

ROMANCE IN THE WORKPLACE: WHEN “LOVE” BECOMES LITIGATION*

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I. INTRODUCTION: ROMANCE IN THE WORKPLACE—CAN’T LIVE WITH IT, CAN’T LIVE WITHOUT IT

*“Sister Mary Lauretta, a Roman Catholic nun, once counseled: ‘To be successful, the first thing to do is fall in love with your work. She should, of course, now have to add: Just don’t fall in love at work.’”*¹

Numerous studies have shown that many people meet their prospective mates in the workplace.² As more and more hours are spent working, there is less time for people to meet their mate, other than at work. Since time immemorial, “love” in the workplace has been a fact of working life. However, as the laws and regulations governing workplace conduct become more and more restrictive, the dangers inherent in workplace romances become more evident.

Employees now expect that they will not be forced into coerced relationships. Indeed, it appears that quid pro quo claims generally are

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1. *McCavitt v. Swiss Reinsurance Am. Corp.*, 237 F.3d 166, 168-69 (2d Cir. 2001) (McLaughlin, J., concurring).

2. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2124 n.254 (2003) (discussing numerous studies that have been conducted on workplace romances). The various studies revealed that anywhere from 24% to 71% of people have engaged in office romances. *Id.*

on the decline. However, those claims have been replaced with a myriad of workplace harassment claims, most recently with the focus shifting to legal claims by those uninvolved in sexual conduct (whether it be coerced or voluntary) at work. Indeed, young women in the workplace—who have grown up believing that they will get ahead on their merits—find it incomprehensible that a woman should “get ahead” in the workplace by virtue of a sexual relationship with her boss. These young women similarly find it incredible that such a situation does not necessarily give rise to a claim on behalf of those women who merely perform their *real* work.

As evidenced by the recent case of *Miller v. Department of Corrections*,³ the idea of women as “sexual playthings,” whether it be by virtue of a coerced or voluntary relationship, should be antiquated. Unfortunately, such ideas still exist, and are acted upon by some, leaving employers open to liability. On the other hand, substantial privacy interests are implicated by creating workplace rules which govern voluntary romantic relationships. The implementation of those rules in and of themselves may create legal claims on behalf of those affected. Employers must be extremely concerned about their solutions to the tension between workplace harassment and romance rules, on the one hand, and privacy interests on the other.

This Article will explore the legal, practical and public policy concerns implicated by the fact that workplace romances clearly will exist, regardless of the rules and regulations that may be put in place to discourage them.

First, it will explore “first-party” claims arising out of voluntary relationships gone bad. Second, it will explore “third-party” claims arising out of other employees’ workplace “romances.” Next, it will discuss and critique employers’ proposed solutions to these issues. In this context, obviously, all employers must have in place a viable sexual harassment policy and procedure and make sure it is enforced. Whether additional policies should be promulgated regulating workplace romance, however, raises many questions.

These questions include: How far should that policy go? Should it prohibit all relationships among employees? Should it prohibit relationships only among supervisors and direct subordinates? Should it prohibit relationships between any supervisor and any lower level employee, regardless of the direct reporting line? Should it allow such relationships, but require that any employees entering into such a

3. 115 P.3d 77, 80 (Cal. 2005).

relationship report same to management? Should the employer decline to initiate any formal policies and hope for the best?

From an employee's point of view, policies which prohibit certain relationships may be good for morale by discouraging the view that favoritism is not enjoyed and making it less likely that employees will believe they have been retaliated against when a relationship goes bad, as the relationship may be prohibited in the first instance. As will be discussed in the final part of this paper, however, substantial practical problems, as well as legal pitfalls, may arise from such policies.

II. "FIRST-PARTY" CLAIMS: WHEN LOVE TURNS TO LOATHING

One of the most difficult situations for an employer, as well as its employees, is where a formerly voluntary relationship goes south. Whether the two employees are supervisor and subordinate, or even if they are simply coworkers, the emotional, practical, and legal consequences from the breakup of a relationship may be severe. Obviously, these consequences are more problematic when the relationship was between a supervisor and subordinate; however, even with respect to the breakup of relationships between coworkers of equal rank, if not legal problems, at minimum, emotional and morale problems may result in serious disruption of the workplace.

Potential claims involving a supervisor and subordinate are varied. The first, obviously, is where the supervisor ends the relationship with a subordinate and the subordinate claims after the fact that the relationship was never voluntary in the first place. Indeed, this very well might be the case. However, even if the employee fails to prove that the relationship was coerced in the first instance, the employee-plaintiff, the supervisor, and the employer must anticipate long and expensive litigation on this issue.⁴

While cautious plaintiffs' attorneys will be careful to thoroughly investigate the inception and conduct of that relationship prior to asserting such a claim, based upon a potential plaintiff's word that that relationship was never voluntary, such claims, if valid, clearly have the potential for large jury verdicts.

