OFFICE ROMANCE: LEGAL CHALLENGES AND STRATEGIC IMPLICATIONS

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Abstract

Office romance is a reality of the modern workplace as more and more employees meet their best friends and life-partners through their professional connections. Over 40% of today's employees have had personal and romantic relationship with their co-workers and 30% of the marriages were initiated at the workplace. Fewer workers now keep their office relationships a secret. As such, the workplace is a "hotbed" for romance since more people spend more of their time at work these days. As such, there is a need for clear policies and rules regarding personal relationships with colleagues and managers. This article discusses the realities of "love contacts," workplace romance policies, and the challenges and legal implications associated with romantic relationships in the workplace. The authors provide recommendations to employers to avoid legal liability, and they also provide discussion questions that can be utilized for issue awareness, group discussion among managers and employees, and analytical purposes in academic settings as well as for corporate training.

Key words: romance, office relationships, office romance, workplace romance, romantic secrets, love contracts.

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A. Introduction

In today's business world, it is quite common and natural for men and women to work closely together, to socialize, to travel together and perhaps to engage in a work relationship which leads to a romantic relationship. These romantic relationships are formed between employees, between supervisors and managers, but also between managers and supervisors and their subordinate employees. Office romance realities and policies are not limited just to the corporate arena as they impact employees and managers alike in the public sector as well. Some popular political relationships in the United States have involved Presidents (i.e. Bill Clinton and Monica Lewinsky) as well as the 2008 Presidential Candidate (i.e. John Edwards and his mistress,Rielle Hunter). Office romance, therefore, emerges as a very prevalent, contentious, and difficult human resource (HR) issue today, both in the private as well as the public sector for employee and managers – legally, morally, and practically. All employers – large and small – eventually will have to deal with the challenge of employees who date, fall in love, and then in many cases fall out of love and break up – perhaps in a bitter and inimical manner.

B. Background and Overview

The number of office romances is substantial, it appears.Career-Builder.com's annual survey for 2009 reported that four out of ten workers of the 8000 surveyed stated that they dated a co-worker at some point in their careers (Adam, 2009). Furthermore, three in ten workers surveyed said they married the person they dated at work (Adams, 2009). The CareerBuilder survey also found that fewer workers are keeping their office romances secret. The study found that 72% of workers who have office romances are open with them, compared to 46% five years ago (Adams, 2009). Adams (2009) describes the workplace as a "hotbed" of romance as well as a more effective place to meet a person than a dating website, a bar or club, particularly when so many people spend so much time at work these days. One particularly well publicized office romance case dealt with former Boeing Company Chief Executive Harry Stonecipher, age 68, whose extramarital affair with a 48 year old female executive resulted in a great deal of adverse publicity for Boeing; and consequently resulted in Stonecipher's termination by means of a forced resignation. At the time, as reported extensively in the *Miami Herald* (Roberts and Maitland, 2005), Boeing's board chairman explained that "the CEO must set the standard for impeachable

professional and personal behavior" (p.2C). Business ethics, therefore, extends to more than "mere" corporate concerns, but also the personal life of top executives. One fact that made the Stonecipher case particularly troublesome, and which surely contributed to the CEO's removal, was that he was brought in to "clean up" the company's ethics after a company and Air Force conflict of interest contracting scandal. His office romance was thus a major embarrassment to Boeing. In Stonecipher's case, the board of directors was "tipped off" as to the romance by an anonymous whistleblowing employee who sent the board a copy of an explicit email that the CEO had written. The whistleblower, it appears, had intercepted an email between the romantically involved pair. Apparently, Stonecipher met the employee, who was a vice-president and a long-time company employee, at a company retreat. At the time of the forced resignation, opinion was divided as to whether the Boeing board did the "right thing." The board's investigation of Stonecipher, however, did not reveal that the office romance caused Stonecipher to influence his paramour's career prospects at Boeing, which clearly would have been unethical. Polls show, nonetheless, that a majority of people in the U.S. think that extramarital affairs are immoral. Thus, an executive having an extramarital affair may raise a character issue for the executive and his or her partner as well as the company. It was suggested that Stonecipher was so quickly terminated because the board did not want the personal email to be made public (Roberts and Maitland, 2005). It is interesting to note for the record that the infamous, and now deceased, Ken Lay of Enron married his secretary (who since Lay died before he was formally sentenced inherited the bulk of his estate, as opposed to the Enron "victims" – shareholders and employees in particular - since Lay, though convicted, was not technically "sentenced").

