims

The strongest justification for employer regulation of supervisor-subordinate relationships derives from sexual harassment claims and other litigation such relationships frequently spawn. While some data suggests that approximately half of all office romances result in successful long-term relationships or marriage, those that do not often result in negative workplace consequences. It is unclear just how often sexual harassment claims grow out of a failed office romance, but abundant anecdotal evidence suggests that this is a common occurrence. In addition,
claims of sexual harassment resulting from an office romance may arise more frequently than lawsuits against the employer. Regardless, claims of sexual harassment allegedly perpetrated by managers are potentially more difficult to defend because of agency liability for supervisory conduct. They may also result in higher damage awards, and/or settlements or insurance payouts. Legal claims resulting from power-differentiated office romances generally fall into four categories: ex-lovers seeking retaliation or revenge, former paramours unsuccessfully attempting reconciliation, third parties upset about their co-workers’ situation, and allegations of employer retaliation.

1. When It Turns Sour: The Jilted Lover

The subordinate former paramour, spurned by an office romance with a supervisor, may allege that he or she was subjected to quid pro quo sexual harassment—that job advancement or benefits were conditioned upon the receipt of sexual favors. In other words, he or she may attempt to claim, retroactively, that the affair was never welcome because he or she felt coerced by his or her employment law partner at Gibbons, Del Deo in Newark, NJ, says “[a] lot of sexual-harassment complaints result from consensual relationships that went bad.” Solomon, supra note 12. But see Powers, supra note 22 (claiming that less than five percent of all EEOC sexual harassment charges involve an ended affair).

37. See 1998 SHRM Survey, supra note 23 (noting a 24% rate of sexual harassment claims compared to a rate of only 4% of claims leading to litigation). The cause for this disparity is unclear, because the term “claims” is ambiguous. Possible explanations may be that attorneys are reluctant to represent such plaintiffs or employers look to quickly settle such claims. However, the potential workplace disruption even from an internal, informal allegation of sexual harassment should not be understated. See id.


39. Payouts on out-of-court settlements on sexual harassment cases have ranged, on average, from $25,000 to $50,000, according to a New York insurer that sells sexual harassment coverage to companies. See Johnson, supra note 36. A much higher figure was reported by a senior partner at Steel, Hector & Davis in Miami, who says she settles 10 or 15 cases a year alleging sexual harassment following the breakup of “consensual” relationships between hierarchical employees for over $500,000, and a few that top $1 million. See Symonds et al., supra note 14. A senior partner at Littler Mendelson, the nation’s largest labor and employment law defense firm, says “I can’t tell you how many cases we get daily” that stem from soured supervisor-subordinate romances, and describes such breakups as a “thermonuclear blast occurring in your workplace.” James Lardner et al., Cupid’s Cubicle: Office Romance Is Alive and Well, Despite a Barrage of Corporate Counter Measures, U.S. NEWS & WORLD REP., Dec. 14, 1998, at 44.

superior. Sometimes, these allegations are simply false. However, lacking adequate proof of the truly consensual nature of the relationship, the employer may find defending this claim difficult when limited to evidence consisting of “he said, she said.” In these instances, early management may provide valuable security against such claims. In addition, sometimes the consensual nature of the plaintiff’s relationship with a supervisor is so readily evident it quickly and fatally undermines the claim.

41. A Jackson Lewis attorney says a soured office relationship can lead to some of the “most outrageous—and sometimes fictitious claims.” Alexandra Alger & William G. Flanagan, Sexual Politics, FORBES, May 6, 1996, at 106; see also Segal, supra note 40, at 37-38 (“While it is undeniable that sexual harassment is pervasive, it is also regrettably true that some sexual harassment claims are thinly veiled acts of revenge on spurned lovers.”); Marjorie Coeyman, Isn’t It Romantic? RESTAURANT Bus., Oct. 15, 1997, at 50 (noting that a general manager of a Minneapolis-based consulting firm said “‘[i]t’s far more dangerous today than it was ten years ago,’” and the chief difficulty is that “‘the accusation of a coercive relationship can be made in an effort to get revenge’”)

42. See infra Part IV.B for a discussion of various management intervention techniques.

43. See Koster v. Chase Manhattan Bank, 687 F. Supp. 848, 861 (S.D.N.Y. 1988) (rejecting the plaintiff’s quid pro quo sexual harassment claim where she proffered “not a scintilla of evidence . . . that even hinted [that her] affair with [her supervisor] was unwelcome. In fact, plaintiff’s own witnesses support the conclusion that the plaintiff welcomed the relationship”); see also Smith v. National R.R. Passenger Corp., 25 F. Supp. 2d 578, 580 (E.D. Pa. 1998) (rejecting claims by the plaintiff, a former employee in the Human Relations Department, that her former employer (Amtrak) had a duty to warn her of the “perfidy” of her former fiancé, Amtrak’s Inspector General). He and the plaintiff had a personal intimate relationship from October 1995 until June 1996, when he allegedly reneged on an earlier promise to marry her. See id. She had resigned her job in March 1996 because he misrepresented to her that they could not continue to work together if they married. See id. The plaintiff also asserted a claim against Amtrak of quid pro quo sexual harassment by her former fiancé, which the court found quite transparent:

In essence, she is claiming that in hindsight she would not have engaged in a “personal, and ultimately, intimate relationship” with [him] if she had known his promises, including his promise to marry her, were false . . . . [I]t is clear that plaintiff had a willing relationship with a co-employee she agreed to marry. Significantly, plaintiff never avers that [his] behavior toward her was displeasing at any time from the relationship’s inception . . . until her resignation . . . . It was only thereafter that plaintiff learned of his alleged duplicity. While she may now regret this chapter in her life, she cannot deem unwelcome retroactively what at the time she welcomed . . . . Although an employer in modern times has many obligations not dreamed of in yesteryear, things have not moved to the point under state or federal law where an employer becomes responsible for warding off welcome office romances and marriage proposals which ultimately go awry. There are some unfortunate events in life for which the courts have no remedy. Plaintiff’s situation, as pleaded, is one of them.

Id. at 580-81 (emphasis added); see also Hines v. Abbott Realty, Inc., No. 96-C-2465, 1998 U.S. Dist. LEXIS 2935, at *12-16 (N.D. Ill. Mar. 10, 1998) (unpublished opinion) (suggesting plaintiff’s quid pro quo sexual harassment claims against her former employer (which were not actually adjudicated because the case was dismissed for lack of
seemingly innocent, and perhaps innocently intentioned, request for a date can later become a quid pro quo claim when the subordinate is denied a benefit to which the employee believes he or she was entitled. 44

A related situation in this category includes occasions where the jilted supervisor retaliates in the workplace against the subordinate employee for ending the relationship. 45 In the 1998

prosecution) would have been precluded because of her consensual relationships with the defendant company's chief executive officer and another manager). The court ruled that:

[The] plaintiff admitted that prior to 1994, she was involved in a romantic liaison with [the CEO] which for the most part was mutually acceptable. Accordingly, by plaintiff's own admission, there was no sexual harassment for the year 1994 or for the years prior thereto . . . . [I]t appears that her romantic relationship with [him] . . . continued unabated to at least June of 1995 [when he removed himself as plaintiff's supervisor, and put her under another manager.] . . . [I]n June of 1995, plaintiff began a romantic relationship with [the other manager] . . . . This voluntary and consensual romantic liaison with yet another corporate executive of the defendants not only makes plaintiff an unsympathetic witness, but seriously lessens her credibility with respect to her charges of sexual harassment by [the CEO], and makes the charge even less tenable.

Id. (emphasis added) (footnotes omitted).

44. See Susan Deitz, Romance in the Office Can Pose Problems, NEWSDAY, June 7, 1998, at D33 (“A man can indeed ask someone in a lower-ranking job for a date. But he must make it perfectly clear when he asks her that her job security is in no way related to her answer. That’s the ideal situation. But in the real world, it’s iffy whether a sincere man can ask out a co-worker and, at the same time, make it clear that the job is not dependent on her reply.”).

45. See Schrader v. E.G. & G., Inc., 953 F. Supp. 1160, 1167 (D. Colo. 1997) (finding that the plaintiff, a man, who formerly dated his female second-line supervisor, stated a claim for sexual harassment where the evidence suggested that she threatened to fire him if he did not resume the relationship); Lewis v. Oregon Beauty Supply Co., 733 P.2d 430, 434 (Or. 1987) (finding an employee liable for intentional interference with an economic relationship where he subjected plaintiff, a co-worker and former girlfriend, to a pattern of harassment after she stopped dating him: he glared and swore at the plaintiff, called her a “whore,” told other employees he contracted venereal disease from her, searched her belongings, threw things at her, withheld necessary job information from her, and intentionally slammed a door that hit her); see also Katherine Shaver, Montgomery Settles Fired Prosecutor’s Suit, WASH. POST, Aug. 13, 1999, at A1 (noting that the state’s attorney’s office agreed to pay $320,000 to settle a lawsuit filed by a former prosecutor who claimed that, after she ended a two-year affair with her boss, he retaliated by not promoting her, reassigning some of her work to less experienced co-workers, excluded her from decision-making discussions, and later fired her); cf. Green v. Administrators of the Tulane Educ. Fund, No. 97-1869, 1999 U.S. Dist. LEXIS 4930, at *28-29 (E.D. La. Apr. 8, 1999) (denying summary judgment where the jury could reasonably find that the plaintiff was subjected to hostile work environment sexual harassment by her supervisor after her sexual relationship with him ended), recon. denied, No. 97-1869, 1999 U.S. Dist. LEXIS 12686, at *5 (E.D. La. Aug. 11, 1999) (declining to find that “simply because a person has had an ‘affair gone
SHRM Survey, 46 17% of respondents reported "complaints of retaliation when the romance ended," and 75% of respondents surveyed whose companies had written or unwritten policies on workplace dating cited "potential for retaliation if the romance ends," as one of the reasons for having the policies. 47 This kind of retaliation frequently results in claims of gender discrimination by the subordinate employee against the supervisor. However, several courts have dismissed these cases, finding that the employment action was not motivated by the plaintiff's gender, but rather because he or she was a former lover who had jilted the supervisor 48 or vice versa. 49 On the other hand, if the subordinate feels spurned, he or

46. See supra note 23.
47. See id.
48. See Huebschen v. Department of Health and Soc. Servs., 716 F.2d 1167, 1172 (7th Cir. 1983) (dismissing the sex discrimination claim of a male employee who was fired on the recommendation of his female supervisor with whom he had recently terminated a consensual sexual relationship, because the fact that he was a former lover who jilted the supervisor, not that he was man, motivated the decision); see also Keppler v. Hinsdale Township Sch. Dist. 86, 715 F. Supp. 862, 869 (N.D. Ill. 1989) (finding that where retribution is taken solely because the plaintiff jilted a former partner, the claim fails because it is predicated on the basis of a failed relationship, not gender); cf. Rothenbusch v. Ford Motor Co., No. 93-3945, 1995 U.S. App. LEXIS 18936, at *7-8 (6th Cir. July 20, 1995) (per curiam) (unpublished opinion) (finding that the employer was not liable for a divorcing husband's harassment of his wife, both of whom were employees, since to find the employer liable, such harassment must be based on sex and not personal animosity); Campbell v. Masten, 955 F. Supp. 526 (D. Md. 1997). The court stated that the plaintiff must offer some evidence that the discrimination took place because of her status as a woman, not simply as a result of personal incompatibility and petty grudges. In the absence of such a distinction, any workplace affected by a consensual workplace romance gone sour, and the concomitant workplace politics, could spawn [a] Title VII claim . . . . An employee who [chooses] to become involved in an intimate affair with her employer . . . cannot then expect that her employer will feel the same as he did about her before and during their private relationship. Feelings will be hurt, egos damaged or bruised. The consequences are the result not of sexual discrimination, but of responses to an individual because of her former intimate place in her employer's life.

Id. at 528-29 (emphasis added) (citation omitted); see also Succar v. Dade County Sch. Bd., 60 F. Supp. 2d 1309, 1317 (S.D. Fla. 1999) (finding that an employer cannot be held liable for co-worker to co-worker harassment that is not gender-based); Holtz v. Marcus Theatres Corp., 31 F. Supp. 2d 1139, 1148 (E.D. Wis. 1999); Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1248 (11th Cir. 1998) (finding that where the company president chose, between two lesbian employees whose romantic relationship had ended, to fire the lower-ranking employee in order to retain the more valuable employee, the plaintiff could not claim that the decision was "because of sex" since both employees were women).

she may attempt to retaliate against a former paramour through unprofessional or disruptive behavior in the workplace. In extreme cases, regardless of whether the supervisor or subordinate is rejected, workplace violence may result. This may be especially true when the relationship constitutes an extramarital affair for one or both of the employees, thus creating the risk of an enraged spouse.

(Oct. 28, 1999). The plaintiff was the defendant attorney's former law office manager. See id. The defendant fired her following reconciliation with his wife. See id. at *2. Plaintiff candidly acknowledged that the relationship was consensual and voluntary, not coerced or unwelcome. See id. at *3. The trial court found the defendant discriminated against the plaintiff based on "sex" in violation of the state human rights law. See id. at *4. The appellate court unanimously reversed, declaring "sex" means "gender" and not "sexual liaisons" or "sexual attractions." See id. at *8. The court stated that "[a]lthough surely antithetical to good business practices, discrimination against an employee on the basis of a failed voluntary sexual relationship does not of itself constitute discrimination because of sex." Id. (citations omitted); cf. Freeman v. Continental Technical Servs., Inc., 710 F. Supp. 328, 331 (N.D. Ga. 1988) (finding no Title VII discrimination on the basis of sex where the plaintiff was terminated by her supervisor because of a sexual relationship with him and her resulting pregnancy). Even when the alleged romance is between an employee and a non-employee, where the latter is the boss' spouse, the power-differential and the work nexus can supply the minimum ingredients to launch a quid pro quo claim. In one case, for example, a plaintiff alleged that his boss's wife aggressively pursued him, and, afraid to rebuff her unwelcome advances for fear of harming his career, he engaged in sexual contact with her. When his boss learned of the affair he was fired. See Ann Davis, Pained Webber: Socializing of a Staffer and Boss's Wife Spells Woe at Brokerage Firm, WALL ST. J., Nov. 23, 1998, at A1.

50. Misconduct of this type will almost certainly doom the employee's lawsuit. See Cram v. Lamson & Sessions Co., 49 F.3d 466, 475 (8th Cir. 1995) (dismissing claims of hostile work environment sexual harassment and retaliatory discharge by a former female paramour of a supervisor where the plaintiff created the hostile work environment by confronting her apparent rivals, two other co-workers who also allegedly had liaisons with the supervisor). See, e.g., Lashly & Baer, P.C., Sexual Harassment and the Workplace Romance Gone Awry, Mo. EMPL. LTR., May, 1995, available in LEXIS, Human Resources Newsletters. However, while the employee's lawsuit against the employer may fail, the disruptive consequences of their retaliatory misconduct may be dramatic—indeed, so much so that one law firm won a $1.5 million verdict against a former paralegal/subordinate paramour for her "relentless campaign of harassment" against one of its attorneys. See Saret-Cook v. Gilbert, Kelly, Crowley & Jennett, 88 Cal. Rptr. 2d 732, 736 (Cal. App. 2d Dist., Sept. 15, 1999); see also In This 'Fatal Attraction' Case, Everyone Loses, THE RECORDER (visited Sep. 17, 1999) <http://www.callaw.com/stories/edit0917b.html> (discussing the Saret-Cook case, where after the affair ended in the employee's pregnancy the employee discussed intimate details with others in the workplace; falsely told the baby's father that she was carrying twins and that one was stillborn; made approximately 1800 personal calls from the firm to the attorney's family; stalked and harassed the attorney at work; and, on her last day at work, refused to leave the attorney's office, yelling, "I'm going to destroy you and I'm going to destroy your family and everything that is near and dear to you").

51. See Dean J. Schaner, Romance in the Workplace: Should Employers Act as Chaperones?, 20 EMPLOYEE REL. L.J. 47 (1994); see also Weldy v. Piedmont Airlines,
2. Unwelcome (Previously Welcome) Sexual Advances by a Supervisor

A more common but preventable claim of sexual harassment arises when a subordinate discontinues the romance and the supervisor continues to make sexual advances. What was once welcome conduct is now unwelcome and is quickly transformed into sexual harassment. A quid pro quo claim will lie where the supervisor demands to continue the relationship and attempts to use his or her workplace power to coerce the subordinate to resume the relationship.52 Even absent threats, the supervisor's conduct will create a hostile environment claim if unwelcome advances are sufficiently severe and pervasive.53

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52. See Walker v. MacFrugals Bargains, Closeouts, Inc., No. 93-4135, 1994 U.S. Dist. LEXIS 18136, at *13-15 (E.D. La. Dec. 9, 1994) (finding that a supervisor's threat to make the plaintiff's life at work "more difficult" if she did not capitulate to his demands to resume their prior consensual sexual relationship constituted quid pro quo sexual harassment); Fuller v. City of Oakland, No. C-89-0116 MPH, 1992 U.S. Dist. LEXIS 2546, at *30 (N.D. Cal. Feb. 10, 1992) (holding that a previous relationship did not bar the plaintiff's claim, since, "[o]nce [he] understood that his advances were no longer welcome, his conduct became actionable"), rev'd and remanded on other grounds, 47 F.3d 1522 (9th Cir. 1995); Babcock v. Frank, 729 F. Supp. 279, 281 (S.D.N.Y. 1990) (finding that the plaintiff stated both quid pro quo and hostile environment sexual harassment claims based on her supervisor's unwelcome sexual advances which occurred after she terminated their romantic relationship, but included the period when she temporarily resumed the relationship because "she succumbed to [the advances], on occasion, because of [his] threats, including job-related threats and promises"); Keppler, 715 F. Supp. at 869 (finding that a claim will survive where the alleged harasser demanded that the parties continue the relationship before taking the challenged personnel action and had threatened retaliation for refusing that demand); Shrout v. Black Clawson Co., 689 F. Supp. 774, 780-81 (S.D. Ohio 1988) (finding that the plaintiff stated claims of both quid pro quo and hostile environment sexual harassment where she terminated a once consensual voluntary relationship with her direct supervisor and he thereafter allegedly subjected her to unwelcome sexual advances and refused her performance evaluations and salary reviews to persuade her to resume the relationship); cf. Shaver, supra note 45 (discussing a case where the plaintiff claimed that a state prosecutor continued to make sexual advances towards her after she broke off their affair).