Conversely, and perhaps more often, if the subordinate employee is

4. See, e.g., *Browning v. Ohio State Highway Patrol*, 786 N.E.2d 94, 102 (Ohio Ct. App. 2003) (denying a hostile work environment claim and affirming a judgment for the defendant because sex between plaintiff and former supervisor was consensual); *Koster v. Chase Manhattan Bank*, 687 F. Supp. 848, 857 (S.D.N.Y. 1988) ("While the genesis of the relationship is unclear, there is not a scintilla of credible evidence to suggest it was coerced or unwanted by either party.").

the one to end the relationship, the supervisor may be foolish enough to retaliate against him or her for terminating the relationship. Obviously, if proven, these claims have legal merit, if the terms and conditions of the subordinate employee's employment changed after the relationship was terminated. If so, that employee's employment terms and conditions clearly depended upon his or her submission (and later, his or her refusal to submit) to the sexual relationship, therefore justifying a quid pro quo and/or retaliation claim.⁵ Amazingly, however, some courts have held that no cause of action for sex discrimination or sexual harassment can be had on these facts, because the adverse employment actions are predicated, not on the plaintiff's gender, but on the termination of the relationship.⁶

Finally, after a voluntary relationship ends, either party may be subjected to continuing advances by the party who did not wish to end the relationship, assuming that the decision was not mutual. While such a claim will be more difficult for a plaintiff who has previously engaged in a consensual relationship, clearly these claims are viable as hostile environment sexual harassment claims.⁷

In the co-worker context, claims may be had on behalf of employees who are fired because a contentious workplace relationship disrupted the employment environment.⁸ While employers may fire any employee for improper conduct at work, an employer who fires an employee for personal difficulties with a coworker, which do not occur at work, may lead to privacy claims. Furthermore, at least one employer who fired an employee under such conditions has been held liable for whistleblower retaliation under state law.⁹

Also, alienation of affection claims by the spouses of employees who engaged in workplace romances, asserted *against the employer*,

5. See, e.g., Pergine v. Penmark Mgmt. Co., 314 F. Supp. 2d 486, 491-92 (E.D. Pa. 2004).

6. See, e.g., Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1201-02 (11th Cir. 2001); Mauro v. Orville, 697 N.Y.S.2d 704, 707-08 (App. Div. 1999).

7. Johnson v. West, 218 F.3d 725, 729, 731 (7th Cir. 2000); Walko v. Acad. of Bus. & Career Dev., L.L.C., No. 04 C 3113, 2006 WL 305888, at *6 (N.D. Ill. Jan. 31, 2006); Giminiani v. City of Albany, No. 1-99 CV 2161 GLS RFT, 2005 WL 2039197, at *3 (N.D.N.Y. Aug. 24, 2005). *But see* Keefe v. Mega Enters., No. 02 C 5156, 2005 WL 693795, at *7 (N.D. Ill. 2005) (demonstrating that although such a claim may be asserted, the plaintiff failed to show a hostile environment); Fontenot v. Buus, 370 F. Supp. 2d 512, 517, 520 (W.D. La. 2004) (dismissing the plaintiff's claims because she failed to demonstrate sufficient proof of a hostile work environment after a consensual sexual relationship ended).

8. See *infra* Section III.

9. Treepanier v. Nat'l Amusements, Inc., 649 N.W.2d 754, 759 (Mich. Ct. App. 2002). In this case, an employer fired employee for obtaining a restraining order against coworker who had been his girlfriend. *Id.* at 756.

have, not surprisingly, been rejected.¹⁰

III. IT GETS WORSE: CLAIMS BY UNINVOLVED THIRD PARTIES

A. Sexual Harassment

In a case which reverberated throughout the employment world, the Supreme Court of California issued its opinion in *Miller v. Department of Corrections*,¹¹ on July 18, 2005. The court's opinion was not without support, particularly in EEOC Guidance issued years ago with respect to third-party claims based upon widespread favoritism of subordinates with whom supervisors had sexual relationships.¹² However, the court's holding in *Miller* is one of the few, and certainly the most comprehensive, that has held that such a claim may be viable.

The plaintiffs in *Miller* were female employees of the California Department of Corrections who alleged sex discrimination and retaliation claims under the California Fair Employment and Housing Act (FEHA).¹³ In holding that a triable issue of fact existed which precluded summary judgment—or in other words, whether the warden's favoritism toward three subordinate female employees with whom he had had sexual affairs constituted sexual harassment as to the plaintiffs—the court also reversed and remanded the court of appeals' determination that plaintiff could not establish a *prima facie* case of retaliation for complaining of such conduct.¹⁴

Noting that California courts frequently turn to federal authorities interpreting Title VII for assistance in interpreting the FEHA's prohibition against sexual harassment,¹⁵ the court turned to the EEOC's Policy Statement in this regard.¹⁶ In that Policy Statement, the EEOC observed that, although isolated instances of sexual favoritism in the

10. See *Helena Labs. Corp. v. Snyder*, 886 S.W.2d 767 (Tex. 1994) (denying a claim against employer where underlying alienation of affection claim against co-employee was abolished); *Jackson v. Righter*, 891 P.2d 1387 (Utah 1995) (holding that alienation of affection claims remain viable, but employers are not responsible).