Shellenbarger (2010) had a most interesting, as well as intriguing, article dealing with dating in the workplace, indicating that employers now may be more acquiescent, even approving, of dating among their employees. Shellenbarger (2010) related one instance of a boss who allowed co-workers, who met at a training session for new recruits, to date. They then dated openly. Moreover, when the male co-worker wanted to propose, the boss set up a fake "test" of teleconferencing equipment, and invited the female employee to the "test"; and when the male co-worker attempted to assist his girl-friend with the "test," he guided her to a hidden engagement ring, and then flashed a slide which said "Say Yes"! She did, reported Shellenbarger(2010, p. D1), after "a moment of stunned silence"; and consequently the two were married, and remain married, and still work at the company – Cisco Systems in San Jose, California. Shellenbarger

(2010, p. D1) boldly declared that "office romance is coming out of the closet," and the workplace has become a "place for courtship." Shellenbarger (2010, p. D1) referred to a very recent study in which 67% of employees stated they had no need to hide their office relationships, which figure is up from 54% in 2005. In the past, the Baby-Boomers kept their office romances secret, in part because of fears of career damage, reprisal, and sanctions, particularly since many employers had policies strictly forbidding office romances, at least between employees and those in management hierarchy. Yet societal mores may be changing regarding office dating. There is more "openness about sexuality," said Shellenbarger (2010, p. D1) as well as more equality between the sexes. However, Shellenbarger (2010, p. D1) stated that it would nonetheless still be considered to be inappropriate for married employees to date other co-workers, as well as for dating co-workers to engage in displays of affection in the workplace. Even the most liberal employer would expect, and demand, that employees who are dating behave in a professional manner. Moreover, Shellenbarger (2010) emphasized that it still would be considered inappropriate for a boss and a subordinate employee to date. Similarly, Adams (2009) declares that the first rule of office romance is to avoid a supervisor-supervisee relationship.

Yet Shellenbarger (2010, p. D1) also declared that, realistically, for an employer to try to "stamp out office romance is like standing in front of a speeding train," particularly because the workplace consistently comes up in surveys as the "number one" place to meet a mate. Shellenbarger (2010, p. D1) quoted one employee, a professional development coordinator at a technical services firm, who said that workplace dating is "unavoidable" since employees, who are often like-minded and have similar interests, spend so much time together. Shellenbarger (2010, p. D1), however, did state that office romances can have a "negative spillover effect" on co-workers. The experience of two co-workers who commenced datingshowed that initially they were considered to be equals on the job, with each other and their co-workers; but when the two started to go out to lunch regularly, their co-workers felt "excluded," which created "a lot of negativity." The two co-workers eventually left the company(Shellenbarger, 2010, p. D1). The extent of the potential workplace romance problem was underscored by Rosenberg (2007) who reported in 2007 that 43% of U.S. workers admitted dating a co-worker. Of course, many of these relationships lead to marriage and have "happy endings," and some relationships that end leave the former romantic partners as still "friends," but unfortunately many other relationships end

acrimoniously, degenerate into antagonism and recriminations, and then even worst, lead to lawsuits.

Despite the legal and practical challenges, Shellenbarger (2010, p. D1) reported that some employers today, especially those with many young workers, are "taking a more neutral stance on office romance." Shellenbarger (2010, p. D1) gave as an example Cisco Systems, whose dating policy states that the company "does not encourage or discourage consensual relationships in the workplace"; however, the policy also says that relationships between supervisors and subordinate employees are "frowned upon," and may result in a transfer or reassignment. Another illustration would be Southwest Airlines. The company, as reported by Hymowitz and Lublin (2005), not only employs over 1000 married couples, but also explicitly allows consensual office romantic relationships. However, the airline also has a policy and a process that affords an employee who objects to a particular office romance to complain to the HR department or to a manager, who in turn is obligated to find a remedy if the office romance negatively impacts the company's "culture." One would presume that the company's culture would demand at a minimum professional and ethical behavior at the workplace.

