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REGULATING WORKPLACE ROMANCES: SOME GUIDANCE FROM THE COURTS

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ABSTRACT

Many problems are commonly attributed to workplace romances. These include perceptions of favoritism, sexual harassment, the spillover of "family" problems into the workplace, and others. To prevent these problems from occurring, many firms have adopted nonfraternization policies. Despite the firms' laudable intentions, such policies have engendered significant litigation. This research examines relevant court decisions rendered throughout the United States to determine the contours of legally enforceable nonfraternization policies.

In addition to providing individuals with economic benefits, work usually allows people to interact socially. Many factors, notably the significant influx of women into the workplace in recent years, have contributed to the increasing incidence of one potentially problematic type of social interaction—workplace romances. This may include dating relationships, marriage, or other forms of romantic involvement. Examples of the types of problems this form of social interaction may engender include work–family conflicts, the spillover of family problems into the workplace, sexual harassment, confidentiality breaches, perceived favoritism, and career derailment [1].

To avoid these problems, many organizations have adopted formal or informal antinepotism policies [2, 3]. Some organizations have taken even more aggressive steps to avoid problems associated with workplace romances. Although these policies differ, they commonly prohibit supervisors from marrying, dating, or fraternizing with their subordinates; coworkers from marrying, dating, or fraternizing with each other; and employees from marrying, dating, or fraternizing with customers or competitors' employees. Despite the laudable intentions of these

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efforts, they are not always well received. Legal claims filed against private sector employers include breaches of the covenant of good faith and fair dealing, the intentional or negligent infliction of severe emotional distress, breaches of contracts, and discrimination. Public sector challenges have included sex discrimination and violations of constitutionally protected rights to privacy, freedom of association, due process, and equal protection. This research examines relevant judicial decisions rendered throughout the United States to determine the contours of legally enforceable nonfraternization policies.

PRIVATE SECTOR DISPUTES

Nonfraternization Policies Rejected by the Courts

Shortly after Rulon-Miller was promoted to a managerial position at IBM, she was terminated because she was dating a competitor's employee. She sued, claiming her supervisor breached the covenant of good faith and fair dealing and intentionally inflicted severe emotional distress [4].

The court explained that, at the very least, the covenant of good faith and fair dealing affords employees the right to reap the benefits of the policies adopted by their employers. IBM's culture of being honest with its employees, respectful of their privacy, and providing them with significant job security is well-documented. Its privacy policy ensures that employees may keep their jobs even if their supervisors disapprove of their off-the-job behavior. And its conflict-of-interest policy had never before been construed as prohibiting employees from dating competitors' employees, especially where, as here, they have no access to sensitive information that would be useful to the competitor [4].

Rulon-Miller's supervisor did not merely fail to comply with IBM's privacy policy; he flagrantly disregarded it. He also acted as if her relationship with the competitor's employee was new when he clearly knew about it long before she was promoted. Furthermore, he had promised her a few days to choose between the job and her relationship, but he made the decision for her one day after issuing his ultimatum. His actions implied she was incapable of making the decision herself or he was acting in her best interests. For these reasons, the court held the supervisor breached the covenant of good faith and fair dealing. His words and conduct were also sufficiently extreme and outrageous to hold IBM liable for intentionally inflicting severe emotional distress [4].

In Kansas, a married but separated manager employed by Coleman Company took a business trip. An unmarried female coworker accompanied him. The couple paid for her expenses. Both individuals were excellent employees, but they were fired when they returned. The reasons proffered for their terminations included dishonesty, breach of trust, and increasing the company's insurance liability. Other evidence, however, indicated the firing executive disapproved on

religious grounds of unmarried women traveling with married men. The couple sued, claiming their terminations breached their implied contracts [5].

The company's personnel policies stated employees must be afforded progressive discipline to correct their performance or conduct problems and they may be terminated only for just cause. The only exception involved rules violated in such a manner that corrective measures are infeasible or unwarranted. A disclaimer in the supervisors' manual stated it was not a contract. This did not determine the issue, however, because the evidence did not establish that the employees were aware of the disclaimer or that it was intended to create an unqualified employment-at-will relationship. This is especially true given the other provisions in the manual and the statements made to the employees by their supervisors. Because there was a material issue of fact regarding the existence of an implied contract obligating Coleman to terminate its employees only for just cause, its motion for summary judgment was denied [5].

In a different case, an executive vice president was fired for having an adulterous affair with the wife of another company employee [6]. He sued, claiming his termination breached his employment contract. The trial court agreed and awarded him $200,000. On appeal, his motion for summary judgment was denied because of a factual dispute not addressed by the trial court [6].