11. 115 P.3d 77 (Cal. 2005).

12. OFFICE OF LEGAL COUNSEL, EEOC, NO. N-915-048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990), reprinted in 2 EEOC COMPL. MAN. (CCH) § 615, ¶ 3113 [hereinafter EEOC FAVORITISM GUIDANCE].

13. *Miller*, 115 P.3d at 80 (citing Fair Employment and Housing Act (FEHA), CAL. GOV'T CODE §§ 12900-96 (West 2008)).

14. *Id.* at 96-98.

15. *Id.* at 88.

16. *Id.* (citing EEOC FAVORITISM GUIDANCE, *supra* note 12).

workplace do not violate Title VII, widespread sexual favoritism may create a hostile work environment in violation of Title VII by sending the demeaning message that managers view female employees as “sexual playthings” or that “the way for women to get ahead in the workplace is by engaging in sexual conduct.”¹⁷

The EEOC Policy Statement at issue covers three topics: (1) isolated favoritism; (2) favoritism where sexual favors have been coerced; and (3) widespread favoring of consensual sexual partners. The Policy Statement begins by explaining that: “[a]n isolated instance of favoritism towards a paramour (or a spouse, or a friend) may be unfair, but does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.”¹⁸

The Policy Statement goes on to state: “A female charging party who is denied an employment benefit because of sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she was a woman.”¹⁹ As the *Miller* court noted, this portion of the EEOC Policy Statement reflects the position of a great majority of the federal courts.²⁰

Although not discussed in *Miller* because it was not an issue in that case, the EEOC Policy Statement also explains the Commission’s position regarding coerced sexual activity with victims who do not complain, including the situation in which the coercion results in employment benefits to the victim.²¹ This aspect of the Policy Statement merits discussion here.

As set forth therein, both men and woman who are qualified for but denied a benefit given to a woman (or a man) in a coerced sexual relationship with a supervisor, on the basis of favoritism, may argue that they were injured as a result of the discrimination leveled against the woman who was coerced.²² In *DeCintio*,²³ for example, a male plaintiffs’ claim of favoritism was not rejected because of lack of standing, but because the woman who received the favorable treatment

17. *Id.* (citing EEOC FAVORITISM GUIDANCE, *supra* note 12).

18. EEOC FAVORITISM GUIDANCE, *supra* note 12.

19. *Id.*

20. *Miller*, 115 P.3d at 89 n.8 (citing *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986)); *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002); *Womack v. Runyon*, 147 F.3d 1298, 1300 (11th Cir. 1998); *Taken v. Okla. Corp. Comm.*, 125 F.3d 1366, 1369-70 (10th Cir. 1997).

21. EEOC FAVORITISM GUIDANCE, *supra* note 12.

22. *Id.*

23. 897 F.3d 304.

was not coerced.²⁴

Finally, the EEOC Guidance discusses widespread sexual favoritism.²⁵ The EEOC discussion of sexual favoritism that is more than isolated based upon consensual affairs, and its rationale, is as follows:

If favoritism based upon the grant of sexual favors is widespread in the workplace, both male and female employees who do not welcome the conduct can establish a hostile work environment claim in violation of Title VII. This is regardless of whether any objectionable conduct is directed at them or whether those granted favorable treatment willingly bestowed those sexual favors. This is so because under these circumstances, the message is being conveyed implicitly that the managers view women as “sexual playthings,” thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is sufficiently severe or pervasive to alter the terms of their employment and create an abusive environment, as with any other hostile environment claim.²⁶

As the EEOC has clearly explained, managers who engage in such widespread sexual favoritism are communicating a message that the way for women to get ahead in the workplace is by engaging in sexual conduct, or that sexual solicitations are a prerequisite to their fair treatment, thus forming the basis for an implicit quid pro quo harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.²⁷

The *Miller* court thus held, following the Guidance of the EEOC, as well as standards employed in its prior cases, that an employee may establish an actionable claim of sexual harassment by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.²⁸ The court went on to hold that, under the circumstances of the case at bar, a trier of fact reasonably could find from the evidence in the record that a

24. *Id.* at 307-08; *cf.* *Allen v. Am. Home Foods*, 658 F. Supp. 451, 452 (N.D. Ind. 1986) (holding that males who lost their jobs due to employer’s discrimination against females suffered injury and had standing to sue under Title VII); *EEOC v. T.I.M.E.-D.C. Freight Inc.*, 659 F.2d 690, 692 n.2 (5th Cir. 1981) (establishing that white plaintiffs can challenge discrimination against blacks if they show injury).