Office romance can intersect with the law and the legal system in several problematic ways.Office romance can engender legal liability under the common law (case law) as well as pursuant to federal and state statutory law. The principal legal doctrines that might be triggered by a workplace romance would be employment law, specifically the employment at-will doctrine, contract law, tort law, and federal and state civil rights statutes. In the next section of the articles, the authors explicate and illustrate these legal doctrines in the context of office romance.

C. Contract Law – The Love Contract

The starting point for any discussion of employment law in the U.S. is the old common law employment at-will doctrine. If an employee has a contract with his or employer that limits the circumstances under which an employee can be discharged, then the employee is not an employee at-will (Cavico and Mujtaba, 2008).Of course, the contract that the employer has with his or her firm will specify certain policies and rules and regulations of employment that the employee promises to abide by or else suffer sanctions, including discharge. These employment policies and rules naturally can encompass workplace romance situations. Some companies have

clear and firm "no fraternization" policies that the employees are contractually obligated to obey because such policies are embodied in the employment contract between the employer and the employee. Violation of such a policy by engaging in a forbidden office romance would of course subject the erring employees to sanctions for breach of contract, including and up to discharge from employment. Wal-Mart is such a company that has a strict policy prohibiting workplace romance. Morgan (2010) related an office romance contract law situation where a Wal-Mart manager was discharged for dating a female colleague in violation of the company's "no fraternization" policy which was a part of the manager's contract with the company.

Assuming an employer allows office romance, one legal device that the employer can use to help ward off sexual harassment lawsuits is to require the dating co-workers to sign a so-called "love contract," at times called a "cupid's contract," wherein they state that their mutual love and affection is consensual and that their romance will neither interfere with their work responsibilities nor the workplace (Morgan, 2010; Adams, 2009). These "love contracts," of course, are governed by contract law principles. The key aspect to the love contract is that it is a written acknowledgment that the workplace romantic relationship between the employees is a consensual one. The contracts are voluntarily signed. Love contracts generally require the employees to promise to obey all employment rules regarding office romance, including the company's policy on sexual discrimination and harassment. Yet these contracts can also be customized for specific situations. The love contract, for example, can require that the employees refrain from displays of affection at work and work-related functions and events. The love contract can specifically and explicitly state that either romantically involved employee can terminate the relationship without fear of retribution and retaliation. Furthermore, the love contract can state that the employees waive their rights to sue for sex discrimination and sexual harassment for any actions or activities that occurred prior to or during the duration of the romantic engagement. They also can state that each participant will seek arbitration rather than file sexual harassment lawsuits if the relationship ends. The contract, moreover, can state that each party to the workplace romance can end the relationship without fear of work-related retaliation. A love contract, therefore, can help protect the employer from discrimination, harassment, and retaliation claims as well as help educate the employees as to workplace rules of conduct, and to ensure that the employees' romantic relationship does not interfere with their job performance or the performance of their co-workers. Morgan (2010) calls these contracts "the

office version of a pre-nup," and seems to rue the fact that "such documentation effectively takes the fun out of an office romance"; but he concludes by declaring "that's the point" (p. 75). However, the love contract should bring the romantic relationship "to the surface," where it can be dealt with in the workplace in a rational and mutually satisfactory manner, as opposed to an outright ban on workplace romance, which might force the romantically involved workers to "go underground" with their romance, thereby possibly inhibiting their work performance.

D. Threats to Enforceability of Love Contracts

Given the relative newness of love contracts in the law, there is still considerable question as to their enforceability (Silverbrand, 2009).In particular, two important common law doctrines may vitiate the love contract – the common law contract "consideration" requirement and the doctrine of "economic duress."

a. Lack of Consideration

In order for a contract to be enforceable in court, it must be supported by consideration; consideration is a bargained for exchange of promises (*Labriola v. Pollard Group, Inc*., 152 Wash. 2d 828, 100 P.3d 791 (2004); *Gatlin v. Methodist Medical Center, Inc*., 772 So. 2d 1023 (Miss. 2000); *Foundation Telecommunications, Inc. v. Moe Studio, Inc*., 341 Ark. 231, 16 S.W.3d 531 (2000); *Geraets v. Halter*, 1999 SD 11, 588 N.W.2d 231 (S.D. 1999)). Each party must make a promise to the other party; otherwise, the contract will not be valid (*Geraets*, 1999).