53. See Emberger v. Deluxe Check Printers, No. 96-7043, 1997 U.S. Dist. LEXIS 17034, at *8 (E.D. Pa. Oct. 30, 1997) (noting that the supervisor was fired after repeatedly violating his employer's orders not to contact a subordinate employee with whom he had had a previous consensual relationship); Prichard v. Ledford, 767 F. Supp. 1425, 1428-29 (E.D. Tenn. 1990) (finding that the defendant's continued unwelcome sexual
Cases on this point suggest that the hostile environment claim often arises when emotion obscures the harasser's better judgment. 54 While the supervisor may be well aware of the risks of sexual harassment and understand the meaning of "unwelcome" advances, the supervisor may lose sight of its meaning if the supervisor disagrees with the subordinate employee's rejection. 55 Because the supervisor refuses to accept that the relationship is over, he or she may continue to approach the subordinate employee hoping to reconcile. 56 While the supervisor would probably insist that his or her actions were not "unwelcome," subjective beliefs do not necessarily prevail in court. 57 In addition, it is possible that some employers overlook sexual harassment claims made by a participant in a failed office romance, evincing an unsympathetic attitude that says to the employee, "you made your own bed, now lie in it." Either way, employers will pay in litigation for their lack of vigilance in these situations. 58

3. Third-Party Discrimination Claims

Another litigation by-product of workplace romances are claims, usually by third-party co-workers of the subordinate, that the supervisor's preference (real or perceived) towards his or her partner constitutes unlawful disparate treatment in violation of Title VII. 59 Some courts have held such sexual favoritism actionable

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54. See, e.g., Prichard, 767 F. Supp. at 1427-28 (noting that the defendant-employer involved with the plaintiff-employee attempted to restrict her social activities by preventing her from doing anything after work except with him).
55. See id.
56. See id.
57. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (noting that "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact").
58. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (stating that an employer's affirmative defense to liability for actionable hostile environment created by a supervisor with immediate or higher authority over the employee, where no tangible employment action is taken, requires first that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior).
as gender discrimination under Title VII. \(^{60}\) However, most courts have rejected these suits. Unwilling to apply discrimination or sexual harassment law to remedy the problems wrought by a co-worker's personal relationship with the boss, courts have held that preferential treatment of a paramour is not discrimination based on sex. \(^{61}\) The Equal Employment Opportunity Commission ("EEOC") has adopted this majority view, comparing the issue to nepotism. \(^{62}\)

Related arguments such as sexual favoritism creates a hostile work environment for the other employees in the workplace, or that sexual favoritism has a disparate impact on employees, have similarly failed. \(^{63}\) However, an important exception exists where the alleged favoritism is so commonplace or pervasive that it appears to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex").

\(^{60}\) See King v. Palmer, 598 F. Supp. 65, 67 (D.D.C. 1984) (holding that a prima facie case of sex discrimination existed where a promotion sought by the plaintiff was given to another employee who was having an affair with the person who was partly responsible for making the decision), rev'd on other grounds, 778 F.2d 878 (D.C. Cir. 1985); Toscano v. Nimmo, 570 F. Supp. 1197, 1199-1203 (D. Del. 1983) (holding that the supervisor's promotion of his lover over the plaintiff was sufficient to predicate liability under Title VII).

\(^{61}\) See Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990) (finding that "[a] sexual relationship between a supervisor and a co-employee could adversely affect the workplace without creating a hostile sexual environment. A supervisor could show favoritism that, although unfair and unprofessional, would not necessarily . . . create a claim for sexual harassment"); DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 307 (2d Cir. 1986) (stating that "we can adduce no justification for defining 'sex,' for Title VII purposes, so broadly as to include an ongoing, voluntary, romantic engagement"); Candelore v. Clark County Sanitation Dist., 752 F. Supp. 956, 960 (D. Nev. 1990) (concluding that "[p]referential treatment of a paramour, while perhaps unfair, is not discrimination on the basis of sex in violation of Title VII"); Miller v. Aluminum Co. of Am., 679 F. Supp. 495, 501 (W.D. Pa. 1988) (holding that "preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination . . . . Favoritism and unfair treatment, unless based on a prohibited classification, do not violate Title VII") (citations omitted).

\(^{62}\) See EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (Jan. 12, 1990) ("Title VII does not prohibit isolated instances of preferential treatment based on consensual romantic relationships. An isolated instance of favoritism to a 'paramour' (or a spouse or friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.").

\(^{63}\) See Herman v. Western Fin. Corp., 869 P.2d 696, 702 (Kan. 1994) ("We do not believe that an actionable Title VII claim may be made simply from allegations that female employees had to take up the slack for a male supervisor who was shirking his duties while involved in a consensual affair with another supervisor."); see also Drinkwater, 904 F.2d at 861 n.15 (referring to a theory that "possits that there is a sexual power asymmetry between men and women and that, because men's sexuality does not
pears that job benefits are rewarded or withheld depending on an employee’s participation. Courts have consistently analyzed such behavior as a type of class-based quid pro quo sexual harassment. 64 Finally, a recent case illustrates yet another novel complaint derived from the favoritism argument: female executives claimed that the boss’ girlfriend discriminated against them because of their sex. 65

4. Other Retaliation Complaints

Although Title VII discrimination claims founded upon allegations of sexual favoritism have been largely rejected by the courts, third-party co-workers still complain about supervisor-subordinate romances, often invoking the machinery of Title VII by claiming retaliation. 66 Some of those employees participate in the external statutory discrimination complaint process by filing a charge with EEOC and later instituting a lawsuit. 67 Other employees avail

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64. See Broderick v. Ruder, 685 F. Supp. 1269, 1278 (D.D.C. 1988) (finding that widespread sexual relationships in the office between managers and employees harassed plaintiff and other female employees “by bestowing preferential treatment upon those who submitted to [the] sexual advances”); Lisa Jenner, Office Dating Policies: Is There a Workable Way?, HR Focus, Nov. 1993, at 5 (reporting on one case where the plaintiff, formerly a Securities and Exchange Commission attorney, described her experiences as “economic rape” because she alleged that those who became involved in personal relationships with managers or subordinates received perks and those who refused could not compete at work).

65. See Jon G. Auerbach, Lotus President and Female Aide Are Named in Sex-Bias Complaint, Wall St. J., May 12, 1999, at B8 (citing to a complaint filed on April 16, 1999 with the Massachusetts Commission Against Discrimination). In this instance the allegation is different from the traditional sexual favoritism claim, where the subordinate employee was favored because of her relationship with her supervisor to the detriment of her co-workers (male or female). See id. Rather, the plaintiffs (female managers) complained that the company president had had “a long term intimate relationship” with his female executive assistant, and that she discriminated against them because they were women. See id. (emphasis added).

66. See Cross v. Cleaver, 142 F.3d 1059, 1073-74 (8th Cir. 1998) (holding a police department liable for its chief’s retaliation against an officer who filed a sexual harassment complaint against a co-worker she dated at one time; the co-worker testified that he discussed the plaintiff’s complaint with his friend, the chief of police, who allegedly stated that he would “get the bitch”); Reginelli v. Motion Indus., Inc., 987 F. Supp. 1137, 1141 (E.D. Ark. 1997) (awarding plaintiff over $950,000 in damages for wrongful discharge because he reported a suspected sexual relationship between the branch manager and a subordinate female employee).

67. See generally Robinson v. Shell Oil Co., 519 U.S. 337, 339 (1997) (explaining that the plaintiff first filed an EEOC charge of racial discrimination and then filed suit because of retaliation by the employer for the EEOC complaint); Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202 (1997) (explaining that plaintiff filed an EEOC
themselves of internal employer complaint processes by alleging that they believe that the interoffice romance discriminates against them. The complaining employee's conduct normally constitutes opposition to unlawful discrimination, which is specifically protected by §704(a) of Title VII.68

Consequently, if the employer takes any adverse employment action against an employee who engages in protected opposition activity, then that action constitutes unlawful retaliation.69 Sometimes, despite an employer's best efforts to enforce proper policies against discrimination and retaliation, an employer can still be held responsible for retaliation. If supervisory employees who desire vengeance take unsanctioned action against a subordinate employee for engaging in protected complaint activity, the employer may be held liable for the supervisory employees' actions.70 For example, a jilted lover, against whom the former paramour has filed a sexual harassment complaint, may try to exact revenge through a third party supervisor or co-employee.71 However, to state a Title VII retaliation claim, the employee must have engaged in protected opposition.72 Without such protected activity, and absent any identifiably unlawful reason, an at-will employee may be fired "for a good reason, bad reason, or for no reason at all."73 Even an employee who merely knows of the boss' relationship with a co-worker, but does not officially complain about it, may be vulnerable to retaliation.74 The employee might be fired simply because he or she possesses potentially embarrassing information regarding the supervisor.75 The employee's knowledge itself is not protected by charge based on sex discrimination and was subsequently fired in retaliation for the EEOC complaint).

68. See 42 U.S.C. §2000e-(3)(a) (1994) (stating that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed . . . an unlawful employment practice").

69. See Reginelli, 987 F. Supp. at 1138 (stating that Title VII "extends to forbid ‘discrimination against . . . employees for attempting to protest or correct allegedly discriminatory conditions of employment’") (citation omitted).

70. See Cross, 142 F.3d at 1073-74.

71. See id. at 1059.

72. See id. at 1071.


74. See Ellert v. University of Texas, 52 F.3d 543 (5th Cir. 1995) (finding plaintiff's knowledge of her supervisor's unwelcome "secret" relationship with a third-party female subordinate employee was a gender-neutral reason for her termination and therefore outside the protective scope of Title VII).

75. See id. at 544.
Title VII retaliation claims, much like the closely related category of whistleblower claims, represent a common and powerful mechanism for employees to bring action against their employers for acts or omissions relating to office romances. Despite legal roadblocks for employees to bring direct sexual harassment and gender discrimination complaints against their employers regarding co-employees and supervisors who become romantically involved, employees may nonetheless subject employers to indirect liability by wrapping themselves in the statutory protection afforded to Title VII participants.

III. LEGAL CHALLENGES TO FRATERNIZATION POLICIES

A narrowly-tailored employer policy, addressing only the problem of supervisor-subordinate romances, will normally withstand judicial scrutiny under almost every common-law, statutory, and constitutional attack. With few exceptions, primarily owing to inconsistent or discriminatory applications of such policies, courts have upheld employers’ rights to regulate this particular aspect of their employees’ otherwise private behavior.

A. Discrimination and Inconsistency

An employer who punishes an employee for any reason owes eternal vigilance to consistency. Different treatment of similarly situated employees offends most employees’ (and therefore most jurors’) basic sense of fairness. Therefore, whether an employer has an express policy, an unwritten policy, or no policy on employee fraternization issues, the employer must be especially careful to deal with similarly situated employees in the same manner. Employers are most vulnerable if they remain unaware of some workplace romances, or if they ignore them in some cases and take action in others, without formulating a coherent policy or set of rules. An employer’s demonstrable inconsistency may result in an enormous damages verdict for a discharged employee. Even if

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76. See id. at 546.
the company acts pursuant to a clearly applicable policy in the particular case, disparate treatment of similar cases is a recipe for disaster.\textsuperscript{79}

For example, in \textit{Bingham v. Rohr Industries, Inc.},\textsuperscript{80} a San Diego, California jury awarded $4 million to two former employees of Rohr Industries on a breach of employment contract claim.\textsuperscript{81} The company's director of corporate human relations and a manager in the same department were fired in 1990.\textsuperscript{82} The company claimed that the relationship created a conflict of interest, undermined management, and disrupted morale in the department.\textsuperscript{83} Although Rohr reportedly "had a policy precluding couples from working in a supervisor/subordinate capacity,"\textsuperscript{84} the plaintiffs argued that the company did not have a formal policy barring dating among employees.\textsuperscript{85} The plaintiffs also argued that "thirty-four similar relationships at the company had been allowed to flourish."\textsuperscript{86}

Inconsistency may result not just from applying a policy differently among similarly situated employees, but by not applying it at all to certain classes of employees. Rank and file employees' morale will surely suffer dramatically if they perceive a double stan-

\textsuperscript{79} "'All any good attorney would have to do is find one person that had a relationship and wasn't fired, ... and you're off to the races.'" Lardner et al., \textit{supra} note 39 (quoting Dennis M. Powers, a law professor at the University of Southern Oregon).


\textsuperscript{81} \textit{See} id.


\textsuperscript{84} Markels, \textit{supra} note 35.


\textsuperscript{86} Markels, \textit{supra} note 35; \textit{see also} Hearn, \textit{supra} note 82. The parties apparently settled the case thereafter. Another couple formerly employed by Rohr, married since 1992, also brought a lawsuit after they lost their jobs in 1993. \textit{See} Elizabeth Douglas, \textit{For Better or Worse: Companies Learn to Deal with Romance in the Workplace}, \textbf{SAN DIEGO UNION-TRIBUNE}, Oct. 9, 1994, at 11. They challenged the husband's layoff and the wife's resignation on the grounds that they were unfairly targeted because of their relationship by two supervisors elsewhere in the department. \textit{See} id. In another case, a former supervisor at a Houston company alleged wrongful termination based on his marriage to an employee. \textit{See} Markels, \textit{supra} note 35. "After warning him against dating a subordinate, [the employer] fired him upon learning that he had married her." \textit{Id.} The plaintiff claimed the company unevenly administered its anti-dating policy, because other people met there and got married and were not fired. \textit{See} id.
APPARENTLY THERE ARE NO REPORTED CASES YET WHERE AN EMPLOYER HAS BEEN FOUND LIABLE FOR INCONSISTENTLY APPLYING A DATING POLICY WHERE HIGHER-LEVEL EMPLOYEES WERE EXPLICITLY OR DE FACTO EXCLUDED. HOWEVER, BUSINESS ACCOUNTS SUGGEST THAT THESE CASES ARE OFTEN RESOLVED IN FAVOR OF PLAINTIFFS.

Discriminatory application of an employer's fraternization policy is simply another form of inconsistency, whereby employees of one protected group and employees outside that group receive differential treatment. For example, where an employer disciplines a female for dating a male subordinate but does not punish the male subordinate, or does not punish the male supervisor for dating a female subordinate, most courts have held that the affected employee will state a prima facie case of sex discrimination. Still, some courts will reject plaintiff's claims where the compared employees are not sufficiently similarly situated, notwithstanding their different genders. One way to avoid this problem, however, is to


88. For example, an IBM manager won a $375,000 federal court jury verdict. See Claire Cooper, Jury Award for Ex-IBM Exec Upheld, SACRAMENTO BEE, June 14, 1996, at A3. The decision was subsequently affirmed by the Ninth Circuit Court of Appeals. See id. The parties later settled. See Mancinelli v. International Bus. Mach. Corp., 95 F.3d 799 (9th Cir. 1996). IBM's policy at that time prohibited a manager's romance with a subordinate. Its Manager's Manual stated, "A manager may not date or have a romantic relationship with an employee who reports through his or her management chain, even when the relationship is voluntary and welcome." Hymowitz & Pollock, supra note 13. It would seem IBM was merely enforcing its policy against a clear violation.

89. See Duchon v. Cajon Co., 791 F.2d 43, 46 (6th Cir. 1986) (reversing summary judgment for employer where plaintiff alleged gender discriminatory discharge for her relationship with a male employee, who was not disciplined); Zentiska v. Cardinal Indus., Inc., 708 F. Supp. 1318, 1320 (S.D. Ga. 1988) (denying employer's summary judgment motion where plaintiff alleged she, and not the male employee with whom she had had a romantic relationship, was subjected to adverse employment action; the court held that the allegation of selective application was sufficient to state a claim for sex discrimination); cf. Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1042-43 (7th Cir. 1993) (reinstating age discrimination claim but affirming the district court's decision that plaintiff did not make out a prima facie sex discrimination case because he failed to prove that the "no dating policy" was not enforced against similarly situated female employees).