American Ka-Ro's president testified he had warned Schuermann about having "affairs inside the company" following an incident with a female office clerk. Schuermann admitted he had had affairs with female employees, but denied he had been disciplined for doing so. The court concluded this factual dispute was material to the issue of just cause. That is, absent prior warnings, a jury could reasonably find that just cause did not exist for terminating Schuermann [6].

Finally, Slohada was fired for having a sexual liaison with a female subordinate who was not his wife. He sued, claiming his services would not have been terminated if he had been unmarried. As such, his termination violated a New Jersey statute prohibiting discrimination because of applicants' or employees' marital status [7].

Slohada contended that by enforcing this policy, married managerial employees who engage in sexual activity out of wedlock would be fired, but unmarried managerial employees who engage in sexual activity would not. The court held that if Slohada's marital status played at least a part and was a causal factor in the decision to fire him, it would constitute unlawful marital status discrimination. Accordingly, he raised a question that was sufficient to defeat the employer's motion for summary judgment [7].

Nonfraternization Policies Upheld by the Courts

Crosier, a manager at United Parcel Service (UPS), knowingly violated the company's unwritten policy proscribing social relationships between managerial and nonmanagerial employees. When he promoted his girlfriend, other

employees began to comment about or complain of favoritism. He denied being involved with a nonmanagerial employee the first two times his supervisor questioned him. He admitted it the third time and was fired. He sued, claiming his discharge contravened the covenant of good faith and fair dealing [8].

Crosier knew this policy had recently been enforced against a different manager. As such, his termination could not have been a surprise. Moreover, UPS can be said to have a legitimate interest in avoiding appearances of favoritism, claims of sexual harassment, and employee dissension attributed to romantic relationships between supervisors and their subordinates. Because its concerns outweigh Crosier's concerns regarding significantly reduced occupational mobility among older employees, the court affirmed UPS's motion for summary judgment [8, 9].

In Oregon, a customer service manager at Target Stores was fired without warning for gross misconduct when he engaged in an extramarital affair with one of his subordinates. Basich, the manager, sued, claiming his termination breached his implied employment contract [10].

Managers at Target receive a personnel policy manual designed "to assure fair and equitable treatment for all employees." The manual contains a disclaimer stating it is not a contract. Basich also signed a statement on his employment application stating no contract of employment was created and he was an at-will employee. Because of these disclaimers, no employment contract existed, as a matter of law, between Basich and Target. Accordingly, the court granted Target's motion for summary judgment [10-13].

In a different case, a former patient accused a chemical dependency counselor of initiating a sexual relationship with him less than one year after he was discharged. The clinic's investigation confirmed his allegations. When Meleen rejected her employer's offer of a nonclinical position, she was fired. She sued, claiming wrongful termination, defamation, negligent infliction of emotional distress, and intentional infliction of emotional distress [14].

The clinic's written employment policies provided employees may be terminated only for good cause. Its good faith investigation revealed Meleen did initiate sexual contact with the former patient, and this constitutes good cause for termination. Accordingly, the clinic's motion for summary judgment on her wrongful termination claim was granted [14].

The court also granted the clinic's motion for summary judgment on each of her other claims. Meleen produced no evidence of malice to support her defamation claim. Absent defamation, there was no basis for her negligent infliction of emotional distress claim. Her intentional infliction of emotional distress claim also failed because she did not produce any evidence of extreme and outrageous conduct by the clinic [14].

Fayard, a security guard, was fired for dating a client's employee in violation of her employer's written nonfraternization policy. She sued, claiming she was wrongfully terminated and Guardsmark had unlawfully invaded her privacy [15].

The court explained that under the doctrine of equitable estoppel, which is not favored in Louisiana, Fayard must show: 1) a representation had been made; 2) she had justifiably relied on the representation; and 3) she had suffered a detrimental change in her position because of such reliance. She claimed she detrimentally relied on a policy prohibiting on-duty, but not off-duty, fraternization. The court affirmed Guardsmark's motion for summary judgment because she did not present any supporting evidence [15].

Regarding her other claim, a tortious invasion of privacy occurs only when the defendant's conduct unreasonably or seriously interferes with the plaintiff's privacy interest. Fayard's claim was based on her allegations that Guardsmark watched her house and ran license-plate checks on visitors' cars. Any observation of her home or of visitors to her home, however, was conducted from a public area. Because the company did not unreasonably intrude upon her seclusion or solitude, its motion for summary judgment was granted [15].

PUBLIC SECTOR DISPUTES

Nonfraternization Policies Rejected by the Courts

Thorne passed all examinations and interviews required to become a police officer in El Segundo, California. Nevertheless, she was disqualified because she allegedly had a poor attendance record, barely passed the physical agility test, was deemed weak in her upper body, and had only recently indicated any interest in becoming a police officer. She sued, claiming she had been disqualified because of her sex in violation of Title VII of the Civil Rights Act and the city had violated her rights to privacy and freedom of association guaranteed by the U.S. Constitution [16].