25. EEOC FAVORITISM GUIDANCE, *supra* note 12

26. *Id.*, quoted in *Miller v. Dept. of Corrs.*, 115 P.3d 77, 89 (Cal. 2005).

27. *Id.*

28. *Miller*, 115 P.3d at 90.

hostile environment was created.²⁹

It is important to note that, in reviewing the evidence, the *Miller* court made it clear not only that isolated instances of favoritism would fail to support such a claim, but that the mere presence of office gossip would be insufficient to establish the existence of widespread sexual favoritism.³⁰ However, the court noted that the evidence of such favoritism in the case before it included:

admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications [for favored female employees], and [the supervisor's] admission [that] he could not control plaintiffs' co-employee because of his sexual relationship with her.³¹

Thus, the court held a jury could conclude that a sexually hostile environment existed.

Notably, the court also rejected defendant's argument that acceptance of the plaintiffs' position in that case would inject the courts into relationships that are private and consensual and that social policy disfavored such invasions of privacy.³² In summarily rejecting that contention, the court noted that it is not the relationship which is being regulated, but its effect on the workplace, and that the effect is relevant under the appropriate legal standard.³³ The court noted in this context that it had not discussed in its opinion the interactions between the supervisor and his sexual partners that were "truly private."³⁴

The concern raised by the defendant in that case about privacy is meritorious as to truly private acts, as will be discussed below. However, the court's conclusion about widespread sexual favoritism in the workplace is well-reasoned. Indeed, while it may be argued by employers seeking to distinguish the *Miller* case that the conduct in that case was so extreme, outrageous and public that most cases will not rise to that level, it is clear that favoritism of employees who engage in romantic or sexual relationships at work is a very real and serious risk for employers. Aside from the legal issues, moreover, the effect on the morale of other employees (both male and female) of seeing a co-

29. *Id.*

30. *Id.* at 94.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

employee get ahead in his or her job by virtue of having sex with the boss defeats the meritocracy that purportedly exists in this country.

On the other hand, employees and their counsel must be cautious in utilizing *Miller*. Not every isolated instance of favoritism of a “paramour” will give rise to a claim. The line is drawn, in accordance with the EEOC Guidance, between isolated instances and “widespread” sexual favoritism, such that the environment is deemed to be hostile. This demarcation line has been, and will continue to be, a difficult issue. However, guidance from cases other than *Miller* may be helpful. For example, in *Sheffield Village v. Ohio Civil Rights Commission*,³⁵ the plaintiff complained that widespread sexual favoritism resulted in a hostile work environment and that she was thus denied the opportunity to become a full time dispatcher.³⁶ After a detailed discussion distinguishing isolated sexual favoritism from widespread sexual favoritism, the court found the plaintiff was unable to demonstrate that the terms and conditions of her employment were subjectively affected since during her tenure as a part-time dispatcher, only one of the consensual relationships she complained of existed.³⁷ In addition, numerous cases have dismissed “paramour” claims because the determinant factor as to the alleged favoritism was the relationship, and not gender.³⁸ Indeed, even after *Miller*, this rationale has been utilized to dismiss claims. For example, in *Wilson v. Delta State University*,³⁹ the Fifth Circuit held that preferential treatment is not sex discrimination because it discriminates against all males and females, except for the paramour.⁴⁰

The most helpful discussion of this issue prior to the *Miller* case was relied upon by the EEOC in its Guidance. In *Broderick v. Ruder*,⁴¹ the court concluded that sexual favoritism contributes to a hostile work environment in violation of Title VII. In that case, the plaintiff, an attorney, alleged that two of her supervisors gave employment benefits

35. No. 99CA007283, 2000 WL 727551 (Ohio Ct. App. June 7, 2000).

36. *Id.* at *4.

37. *Id.* at *7-10, *11. The court also rejected the plaintiff’s quid pro quo claim on the grounds that she was unable to demonstrate that there was a gender based expectation that individuals assigned to dispatch would submit to the sexual demands of members of the police department. *Id.*

38. *E.g.*, *Taken v. Okla. Corp. Comm.*, 125 F.3d 1366, 1369-70 (10th Cir. 1997); *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996); *DiCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986); *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 802 (N.J. 1990).

39. 143 Fed. Appx. 611 (5th Cir. 2005).

40. *Id.* at 612. *But see Ritchie v. Dep’t. of State Police*, 805 N.E.2d 54 (Mass. App. Ct. 2004) (holding hostile environment claims can be asserted, although not necessary for court to decide in that case because a clear retaliation claim survived).

41. 685 F. Supp. 1269 (D.D.C. 1988).

to secretaries with whom they were conducting sexual affairs. She also alleged that another supervisor favored an attorney because of his sexual attraction to her. In that case, there were “isolated,” unwanted sexual advances made to the plaintiff as well.