90. See Karp v. Fair Store, Inc., 709 F. Supp. 737, 740-41 (E.D. Tex. 1988) (stating that "[e]mployees who fraternize socially and those who do so sexually, however, are not similarly situated for purposes of the present gender discrimination analysis"), aff'd sub nom., Karp v. Fair, Inc., 914 F.2d 253 (5th Cir. 1990); see also Acred v. Motor Convoy, Inc., 1988 U.S. Dist. LEXIS 15974, at *18-19 (W.D. Tenn. Sept. 12, 1988) (holding that even if male supervisors violated broader, unwritten socialization policy, the conduct was not sufficiently similar to plaintiff's sexual relationship with subordinate to make out a prima facie case).
equally penalize both male and female employees who violate the policy, irrespective of their position as supervisor or subordinate.91

In other cases, employees have not alleged disparate treatment based on sex, but rather discrimination based on race.92 For example, in Otudeko v. Kansas Department of Social and Rehabilitation Services,93 the employee argued that the employer treated him differently than other employees who engaged in office romances because the relationship in question involved individuals of different races.94 The employee claimed that the policy's application was a pretext for the employer's real discriminatory motive.95

Finally, an employer could also discriminate by use of a facially neutral policy which disproportionately affects a protected class, such as one sex over the other.96 For example, in EEOC v. Rath Packing Co.,97 the Eighth Circuit found that the employer's no-spouse hiring policy significantly reduced female applicants' employment opportunities because 95% of the employees were male.98 However, in order to prove discrimination, an employee must not only show that the employer's policy resulted in a disparate impact on female employees, but also that the policy was only enforced against female employees a statistically significant number of times.99 In some instances, an anti-fraternization policy which

92. See Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 590-91 (5th Cir. 1998) (upholding employer's liability for racial discrimination against white female employee, who dated and later married a black co-worker, where the jury found that race was a motivating factor in the employer's discharge of plaintiff); Otudeko v. Kansas Dept' of Soc. & Rehabilitation Servs., No. 94-4268-DES, 1994 U.S. Dist. LEXIS 18923, at *10-14 (D. Kan. Dec. 12, 1994) (finding that an African-American plaintiff's allegations of discrimination, based on his employer's reaction to his asking white co-workers for dates and his employer's statements generally opposing interracial relationships, did not rebut employer's legitimate nondiscriminatory reasons), aff'd, 1995 U.S. App. LEXIS 16410 (10th Cir. July 5, 1995). See, e.g., Markels, supra note 35 (discussing a pending case in which a supervisor alleged he was fired by a Houston air conditioner maker for dating, and then marrying, a subordinate of a different race).
94. See id. at *14.
95. See id.
96. See 42 U.S.C. § 2000e-2(k)(1)(A) (1994). The policy is unlawful if, in addition to disparate impact, the employer fails to show that the policy is job-related and a business necessity.
97. 787 F.2d 318 (8th Cir. 1986).
98. See id. at 320.
requires only the subordinate to resign or face involuntary transfer may also create disparate impact discrimination. Although the policy might be facially neutral, it could disproportionately affect women if more men occupy managerial positions.

However, no plaintiff has yet successfully defeated an employer's fraternization policy on these grounds.\textsuperscript{100} Further, as women continue to advance towards equality with men in the workplace, the likelihood of successfully challenging a fraternization policy under a disparate impact cause of action will diminish.\textsuperscript{101} Other arguments attempt to limit private non-unionized employers' otherwise unrestricted power over their at-will employees in these matters.

B. \textit{Attacks on Employment-At-Will}

1. Good Cause and Implied Covenant of Good Faith and Fair Dealing

Private sector employees discharged or disciplined for violating employer fraternization policies have often challenged the action by attempting to modify the doctrine of employment-at-will to require "good cause" for the employer's action, or by claiming a breach of an implied covenant of good faith and fair dealing in the employment contract.\textsuperscript{102} For example, in \textit{Crosier v. United Parcel Service, Inc.},\textsuperscript{103} the employer discharged the plaintiff, a supervisor, who dated and cohabited with a subordinate employee in violation of an unwritten policy prohibiting social relationships between manage-

\textsuperscript{100} See, e.g., Standeford v. Wal-Mart Stores, Inc., No. 4:95-CV-67, 1996 U.S. Dist. LEXIS 4645, at *7 (W.D. Mich., Mar. 4, 1996) (finding that firing a female customer service manager for violating the company's fraternization policy by having a sexual relationship with, and later marrying, a subordinate male employee did not prove disparate impact or enforcement of the policy against women), aff'd, No. 96-1372 1997 U.S. App. LEXIS 13126 (6th Cir. June 2, 1997). The court also rejected the plaintiff's pretext argument, stating that "[f]iring someone, out of concern about a relationship in which there is a great age disparity and in which one of the parties is committing adultery and has children, is not illegal." \textit{Id.}

\textsuperscript{101} See \textit{DePalo, supra} note 91, at 89-90.

\textsuperscript{102} See \textit{Arno v. Club Med, Inc.}, 22 F.3d 1464, 1470 (9th Cir. 1994) ("[T]he personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged can give rise to an implied agreement that the employment relationship will continue until the employer has good cause to terminate the employee.") (quoting \textit{Pugh v. See's Candies, Inc.}, 171 Cal. Rptr. 917, 925-26 (Cal. Ct. App. 1981)).

\textsuperscript{103} 198 Cal. Rptr. 361 (Cal. Ct. App. 1983).
ment and non-management employees.\textsuperscript{104} The court rejected the plaintiff's good cause attack, finding that the policy was justified by the employer's need to avoid perceptions of favoritism, claims of sexual harassment, and ultimately to prevent sexual harassment.\textsuperscript{105}

Other courts addressing this question have refused to create such a right or have upheld the employers' interests against the employee's rights.\textsuperscript{106} It should be noted that in the \textit{Rohr} case,\textsuperscript{107} the company was indeed found liable for breach of an implied covenant. However, the verdict was apparently not based on the fact that the company took action against the plaintiffs for their conduct. More specifically, the jury perceived that the way the company handled the investigation into the couple's behavior was unfair—especially its inquiry into the subordinate woman's background and her past personal life.\textsuperscript{108} These unique facts make this case an exception, related not to the right of an employer to take adverse action against supervisor-subordinate romances, but to the employer's process preceding that action. Accordingly, the good faith and fair dealing exception to the at-will doctrine will not likely protect fraternizing employees from employer reaction.\textsuperscript{109}

\textsuperscript{104} \textit{See id.} at 362-63.

\textsuperscript{105} \textit{See id.} at 366.

\textsuperscript{106} \textit{See Karp v. Fair Store, Inc.,} 709 F. Supp. 737, 741-42 (E.D. Tex. 1988) (assuming the validity of plaintiff's assertion that an oral employment contract requires good faith and fair dealing; nevertheless, the court refused to substitute "its business judgment for that of the company" where the employer allegedly fired the plaintiff for "immoral conduct"), \textit{aff'd sub nom.}, \textit{Karp v. Fair, Inc.}, 914 F.2d 253 (5th Cir. 1990); \textit{see also} \textit{Ward v. Frito-Lay, Inc.}, 290 N.W.2d 536, 538 (Wis. Ct. App. 1980) (accepting the argument of an implied contractual duty, but finding that the employer acted in good faith because it kept the plaintiff on the payroll several months after his discharge so that his pension would vest, gave him a good reference, and did not contest his unemployment claim).

\textsuperscript{107} \textit{See supra} notes 80-86 and accompanying text for further discussion of the \textit{Rohr} decision.

\textsuperscript{108} The jury foreman reported that the jury "was swayed by the unfairness of \textit{Rohr}'s investigation of the couple's relationship before firing them. That investigation was concluded after extensive questioning of [the woman's] past personal relationships and without talking to either [of the plaintiffs]." Lorie Hearn, \textit{Punitive Damages for \textit{Rohr}: $500,000, San Diego Union-Tribune,} Nov. 19, 1992, at D1. The plaintiffs had claimed that the issue of their relationship was "a smoke screen" to get rid of them because of the male plaintiff's disagreements with the company's chairman and chief executive officer. \textit{See id.; see also} Hearn, \textit{supra} note 82; Thom Mrozek, \textit{Ex-Executive of \textit{Rohr} Wins $500,000 Justice: Jury Finds that the Company Wrongfully Fired Her and Another Employee,} L.A. \textit{Times,} Nov. 19, 1992, at B2.

\textsuperscript{109} \textit{See DePalo, supra} note 91, at 78.
2. Implied Contract

Like the good faith exception, implied contracts are another means by which fraternizing employees attempt to convince courts to modify the doctrine of employment-at-will in order to shield them from their employer's adverse response. However, employees often find little proof to imply an employer's contractual promise not to discipline or discharge them for their behavior. For example, general employee handbooks or ambiguous oral statements by management do not suffice.

Courts have also consistently rejected implied contracts where power-differentiated employees become romantically involved, especially where the defendant employer clearly communicates its policy and thus provides adequate notice to employees that such conduct entails negative employment consequences. For example, in *Coatney v. Enterprise Rent-A-Car Co.*, the court held that the employer's handbook, which contained a policy requiring timely disclosure of personal relationships between supervisors and subordinates, did not confer rights or contain a promise not to discharge. On the other hand, in *Rulon-Miller v. International Business Machine Corp.*, the plaintiff was fired by a supervisor who objected to her relationship with a competitor's employee. The plaintiff introduced a memo from IBM's chairman to all employees which stated that the company was concerned with an employee's off-the-job behavior only when it affected job performance or if it "affect[ed] the reputation of the company in a major way."

Although Rulon-Miller premised her claims on wrongful discharge through a breach of the duty of fair dealing and as intentional infliction

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110. Under the implied contract theory a plaintiff must show that its employer, in promulgating an employment handbook or policy, made an offer to the employee and that the employee's initial or continued employment constituted acceptance and consideration for those procedures. See *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1464 (10th Cir. 1994).

111. See id. at 1464-65 (noting that a plaintiff may not aggregate various documents to establish an implied contract).

112. See *Dupree v. United Parcel Serv.*, Inc., 956 F.2d 219, 222-23 (10th Cir. 1992) (finding that discharge for violating the company's anti-fraternizing policy by dating a fellow manager did not constitute a breach of an implied contract because the alleged oral statements made to the employee were too vague).


114. See id. at 1208-11.


116. See id. at 528.

117. Id.
tion of emotional distress, the chairman's memo was used to imply a promise.\footnote{118}

3. Public Policy

In another effort to carve out an exception to employment-at-will, plaintiffs have argued that the employer's action violated a public policy which should protect employees from discharge. The principal problem with this argument, however, is that courts have severely restricted any form of public policy based action to situations where the employer's action negatively affects societal interests.\footnote{119} For example, some states have recognized a public policy tort of wrongful discharge where an employer fires an employee for fulfilling a public obligation, such as serving on a jury.\footnote{120} By contrast, the general public has no interest in protecting employees' private affairs that have no connection to civic obligations or other broader interests of society.\footnote{121} Accordingly, in cases specifically involving employee office romances where the employer has otherwise acted reasonably and consistently, courts have rejected these claims.\footnote{122}

4. Privacy

In addition to attempting to imply good cause or good faith, a

\footnote{118} See \textit{id.} at 527, 530
\footnote{119} See \textit{White}, \textit{supra} note 73, at 28 (calling public policy hard to define and therefore inappropriate as the foundation for this cause of action).
\footnote{120} See \textit{Nees v. Hocks}, 536 P.2d 512, 515-16 (Or. 1975); see \textit{generally Steven L. Willborn et al., Employment Law} 128 (2d ed. 1998) (listing situations in which courts have upheld suits for wrongful discharge in violation of public policy, such as refusing to commit unlawful acts, exercising statutory rights, and fulfilling a public obligation).
\footnote{121} See, e.g., \textit{Talley v. Washington Inventory Serv.}, 37 F.3d 310, 312 (7th Cir. 1994) (dismissing a claim of wrongful termination of an employee based on a social relationship with another employee which later led to marriage); \textit{Watkins v. United Parcel Serv., Inc.}, 797 F. Supp. 1349 (S.D. Miss. 1992) (rejecting plaintiff's argument for public policy exception to employment-at-will where plaintiff was terminated for dating a subordinate employee in his supervisory chain in violation of the employer's policy against such relationships); \textit{Rogers v. International Bus. Mach. Corp.}, 500 F. Supp. 867, 868-870 (W.D. Pa. 1980) (finding no violation of public policy because termination followed timely notice, an investigation in which the plaintiff participated, and written accusations by co-workers of resulting negative work performance); \textit{McCluskey v. Clark Oil & Ref. Corp.}, 498 N.E.2d 559, 561-62 (Ill. App. Ct. 1986) (holding that a plaintiff discharged because she married a co-worker did not violate any public policy); \textit{Patton v. J.C. Penney Co.}, 719 P.2d 854, 857 (Or. 1986) (stating that it may seem harsh that an employer can fire an employee because of his or her dislike of the employee's personal lifestyle, but that only rare circumstances will trigger the public policy exception to the doctrine of employment-at-will).
\footnote{122} See \textit{supra} note 121 for examples of such cases.
contract or promise, or relying on an asserted societal or public policy interest, employee challenges to employer fraternization rules have relied on the common law tort of invasion of privacy in order to invoke a state and/or federal constitutional right to privacy. For example, in the Rohr case, although the employer's lack of consistency supported the verdict, the jury also found the company liable for violating the subordinate employee's privacy during the company's investigation of her personal background.

Careful employers will avoid privacy cases in the same way that they prevent inconsistency, by ensuring that each office romance is handled fairly in comparison to others and with due regard for the employees' personal rights. As such, employers should enforce a policy without undue investigation or unnecessary disclosure of employees' personal affairs. Indeed, courts will likely reject an invasion of privacy claim when an employer's investigation

123. See Markels, supra note 35 (noting that a supervisor was fired by a Houston employer for dating and then marrying a subordinate; also alleging violations of privacy protection provisions of the Texas state constitution).

124. See id.

125. See supra notes 80-86 and accompanying text for a discussion of Rohr.

126. See Richter & Clary, supra note 87 (noting that the defendant corporation had "thirty-four other couples in its upper ranks that [it] acknowledged were carrying on romantically"); see also Mrozek, supra note 108 (noting that the company's investigation was too "far reaching"). In another invasion-of-privacy lawsuit recently filed in Philadelphia, the plaintiff alleged that he was confronted at work by an attorney and a company security officer and interrogated about his spending the night with a female co-worker. According to the plaintiff, the evening in question began with the plaintiff's offer of a ride home from work, which then led to dinner, visits to two nightclubs, and ended with consensual sex at the plaintiff's apartment. Thereafter, plaintiff and the woman talked on the telephone a few times and made arrangements for a second date, which the plaintiff later cancelled. The company representatives told the plaintiff that his co-worker whom he neither supervised nor worked closely with alleged sexual harassment stemming from their night together. The plaintiff alleged that the company improperly required him to answer questions concerning intimate details of the evening. See Robert Sharpe, Employee Sues Over Questions About Date, THE LEGAL INTELLIGENCER (visited Aug. 9, 1999) <http://www.lawnewsnet.com/stories/A4223-1999Aug6.html>.

is limited solely to interviews of other employees, an examination
of company records, and when disclosure of information is made
only to necessary officials on a need-to-know basis.\textsuperscript{128} Moreover,
employees, particularly in the private sector, have very few work­
place privacy rights. In order to prevail on an invasion of privacy
claim, they must have a reasonable expectation of privacy in the
particular matter.\textsuperscript{129} If employers give their employees actual ad­
vance notice of the policy regarding office romance, whether
through a policy, letter, handbook, training session, or briefing, the
employer should not face any liability because the employee would
not have a reasonable expectation of privacy regarding the exist­
ence of the relationship.\textsuperscript{130} Employees who objectively know they
have no privacy expectation thus have an especially weak argument
against an employer’s motion for summary judgment on these
claims.

5. Intentional Infliction of Emotional Distress

In addition to privacy claims, another tort alleged by employ­
ees which challenges office romance policies is intentional infliction
of emotional distress. However, this cause of action has an ex­
tremely high threshold of proof that makes it an unlikely vehicle for
a successful challenge by an aggrieved employee.\textsuperscript{131} The claim re­
quires a plaintiff to prove the employer intentionally engaged in

\textsuperscript{128} See Rogers, 500 F. Supp. at 870; see also Watkins, 797 F. Supp. at 1359 (re­
quiring plaintiff to show bad faith or "reckless prying" on the part of UPS).

\textsuperscript{129} See Mares v. ConAgra Poultry Co., 971 F.2d 492, 496 (10th Cir. 1992) (re­
jecting claims that employees submit a medical form was an
intrusion upon seclusion, where there was no "substantial interference with seclusion"
or not "highly offensive to a reasonable person," and where the employer offered legiti­
mate reasons for the submission, such as "maintaining the integrity of its drug testing")
(quoting Restatement (Second) of Torts § 652B (1977)); Borse v. Piece Goods Shop,
Inc., 963 F.2d 611, 620 (3d Cir. 1992) (recognizing that tortious 'intrusion upon seclu­
sion' requires intentional intrusion "upon the solitude or seclusion of another of his
private affairs or concerns [and that] . . . the intrusion would be highly offensive to a
reasonable person") (quoting Restatement (Second) of Torts § 652B).

\textsuperscript{130} See Holland & Hart, \textit{Be My Valentine but Not at Work}, IDAHO EMPL. L.
LTR., Feb. 1997, available in LEXIS, Human Resources Newsletters; see, e.g., Perkins
Coe, \textit{Workplace Romances and the Lives They Destroy}, OR. EMPL. L. LTR., July 1997,
available in LEXIS, Human Resources Newsletters; Jonathan A. Segal, \textit{The World May
Welcome Lovers}, HR MAG., June 1996, at 170 ("An expectation of privacy is not rea­
sonable if an employer destroys it.").