The evidence was sufficient to find sex discrimination. The city articulated legitimate reasons for her disqualification, including her lack of aggressiveness, self-assurance, candor, and motivation; her poor attendance; and her low moral standards. But it applied a stereotyped view of women's physical abilities to Thorne, even though she passed the physical agility test. Moreover, her disclosure during the polygraph examination—that she had had an affair with a married police officer in the department that resulted in her becoming pregnant—was a factor in the decision to disqualify her. The affair was conducted in private, while off duty. It did not interfere with her work performance. Nor did it cause a scandal within the department. For these reasons and because different standards were applied to the male officer with whom she had the affair, the court concluded the city's reasons for disqualifying her were pretextual.

The evidence also supported her constitutional claims. The state must have an extremely compelling interest to justify encroaching upon such fundamental rights as family living arrangements, procreation, and marriage. The city conditioned Thorne's employment on her answering questions about personal sexual

matters and refused to hire her because of her answers. This clearly implicates constitutionally protected privacy and associational interests. The city failed to produce persuasive evidence regarding the impact of Thorne's constitutionally protected, private, off-duty personal activities on her work performance. Nor did it produce evidence of specific policies, with narrow implementing regulations, governing these matters [16, 17].

Wilson, a police officer, was fired for dating the daughter of a convicted felon who was reputed to be a key figure in organized crime in central Florida. Sufficient evidence was presented to support his claim that being terminated for this reason violated his associational rights [18].

The court explained that government employment cannot be conditioned upon the relinquishment of rights protected by the First Amendment, including freedom of association. To prevail, Wilson must show his conduct was constitutionally protected and was a substantial or motivating factor in the city's decision to fire him. The city may rebut his claim by demonstrating it would have made the same decision absent the protected conduct [18].

Associational rights are not limited to political associations or associations for the advancement of shared beliefs. Private and social associations, including dating, are protected. As such, Wilson's conduct was protected. Furthermore, the officer's association with the felon's daughter was a substantial factor in the city's decision to fire him. The court concluded sufficient evidence existed to find that he would not have been fired absent his association with her [18].

Nonfraternization Policies Upheld by the Courts

Rumors that police officers Endsley and Redmond were lesbians began circulating shortly after Endsley was hired and intensified when other officers were called to quell a disturbance involving Endsley and Redmond's husband. Although the facts are in dispute, the court accepted Endsley's contention that she was fired. She sued, claiming her termination violated her constitutionally protected associational rights [19].

First Amendment rights are not absolute, but the state may not condition employment upon the relinquishment of these rights without substantial justification. The court must balance the interests of the employee with the interests of the state as an employer in promoting the efficient performance of the public services it provides. The court found that Endsley was fired because of the rumors that existed concerning her relationship with Redmond. The employer acted to protect the public image of the Department; to maintain close working relationships within the Department; and to maintain close working relationships with the community. These legitimate concerns outweigh an associational rights Endsley might have. Accordingly, the employer's motion for summary judgment was granted [19-21].

Naragon was hired as a full-time visiting instructor at Louisiana State University (LSU). Shortly thereafter, she entered into an intimate homosexual relationship with Doe, a freshman music major who was not one of her students. She subsequently engaged in angry exchanges regarding this relationship with Doe's father when he confronted his daughter on campus and with friends of Doe's family when they confronted her in a shopping mall. Campus security quelled the former disturbance; mall security resolved the latter by evicting Naragon. The university allowed Naragon to perform her teaching duties until the school year ended—to avoid further alienating Doe from her parents. Naragon was then returned to her position as a graduate assistant, but without teaching responsibilities. She sued, claiming this violated the Equal Protection Clause of the U.S. Constitution [22].

The court found LSU had reassigned Naragon because of the adverse effects her relationship with Doe had or could have on students, the school, and the instructor's effectiveness as a teacher, not because of her homosexuality. A teacher stands in a position of trust, a role Naragon compromised. Physical intimacy between a teacher and students is an ethical breach because of the perceptions of other students and because of the damage done to the relationship between the university and the public, including current and prospective parents. These concerns were heightened by the resulting damage to Doe's relationship with her parents and by the control Naragon exercised over her. For these reasons, there was sufficient evidence to find Naragon's reassignment was not contrary to the Equal Protection Clause [22].

Two nonprobationary police officers met and began dating while they were employed by the Amarillo Police Department (APD). They worked different shifts and neither one supervised the other. Whisenhunt's supervisor told them dating was okay but they should not live together. The chief of police investigated the couple's off-duty activities and found they maintained separate residences. Nevertheless, they were suspended for twelve days because of their relationship. Whisenhunt was also demoted for cohabiting with Shawgo and for sharing an apartment with a subordinate officer. The couple unsuccessfully appealed their disciplinary penalties to the Texas Civil Service Commission. Shawgo then resigned because her coworkers and the public subjected her to rude and hostile remarks regarding her relationship and because she was assigned to isolated field patrols without a partner. Whisenhunt resigned because he was demoted from the active uniform division to the records department, where he was isolated from the officers he had previously supervised. They sued, claiming the APD had violated their federal due process rights and unlawfully invaded their privacy [23].