The *Broderick* court discussed sexual favoritism in the workplace as “undermin[ing] plaintiff’s motivation and work performance and depriv[ing] plaintiff and other . . . female employees, of promotions and job opportunities,” which created a hostile environment and possibly an implied quid pro quo claim since the managers, by their conduct, were telling the female employees that sexual conduct will result in job benefits.”⁴²

B. *Have the Miller Court and the EEOC Gone Far Enough?*

It can be argued cogently that both the *Miller* court and the EEOC Guidance have not gone far enough in this area. While such a statement is likely to engender enraged responses from employers and the management bar, the logic of a claim for a man, or a woman, in a work environment where a “paramour” is receiving favorable treatment remains: if a paramour receives favorable treatment on the basis of sexual favors, it creates an “implicit” quid pro claim, in that, absent such sexual favors, the benefits are not obtained. Of course, the legal argument against this theory is that it is not favoritism based upon gender or sex; it is merely favoritism based upon a preference for a particular person. However, arguably, sex is to have no role in the workplace—and certainly no role in the meritocracy of getting ahead, getting promotions, getting raises, and the like. By injecting that element into the workplace, clearly, other women (or men, if a man is the paramour) may have an implicit quid pro quo claim.

Conversely, the opposite sex may argue that because he or she is not of the sex as to which the supervisor is interested in having a sexual relationship, he or she is disadvantaged because of her or her sex. Thus, it is possible that both male and females may be able to argue an

42. *Id.* at 1278; see also *Proksel v. Gattis*, 49 Cal. Rptr. 2d 322 (Ct. App. 1996). In *Proksel*, although the court rejected a claim based upon favoritism from a single affair in small office, it recognized that sexual favoritism by a manager may be actionable when it leads employees to believe that they can receive favorable treatment if they become romantically involved with him, the affair is conducted in a manner so indiscreet as to create a hostile work environment, or the manager is engaged in other pervasive conduct which creates a hostile work environment. See also *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990) (stating that overt manifestations of sexual favoritism may create a hostile work environment when they convey a message that women cannot be evaluated on grounds other than their sexuality).

“indirect” sex-based discrimination/sexual harassment claim.

While the legal arguments against such claims may prevail, these claims clearly have visceral appeal to all employees like the young women mentioned above—those who have been taught that they get ahead by hard work and good results. From an employer’s standpoint, the morale issues that arise because of favoritism of an employee who gets ahead not on merit, but on the basis of sex or favoritism, cannot be underestimated.

C. Lessons to be Learned From Miller

Employers, employees and their respective counsel should ask themselves the following questions when determining the viability of a third-party claim:

- Is there sexual conduct in the workplace itself?
- Is there discussion of the sexual relationship, either by the supervisor or the subordinate, in the workplace?
- Have either men or women been disfavored because of specific benefits given to a paramour, such as promotions, raises, better facilities, shifts and the like?
- Is this a pattern or practice with this particular supervisor, either concurrently or serially with employees?
- Is this a pattern of practice with other supervisors in the workplace, regardless of whether that activity directly impacts the plaintiff?
- Is the paramour directly engaging in abusive or hostile behavior toward the employees who are not paramours, without control by the supervisor?
- Is the relationship clearly provable, as opposed to mere office gossip?
- Have other employees been affected, directly or indirectly, by such favoritism/sexual conduct in the workplace?

Even in the courts that have rejected such claims to date, a showing of widespread sexual favoritism may well create a hostile work environment claim in today’s atmosphere.⁴³

43. See, e.g., *Proksel*, 49 Cal. Rptr. 2d at 324; *Drinkwater*, 904 F.2d at 862.

D. Double Whammy: Slammed for Complaints—When a Foolish Employer Retaliates

In *Miller*, the second of plaintiffs' claims was for retaliation because of their complaints about improper relationships and sexual favoritism.⁴⁴ The court of appeals in *Miller* concluded that plaintiffs had not engaged in protected activity, because they had not expressed opposition to sex discrimination or sexual harassment but merely to unfairness.⁴⁵

The court of appeals faulted plaintiffs for not complaining to defendants that the affairs and related conduct created an atmosphere in which they felt they were being judged on their sexuality, rather than on merit. Moreover, it found it important that they had not claimed to have been propositioned by a supervisor, expressly or impliedly, or to have been the subject of unwanted sexual attention. The plaintiffs had not claimed the atmosphere had become so sexually charged they could no longer do their work, and they did not attempt to report "sexual harassment," but merely complained concerning unfairness in promotions and other benefits given to paramours and the resulting mistreatment of them by those paramours.⁴⁶

Rejecting the Court of Appeals' holding that employees are required to elaborate on their legal theory when they complain, the Supreme Court held that the plaintiffs complained in good faith and that, even if it was ultimately concluded that defendant's conduct did not constitute a violation of the statute, good faith was established.⁴⁷

E. Lessons to be Learned—Part II: Retaliation Claims

The lesson to be learned from this case, as with all retaliation claims, is that an employee should lodge a complaint under the employer's sexual harassment policy, and any other applicable policies, when he or she feels that a sexual relationship or favoritism between a supervisor and a subordinate has affected either or both his or her terms of employment and/or his or her working environment.