\textsuperscript{131} See Hirras v. National R.R. Passenger Corp., 95 F.3d 396, 400 (5th Cir. 1996)
(recognizing that Texas common law requires that (1) the defendant acted intention­
ally or recklessly; (2) the conduct was extreme and outrageous; (3) the defendant's ac­
tions caused the plaintiff emotional distress; and (4) the emotional distress suffered by
the plaintiff was severe").
outrageous conduct that caused the plaintiff severe emotional distress. Applying these elements to office romance situations, an employee will seldom recover, and then only if an employer reacts precipitously and indefensibly out of line with its previous actions. In *Rulon-Miller v. International Business Machine Corp.*, the court upheld a jury award where the employer had applied its conflict of interest policy inconsistently and outrageously. In that case, the supervisor used plaintiff's relationship with a competitor's employee as a pretext to fire her without any due process and under circumstances that appeared quite unfair. The court found that the employer had acted deceptively and oppressively when he unilaterally terminated the plaintiff without giving her a chance to consider the supervisor's ultimatum to either stop dating the man or lose her job. After initially giving her a "couple of days to a week" to think about it, the next day he told her "he had made up her mind for her," and when she protested, dismissed her. The court found that these facts amply justified the jury's finding of extreme conduct sufficient to sustain the tort. However, because the standard for this claim is so high, employers have won the overwhelming majority of lawsuits brought on this basis. *Rulon-Miller* is the only employment case involving an employer's action based on an office romance where such a claim was successful. Indeed, other such claims have failed even where the employers' actions arguably supported a sympathetic plaintiffs' position.

132. See id.
134. See id. at 529.
135. See id. at 528.
136. See id. at 534.
137. Id. (quoting testimony of respondent, Virginia Rulon-Miller).
138. See id.
139. See Holland & Hart, supra note 130 (discussing how some courts have required employees to prove that the company's conduct was so extreme and outrageous as to be "utterly intolerable in a civilized community," thus allowing most employers to win their lawsuits).
140. Cf. Bingham v. Rohr Indus., Inc., No. 637458 (Cal. Super. Ct. Nov. 16, 1992) (unpublished decision) (finding that the company had intentionally inflicted emotional distress upon the subordinate female employee). However, as previously discussed, the verdict on this claim was apparently based on the employer's handling of the investigation of the plaintiff's personal background, rather than on the fact that the employer fired the couple. See supra notes 80-86, 108, and accompanying text.
141. See DePalo, supra note 91; see also Schrader v. E.G. & G., Inc., 953 F. Supp. 1160, 1169-70 (D. Colo. 1997) (finding that the defendant's conduct did not "go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community") where plaintiff claimed that his former girlfriend/second-line
Consequently, the risk of losing an infliction of emotional distress case will be virtually nonexistent for a company that establishes a clear policy addressing supervisor-subordinate office romances and executes sufficient control over its human resources decisions, especially with regards to terminations.

C. Constitutional and Statutory Claims

Apart from discrimination claims and attempts to modify employment-at-will, some employees affected by their employers’ actions or policies regarding office romance may seek a state law or constitutional remedy. Specifically, employees may allege infringement of state-guaranteed rights regarding marital status or a constitutional right to marry, First Amendment association freedoms, or a statutory right to pursue off-duty “recreational” activities.

1. Marital Status Anti-Discrimination Laws

Statutes in twenty states and the District of Columbia prohibit employers from basing employment decisions on an employee’s marital status. Where states have defined marital status as referring only to one’s legal status of being married, single, separated, divorced, or widowed, courts have held that employer rules prohibiting spouses from working together do not violate state laws because the termination is a function of who an employee marries, rather than the status of being married. Moreover, these courts have refused to extend marital status protection to employees who are not married, but are only dating or living together. These

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supervisor sexually harassed him and orchestrated a “witch hunt” that resulted in his discharge) (citation omitted); Watkins v. United Parcel Serv., Inc., 797 F. Supp. 1349, 1361 (S.D. Miss. 1992) (finding that the employer’s actions were not “so extreme, outrageous, or repulsive that might warrant the imposition of liability”) (citation omitted); Patton v. J.C. Penney Co., 719 P.2d 854, 858 (Or. 1986) (finding firing official’s behavior “rude, boorish, tyrannical, churlish and mean—and those are its best points,” but not “outrageous in the extreme” sufficient to support plaintiff’s claim for intentional infliction of severe emotional distress where plaintiff was discharged for his relationship with a female co-employee despite no negative workplace consequences and no written or unwritten policy against relationships with co-workers) (citations omitted).

142. See Randi Wolkenbreit, In Order to Form a More Perfect Union: Applying No-Spouse Rules to Employees Who Meet at Work, 31 COLUM. J.L. & SOC. PROBS. 119, 132 & n.81 (1997) (stating that half of the states have laws against marital status discrimination).

143. See id. at 133-34 & nn.85-91.

144. See Waggoner v. Ace Hardware Corp., 953 P.2d 88 (Wash. 1998) (upholding discharge of employees for violation of policy forbidding employment of “cohabitators or dating employees” under Washington law barring discrimination based on marital status); Perkins Coie, Court Says Terminating ‘Cohabitators’ Not Discriminatory, WASH.
courts reason that marital status protection does not extend to non-spousal relationships.\(^{145}\) However, at least five states interpret their marital status protection statutes broadly, and find discrimination where an employee would not have been fired "but for" marrying a co-worker.\(^{146}\) In these states, employers will be held liable if they still have or enforce an anachronistic general no-spouse rule.\(^{147}\)

Employers often address spouse issues through limited no-spouse supervision rules that restrict married employees from directly reporting to each other.\(^{148}\) The underlying justification is the employer's concerns about conflicts of interest or the perception of a conflict of interest by other employees. However, an employer might create vulnerability if it has only a limited no-spouse supervision rule without a corresponding fraternization policy for non-married employees. This situation arises when, for example, an employer prevents spouses from directly supervising each other but fails to prohibit or prevent similar conduct when a supervisor is living with or dating a subordinate.\(^{149}\) Because employees' reactions to the workplace implications of two such employees the day before they are married will differ little the day after, employers whose policies present such apparent hypocrisy will have a problem.\(^{150}\)

Furthermore, as discussed previously, an employer's interest in

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\(^{145}\) See supra note 144.

\(^{146}\) See Wolkenbreit, supra note 142, at 133 n.84 (citing John C. Beattie, Note, Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples, 42 Hastings L.J. 1415 (1991)).

\(^{147}\) See id. at 133.

\(^{148}\) Many more employers have no-spouse supervision policies than fraternization policies. See DePalo, supra note 91, at 82 n.207 (citing Michael R. Losey, Manage the "Personal" in Interpersonal Relations, Managing Off. Tech., Nov. 1993, at 25, 28).

\(^{149}\) See supra note 144 for cases detailing no-spouse supervision policies.

\(^{150}\) An employer's policy or actions which are inconsistent in this regard could appear arbitrary and capricious to a court and provide an opening for an effective legal challenge by the affected employee(s). See, e.g., Muller v. BP Exploration (Alaska) Inc., 923 P.2d 783, 785-86 (Alaska 1996) (stating that in this case the employer said that it would not object to a relationship between a training instructor and a trainee unless it
avoiding sexual harassment litigation is a strong justification for fraternization policies that apply to all employees rather than just spouses, since most courts will not entertain a claim that an employee was sexually harassed by his or her own spouse (unless they were legally separated or in the throes of divorce). Consequently, a limited no-spouse rule is deficient because it only addresses the favoritism issue and only then as it is triggered by the formality of marriage.

A better arrangement is a more comprehensive policy that addresses all supervisor-subordinate romantic relationships, thus prohibiting spouses from supervising each other, discouraging hierarchical romances, and addressing them when they arise. Such a policy will better serve an employer’s interests in good morale, productivity, and most importantly, avoidance of costly sexual harassment suits.

2. Fundamental Right to Marry

Aside from marital status discrimination laws, employee challenges to office romance policies may rely on a claimed statutory right to marry. In the public sector, employees have also successfully challenged a governmental employer’s rules that significantly interfere with the U.S. Constitution’s fundamental right to marry. In *Voichahoske v. City of Grand Island*, the defendant municipality, pursuant to its general no-spouse policy, fired an employee who married another employee, even though he worked in a different department than his wife and they had no official authority over each other. The Nebraska Supreme Court applied strict scrutiny and remanded the case so that the municipality could present evidence showing that there was a compelling government interest to justify the no-spouse policy. The court stated that the no-spouse policy must protect “against a clear, substantial, and direct threat to the efficiency, integrity, morale, and discipline of state employees

led to marriage, in which case the instructor would have to step down; yet, when the couple got engaged, the employer demoted and transferred the instructor).

151. See supra Part II.C for a discussion of sexual harassment and other discrimination claims.

152. The U.S. Constitution prohibits public entities from “significantly interfering” with the decision to marry. See Zablocki v. RedhaJ, 434 U.S. 374, 386 (1978); see also Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (holding that the right to marry cannot be restricted based on the race of the couple).


154. See id. at 126.

155. See id. at 129.
and the merit system under which they are recruited, their performance evaluated, and their tenure assured.

Most other courts, however, have required only a rational basis for such employment policies and have not applied strict scrutiny. Accordingly, they have declined to strike down employer non-fraternization and anti-nepotism policies because the rules do not directly and substantially interfere with the right to marry and are generally justified by a legitimate employer interest. This difference in the level of judicial scrutiny of employer policies highlights that the courts' willingness to intervene depends on the amount of the employer's interference with the employees' right to marry. The public employer's no-spouse rule in Grand Island cost the plaintiff his job (high interference), whereas by contrast, anti-nepotism policies typically address the supervision structure of employees (low interference). Rather than prohibiting an employee's spouse or relatives from working for the same organization, these rules prevent those persons from working together in a reporting relationship.

In one unusual case, two public employees alleged infringement of their fundamental right to marry even though, at the time

156. Id. (quoting Johnson v. Minnesota Civil Serv. Dep't, 157 N.W.2d 747, 751 (Minn. 1968)).

157. See Parks v. City of Warner Robins, 43 F.3d 609, 614-15 (11th Cir. 1995) (finding anti-nepotism policy met rational basis test because of legitimate employer interests such as "avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism or even appearance of favoritism; preventing family conflicts from affecting workplace; and . . . decreasing the likelihood of sexual harassment"); see also Wright v. Metrohealth Med. Ctr., 58 F.3d 1130, 1136-37 (6th Cir. 1995); Keeney v. Heath, 57 F.3d 579, 581-82 (7th Cir. 1995) (holding that a county jail regulation forbidding employees from becoming socially involved in or out of jail did not violate plaintiff's constitutional right to marry because the regulation was justified to protect morale among the staff and to prevent favorable treatment.); Waters v. Gaston County, 57 F.3d 422, 426-27 (4th Cir. 1995); Parson v. County of Del Norte, 728 F.2d 1234, 1237 (9th Cir. 1984) (stating that strict scrutiny analysis did not apply in determining the constitutionality of defendant's no-nepotism rule prohibiting spouses from working as permanent employees in the same department since no fundamental right was implicated); Cutts v. Fowler, 692 F.2d 138, 141 (D.C. Cir. 1982) (same).

158. One commentator has argued that public employers' office romance policies, like the no-spouse policy in Grand Island, should be subjected to strict scrutiny. See Kathleen M. Hallinan, Invasion of Privacy or Protection Against Sexual Harassment: Co-Employee Dating and Employer Liability, 26 COLUM. J.L. & SOC. PROBS. 435, 460 (1993). Nevertheless, she concludes that a restriction on supervisor-subordinate dating would still pass this test, under either a constitutional claim of invasion of privacy or interference with the right to marry, "because the interests of protection against sexual harassment and the prevention of favoritism based on involvement in a sexual relationship are integral to the fair and efficient operation of the public employer and thus vital to its ability to fulfill its public function." Id. at 461.
of the violation, they were merely cohabiting with each other.\footnote{159} The plaintiffs, a dispatcher and a sergeant, were fired for violating a general anti-fraternization regulation ("misconduct justifying discharge for employees of different ranks to socialize in situations im­imical to the discipline and order of the Department").\footnote{160} Under a rational basis review, the court balanced the government's strong interests in maintaining a well-functioning police department and protecting the community with the burden of infringing upon the plaintiffs' right to marry.\footnote{161} The court found that the balance favored the state and upheld the police department's decision.\footnote{162} However, the court noted in dicta that the plaintiffs might have prevailed if the department were larger.\footnote{163} The court explained that the state's interest would thereby be diminished because "[a] sergeant who is one of many is far less likely to be able to exert the kind of pressure that would prevent fair evaluation of the dispatcher's performance."\footnote{164}

3. First Amendment Freedom of Association

As the above discussion indicates, unmarried plaintiffs face an obvious barrier to asserting an impermissible burden on their fundamental right to marry. However, the same claim may be recast as an infringement of the First Amendment right of freedom of association.\footnote{165} For example, in \textit{Adkins v. Board of Education},\footnote{166} the Sixth Circuit held that a school secretary could maintain such a claim against the school board based on the superintendent's refusal to recommend her for continued employment, allegedly because she had married the principal for whom she worked.\footnote{167} Although a First Amendment argument might theoretically apply to employer fraternization policies,\footnote{168} these policies are probably not vulnerable to such a claim because of the negligible infringement on employees' association freedom. Employees covered by

\footnotesize{159. See Kukla v. Village of Antioch, 647 F. Supp. 799 (N.D. Ill. 1986).}
\footnotesize{160. \textit{Id.} at 802 (quoting Departmental Directive No. 72).}
\footnotesize{161. See \textit{id.} at 805, 808-11.}
\footnotesize{162. See \textit{id.} at 810.}
\footnotesize{163. See \textit{id.}}
\footnotesize{164. \textit{Id.} at 811.}
\footnotesize{165. See U.S. \textit{Constitution} amend. I; see also Kukla, 647 F. Supp. at 802.}
\footnotesize{166. 982 F.2d 952 (6th Cir. 1993).}
\footnotesize{167. See \textit{id.} at 955.}
\footnotesize{168. One San Francisco plaintiffs' sexual harassment attorney flatly states that he believes "nonfraternization policies are not legal" because "[t]hey infringe on First Amendment rights of freedom of association." Ron Lent, \textit{Office Romance Crackdown}, J. \textit{Com.}, Sept. 2, 1998, at 5A.}
policies against supervisor/subordinate romances are not generally restricted in terms of whom they may associate with as romantic partners; rather, they are only limited to choosing companions other than their supervisors or subordinates at work.\footnote{169} Furthermore, legitimate employment-related reasons provide a rational basis for such a rule.

An employee's association freedom claim may be combined with a constitutional right to privacy argument. In \textit{Shawgo v. Spradlin},\footnote{170} two police officers, who were members of the same unit but held different ranks, were disciplined by the department for off-duty dating and alleged cohabiting.\footnote{171} The applicable regulation proscribed conduct that "if brought to the attention of the public, could result in justified unfavorable criticism of [an officer] or the department."\footnote{172} The Fifth Circuit acknowledged that the employees did have a constitutional right to privacy, but emphasized that the right "is not unqualified."\footnote{173} The court required the police department to establish a rational connection between the regulation and the department's duty to protect the public.\footnote{174} Balancing those interests against the individuals' rights, the court found for the police department because the plaintiffs failed to "demonstrate that there is no rational connection between the regulation, based as it is on the county's methods of organizing its police force, and the promotion of safety of persons and property."\footnote{175} Instead, the court "ascertain[ed] a rational connection between the exigencies of department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit."\footnote{176}

In contrast, courts have found in favor of dismissed employees on First Amendment association and privacy grounds where such an important workplace nexus is lacking as well as in circumstances not involving the supervisor/subordinate relationship.\footnote{177} An em-
ployer can effectively avoid liability in such situations if its fraternization policy carefully delineates the basis for the regulation, is limited solely to addressing power-differentiated relationships, and avoids the extreme penalty of firing employees for their transgressions. For the policy to survive review, the employer must demonstrate the legitimacy of its interest in the area of private employee interaction. The employer must also justify that its "punishment" fits the employee's "crime."

Although the Supreme Court denied certiorari in Spradlin, Justice Brennan noted in his dissent that even if the employer's interests indeed trumped the employees' First Amendment association and privacy rights, the employees might still have another overriding constitutional claim. He argued that the rule under which the plaintiffs were punished constituted notice so inadequate that it might offend the Fifth Amendment right to due process:

Public employers in general, and police departments in particular, may well deserve considerable latitude in enforcing codes of conduct. It is hard to understand, however, how such a code can be either fairly or effectively enforced when employees are not told of the standards of conduct to which they are expected to conform.

This echoes the reasoning of courts that have analyzed privacy claims in the private sector at-will employment regime. It suggests that if a public employer's policy forbidding co-employee dating is clearly articulated, the employer has provided constitutionally adequate notice to the employees, and effectively insulates the employer from later claims of privacy invasion.

4. Laws Protecting Employee Off-Duty Legal Activities

Apart from questions of marriage and freedom of association,
some jurisdictions have enacted special laws that protect employees from adverse employment action for legal, off-duty activities. Application of these laws to shield co-employee dating from employers has garnered mixed results. However, there are apparently no cases where plaintiffs have successfully used these laws to attack application of an employer fraternization policy to supervisor-subordinate romances. These laws incorporate a provision which provides employers with an avenue of exception for off-duty activity that nevertheless presents an obvious job nexus, such as a supervisor and subordinate having a romantic relationship. Consequently, a plaintiff's claim should fail, despite any such statute, because employers can readily justify the potential job impact and litigation risks posed by employees in a direct reporting or other hierarchical relationship. The prohibition of employer interference with employees' recreation is qualified by allowances for legitimate job-related employer interests.