According to the court, government employees have a property interest in their jobs entitling them to federal due process protection if there are rules or mutually explicit understandings that provide them with a reasonable expectation of job security. The provisions of the state's civil service statute support their reasonable

expectation of continued employment, thereby establishing a property interest in their jobs. Texas law, however, permits the chief of police to suspend any officer under his/her supervision for disciplinary purposes for up to fifteen days. Federal due process does not require a hearing prior to the imposition of this statutorily limited sanction, and the postsuspension hearing afforded the police officers sufficient protection [23].

Regarding Whisenhunt's demotion, he was not warned regarding the consequences of off-duty romantic involvement with a coworker—conduct that was a common practice at the department and tacitly or expressly approved by his supervisor. Nor was this conduct so clearly within the ambit of the regulations that it carried its own warning of wrongdoing, as does illegal conduct. But cohabitation or romantic involvement between a superior and subordinate officer is not independently protected by the Constitution. Accordingly, the notice provided by the state civil service regulations, however, vague it may have been, did not offend the minimum requirements of federal due process [23].

Similarly, Whisenhunt was not allowed to introduce evidence at his hearing of known but unpunished dating and cohabitation in the department. Nor was he allowed to introduce evidence of a grudge the chief of police may have held against him for publicly criticizing department policies. Because he was allowed to present his essential defense, his spotless performance evaluations, and evidence indicating the absence of public complaints regarding cohabitation, however, the state administrative hearing did not deprive him of the minimum federal due process rights to which he was entitled [23].

Finally, the plaintiffs' rights to privacy were not violated. Although matters pertaining to procreation, marriage, family, and the right to associate for social as well as political purposes are protected by the Constitution, the right to privacy is not absolute. Forbidding police officers, especially those holding differing ranks, to share an apartment or cohabit is rationally related to the maintenance of department discipline [23, 24].

CONCLUSION AND IMPLICATIONS FOR EMPLOYERS

The foregoing suggests there are few definitive answers regarding the contours of legally enforceable nonfraternization policies. The courts' decisions do, however, provide some valuable guidance regarding how these policies should be designed, implemented, and administered. That is, disciplinary penalties levied against employees who violate nonfraternization policies that satisfy certain requirements are likely to withstand legal scrutiny.

Nonfraternization policies adopted for the purpose of satisfying personal desires such as an executive's religious beliefs or moral standards are not likely to pass muster. Acceptable policies, on the other hand, are adopted for the purpose of achieving legitimate employment objectives. Avoiding sexual harassment, perceptions of favoritism, employee dissension, conflicts of interest, and real

threats to an employer's public image are examples of such objectives. They must also be designed to serve these legitimate purposes in a manner that does not unduly infringe on employees' legitimate concerns or rights. Examples include constitutionally protected rights to due process, privacy, freedom of association, equal protection, and any contractual rights they might enjoy. The policies must also be administered in a nondiscriminatory manner.

Employers should communicate their nonfraternization policies and the reasons for their adoption to all employees, including supervisors and managers, to clarify their expectations. These policies must specify what is and is not permitted and the disciplinary penalties that may be levied if they are violated. Training programs designed to convey management's intolerance of such relationships and to ensure all employees understand these requirements should also be conducted.

Managers should be trained to ensure they understand and abide by other human resource management policies and procedures. For example, employee handbooks and human resource policy manuals frequently provide that employees may only be terminated for just cause and only if progressive discipline fails to correct their performance or conduct problems. Under certain circumstances, these provisions may be contractually binding. That is, the failure to abide by them may engender litigation and liability for breaching implied contracts. Simply stated, employers should ensure their promises are honored. Alternatively, if they do not want to be bound by these provisions, they should 1) include a disclaimer in these documents clearly stating they are not contracts, or 2) refrain from making such promises.

On learning that employees may be engaged in a prohibited relationship, employers must inform the employees of the charges against them so they can prepare their defenses. Employers should promptly conduct a thorough investigation to determine whether an infraction has actually occurred. At the very least, they should interview the affected employees and any other employees who may have knowledge of the alleged relationship. A hearing should also be conducted to allow the accused employees to present their side of the story and to defend themselves.

Finally, if the investigations produce sufficient credible evidence to clearly establish that the accused employees are involved in a prohibited relationship, appropriate disciplinary penalties should be levied against the guilty employees. These penalties must be consistent with the provisions of the policy and with penalties imposed for previous infractions.

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ENDNOTES

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