44. *Miller v. Dep't of Corr.*, 115 P.3d 77, 94-95 (Cal. 2005).

45. *Id.* at 96.

46. *Id.*

47. *Id.*; see also *Ritchie v. Dep't of State Police*, 805 N.E. 2d 54, 61-63 (Mass. App. Ct. 2004) (holding that plaintiff clearly stated a claim for retaliation when she complained of other employees' voluntary sexual conduct at work); *Drinkwater*, 904 F.2d at 853 (rejecting the plaintiff's third-party gender discrimination claim, but upholding the retaliation claim, since the complaining subordinate had a good faith belief that discrimination was occurring).

Regardless of whether the underlying claim ultimately will be held to be meritorious, adverse action taken against the employee for making such a good faith complaint, particularly in light of recent authority,⁴⁸ should create a viable claim. Indeed, as with all cases of retaliation, employers most often get themselves into difficulties, and are forced to appear before juries, because they have improperly handled complaints of alleged discrimination or sexual harassment and fostered or allowed retaliation, rather than engaging in appropriate remedial measures.

IV. APPROPRIATE RESPONSES: WHAT'S A GOOD EMPLOYER TO DO?
(AFTER ALL, I'VE GOT TO SUPERVISE MY TEENAGE KIDS AT HOME; I
DON'T NEED IT AT WORK)

Employers' responses to dating between coworkers are varied. They may be categorized as follows:

1. Control your hormones; no dating at work.
2. Fraternalize only with employees of equal rank.
3. You can do it (if you tell us).
4. I'm a lawyer: I can solve everything by a document—the "love" contract.
5. Don't favor anyone you know—general anti-nepotism policies.

A. *Control your Raging Hormones*

Given human nature, it is virtually impossible to prohibit all dating in the workplace between coworkers, regardless of whether they are of equal rank, supervisor and subordinate, and/or work in the same department or area. Stories abound about romance that has begun and succeeded in the workplace. The idea that someone who spends a substantial amount of their life in the workplace is not going to date anyone he or she meets in that atmosphere is unrealistic.

Moreover, such prohibitions undermine employee morale, as employees resent these broad attempts to regulate their personal lives. More importantly, if penalties are imposed for violation of the policy, employees will see them as unfair and unjustified, at minimum. Worse, they may assert claims against employers when they are affected by such

48. *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2409 (2006) (holding any employer action that could "dissuade a reasonable worker" from reporting discrimination unlawful).

bans, such as marital status discrimination, invasion of privacy claims, and other such claims which a creative plaintiff's attorney may well assert.

B. Fraternize Only With Employees of Equal Rank

There are good practical and public policy reasons for prohibiting dating between supervisors and subordinates. As set forth above, the potential claims that may arise when such relationships end badly are numerous. In addition to a potential argument by the subordinate that the relationship was not truly voluntary, favoritism claims that may be brought by third parties, as well as difficulties in the working environment if the relationship goes sour, create fertile ground for litigation for plaintiffs.

In this context, an employer who implements such a policy should be careful to ensure that it is the supervisor, not the subordinate, who is punished for violation of the policy. Supervisors should be in a position to know better. Moreover, punishing a subordinate for having a relationship with a supervisor entails numerous legal risks.⁴⁹

Many employers provide in this type of policy that if a relationship between a supervisor and a subordinate develops, one or both will be asked to leave their job, and/or will be transferred. Requiring the subordinate to leave or be transferred, particularly, but not only, if that subordinate is a woman, was the norm back in the "good ol' days." However, requiring this action today gives rise to numerous potential legal claims.

While it may be more difficult for an employer to transfer the more senior person, an involuntary transfer should not be required of the subordinate employee, if the employer wants to be cautious. A solution may be to allow the parties to resolve the situation between themselves (i.e., either one of them leaves or one of them voluntarily transfers, if there is a transfer available), in the hope that this issue can be resolved without an employer mandate. However, if that does not occur, the employer should be prepared to make the difficult decision to transfer (or fire) the supervisor.

The question arises whether such a policy should be extended to any employee in a supervisory or managerial role, regardless of whether the subordinate works directly under that supervisor. A cautious employer will ensure that any person in a managerial, supervisory, or

49. See, e.g., *supra* notes 8-9 and accompanying text.

confidential role does not have a relationship with any employee as to whom, arguably, he or she could affect the terms and conditions of their employment or their working environment in any way. This is to avoid claims not only by a subordinate employee, but the third-party claims discussed above. However, as set forth above, these policies also have legal pitfalls, although not as many as an absolute “no dating” policy may have.

C. You Can Do It, But Tell Us

Some employers allow dating in the workplace, but require reporting to the employer. They then sometimes work with the employees to attempt to permit both employees to remain employed, while protecting the employer’s interests, usually by the voluntary transfer of one or both employees.