One commentator argues that fraternizing between same-level co-workers should generally be protected and that these statutes

181. Colorado, New York, and North Dakota all have such laws. See DePalo, supra note 91, at 96-101 (discussing these state statutes). See COLO. REV. STAT. ANN. §24-34-402.5 (West Supp. 1999) (making it unlawful to terminate an employee for "engaging in any lawful activity off the premises of the employer during non-working hours unless such a restriction: Relates to a bona fide occupational requirement or is reasonably and rationally related to [a particular employee's] employment activities," or is necessary to avoid conflict of interest) (emphasis added); N.Y. LAB. LAW §201-d (McKinney Supp. 1999) (stating that it is unlawful to discriminate because of 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," including "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes"); N.D. CENT. CODE §14-02.4-03 (1999) (making it unlawful to discriminate against an employee for "participation in lawful activity off the employer's premises during non-working hours which is not in direct conflict with the essential business-related interests of the employer") (emphasis added).


183. See supra note 181 for various state laws that provide an exception for off-duty activities.

184. See supra Part II for a discussion of the risks associated with employees who date other employees.

185. See supra note 181 for a discussion of legitimate employer interests.
are the best way to extend that protection because they strike the correct balance between employees' personal interests and employers' workplace interests.\textsuperscript{186} However, she agrees that such laws should still permit employers to impose an adverse employment action where a relationship creates a conflict of interest, i.e., between a supervisor and a subordinate.\textsuperscript{187} Accordingly, these statutes provide another example of a legal mechanism whereby employers' concerns about a particularly narrow category of office romances may still prevail over the personal interests of affected employees.

D. Third-Party Enforcement: Indirect Litigation

Occasionally, employees and third parties have attempted to sue an employer when the employer has not enforced a fraternization policy.\textsuperscript{188} These cases are rare and appear to be an example of litigation in which plaintiffs try to reach a "deep pocket" to pay for an alleged wrong that has little or no nexus to any act of the defendant company. When employers forbid fraternization but fail to enforce their policies, plaintiffs may argue that but for the employer's omission the "damage" would not have occurred.\textsuperscript{189} Possibly, a more progressive policy aimed at discouraging power-differentiated relationships without prohibiting them entirely would have presented a less tempting target. Regardless, the workplace nexus was insufficient to premise any employer liability.\textsuperscript{190} These cases do not present a valid legal challenge to the existence of such policies. If anything, they reinforce the need for employers to vigilantly monitor their human resource issues and consistently and fairly apply clear policies.

In summary, courts will uphold employer fraternization policies that are properly tailored and consistently and gender-neutrally applied. Private sector employees have often attempted, unsuccess-

\begin{itemize}
\item \textsuperscript{186} See DePalo, \textit{supra} note 91, at 96, 103.
\item \textsuperscript{187} See \textit{id.} at 101.
\item \textsuperscript{188} See \textit{L.C. v. United Parcel Serv., Inc., No. 91-CA-000510-S, slip. op. at 2 (Ky. Ct. App. Jan. 24, 1992) (unpublished decision) (noting that an ex-employee sued a former supervisor for intentional infliction of emotional distress because he allegedly infected her with genital herpes; plaintiff also sought to hold her former employer vicariously liable because she alleged it had not enforced company policy prohibiting supervisor/employee relationships); see also Doe v. Western Restaurants Corp., 674 So. 2d 561, 564 (Ala. Civ. App. 1995) (ruling for the employer despite a policy that prohibited fraternizing between assistant managers and hourly employees).}
\item \textsuperscript{189} See \textit{supra} note 188. This author does not advocate a policy forbidding fraternization. \textit{See infra Part IV.A.}
\item \textsuperscript{190} See \textit{supra} note 188 for examples of cases that have been decided in favor of employers despite failing to enforce their no fraternization policies.
\end{itemize}
fully, to modify the employment-at-will doctrine with contract exceptions such as an implied covenant of good faith and fair dealing or through an implied contract or oral promise. They have also advanced arguments for tort exceptions to at-will employment based on violations of public policy, privacy, and intentional infliction of emotional distress. Challenges have also relied on statutory prohibitions on marital status discrimination and laws that protect off-duty recreational activities. Constitutional arguments have cited the fundamental right to marry and the First Amendment rights of privacy and freedom of association. Nevertheless, all of these various legal assaults on employer policies have failed to thwart specific regulation of supervisor-subordinate relationships because the courts properly recognize employers’ legitimate workplace concerns regarding these matters.

Litigation over adverse employment actions is common and often unavoidable. The prophylactic purpose of employer policies on supervisor-subordinate romance is to limit litigation as much as possible by avoiding any need for discipline. By proactively discouraging and thus reducing the incidences of power-differentiated office relationships in the first place, employers will have less occasion to manage such problems, resulting in less litigation overall. What will remain are cases brought against employers by those employees who, notwithstanding a well-communicated policy, are willing to consciously disregard it and refuse to acknowledge the legitimacy of their employers’ interests. In those cases, especially where the employer presents actual evidence of demonstrable workplace consequences from the employees’ relationship, employers can and have successfully defended themselves. Therefore,

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these potential challenges should not deter companies from considering and adopting such policies.

IV. DEVELOPING A COMPREHENSIVE FRATERNIZATION POLICY

A. Policy Considerations

While litigation regarding employer responses to supervisor-subordinate office romances is often unavoidable, the fear of successful attack in court against appropriately tailored and communicated fraternization policies is largely unfounded. Accordingly, employers should consider drafting and implementing such policies. This article will next discuss employers' specific concerns in crafting such policies. Employers should remain sensitive when balancing their interests in maximizing efficiency, productivity, morale, and in minimizing the risk of sexual harassment litigation with the legitimate privacy rights of their employees. Employers should integrate office romance rules with existing or new policies regarding spouses, nepotism, and business conflicts of interest. The extent to which the policy applies to each employee and to each level of the organizational hierarchy must be carefully tailored to the unique circumstances of the particular company and industry. Finally, employers should consider uniformity, such as whether there should be a double standard for CEOs and other high-level management officials, or whether the policy will apply to all employees.

1. Balancing Workplace Concerns Against Employees' Privacy Interests

The first and most important consideration for any employer is the reaction of its employees to implementation of any new personnel policy. Once the rules have been carefully drafted, the company needs to market the new rules to provide everyone with appropriate and adequate notice and training. Indeed, as part of any pre-existing sexual harassment or diversity training program or initiative, an employer might candidly raise the issue and explore employee suggestions and reactions and incorporate those concerns while formulating the policy. The extent to which employees


192. Supervisors should hold question-and-answer sessions with employees upon initiation of the policies to avoid any misunderstanding. In addition, all new employees should receive the policy when they are hired. See Johnson, supra note 36.

193. See Harvey R. Meyer, When Cupid Aims at the Workplace, Nation's Bus.,
agree with, accept, or object to any employer intrusions into what they perceive as their personal lives is very important. The response by employees may depend on a myriad of workplace factors: atmosphere, location, type of work performed, or company size. This response may also vary according to demographics—what might pass in the supposedly “loose” corporate culture of Silicon Valley might not be accepted on the shop floor of a Midwest assembly plant, for example. Regardless, companies must address this issue with as much deference to employees’ legitimate concerns as possible. Failure to do so will do more harm than good. This is especially true in a healthy economy with increasing mobility, where employers must strenuously compete to attract and retain a qualified workforce.

2. Promulgate an Independent Policy or Incorporate It into a Broader Personnel Policy?

Depending on the extent to which other workplace rules have been formalized—such as in policy letters or employee handbooks—an employer considering restricting supervisor-subordinate office romances can choose to introduce a free-standing statement on the subject or include it as another component of a wider policy. For example, although the potential negative workplace consequences of perceived sexual favoritism are different and greater than that for non-sexual favoritism, employers may decide to institute rules which cover all “personal relationships,” not just those

July 1998, at 57 (noting that since the targets of lawsuits are often supervisors, they should receive additional training on the potential explosiveness of dating co-workers).

194. Employers are “forced to walk a legal tightrope” between specific competing interests. See Baker & Daniels, supra note 19. “While it makes no sense to ignore this sensitive issue, you also must be careful not to invade employees’ privacy.” Milton Bordwin, Containing Cupid’s Arrow, SMALL BUS. REP., July 1994, at 53. Michael Karpeles, lead employment lawyer at Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz in Chicago, and frequent contributor on this topic, says, “some companies are afraid . . . of offending employees and afraid of lawsuits . . . [T]he employees rightly or wrongly will think that the company is trying to intrude into their private lives.” Cropper, supra note 14.


196. Dale Winston, an executive recruiter, comments that in today’s labor shortage, “companies are less precipitous about letting people go for any reason, especially if they’re good.” Hymowitz & Pollock, supra note 13. Despite the conduct of its CEO, see infra note 223, Oracle’s general counsel says a no-dating policy would undermine the “company’s ability to woo top talent.” See Markels, supra note 35.
involving intimate association. However, this approach may be hard to justify, since the risk of sexual harassment claims that fraternization policies seek to address arises from the context of employee romances, not employee friendships. A better policy would define the phrase "personal relationships" slightly more narrowly, so as to encompass romantic associations, family relationships (nepotism), and other relationships with the potential for a conflict of interest, such as where employees' side business interests or personal investments present an opportunity for the sharing of proprietary information. Still, employers should not completely ban personal relationships between their employees and competitors' employees in the name of protecting trade secrets and other confidential or sensitive matters. Such a move would unnecessarily affect employees' private lives without adequate justification. Employers can avoid this intrusion, and more effectively address this particular risk, by using the less restrictive means of requiring employees to execute confidentiality agreements.

197. The Walt Disney Company in 1993 had a policy which prohibited managers and supervisors—regardless of their marital status—from having romantic relationships with those they supervise. A Disney spokesman stated: "We do not want spouses to work for each other and prefer not to have family members supervising one another." Enrico, supra note 16. Others agree with this approach: "One-half of a personal relationship (spouse or otherwise) should not report to another." Farr, supra note 195, at 36; see also Brett Chase, Risk Management: Dating Subordinates Is Widely Prohibited, AM. BANKER, June 17, 1997, at 5 (noting that Citicorp's rule is part of its anti-nepotism policy, which prohibits relatives, spouses, or romantic partners from working in the same department); Melinda Socol Herbst, Employers May Police Some Workplace Romances, NAT'L L.J., Feb. 26, 1996, at C19 (recommending definition to include marriage, dating, cohabitation, or any other relationship that could give rise to an actual or apparent conflict of interest or appearance of favoritism).

198. An Apple Computer employee handbook stated that employees:

[M]ay not have a direct reporting or contractual relationship with any member of [their] immediate family, or any other relative or any person with whom [they] have a significant personal relationship. [Employees] must inform [their] manager when [they] are involved in any personal relationship that is, or could be perceived as, a conflict of interest. [Employees] also should consider carefully whether there may be an actual or potential conflict of interest, or even the appearance of a conflict of interest, before accepting an assignment.

Jenner, supra note 64 (emphasis added); see also 1998 SHRM Survey, supra note 23 (reporting that of the 27% of respondents with policies, 13% forbade romances between employees and customers/clients, 4% disallowed romances between employees and employees from a competitor, and 3% disallowed romances between employees and vendors). A senior partner at Rubin and Rudman in Boston recommends a general policy forbidding personal relationships which are a conflict of interest (i.e., with an owner, manager, or employee of a direct competitor). See Bordwin, supra note 194.

Since sexual harassment litigation risk management primarily justifies an employer’s fraternization policy, the policy should be directly incorporated as a component of any existing sexual harassment policy. Most, if not all, employer sexual harassment policies include a provision encouraging employees to report alleged violations to a particular office or company official. A statement discouraging supervisor-subordinate romances, explained in terms of potential claims of unwelcome conduct when the relationship ends, will clearly articulate the employer’s concerns and explicitly encourage employees to utilize the reporting mechanism, thus heading off claims before they arise. The United States Supreme Court’s pronouncements in Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth underscore the necessity for a robust employer sexual harassment policy. These cases stand for the proposition 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.” In those sexual harassment cases where the employee did not suffer a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is entitled to an affirmative defense to liability. To prove its defense, the employer must show both that it was not negligent and that the plaintiff employee was negligent. An employer with a sexual harassment policy that makes no mention of office romance in general, or of supervisor-subordinate romance in particular, may nevertheless argue an affirmative defense to a subordinate employee’s claim of supervisor sexual harassment. However, an employer that specifically discusses and discourages power-differ-
entiated relationships in its sexual harassment policy will be more successful in its argument that it adequately discharged its duty to prevent such behavior. With an express policy in place, especially one which provides, for example, for disclosure of the relationship and potential transfer of one of the employees involved, an employer enhances its argument on both prongs of the defense.

3. Level of Application

Companies need to look at their individual organizational makeup and atmosphere in order to determine where to draw the line in supervisor-subordinate relationships. The question is not limited only to direct reporting situations, where one employee is supervised by the other, but also extends to second- and third-level indirect reporting lines. Is there a difference between an employee dating his or her direct boss, and an employee becoming involved with his or her boss' boss? Does the answer depend merely on the relative rank of the superior, or does it also entail an inquiry into the breadth of the rank disparity between the two people? Greater disparity of rank may increase the severity of the potential problem. If the CEO is dating a mail room clerk, that low-level employee will certainly be "fireproof," or least perceived as such. On the other hand, there might be less chance for favoritism since a distant supervisor is less personally involved in day-to-day employment decisions that will affect the subordinate or any of his or her coworkers.

Finally, what if an employee is only "subordinate" in the sense that he or she occupies a lower-ranked and lower paid position within the company, but is not subject to the superior's power in any direct way—such as where the involved employees are in separate departments with distinctly different supervisory chains? In some companies, specific lines of authority are more relevant, or matter more than "rank."206 For example, in a unionized blue collar workplace where there is a strong traditional differentiation between "management" and the "bargaining unit members" they supervise, mere membership in one category versus the other dictates the terms of the power differential.207 In other companies, a

206. See generally 1998 SHRM Survey, supra note 23 (noting that of the 27% of respondents with written or unwritten policies on office romance, 70% said romance cannot be between supervisors and subordinates, while 6% said romance cannot be between employees of significant rank difference).

similarly clear line of demarcation may separate the “executive suite” from the “worker bees.” This analysis contemplates that any supervisor has inherent authority over any employee, regardless of assignment, and that a romance between the two will create the undesired conflict of interest.

The answers to these questions will depend on a frank assessment of the organizational culture in an attempt to gauge other employees’ potential reactions to each of the three categories of direct reporting, intra-departmental rank disparity, and inter-departmental rank disparity. Therefore, employers must take into account such things as the number of identifiable employee “levels,” the amount of formality in the supervisory structure, and the extent to which the workforce is traditionally segmented into two or more stratified groups. Every company is different, and the formula for each will vary accordingly.

However, not all companies are organized along identifiable vertical lines of supervision. Functions and authority among organizational levels may overlap, even from one task to the next. The more fluid, dynamic, and informal an employer’s workplace structure, the more difficult it is for an employer to decide which employees are sufficiently power-differentiated to warrant concern if they become involved in an office romance.

The organizational structure of a typical large law firm illustrates these particular difficulties. A junior associate might directly report to a senior associate, but may also be supervised by another senior associate on some but not all projects. A partner supervises them both, and the senior associate’s supervisory role is not completely autonomous. A bankruptcy partner is certainly superior to a litigation secretary, but because they work in different “departments” they may have absolutely no official workplace contact. The law firm considering a fraternization policy must squarely address these very different relationships. With respect company with a clearly stratified workforce and it “takes very seriously its long-standing policy prohibiting managers from dating non-management employees, even if they work in different departments.”

208. See Hallinan, supra note 158, at 461 (illustrating the problematic nature of an employer’s attempt at restricting dating between supervisors and employees).

209. See id.

210. See id. at 461-62.

211. See id.; see also Margo Kaufman, Lawyers in Love: The Ups and Downs of Office Romance, CAL. LAW., Feb. 1993, at 46 (recounting examples of office romance problems in the legal profession, including a lawyer at a small firm who successfully concealed her relationship with a law clerk and a summer associate at a large firm who
to partner/associate pairings, some law firms have adopted a "recusal" rule which is supposed to "screen the senior member of the couple from any supervisory authority over the junior member."²¹² However, one may question how this could effectively dispel actual or perceived favoritism, since partners may still be "unlikely to offend one of their own by rejecting a colleague's lover or spouse."²¹³ This example demonstrates that parameters are difficult to draw because the relationships sometimes resist the employer's rudimentary attempts at definition. Indeed, certain office romances remain potentially problematic for an employer regardless of the extent to which employees are classified. The challenge is for employers to clearly articulate to their employees what their concerns are and where the line is being drawn. To the extent that the "line" must remain somewhat fluid, it may serve only as a guideline. The unique makeup of each company will generate individualized assessments of how to properly notify employees of the policy's application.