An employee who signs a love contract may be promising any number of things to the employer (to wit, that the relationship is voluntary, that the relationship will not negatively impact performance of job duties, etc.) (Silverbrand, 2009). However, it is questionable whether the employer actually promises anything in return. It may be tempting to claim that the employee receives the promise of continued employment as consideration (that is, the return promise by the employer to make the employee's promises in the love contract enforceable), but this is a tenuous hope to rely upon. Evidence is to the contrary; for example, non-competition agreements within the employment context are typically held invalid for this very reason (*Labriola v. Pollard Group*,

Inc., 152 Wash. 2d 828, 100 P.3d 791 (2004); *Environmental Products Co., Inc. v. Duncan*, 168 W. Va. 349, 285 S.E.2d 889 (1981)).

Generally, if a non-compete agreement is signed after the employee has started working, the employment is not viewed as consideration because the worker already has employment – the employer is not giving the employer anything "new" in the sense of additional performance or a new return promise (*Labriola v. Pollard Group, Inc*., 152 Wash. 2d 828, 100 P.3d 791 (2004)). As such, new and independent consideration is required (*Labriola*, 2004). Note that consideration is found to exist when the non-competition agreement is entered into at the onset of employment, since in such case the promise of employment has been given in exchange for the promise not to compete, and thus the promise-for-a-promise consideration of Anglo-American contract law is present..

Thus, in the love contract case, if the employer were to provide a bonus or reward for signing the love contract – for example, a monetary bonus – the requirement of consideration would be satisfied; and yet this tactic would make employers susceptible to the very threat that they are trying to avoid – discrimination lawsuits. Employees who are not in sexual relationships could argue that they were discriminated against on the basis of sex, since those employees who are in sexual relationships received bonuses, while they did not. One way to circumvent this problem would be to have all employees sign love contracts, whether or not they are in relationships. But yet again there would be a problem. If employees state in advance that any relationships they enter into are voluntary, then the very purpose of the love contract is nullified – employees are, in effect, promising that they will not be sexually harassed by anyone in the future. Such a promise means nothing. As such, love contracts may fail to be enforceable for lack of consideration on the part of the employer.

b. Economic Duress

It has been argued that love contract policies may be seen as a form of economic duress (Silverbrand, 2009). Economic duress is established when a party shows the existence of wrongful acts or threats, financial distress caused by the wrongful acts or threats, and the absence of any reasonable alternative to the terms presented by the wrongdoer (*Wright Therapy Equip., LLC v. Blue Cross & Blue Shield*, 991 So. 2d 701 (Ala. 2008)). If an employee proves that he or

she entered the love contract as a result of economic duress, the agreement will be unenforceable. (Id.) In this way, an employee who has been induced to sign a love contract under threat of termination may be able to void the contract (Silverbrand, 2008). As a cornerstone of his or her case, such employee would need to convince the court that the threat of termination was "wrongful" (*Wright Therapy Equip., LLC v. Blue Cross & Blue Shield*, 991 So. 2d 701 (Ala. 2008); Silverbrand, 2008). This legal hurdle may be challenging, though, as case law generally accepts the validity of non-fraternization policies (Silverbrand, 2009). Non-fraternization policies prohibit social relationships among employees or between certain employees, such as supervisors and subordinates. Such policies are typically held valid, despite the fact that employees are forced to abide by them under threat of termination (Silverbrand, 2009). Given the similarities between these love contract and non-fraternization policies, it is difficult to assert that love contract policies would somehow be viewed differently. Moreover, almost any contract an employee signs as a requirement of the job could be labeled "economic duress," since there is an underlying threat of termination; yet non-competition and confidentiality contracts and agreements are common within the workplace. All in all, there is little reason to believe that love contracts would be voided due to economic duress. The common law tort of invasion of privacy is another matter indeed.

E. Tort Law – Invasion of Privacy

The common law tort of invasion of privacy is a major legal concern in an office romance situation. Since this tort is an intentional tort the transgressing defendant is subject to liability for damages, including punitive damages (Cavico and Mujtaba, 2008). Consequently, if the romantically involved employees feel that their employer has been too aggressive and intrusive in uncovering their office romance, for example, by monitoring, surveillance, and "corporate spies," the romantically involved co-workers may be discharged, but they also may have a very good common law tort case for invasion of privacy against their former employer. The essence of the privacy tort is that a person under the common law may have a reasonable expectation of privacy in certain personal and private spheres of his or her life, and any intrusion may trigger the tort. What makes the aforementioned Wal-Mart case most interesting, as well as potentially legally problematical from this intentional tort perspective, was the fact that Wal-Mart used an

investigator to spy on the manager who was on a factory inspection tour in Central America, and that the investigator obtained evidence that the manager was romantically involved with a female colleague after four days of surveillance when the investigator heard "moans and sighs" emanating from their bedroom at the Holiday Inn (Morgan, 2010). Accordingly, if the employer intends to implement and enforce its office romance policies the employer must be very careful not to do so in an intrusive manner.