However, the serious question arises as to what an employer will do if an employee violates the “you must tell us” policy. Will it fire the offending employees? Will the employer then be subjected to a claim by a subordinate employee who does not tell them of such a relationship, when the supervisor, who again, arguably, should know better and has not reported same? What about a claim by the employee that the supervisor told him or her not to report it because it would affect the supervisor’s standing within the company? What about a claim by the subordinate that, even if the dating relationship was not coerced, the non-reporting *was* coerced?

This approach also runs the risk of the employer acting like an ostrich—if it doesn’t know about workplace dating, there mustn’t be any problem. It also engenders practical problems where no feasible transfer can be made and/or in the situation where the supervisor, while directly supervising the subordinate, is perceived by others to engage in favoritism. This adversely affects not only morale, but arguably creates third-party claims, as set forth above.

D. I’m a Lawyer: A Document Will Solve the Problem

While a catchy phrase, so-called “love contracts” are a lawyer’s construct. Lawyers seem to believe that they can solve all problems by creating a written document. In the “love contract” arena, employees involved are required to sign a document stating that their relationship is consensual, that they will not engage in inappropriate behavior in the workplace or at company-sponsored events (ah, the inevitable holiday

party mischief), that they understand the employer's sexual harassment policy, and that they understand that employment decisions should not be affected by the relationship. In some contracts, the employees also affirm that they have been given the opportunity to consult with counsel, that their signing of the document in and of itself is not coerced, that they will agree to arbitration of any disputes, and the like.

It would be wonderful if such a contract would solve the problem. From an employee attorney's point of view, however, these so-called contracts are rife with practical and legal problems, including the following:

A. Parties cannot agree to waive future rights. It is against public policy (at least in all jurisdictions of which this author is aware) to require a prospective waiver of future claims.⁵⁰ Thus, while a "love contract" may be some evidence that the relationship was voluntary (at least at its inception), it will not protect the employer from a subsequent claim in any respect.

B. Doesn't such a "contract" fail under basic contract law for lack of consideration on the part of the employer?

C. The main purpose of such love contracts is to require the subordinate employee to affirm that the relationship (again, at least at the inception) is completely voluntary and not coerced. It must be asked: what prevents an employee from arguing that, just as a relationship may be coerced, the supervisor and/or employer coerced that employee into entering into the love contract itself? Indeed, this argument seems ripe for any employee required to sign such a contract.

D. This type of contract clearly has the employer acting as if a "parent of teenage kids" in the workplace. Particularly when such a contract is required for coworkers on an equal footing, the love contract injects the employer into private consensual relationships which, arguably, are none of its business and invade the parties' privacy. Moreover, some love contracts require that the parties notify the employer if and when the relationship ends, another invasion of privacy.

If the love contract is required in order for the employer to be aware of a situation, it also requires monitoring by the employer to ensure that the relationship continues to be voluntary and consensual. This monitoring of a relationship that the employer has allowed in the first place as consensual adds an additional level of invasion of privacy. By monitoring that relationship—arguably to make sure nothing goes wrong

50. *E.g.*, *FASA Corp. v. Playmates Toys Inc.*, 892 F. Supp. 1061, 1066 (N.D. Ill. 1995); *Tjart v. Smith Barney, Inc.*, 28 P.3d 823, 830 (Wash. Ct. App. 2001).

if it goes sour—the employer might be able to head off sexual harassment claims by the subordinate. But, conversely, if it interjects itself into a relationship that continues to be voluntary, particularly if such relationships clearly are allowed by the employer, it invades the employees's privacy.

E. Does this type of policy require disclosure of a relationship between two employees of the same sex? If so, this will require such employees to notify an employer that they are dating, thereby disclosing their sexuality, of which the company may have been unaware. Obviously, this situation potentially leads to claims of discrimination on the basis of sexual orientation, where such claims are allowed under state law. Moreover, this type of policy implicates serious privacy concerns, not only on behalf of same sex couples, but on behalf of employees who may be married and, thus, required to inform the employer of their adultery (which, regardless of its moral implications, may be an illegal invasion of their privacy).

F. When are employees required to notify the company of such a relationship, either by “love contract” or otherwise? Should employees be forced to notify the company that they have had a date? Or only after they have had sex? Or only if they are in a long-term, committed relationship? In this day an age, what *is* a “long-term” and/or “committed” relationship? Who is going to determine these issues and be responsible for avoiding the invasion of privacy that may result from same?

G. If the relationship is between coworkers, some love contracts require that they will neither seek nor accept positions with supervisory reporting responsibilities involving one another. Does this improperly limit either or both of the co-employees' promotional and other favorable work opportunities?

H. Do you *really* want to know? If the employer requires the signing of a love contract, the employer also must be prepared to immediately deal with any notification by either party to the contract that there is a difficulty and immediately investigate same under the sexual harassment policy of the company. However, the company also must be prepared to transfer or otherwise remove the supervisor, not the subordinate, to another position when difficulties arise.