4. CEOs and High-Ranking Management

Perhaps the most sensitive cases of employee fraternization for companies involve their highest-level employees. For uniformity and general morale, any employer personnel policy should apply to all employees equally.²¹⁴ However, unique considerations occasionally create an exception for top managers. In the wake of the investigation of President Clinton's relationship with Monica Lewinsky, opinions abounded regarding how such a matter would be treated in a private corporation.²¹⁵ Indeed, the amount of discussion and national preoccupation with the Clinton-Lewinsky relationship may very well exert an influence on businesses to consider and adopt fraternization policies, much in the same way that the 1991 Senate confirmation hearings for United States Supreme Court Justice Clarence Thomas spurred a great deal of activity in

²¹³ Id.
²¹⁴ See supra Part III.A for a discussion of the value of consistent application of employer policies.
employee complaints and employer policies on sexual harassment.216

Corporate boards of directors are certainly risk averse to sexual harassment by the company’s leadership—or romantic relationships with subordinate employees that can create that perception. First, there is the risk of litigation exposure: instances of high-level officers involved with employees they supervise may be bad, if for no other reason than they openly invite a lawsuit if they do not last. In fact, this may be a greater risk than in the case where the supervisor is at a lower level within the company because plaintiffs know employers want to quickly settle such claims. In addition, when an employee makes a sexual harassment claim against one of the company’s top leaders, the potential pocket is seemingly its deepest. In court, a jury could very well view a relationship involving a high-level manager more negatively than one involving a lower-level employee. Everyone expects leaders, whether in politics, business, or other environments, to set the example by their own behavior. Compliance with the law is proportional to rank—the higher up the leader, the higher the expectations.

The potential fallout from a failed supervisor-subordinate relationship involving a high-ranking supervisor may also be greater compared to the consequences from the same scenario with a lower-level supervisor and his or her subordinate, if the matter becomes known within the company. Because of the elevated visibility and status of a leadership position, a hierarchical romance is more likely to damage morale and set a poor example for other employees.217 Furthermore, romantic involvement with a

216. See Cindy Glover, Few Firms Deal with Romances, ALBUQUERQUE J., Aug. 30, 1998, at A1. “Several managers acknowledged, however, that [President] Clinton’s admission of a dalliance with Lewinsky could lead to more companies adopting fraternization policies,” which would “follow a pattern in the 1990s of public scandals having a ripple effect on the business world.” Id.

217. Boards take a dim view of corporate leaders whose romantic ties create the appearance of impropriety. Management psychologist Harry Levinson says chief executives set an example, motivate people, and stand for the values of the company. See Alicia Kitsuse, Love in the Limelight, ACROSS THE BOARD, Mar. 1992, at 25. “[T]hat kind of behavior is less and less acceptable.” Id. For example, the president of a company in Boston which offers training on office relationships says, “It becomes a free-for-all if the CEO can behave this way.” Symonds et al., supra note 14. Even if an affair doesn’t cause legal problems, it can hurt employee morale. See id. In 1996, the chairman and CEO of Silicon Graphics Inc. began dating a much younger woman who worked in human resources, where he had also met his wife—whom he had been separated from for 11 years. See id. The affair upset other employees: “It’s hard to be credible about sexual harassment when the chairman of the company dates somebody who works for him, even indirectly.” Id.; cf. MAINIERO, supra note 18, at 146 (noting
subordinate may raise serious questions about the manager’s judgment, thus undermining his or her credibility and authority.\textsuperscript{218} Finally, public attention about the matter, triggered by the manager’s high position, may weaken the company’s general community standing.\textsuperscript{219} If the company decides to take action, usually against the superior, the matter is often handled quickly and quietly, with as little publicity as possible.\textsuperscript{220} Often, the end result is that the employer loses an otherwise competent high-level manager. Additionally, high-ranking employees present a special challenge for consistent policy application, the lack of which can lead to significant liability.\textsuperscript{221}

Despite these potential problems with a high-level employee’s involvement with a subordinate, corporate boards must consider their fiduciary duty to shareholders and thus may be compelled to

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that there may be less potential for major workplace disruption if hierarchical romance occurs at lower levels).

\textsuperscript{218} “Execusex” can be dangerous for upper level managers because it can create a perception of poor judgment. See MAINIERO, supra note 18, at 146 for examples of employee views on upper management relationships.


\textsuperscript{220} Two attendees at a recent Human Resource Management conference reported that their CEOs resigned after facing inquiries from their corporate boards over alleged “inappropriate relationships” with subordinates. See John Accola, \textit{Office Affairs; ‘Cupid Cops’ Discourage Romance Between Co-workers, But Few Companies Have Set Down Their Policies in Writing}, \textit{DENVER ROCKY MNTN. NEWS}, Aug. 23, 1998, at 1G. Asked how President Clinton’s conduct would play on Wall Street, Thomas Donaldson, a business ethicist and professor at the University of Pennsylvania’s Wharton School of Business, said: “The reaction would be swift, and it would be serious. The CEO would no longer be CEO.” \textit{CNN Newsstand Fortune: Men Behaving Badly} (CNN television broadcast, Sept. 16, 1998). Michael Daigneault, President of the Ethics Resource Center, says the majority of those he spoke to considered this circumstance so potentially damaging to the corporate reputation and to the trust placed in the leader of the organization that “very serious consequences would accrue [sic], including asking the leader to resign.” \textit{Id.; see also} Andrew Backover & Sean Wood, \textit{If Bill Were A CEO, His Job Would Be in Jeopardy}, \textit{FORT WORTH STAR-TELEGRAM}, Aug. 23, 1998, at 1 (comparing the professional implications of a corporate officer engaging in similar conduct to that of President Clinton’s affair with Monica Lewinsky).

\textsuperscript{221} See supra part III.A for a discussion of the value of consistent application of employer policies.
retain the high-ranking employee.\textsuperscript{222} For this reason, there are a number of celebrated instances of CEOs and other high-level corporate executives who became involved with subordinate employees, but for whom there were no perceptible negative consequences.\textsuperscript{223} In one case, rather than do nothing or remove the superior employee, a company simply fired the subordinate because the higher-ranking employee was much more valuable.\textsuperscript{224} Ellen Bravo, executive director of 9 to 5, National Association of Working Women, terms this phenomenon—a manager whom the company is apparently reluctant to fire because of relative worth to the business—an “UGLI—an Untouchable God-Like Individual.”\textsuperscript{225}

\begin{itemize}
  \item \textsuperscript{222} See Alex Fryer & Carol M. Ostrom, \textit{Office Sex Almost Never Puts CEOs Out of Work}, \textit{Seattle Times}, Sept. 27, 1998, at A1. “The board of directors is [also] legally bound to safeguard shareholders’ investments, not enforce a moral code.” \textit{Id.} “When you remove someone and stock goes down, what have you accomplished?” \textit{Id.}
  \item \textsuperscript{223} Larry Ellison, head of Oracle Corp. in Silicon Valley, admitted he had a sexual relationship with an administrative assistant, Adelyn Lee, for about 18 months starting in 1991. \textit{See Cropper, supra note 14.} She was dismissed and filed a wrongful discharge suit, saying she had been bullied into having sex. \textit{See id.} The company settled for $100,000, but Lee was later ordered to return the money and sentenced to a year in prison after she was convicted of perjury and falsifying documents (sending a phony e-mail message to help herself in her suit). \textit{See id.} Ellison has suffered no apparent repercussions from his behavior, and remains widely respected for his innovations in the computer industry. \textit{See Kirstin Downey Grimsley & Jay Mathews, Executives’ Privilege? In Boardroom, Sex Seldom Leads Censure, \textit{Wash. Post}, Sept. 16, 1998, at A1.}
  \item Another example is Milan Panic, former prime minister of Yugoslavia and current chairman and chief executive of California-based ICN Pharmaceuticals Inc. \textit{See Miriam Horn, \textit{Sex and the CEO}, U.S. \textit{News & World Rep.}, July 6, 1998, at 32.} He and his company have previously settled six sexual harassment lawsuits brought by female employees, several with whom he acknowledged having had consensual relationships. \textit{See id.} ICN’s general counsel and one of its board members say that the lawsuits constitute “extortion” driven by the greed of women who target Panic because of his high profile and wealth. \textit{See id.} The company pays settlements as the only way to avoid bad publicity and the prolonged distraction and cost of litigation. \textit{See id.} According to Freada Klein, a sexual harassment consultant, most companies faced with complaints against a valuable senior executive will, “more often than not, protect him.” \textit{Id.} In November 1998, Panic and ICN settled two more such lawsuits by former female employees. \textit{See Outlook: People in the News, U.S. \textit{News & World Rep.}, Nov. 9, 1998, at 18.}
  \item \textsuperscript{224} See C. Thorrez Indus. v. Michigan Dep’t of Civil Rights, 24 Fair. Empl. Prac. Cas. (BNA) 113, 114 (Mich. Ct. App. 1979) (noting that a higher-ranked male wanted to resign to save his marriage after his wife complained to his employer about his affair with a subordinate female employee; instead, the employer fired the lower-ranking woman because she was less skilled and less trained).
  \item \textsuperscript{225} Grimsley & Mathews, \textit{supra} note 223. Certain CEOs and managers potentially possess enough company power to frustrate or thwart any effort to remove them. \textit{See id.} For example, some executives control large blocks of stock, and may also control their boards of directors, appointing people likely to support them regardless of their “private” personal behavior. \textit{See id.}
Thus, in most cases, it takes something more than just awareness of an executive's relationship with an employee to trigger employer reaction—such as negative publicity. The matter could become "public" as a result of a sexual harassment lawsuit by the jilted ex-lover/subordinate, divorce, or other fallout if one or both participants is married. Absent the publicity ingredient, an organization is unlikely to act. However, "publicity" can be defined in a myriad of ways: public at large through the media, the corporate board, or the shareholders. Still, there are reported exceptions where it seems there was enough of the "something more" necessary to go after a high level supervisor. An exception may also exist for intimate relationships between male bosses and their female executive secretaries, however Dr. Mainiero, author of *Office Romance*, suggests that it is a very narrow and unlikely exception. If it exists at all it is because secretaries—in the traditional (and arguably quite anachronistic) sense—have no power and that "all they do is serve as doormats for their bosses. They threaten no one, unless they use the affair for career advancement." While this scenario may have been valid in the past, in today's workplace it seems very doubtful that a secretary's job responsibilities would be regarded as so limited, or her opportunities for career advance-
ment so nonexistent, that there would be no workplace consequences if she became romantically involved with her boss. Also, whatever power secretary's lack, they can still file a sexual harassment claim. For these reasons, and for lack of any anecdotal or other evidence supporting this contention, there is probably not, nor should there be, any sanctuary for such a situation.

5. Other "Employees"—The Contingent Workforce

A final point should be made as to who should be covered by an employer's office romance policy. Many modern workplaces are evolving toward significant use of "consultants," "independent contractors," and other third parties who regularly work alongside company employees for long terms but who are still non-employees. The company should nevertheless regulate these persons' behavior in the workplace vis-à-vis regular employees and should consider that they too can subject the business to Title VII liability. Occasionaly, a company may place these non-employees in a position of some authority over other employees, to direct aspects of their work on a particular project, for example. Depending on the frequency of this arrangement and the extent of the non-employee's supervisory role, an organization may be wise to consider including such individuals within the ambit of its fraternization policy.

B. Policy Types and Components

As the preceding discussion indicates, employers face a range of decisions about how to construct and implement employee fraternization policies, which are as divergent as the organizations themselves. The following section generally categorizes and discusses those employer formulations and analyzes their relative strengths and weaknesses.

1. Express Prohibitions

Some employers simply impose an outright ban on hierarchical romances. Several companies currently have such policies. 231

230. An employer "may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action." EEOC Guidelines, 29 C.F.R. §1604.11(e) (1999); see also Folkerson v. Circus Circus Enter., Inc., 107 F.3d 754, 756 (9th Cir. 1997); Whitaker v. Carney, 778 F.2d 216, 220-22 (5th Cir. 1985).

231. See Clinebell et al., supra note 17 (citing 1994 AMA/Money Poll, supra note...
Successful enforcement of this option requires sufficient penalties to effectively deter employees from engaging in the behavior that the employer seeks to extinguish. Yet, a quarter of the companies with such policies report no resulting consequences for a violation. The end result of such a policy is rarely full compliance because participants can conceal the relationship or are otherwise undeterred by minimal or nonexistent employment ramifications.

9). Only 6% of the respondents had a written policy on employee dating; of those, 57% forbid employees from dating a superior, 61% forbid employees from dating a subordinate, but only 7% forbid employees from dating a co-worker. See id.; see also 1998 SHRM Survey, supra note 23 (noting that of the 27% of respondents with written or unwritten policies addressing office romance, 70% said romance cannot be between supervisors and subordinates).

232. See Alger & Flanagan, supra note 41 (noting that United Technologies now bans supervisors from dating anyone under their authority); see also Lent, supra note 168. IBM tells supervisors that if they want to date subordinates they have to inform their supervisor, who must then transfer one of the two employees to a different department. See Alger & Flanagan, supra note 41. Staples Inc. prohibits managers from having a personal or romantic relationship with a subordinate and got rid of its former president, Martin Hanaka, in October 1997 for allegedly violating that policy. See Cropper, supra note 14. Unlike other Silicon Valley companies, Intel has a strict policy banning "fraternization" between managers and subordinates, the penalty for which is discipline "up to and including termination." Glover, supra note 216. Southwest Airlines and Honeywell Defense Avionics Systems both have policies stating that supervisors and subordinates cannot date. See id. BankAmerica, with 78,000 personnel, prohibits managers from dating subordinates. See Chase, supra note 197. Wal-Mart prohibits dating between bosses and subordinates and has successfully defended its policy in court several times. See Standeford v. Wal-Mart Stores, Inc., 1996 U.S. Dist. LEXIS 4645 (W.D. Mich., Mar. 4, 1996), aff'd, 1997 U.S. App. LEXIS 13126 (6th Cir. June 2, 1997); New York v. Wal-Mart Stores, Inc., 621 N.Y.S.2d 158 (N.Y. App. Div. 1995). At Safeco, a financial services company, the policy reads: "It's improper' for any supervisor to have a relationship with a subordinate." Jones & Armour, supra note 11. According to a Safeco company spokeswoman, even trying to have a romantic relationship with someone whom you supervise or whose salary you authorize could be grounds for dismissal. See Fryer & Ostrom, supra note 222.

233. A policy proscribing relationships between supervisors and subordinates should state that employees who violate the policy risk transfer or termination. See Herbst, supra note 197.

234. See 1998 SHRM Survey, supra note 23. Of the 27% of respondents with a written or unwritten policy on office romance, consequences for violations included transfer within the organization (42%), termination (27%), counseling (26%), formal reprimand (25%), and demotion (7%); 25% did not have any consequences. See id.

235. "Legislating romantic interludes only drives them underground. . . . [T]he stronger the prohibition, the more likely people will keep these relationships secret. And the employer who doesn't know about these relationships runs a greater risk of sexual-harassment complaints if the romance turns sour." Solomon, supra note 12. A Denver organizational behavior consultant favors policies that require disclosure of consensual relationships. See Karen Hildebrand, When Employees Are Stepping Out, COLO. BUS. MAG., Dec. 1997, at 48 ("People shouldn't date under the carpet . . . [s]ecrecy is negative.' Some employers may feel squeamish about getting involved in employees' personal lives, but when management is informed up-front, issues of report-
However, many office romances do not remain secret for long, despite the best efforts of the employees involved.\textsuperscript{236} An employer should not encourage its employees to hide their office relationships by imposing an outright ban on such relationships. If rules or the corporate culture is prohibitive of these liaisons, and employees choose to be secretive, the employer may aggravate the matter by being blindsided by a sexual harassment complaint when the romance ends.\textsuperscript{237} Likewise, a policy allowing employees who become involved in supervisor-subordinate romances to choose between terminating the relationship or resigning may be too optimistic and may instead foster dishonesty and deception.\textsuperscript{238} The reality is that a policy of prohibition is the wrong approach because it fails to prevent interoffice relationships.\textsuperscript{239} Given the futility of preventing office romances altogether, it is better to discourage such relationships in limited circumstances and properly and positively manage them when they occur.

Notwithstanding the potential ineffectiveness of express employer policies prohibiting office romances between supervisors and subordinates, some lawyers and other employment professionals still seem to favor such bans.\textsuperscript{240} However, several of these com-

\begin{itemize}
\item \textsuperscript{236} See Mainiero, supra note 18, at 280, app. D (noting that survey results reported that 36\% of participants in office romances erroneously thought that no one knew; 40\% said some people knew and others did not).
\item \textsuperscript{237} See Dean, supra note 199, at 1055 n.22.
\item \textsuperscript{238} See supra note 235.
\item \textsuperscript{239} A former human resources vice president for a major corporation said, "[T]he workplace is to sex as mold is to penicillin, and no management edict aimed at curbing this very basic human activity will ever succeed." Lawrence Van Gelder, \textit{On the Job Love Potion No. 9 in the Water Cooler}, \textit{N.Y. Times}, Feb. 2, 1997, at F11.
\item \textsuperscript{240} A partner and an associate at the New York office of the Minneapolis firm Dorsey & Whitney recommend establishing a written policy \textit{prohibiting} supervisor/subordinate romantic relationships. See Stewart D. Aaron & Jacob Thomas, \textit{Office Romances and Other Dangers}, \textit{Legal Times}, June 22, 1998, at 29 (emphasis added). "To achieve an appropriate balance in the law firm setting, . . . firm administrators should craft a policy which \textit{restricts} dating between coworkers in disparate power positions to protect its employees from sexual harassment without chilling all employee interaction and communication." Hanlon, supra note 25, at 24 (emphasis added).
\end{itemize}
mentators also state this as a preference, with their second choice being a rule requiring disclosure.  