F. Civil Rights Act and Sexual Harassment

Workplace romances, alas, like other romances, can "crash and burn," and thereby perhaps degenerate into sexual discrimination and sexual harassment lawsuits by the former romantically involved co-workers. The possibility of a sexual harassment lawsuit is markedly increased if a manager or supervisor was dating a subordinate employee. The "biggest pitfall" of office romances, according to Shellenbarger (2010, p. D1), is the potential for "messy breakups," perhaps resulting in allegations of sexual harassment and consequently lawsuits. Shellenbarger (2010) reported a study conducted in 2006 by the human resourcesprofessionals, where 67% of the employees surveyed cited as a significant problem the possibility of retaliation by "spurned or disappointed lovers," which percentage was up from 12% in 2001. Sexual harassment lawsuits can also arise due to a workplace that has become saturated with romance among the dating and perhaps flirting and romancing at work co-workers. Other employees, third parties not involved in the romance, might feel so uncomfortable and embarrassed, and consequently claim that the workplace is an offensive, abusive, and hostile one sexually, which is a form of sexual harassment and sex discrimination and thus a violation of the Civil Rights law (Cavico and Mujtaba, 2008). Similarly, the workers not involved in the romance may assert sexual favoritism and sue for sex discrimination and harassment, especially if the romantically involved workers are a "boss" and a subordinate employee. An office romance could readily degenerate into sexual harassment lawsuit especially when a position, promotion, or any advancement takes place because an employee agreed to sexual requests made by a manager or supervisor. Adams (2009) notes that an employee can make a sexual harassment claim "merely" if she (though of course it could be a "he") asserts that she did not want to date her manager or supervisor, but felt compelled to do so. Furthermore, a sexual harassment lawsuit can arise when a workplace romance ends on a "bad

note." Especially problematic is when one of the participants in an office romance does not want to end the romantic relationship and consequently continues to pursue the relationship verbally and by conduct. Office romance, therefore, can seriously encroach on the workplace in the form of legal liability. Of particular concern to employers would be a romantic relationship between a manager or supervisor and a subordinate employee, because if such a romance relationship falls apart there is a very good chance that the subordinate employee will sue the supervisor for sexual harassment. Claims by third party employees not involved in the romance alleging sexual favoritism can also be predicated on sex discrimination and sexual harassment theories. Morgan (2010) deemed these co-worker lawsuits to be "a new legal menace," and also underscored that these "so-called hostile work environment sexual harassment claims are difficult to prove and easy to allege, particularly by employees fearing for their jobs in a sluggish economy" (p. 74).

To further complicate the legal situation for the employer, it must be emphasized that fairly recently the Supreme Court in the United States has considerably broadened the exposure of employers for sexual harassment committed by their employees. If there is sexual harassment inflicted by a manager or supervisor to a subordinate employee in the management hierarchy, and the employee suffers a tangible job loss, such as being discharged or even just losing time from work due to stress, then the employer is absolutely liable for the sexual harassment (Cavico and Mujtaba, 2008). Absolute means absolute! Consequently, the employer has no defense; but hopefully does have some sexual harassment insurance! Because of these laws, some employers still strictly forbid any type of dating; others permit it but only if the employees are in different divisions or departments; others permit it but require employees to declare their relationship and sign some type of dating contract stating that the relationship is a consensual one and also allowing the employer to separate the dating co-workers at work. Another important civil rights ramification to office romance deals with the retaliation doctrine of civil rights law in the United States.