I. What do you do when a third-party informs the employer about the so-called relationship? This may occur, as in *Miller*, where co-employees are upset about the relationship and report it. What do you do if the report is based upon rumor and hearsay? Do you as an employer investigate that relationship to determine if it exists and if so,

if it is voluntary? How do you screen for and determine that such claims are only malicious gossip? The reporting by a co-employee of an alleged office affair may invite defamation, as well as invasion of privacy, claims.

J. What do you do when an employee will not enter into the agreement? Can you fire or refuse to promote an employee for refusing to do so? The employer runs serious risks if it fires or fails to promote employees who will not enter into contracts which arguably involve, at least as to co-employees, private conduct. What about the employer who does not uniformly enforce the requirement that such love contracts be signed? The following situation is easily imaginable: a powerful, high-level employee does not reveal such a relationship and/or sign such a contract, but lower level employees are forced to do so and/or suffer adverse consequences when they refuse to do so.

K. Even if the love contract is helpful to the employer, in the sense that the subordinate has acknowledged that the relationship was voluntary in the first instance, and thus might fend off a sexual harassment suit on that basis, it is useless if the subordinate breaks off the relationship and is harassed or retaliated against by the supervisor, or in other ways made miserable at work.

On balance, the myriad of difficulties, both practical and legal, with love contracts militates against the use of such contracts.

E. Don't Favor Anyone You Know—General Anti-Nepotism Policies

While not without their own problems, general anti-nepotism policies may be the best recourse for *private* employers.⁵¹ These policies do not regulate only romantic involvement or sexual relationships, but any relationship at work which could lead to difficulties in inter-company relationships, as well as legal problems. These policies generally involve a combination of prohibitions against supervisory authority over those having an intimate relationship with the supervisor; the employment of relatives or other persons with whom a supervisor has a close relationship, including house—or roommates; and the prohibition against employees having access to confidential or sensitive information from having such a relationship with a co-worker. Such policies also normally contain a requirement for disclosure of a relationship which might be subject to the policy, in order for the company to determine whether a conflict is involved.

51. Additional constitutional considerations may discourage their use by public employers.

The advantage of such policies is that they do not focus on sexual, marital, or other intimate relationships, they do not require employees to disclose the precise nature of the relationship (i.e., an employee who may be having a relationship with someone of the same sex and be living with that person may simply fall within the “cohabitation” prohibition), and they allow for the transfer of one or both employees (voluntarily, if possible), with the supervisor taking the brunt of such a decision, as a solution.

Such policies may specifically prohibit:

- Employees having supervisory authority over an immediate family member;
- Supervisors having authority over an employee with whom the supervisor is engaged in a consensual romantic or sexual relationship;
- Supervisors having authority over someone with whom the supervisor lives or shares a residence, even in a non-romantic relationship;
- Anyone in a department with access to confidential or sensitive information about an employee, or about that employee’s coworkers, from having any of the above relationships.

Some companies have a very strict anti-nepotism policy. This anti-nepotism policy may prohibit the employment of all persons having relationships with shareholders, partners, and other high-level persons in positions of power. This type of policy addresses the practical (and legal) concern that such a high-level person may, even indirectly, influence the progression of someone with whom he or she has a close relationship.

V. CONCLUSION

Walking the minefield of workplace romance is difficult for both employers and employees. Employers who believe that this minefield affects only them, in that they need to protect themselves against potential claims, are only half-right. Employees are adversely affected by employers’ improper attempts to invade their privacy and their failure to control improper supervisor/subordinate relationships. The best way to handle such situations is to work toward a solution that walks the delicate tightrope between such privacy interests and the need to control the workplace, preferably through training and discussions with

employees about cooperative solutions to “love” in the workplace—which is here to stay.

As Judge McLaughlin in his reluctant *McCavitt* concurrence aptly stated:

Romance has a distinctly distinguished history of originating in office contacts. It is one of the most clichéd of movie plots – see notably the Katharine Hepburn and Gig Young (or, if you prefer, Spencer Tracy) roles in the holiday classic “Desk Set”

. . . .

If . . . the Legislature saw fit to protect an employee’s right to engage in such historically revered activities as riding a motorcycle and hang-gliding, it certainly should have extended protection to the pursuit of a romantic relationship with whomever an employee chooses – even a fellow, unmarried employee – outside the office, during non-working hours. This is compellingly so in today’s society, where ostracizing anyone associated with one’s office from the acceptable dating pool would doom the majority of the population to the life of a Trappist monk.⁵²

What more need be said?*

52. *McCavitt v. Swiss Reinsurance Am. Corp.*, 237 F.3d 166, 169-70 (2d Cir. 2001) (McLaughlin, J., concurring).

* This material is for educational purposes and should not be considered legal advice. Experienced employment counsel should be consulted with respect to particular issues relating to this topic.