2. "Date and Tell"

Since interoffice relationship bans are potentially counterproductive, the emerging approach, which is apparently growing in popularity among companies with a policy in this area, is the "date and tell" approach. Whether in explicit or unwritten form, this rule does not forbid supervisor-subordinate romances; rather, it encourages the employees to notify and disclose their relationship to management. Since it constitutes a more positive and less punitive approach, employees should more readily accept this limited intrusion on their privacy and appreciate their employer's willingness to accommodate them, while simultaneously minimizing damage to their careers and to the company. Some commentators appear to split the difference between express policy bans on employee fraternization and "date and tell" rules, by recommending employers do both. These opinions hold that the employer

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241. Segal also suggests two alternatives: (a) allow dating but provide up-front training for supervisors, if not all employees, in just how explosive office romance can be; or (b) allow dating but require supervisors to report it if they date a direct report or anyone else in the same chain of command. See Segal, supra note 130 (emphasis added).


243. See id.

244. "If a dating relationship does develop between supervisor and subordinate, the employees involved should be required to notify the employer of the situation." Hallinan, supra note 158, at 458 (emphasis added). “[E]veryone needs to know that these involvements are to be reported to the appropriate next level of management and that a reassignment in job responsibilities may have to occur. Encourage openness. Emphasize that relationships in line organizations will be honestly discussed and fairly resolved.” Farr, supra note 195, at 36 (emphasis added). Clinebell, Hoffman, and Kilpatrick, business management professors, recommend a comprehensive dating policy, including a requirement that the supervisor and the subordinate report the relationship to the immediate supervisor (for the supervisor) and the appropriate HR manager (for the subordinate). See Clinebell et al., supra note 17. Finally, W. Michael Hoffman, executive director of the Center for Business Ethics at Bentley College says, “‘Organizations need to find an appropriate solution to accommodate human lives and relationships’. . . ‘Workers should disclose it to the proper people, and corporations should try to work together with them on a case-by-case basis.’” Steven Ginsberg, When Cupid Comes to the Cubicle, WASH. POST, Nov. 2, 1997, at H4 (emphasis added).

245. Michael Karpeles, a Chicago employment lawyer, recommends that “compa-
should make it clear that supervisors will not be permitted to become involved with subordinates, but if they do, they must disclose it to management for non-punitive corrective action.\textsuperscript{246}

Although straightforward in theory, in practice the "date and tell" approach has innumerable variations.\textsuperscript{247} Consequently, a relationship may come to the company's attention through voluntary or mandated disclosure. Regardless of the manner in which it is brought to their attention, management should meet with the employees to express its concerns. The purpose of this is two-fold: (1) it permits the employer to confirm with the participants of the relationship that it is, in fact, consensual, and to request that manage-
ment be properly informed if and when the relationship ends, and (2) it provides an opportunity for the employees themselves to identify and choose a way to fully mitigate the potential organizational detriment posed by the situation—to ensure, at a minimum, that the supervisor has no say in the subordinate’s workload and raises, either by changing the reporting structure between the employees or by transferring one of them. Options short of discharge are often much more readily available and easier to effect in large organizations than in a smaller workplace. If transfer or resignation are the only available options, the decision of which employee stays and which one goes should be left, if possible, to the

248. The employer should tell the employees about the company’s pertinent policies, including the potential legal, management, and co-worker problems that could result from their personal relationships . . . . So that the couple will be sensitive to [these] concerns . . . , the employer should recommend that the employees notify the employer if the relationship terminates or is no longer consensual in order to allow the company to take measures to avoid potential sexual harassment claims. Herbst, supra note 197 (emphasis added); see also Solomon, supra note 12.

249. To the extent the employees can quickly determine for themselves who should transfer or leave, any potential discrimination claims will be undercut. See Herbst, supra note 197. If the couple cannot, within a specified reasonable period, volunteer a solution, then management should decide how to handle the situation. See id. “More positive results can be achieved if the couple approaches management before management approaches them. Companies like to help responsible couples find a good solution—and the solution could enable both employees to stay with the company.” Kathleen Neville, Corporate Attractions 177 (1990). “[T]he employer should encourage the employees to actively participate in effectuating a remedy.” Hanlon, supra note 25.

250. IBM handles situations of managers being romantically involved with subordinates by changing the reporting structure of the involved employees. See Alexa Bell, Employees Looking for Love in All the Right Places, INVESTOR’S DAILY, Oct. 19, 1990, at 6. Furthermore, the company stresses that it is up to the employees to inform management of their dating relationships. See id. AT&T also tells its employees to “come forward so they can change their work relationship.” Hymowitz & Pollock, supra note 13 (citation omitted). GM asks supervisors and subordinates in a consensual relationship to advise management. See Jones & Armour, supra note 11. GM responds by “creating a different reporting relationship to protect everyone.” Symonds et al., supra note 14 (citation omitted).

251. Coopers & Lybrand, an accounting firm, has a written code of conduct which requires participants in supervisor/subordinate romances to tell the partner in charge of their office, and one or both individuals is then transferred. See Maggie Jackson, As Office Romances Bloom, Beware the Court in Courtship, CHICAGO DAILY L.B., Feb. 13, 1998, at 1.

252. Internal transfers “will work best in a hierarchical organization where subordinates could be put under the supervision of managers with whom they are not romantically involved.” See Hallinan, supra note 158, at 458-59.
Although it is an option available to the employees, an employer should not encourage or insist that the employees end the relationship. However, the supervisor should be permanently removed from any substantive decisions affecting the subordinate’s terms and conditions of employment.

Some companies utilize a negative incentive and provide for potential discipline if employees fail to disclose a power-differentiated romance to management. The rationale for this approach is to discourage the participants' secrecy about the relationship and increase the employer's ability to limit any fallout. For example, in July 1998, the New Jersey Attorney General announced a “date and tell” policy for the state’s Department of Law and Public Safety, under which supervisors are required to report any “consensual personal relationship” with subordinates. The policy comes with

253. However, IBM requires the manager to “‘step forward and transfer to another job within or outside the company . . . not the subordinate who may have less flexibility.’” Hymowitz & Pollock, supra note 13 (citation omitted). At the time, it was this policy that IBM seemed to have been following when it forced Dan Mancinelli to choose between two demotions outside of Sacramento, where he was dating a subordinate manager. See Cooper, supra note 88 and accompanying text for a further discussion of Mancinelli’s suit against IBM. Given the benefit of hindsight after a $375,000 verdict for the plaintiff in that case, it seems IBM could and should have considered more flexible options to deal with the situation. For example, it could have met with both Mancinelli and the subordinate and asked them to formulate a solution. If no agreement could be reached, IBM could then have changed Mancinelli’s job and reporting structure without transferring or demoting him, thereby mooting the anonymous favoritism complaints.

254. At any rate, the employees’ agreement to “cease and desist” is inherently unreliable. See generally Hymowitz & Pollock, supra note 13.

255. If company policy “calls for a change of job assignment to separate the reporting lines,” and the lower-ranked individual is always moved, that could create discrimination against female employees “who most often will be the lower ranked individual.” Farr, supra note 195, at 37.

256. In Coatney v. Enterprise Rent-A-Car Co., 897 F. Supp. 1205 (W.D. Ark. 1995), the employer's personnel handbook contained the policy that personal relationships between supervisors and management employees and those who report to them directly or indirectly must be disclosed. See id. at 1209. Failure to timely disclose the relationship was cited as cause for demotion, transfer, resignation, or discharge. See id.; see also Chase, supra note 197 (noting that Citicorp, with 90,000 employees, has a strict policy on intra-office relationships: an employee who becomes involved with a co-worker must disclose this to his/her boss; employees who do not follow this rule can be fired). Jonathan Segal, a prominent employment attorney, agrees: “[F]ailure to report dating . . . should be a firing offense for the higher-ranking, not the lower-ranking, worker in the relationship.” Hequet, supra note 240, at 48.

257. See supra Part IV.B.1 for a discussion of employers’ express prohibitions regarding hierarchical romances.

258. The rule was announced one day after a jury awarded a former female deputy attorney general $350,000 in a sexual harassment case against the state agency. See Stuart Silverstein, Employers Use Consent Form to Regulate Office Romances; Date and
an unusual twist: the penalty for failure to disclose is denial to the involved employee(s) of a "state-paid defense" should a sexual harassment claim later develop.259 In another example, a large Texas energy firm found discharge a very effective motivator.260 After the firm fired two employees for engaging in an undisclosed relationship, a dozen more supervisor-subordinate couples came forward to avoid being discharged.261 On the other hand, some commentators recommend that the employer apply the same remedies when it learns that a dating relationship exists, regardless of whether the employees have voluntarily informed management of its existence.262

Employers face two additional issues under a "date and tell" policy: who decides what is "dating" or a "romantic relationship," and when should employees tell.263 Critics of "date and tell" policies argue that because of these questions, even provisions for disclosure and transfer are unworkable.264 However, the simple solution is that companies should be reasonable and use their best judgment, especially when they take action for the first time, be-

Tell Rules May Limit Liability if an Office Fling Triggers Lawsuit, STAR TRIB., Sept. 28, 1998, at 6D.

259. 153 N.J.L.J. 747, Aug. 24, 1998, at 3. "New greeting card genre: 'I love you so much I told the boss.'" Id. This approach initially appears dubious, since sexual harassment suits are ordinarily brought against the employer, not the individual. However, because this state entity would have Eleventh Amendment immunity in federal court, a plaintiff would have to bring a suit for damages under § 1983 against the state official pursuant to the established doctrine of Ex Parte Young, 209 U.S. 134 (1908). Absent a "state-paid defense," the defendant would almost certainly wish to retain private legal counsel at considerable personal expense. See Miller v. Maxwell's Int'l, 991 F.2d 583, 587-88 (9th Cir. 1993) (discussing the circumstances under which an employer might find himself individually liable and holding that there is no individual liability under Title VII or the Age Discrimination in Employment Act); accord EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995) (holding that individuals who do not otherwise meet the statutory definition of employer cannot be liable for violations of the Americans with Disabilities Act). Moreover, if deprivation of a "state-paid defense" includes denial of indemnification routinely afforded to state officials for liability predicated on acts performed in their official capacity, then the defendant would be left potentially very exposed indeed. See id. This unique policy could not be replicated satisfactorily for a private employer, because Title VII only provides for employer liability. See Miller, 991 F.2d at 587.

260. See Lardner et al., supra note 39.

261. See id.

262. See Hallinan, supra note 158, at 458 n.165.

263. In an extreme reaction, "one city agency in California [supposedly] requires disclosure before the first kiss." Solomon, supra note 12.

264. See Markels, supra note 35 (suggesting that identifying the correct time when disclosure is appropriate, as well as the extent to which management may question employees regarding suspected relationships, remains problematic).
cause more individuals may come forward and employers would then be "bound" to the same action in later cases. Employers should heed the lessons gleaned from the courts' decisions in cases where employees challenged policies, particularly those few exceptions where employers lost, and strive to achieve consistency while still respecting the employees' legitimate privacy interests. Employers should never go out of their way to root out and discover these relationships, but they should be vigilant enough about their workforce that these matters naturally come to management's attention. A non-prohibitive policy that discourages these romances but seeks to defuse the matter before it becomes a problem is one that employees will respond to and is thus the ideal policy.  

Critics may contend that a "date and tell" policy poses privacy issues. If the employer suspects involvement, and the participants do not disclose it, and managers question them, such questions might violate the employees' privacy. However, as discussed previously, the mere existence of the employer's policy necessarily implicates and balances those interests against the company's legitimate need to minimize litigation risks and avoid perceived favoritism. In addition, any alleged privacy invasion would depend on

265. Perhaps the best example of this is the policy utilized by Silicon Valley-based Remedy Corporation, which has 700 close-knit employees in an open, informal work environment. See Solomon, supra note 12. The company has a very brief written statement regarding inter-office romance between co-workers, which mirrors the corporate culture: romantically involved co-workers cannot be in the same reporting structure, and one cannot be in a position to influence the other's career. See id. "Furthermore, since communication is so highly valued in the company, individuals are encouraged to be open about their relationships." Id. The policy is "designed to avoid the perception of favoritism and bias," and it is communicated to encourage forthrightness. See id.

266. Regarding New Jersey's "date and tell" policy, the executive director of the state's branch of the American Civil Liberties Union expressed concern "about gay and lesbian state employees who may have to 'out' themselves to keep their job. It may also force people to disclose with whom they're having an extramarital affair." Silverstein, supra note 258.

267. See supra Part IV.A.1 for a discussion on balancing workplace concerns against employee's privacy interests.

268. Policies requiring or encouraging disclosure should contemplate strict confidentiality. Supervisor-subordinate relationships between homosexual employees who wish to conceal their sexual orientation should be treated no differently than relationships between heterosexual employees. Power differentiation, not sexual orientation, is what is relevant. However, if a hierarchical romance between two homosexual employees comes to the company's attention, the employees probably failed in their attempt to conceal both their relationship and their sexual orientation from co-workers. If so, the policy does not require them to "out" themselves, since they are, for all practical purposes, already "out." The same analysis applies to married employees having an extramarital affair. See Silverstein, supra note 258. In short, the great majority of court decisions regarding employee challenges to fraternization policies on privacy and other
the nature of the questions and the investigation itself. Within reasonable limits prescribed by specific relevance to the employer’s policy, the potential risk is small.

3. Written Agreements Intended to Preempt Litigation

As discussed earlier, one of the principal reasons for a policy that encourages employees involved in a power-differentiated relationship to voluntarily disclose the relationship to the company early on is that the employer is able to meet with the participants and confirm its consensual nature. Disclosure, together with a confidential meeting with management, may well serve to inhibit any later contrary claims of sexual harassment if the romance turns sour. Presumably, an employer’s position is significantly strengthened against such suits by evidence that the subordinate had the best opportunity to complain but did not. An extension of this logic is illustrated in the recent phenomenon of employees themselves actually recording their positions in the interests of self-protection as well as for the benefit of the company. These documents are euphemistically referred to as “consensual relationship agreements” or, more candidly, “love contracts.”

The first of these agreements was drafted several years ago when an executive requested advice from Littler Mendelson, the nation’s largest law firm specializing in employment issues. As the idea rapidly caught on, the firm developed and now markets a standard form adaptable for these situations—about a thousand of these agreements have been drafted and used. “These ‘love contracts’ may seem a ridiculous way to treat adults but they show that companies have at least begun to grapple with a difficult issue.”

related grounds demonstrate that these objections will normally fail unless the employer discriminates or otherwise treats these employees inconsistently compared to other similarly situated couples. See supra Part III.A for a discussion of legal challenges to fraternization policies when there is discrimination or inconsistency.

269. See supra Part IV.B.2 for a discussion of the policy of “date and tell.”

270. See supra Part II.C.1 for a discussion of romances turned sour.

271. See Mark Hansen, Love’s Labor Laws: Novel Ways to Deal with Office Romance After the Thrill Is Gone, 84 A.B.A.J., June 1998, at 79; see also Silverstein, supra note 258 (describing how the owner of a manufacturing company who, upon discovering two of his executives were involved in an adulterous sexual relationship, asked them to sign a Littler Mendelson-drafted agreement); Symonds et al., supra note 14 (discussing the impact that the Lewinsky scandal had upon office relationships).


273. See Lardner et al., supra note 39.

274. Seglin, supra note 272. A Littler Mendelson partner likens the agreements
The potential benefits of these contracts have not yet been conclusively proven. However, to date there is no reported case that any of the employees who have signed such agreements have sued the employer for sexual harassment related to the office romance, and therefore no court has assessed the documents' legal validity. Employment lawyers generally acknowledge that the agreements cannot guarantee that sexual harassment lawsuits will not be filed, or that a court will not hold an employer liable under such a suit. But they may accomplish their goal more subtly by rendering the plaintiff less sympathetic in the eyes of a judge or, ultimately, a jury. In addition, these agreements may have a secondary positive effect: protection against having evidence of the current relationship used in litigation stemming from a previous one. The supervisor possessing documentary proof that his current romance with a subordinate is entirely voluntary and welcome may thereby thwart attempts by a previous office paramour claiming sexual harassment to use his current relationship against him. On the other hand, critics deride the "love contract" as legal overkill that can damage morale by offending employees by asking them to sign a waiver of their rights.

Notwithstanding the rhetoric, fairly complete versions of two such agreements have been published, permitting an analysis to metal detectors at the entrance to public buildings: "It's sad they are necessary, but with the boom in employment-related lawsuits, companies need to consider the idea." Roberto Ceniceros, Some Employers Using Contracts to Cut Romance Risks, Bus. Ins., Oct. 12, 1998, at 3; see also Lardner et al., supra note 39 (noting that employment lawyer Michael Karpeles says such a document "takes the prenuptial [agreement] to the next level"); Heather Pauly, Sex and the Workplace, Chicago Sun-Times, Aug. 26, 1998, at 6. But see Anne B. Fisher, Getting Comfortable with Couples in the Workplace, Fortune, Oct. 3, 1994, at 139 ("Let us be careful not to make a world so fine and good that none of us can enjoy living in it.").

275. See Ceniceros, supra note 274.

276. Some attorneys express skepticism about the enforceability of such contracts because the employer is not giving up anything in consideration for an employee's signature. See id.

277. See id.

278. See Lardner et al., supra note 39 ("Not infrequently, the executive [signing the agreement] already has a harassment complaint pending."). Interestingly, and perhaps not coincidentally, this was precisely President Clinton's situation when his relationship with Monica Lewinsky became an issue in Paula Jones' suit against him.

279. See Silverstein, supra note 258; cf. Solomon, supra note 12 (describing these measures as "often fear-based, knee-jerk reactions that seem as serious as David Letterman's Top Ten Lists. Scurrying to protect themselves, senior executives have attorneys draft agreements for their potential paramours to sign, stating that quarreling lovers will submit to binding arbitration rather than the 90's version of kiss-and-sue").
here.280 The first excerpt is from a letter sent by a top executive at a company with roughly 3,000 employees, to his paramour, an assistant vice president, asking her to sign and acknowledge its terms:

I very much value our relationship and I certainly view it as voluntary, consensual, and welcome. And I have always felt that you feel the same. However, I know that sometimes an individual may feel compelled to engage in or continue a relationship against their will out of concern that it may affect the job or working relationships.

It is very important to me that our relationship be on an equal footing and that you be fully comfortable that our relationship is at all times voluntary and welcome. I want to assure you that under no circumstances will I allow our relationship or, should it happen, the end of our relationship, to impact on your job or our working relationship. [also enclosing copy of company’s sexual harassment policy]

The letter ends with a paragraph and a signature block for the recipient which states:

I have read this letter and the accompanying sexual harassment policy and I understand and agree with what is stated in both this letter and the sexual harassment policy. My relationship with (name) has been (and is) voluntary, consensual and welcome. I also understand that I am free to end this relationship at any time and, in doing so, it will not adversely impact on my job.281

This document thus contains the elements of mutual affirmation of the voluntary and consensual nature of the romance, the superior’s promise of no negative job repercussions or retaliation if the romance ends, and an inclusion of the company’s sexual harassment policy.

The above is obviously somewhat informal and lacks some additional important ingredients that companies should consider including in their agreements, such as: (a) a statement that the subordinate is in no way obligated to accept the agreement, i.e., signature is not required, but signifies the absence of any coercion, duress, fraud, or improper inducement; (b) an expression advising and indicating an opportunity to consult with counsel before signing; (c) provisions for express revocation of the agreement, includ-


281. Id.
ing a requirement for immediate notification of management and other procedures; (d) the superior’s permanent relinquishment of any decision-making authority over the subordinate, i.e., that the superior will never appraise the subordinate’s performance, participate in any decision affecting career advancement, salary, benefits, or otherwise affect the terms and conditions of employment; \(^{282}\) (e) an agreement to refrain from engaging in any sexual or amorous conduct in the workplace or other places when on official business; \(^{283}\) and (f) the subordinate’s waiver of rights to pursue a claim of sexual harassment or other legal action against the employer based on any and all events up to the date of the agreement, but not waiving any prospective rights or claims.

A second published excerpt, from an agreement originally drafted “to cover two midlevel employees at a midsize company,” addresses some of these ideas in much more detail. \(^{284}\) It contains

\(^{282}\) See Hallinan, supra note 158, at 458-60 (advocating that employers specifically regulate relationships between supervisors and their direct subordinates); Hanlon, supra note 25; Schaner, supra note 51.

\(^{283}\) A Jackson Lewis attorney counsels clients that travelling employees should book rooms on different floors of a hotel and hold business meetings in rented conference rooms rather than in a room that contains a bed. See Lardner et al., supra note 39.

\(^{284}\) The agreement provides:

C. Female employee is not presently, and has never been, under the direct supervision of male employee . . . . Although the professional obligations and work responsibilities of male employee and female employee occasion­ally involve interaction on a professional level, the regular assign­ments and job tasks of male employee and female employee do not require, necessitate or provide occasion for such interaction.

D. Male employee and female employee each, independently and collect­ively, desire to undertake and pursue a mutually consensual social and/or amorous relationship (“Social Relationship”) with the other.

E. Male employee’s desire to undertake, pursue and participate in said So­cial Relationship is completely and entirely welcome, voluntary and consensual and is unrelated to the Company, male employee’s professional or work-related responsibilities or duties, or male employee’s and female employee’s respective positions in the Company or business relationship to each other. As of the date this . . . Agreement is executed by male employee, male employee . . . agrees that nothing in any way related to, stemming from, or arising out of his relationship with female employee, be it their business-related interaction or their Social Relationship, consti­tutes, has resulted in, or has caused a violation of the Company’s Sexual Harassment Policy or any law or regulation.

F. Female employee’s desire to undertake, pursue and participate in said So­cial Relationship is . . . entirely welcome, voluntary and consensual etc., vice versa the entire preceding paragraph to cover the female employee . . . .

G. Male employee has entered into said Social Relationship after having dis­cussed in depth with female employee the ramifications and implications
preliminary stipulations by the parties that: the subordinate em­
ployee does not directly report to the supervisor; the "social rela­
tionship" is mutually consensual, welcome, voluntary, and
unrelated to the parties' work-related responsibilities; and, after op­
portunity to consult counsel, they have discussed with each other
the relationship's potential work ramifications. 285

These provisions are then followed by a lengthy agreement to
be witnessed by a representative of the employer, in which the em­
ployees acknowledge that: they have had the opportunity to consult
counsel; they read and reviewed the employer's sexual harassment
policy attached to the agreement; they will notify the representative
of any sexual harassment or "if the relationship is 'negatively affect­
ing the terms and conditions' of their employment"; they can report
the same to the employer's personnel director; and, that the em­
ployer will immediately and impartially investigate any alleged vio­
lation and take any and all appropriate remedial action under the
policy. 286 The employees further pledge that they will not engage in
any "sexual or amorous" conduct in the workplace or in public
when on official business, including "holding hands or touching in
an affectionate or sexually suggestive manner; kissing or hugging;
romantic or sexually suggestive gestures; romantic or sexually sug­
gestive speech or communications, whether oral or written; and dis­
play of sexually suggestive objects or pictures." 287 The employees
also agree that either of them can end the relationship at any time
without fear of work-related repercussions or any kind of retalia­
tion. 288 The agreement also states the employees will not seek or
accept a position with a direct supervisory or reporting relationship
between them. 289 Finally, and perhaps most importantly, the em­
ployees agree to submit "any and all disputes which arise or may
arise out of the Social Relationship and any claims of harassment,
discrimination or retaliation by or between" them to binding arbi­
tration, which will be "the exclusive remedy for, and shall constitute the exclusive forum for resolution" of such matters. 290

This contract certainly goes much farther than an informal letter, and, although executed by two co-employees rather than a supervisor and a subordinate, it provides a worthwhile foundation from which to work. Most notable is the inclusion of a waiver of a judicial forum for potential statutory claims. This may be valid, because most federal courts have upheld the enforceability of such provisions in individual employment contracts. 291 If an arbitration provision is included in these so-called "love contracts," and the love contract is itself not mandated by the employer, there is an even stronger argument for the enforcement of the arbitration clause because the employees are well-informed of the nature of the potential claims they are limiting by virtue of the contract's terms. Thus, the waiver is more likely to be considered sufficiently express and knowing. 292

4. Unwritten or Implied Policy

Survey results 293 illustrate that some companies choose not to put their rules in writing, and instead rely on a form of quiet persuasion. 294 These companies believe that despite having no written rules, their employees understand that as a matter of corporate culture or implied policy that supervisor-subordinate relationships are strongly discouraged or will not be permitted. 295 Sometimes that

290. Id.
291. In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court "leave[s] for another day" the question of whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), excludes all employment contracts from its coverage, such that agreements to arbitrate statutory claims contained in such contracts could be held unenforceable. See id. at 25 n.2. However, all but one circuit court has subsequently addressed this question and held that the FAA does apply to most employment contracts, and have therefore upheld employees' agreements to arbitrate statutory discrimination claims. See id.
292. "[A]rbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" Id. at 33 (citing 9 U.S.C. § 2).
293. See 1998 SHRM Survey, supra note 23 (noting that 14% of respondents had an unwritten policy on office romance); see also Jaine Carter & James D. Carter, Office Romances: How to Handle a Love Affair in the Workplace, DES MOINES REG., Oct. 29, 1998, at 3 (noting that a 1997 survey conducted by Strategic Outsourcing found 91% of the 592 companies surveyed said they had no formal policies regulating dating among co-workers).
294. For example, the chairman of one Chicago-area company "had a little talk with the president to let him know his affair had become an issue in the office and to ask him to think about whether this was good for the company." Cropper, supra note 14. The president ended the relationship. See id.
295. For example, a human resource officer at Ticketmaster's Los Angeles office
knowledge may derive from a human resource training program or company memo. Alternatively, employees may infer it from the presence of a related no-spouse supervision policy or the employer's past employment practices. Commentators who advocate this approach couch their recommendations neither in terms of an outright "prohibition" or "ban" typical of an express anti-fraternization policy, nor in terms of "disclosure" or "report" such as found in "date and tell" rules. Instead, they counsel employers to merely "discourage" fraternization.

The implied discouragement approach may have more appeal to smaller companies. These employers may be generally averse to adopting express policies in order to retain greater freedom to deal with each situation individually. An unwritten or implied policy reported no formal policy on office romance, "[e]xcept that there's no dating your boss." Loftus, supra note 29. DuPont also does not have a policy on employee dating. See Jenner, supra note 64. Instead, as part of its training program, A Matter of Respect: Prevention of Sexual Discrimination and Sexual Harassment, employees learn about the potential business impacts of such relationships. See id. The company then makes employees affirmatively responsible to inform management if they become involved in a personal relationship that could adversely affect company business and work with management on ways to alter the work relationship. See id. Delta Air Lines has no official policy, but it does not allow spouses to supervise each other. See Johnson, supra note 36. "Other than that, if you're in the same department, as long as you maintain proper business conduct, you can work in the same office." Id. Coca Cola is also silent on employee dating. See id. "It's certainly not good practice to be dating your subordinate," says their spokesman, but "at the same time, we're all adults who should be able to deal with these things professionally." Id. Lotus Development Corp. has no policy, relying instead on "the exercise of common sense, .... We have to trust people won't do something stupid." Wilmsen, supra note 53. BankBoston simply instructs its managers that it is in their discretion to decide whether a personal relationship is interfering in the professional arena. See id. Chase Manhattan Corp., with 64,000 employees, has no formal guidelines and no policy prohibiting a supervisor from dating a subordinate. See Chase, supra note 197. Prudential does not have a policy on employee dating, but after the Justice Thomas confirmation hearings, the company issued a memo warning employees that romantic relationships "can influence the quality of decisions and can potentially hurt other people." Ellen Rapp, Dangerous Liaisons, WORKING WOMAN, Feb. 1992, at 56. Autodesk, a California-based software maker, has an unwritten policy which its human resources vice president sums up as: "It's not OK for managers to be taking advantage of their authority position in initiating a relationship." Lardner et al., supra note 39.

296. See William D. Marelich, Employee Management: Can We Be Friends?, HR Focus, Aug. 1996, at 17-18 ("Create guidelines that discourage managers from becoming romantically involved with lower-level employees.") (emphasis added); see also William S. Hubbart, The New Battle Over Workplace Privacy 239 (1998) (providing in its sample "Dating and Fraternization" policy: "XYZ Company discourages dating or fraternization between a supervisor and subordinate. .... Any social dating or romantic relationship between a supervisor and a subordinate is discouraged because such conduct is deemed to be unprofessional") (emphasis added).

297. The vice president of human resources for a Colorado aviation company said
may also have certain benefits such as better employee retention\textsuperscript{298} and a reputation of being more family/employee friendly,\textsuperscript{299} thus leading to increased productivity.\textsuperscript{300}

However, small companies may have an even greater stake in policies against supervisor-subordinate fraternization, because romances are often more noticeable and therefore potentially more disruptive in those organizations.\textsuperscript{301} An unwritten policy also carries a greater risk of inconsistency if the business is not careful in applying it or does not keep adequate records.\textsuperscript{302} It may also be less effective overall in accomplishing the intended goal because employees are less likely to avoid such relationships or notify management if there are no apparent ramifications.\textsuperscript{303} Furthermore, absent a clear policy, employees who become involved in such relationships will lack a clear understanding of the company's position.

that though his firm has no explicit policy about employees dating, it would not allow a supervisor/subordinate relationship and would look to transfer one of the participants into a "comparable position in the company." Hildebrand, \textit{supra} note 235. However, he also said that "you could policy yourself to death," and favors instead maintaining freedom to examine each situation based on its own merits, while scrupulously maintaining consistency in treatment and application. \textit{See id.} AT&T also has no written policy on the subject, and treats the issue with "benign neglect." \textit{See} Jackson, \textit{supra} note 251. A company spokesman says, "If you write down too much, you drive people underground." \textit{Id.}

\textsuperscript{298} See \textit{supra} note 196 for a discussion of why companies might not opt for a "no-dating" policy.

\textsuperscript{299} Some companies view office romance positively and even encourage it as part of broader "family friendly" corporate policies. \textit{See} Susan Diesenhouse, \textit{Workers in Love, with the Boss's Blessing}, \textsc{N.Y. Times}, Apr. 24, 1996, at C1. One reporter (in the distinct minority) insists that this is the new paradigm:

Gone are the days when office relationships were scorned for fear of favoritism, impropriety or security problems. Now, some companies . . . are providing opportunities for people to socialize, date and find mates. . . . . . . [P]eople do a better, more productive job if they are happy, and human resource officers find that workers are happy when mingling at the office is not taboo.

. . . . .

For some companies, keeping employees happy seems to outweigh the risk of potential legal problems stemming from harassment.

\textit{Id.}

\textsuperscript{300} See Fisher, \textit{supra} note 274.

\textsuperscript{301} See Meyer, \textit{supra} note 193.

\textsuperscript{302} See Mainiero, \textit{supra} note 18, at 248 (noting that informal practices in the absence of written policy guidelines can be dangerous).

\textsuperscript{303} "It's uncertain if a stated company policy discouraging boss/employee dating can deter intraooffice romances between supervisors and [subordinates]. But it is a certainty that [companies] who have such written policy guidelines are on much sounder footing when confronted by such all-too-real and common real-life experiences." Farr, \textit{supra} note 195, at 37.
on the matter and will be more likely to attempt to maintain secrecy until the situation has become a problem for the company. At that point, the employees may have a better argument for lack of adequate notice or invasion of privacy, which would produce the opposite of the employer’s intended result.\textsuperscript{304} Hence, while implied policies that discourage power-differentiated office romances may have limited benefits for certain companies, a written policy is preferable because it promises greater consistency, effectiveness, and progressive management while minimizing the probability of negative workplace consequences.

5. Insurance

Finally, employers may also consider purchasing the increasingly popular Employment Practices Liability Insurance ("EPLI"), which protects them from adverse judgments and other fallout from personnel decisions and policies. Where available, EPLI coverage may exert some influence on the policy choices of employers who wish to purchase it, because the insurance company may recommend adopting such rules or offer lower rates as an incentive to do so. Underwriters seem to support employers’ efforts to institute express policies on hierarchical romances, and some may even move toward making such rules mandatory for their insureds.\textsuperscript{305}

**Conclusion**

Recent innovations in employer management of employee fraternization, combined with the ineffectiveness of legal challenges to interoffice fraternization policies, may fuel a growing trend toward enlightened policies which strike the best balance between employees’ personal lives and the employers’ workplace concerns about office romance. As such, employers today should be more

\textsuperscript{304} See Hallinan, supra note 158, at 436-37.

\textsuperscript{305} About 70 companies now offer EPLI coverage, and more than half of all Fortune 500 companies have it. See Hansen, supra note 271, at 80. A policy manager for the Alliance of American Insurers stated, “We applaud employers that are implementing these types of policies [which discourage or prohibit supervisor/subordinate office romances], because they are creating a workplace environment that is conducive to productivity.” See Lent, supra note 168. Likewise, the director of insurance and employment relations for the California Chamber of Commerce says it’s 11,000 member companies “definitely want to prevent supervisors from dating their subordinates.” Id. EPLI policies have become a hot specialty market in the aftermath of the Justice Thomas confirmation proceedings, according to the vice president of NAS Insurance Services, Inc., of Encino, California, Lloyd’s of London’s agent for EPLI business. See id.
willing to embrace the potential benefits of implementing an ex­
press policy regarding supervisor-subordinate office romances. Fairly and evenly applied, and with appropriate deference and re­
spect for employees' private lives outside the workplace, such poli­
cies can help maximize an organization's morale and efficiency
while minimizing the potential for debilitating fallout.

All of the strategies available to employers seem very similar
to each other, and in many ways they are. Indeed, there is little
practical difference between prohibiting and discouraging supervi­
sor-subordinate office romance—what matters is that employees
have options and are aware of them, and that employers equally
and consistently attach consequences to any violations. Therefore,
regardless of whether companies prohibit, discourage, or remain
neutral on power-differentiated relationships, one of the most im­
portant ingredients of any policy is the “tell” requirement. In order
for any policy on supervisor-subordinate office romance to do any­
thing other than drive people underground and foster resentment,
the company must encourage disclosure, provide a qualified “am­
nesty” to those who come forward, maintain confidentiality and
consistency, and pledge to give employees the first opportunity at
working out a preferred solution for themselves.

Furthermore, employers should consider the “love contract”
not as an independent solution, but as a new addition to the tool­
box. These agreements should be made available to partici­
pants—both co-employees and especially supervisors and
subordinates. However, these contracts should be strictly voluntary
and not mandated by the company. The company should make it
absolutely clear that it neither requires employees to sign such
agreements, nor penalizes those who do not sign; they should be
available strictly as a courtesy. However, consensual relationship
agreements should not be adopted as the primary answer to the
phenomenon of power-differentiated office romance and should be
reserved for high level employees where transfer or reporting struc­
ture changes are very difficult. Even then, the company should
have an official witness the document after discussing it with each
party privately. The combination of these elements, together with
an express coherent policy statement, adequate training, and notice
for employees (especially supervisors), will provide employers with
the best formula for managing office relationships.