G. Civil Rights Act and Retaliation

Another legal avenue for an aggrieved employee pursuant to the Civil Rights Act is the retaliation claim, that is, a lawsuit instituted by an employee who contends that he or she was discharged to prevent the employee from filing a discrimination claim or to punish the employee

who has filed a civil rights claim (Cavico and Mujtaba, 2011; Cavico and Mujtaba, 2008). Morgan (2010) emphasizes that "currently, retaliation suits are contributing to a wave of litigation that has employers in a panic" (p. 74). Morgan (2010) points to EEOC records which indicate that retaliation claims increased by 23% in 2008, and this percentage was approximately twice the rate of all other claims (p. 74). Moreover, retaliation claims of 32,690 represented about one-third of claims filed with the EEOC. Similarly, in 2009, retaliation claims increased again, accounting for 36% of total claims (Morgan, 2010, p. 74). Trottman (2010), moreover, reported that in 2009 retaliation claims surpassed racial discrimination complaints for the first time since the EEOC commenced operations in 1965 (p. A2). Generally, Trottman (2010) reported that private sector employees instituted a "record number" of discrimination charges in fiscal year 2010; specifically, the number of discrimination complaints filed with the EEOC against employers increased to almost 100,000, which is a 7% increase from a year earlier and a 21% increase from fiscal year 2007 (p. A2). The critical aspect of the retaliation claim, it must be emphasized, is that even if the employee's underlying civil rights complaint, for example, for sexual discrimination or harassment, is deemed to be invalid, the employee may still have a viable retaliation claim if the employer retaliated against the employee for bringing the underlying claim (Cavico and Mujtaba, 2011).

H. State Freedom of Activity and Association Statutes

In addition to federal civil rights laws in the United States, there may be state statutes that impact office romance policies and practices. Several states, such as California, Colorado, New York, and North Dakota, now have very broad statutes protecting the rights of employees to engage in lawful activities outside of the workplace. These statutes typically forbid employers from prohibiting employees to engage in lawful activities and to have associations unless the activity or association conflicts with the employer's business interest or harms its reputation (Davidson and Forsythe, 2011). In Colorado, for example, it is deemed to be a discriminatory and unfair employment practice for an employer to discharge an employee for engaging in any lawful activity off the premises of the employer during non-working hours. The "theme" of these statutes is that an employer should not have a say in the employee's personal life and life-style outside of the workplace. In a state that has one of the aforementioned freedom of lawful activity or

association statutes, the employer must be prepared to demonstrate how its employees dating or the office romance conflicts with its business interests or harms its reputation (Davidson and Forsythe, 2011). Consequently, there are many significant legal ramifications to office romance that employers and managers must be aware of and deal with in a fair and respectful but effective manner. Accordingly, in the following sections of the articles the authors will discuss the implications of office romance and make certain recommendations for managers and employers. The authors first will discuss management implications and make recommendations in the specific area of the love contract; and then the authors will discuss management implications and make recommendations generally.

I. Management Implications and Recommendations – Love Contracts

a. Love Contracts' Viability as a Shield against Lawsuits

Assuming that love contracts are enforceable in court, it is still unclear whether they can act as adequate shields against discrimination lawsuits. A love contract in itself does not stand as proof that the relationship was consensual; ostensibly, an employee can be forced into signing a love contract just as easily as he or she could be forced into the non-consensual relationship itself. Indeed, the very consideration often proffered by employers (continued employment) is based on the presumption that the employee would be terminated if he or she refused to sign. This threat of termination could be used by a sexually harassing supervisor to force a contract signature in much the same way it could be used by the supervisor to force a sexual relationship. Thus, in court, a plaintiff employee who has signed a contract can argue that he or she was "pushed" to sign under the threat of retaliation.

For example, in a *quid pro quo sex* discrimination case, the employee would need to show that the relationship was entered into in exchange for a job benefit or under the threat of retaliation (*Williams v. Joe Lowther Ins. Agency, Inc*., 341 Mont. 394; 177 P.3d 1018 (Mont. 2008); *Ocana v. Am. Furniture Co*., 135 N.M. 539; 2004 NMSC 18; 91 P.3d 58 (N.M. 2004)). If the employee has such proof, it is not a "wild jump" for the jury to believe that the employee signed the contract under the same sort of duress. In other words, if the employee has evidence of

quid pro quo sex discrimination, then by logic, he or she also has proof that the contract was not signed truthfully. At the same time, if the employee lacks proof of discrimination, the employee has no case anyway, so there would seemingly have been little need for the contract in the first place.Moreover, if an employee voluntarily signs a love contract stating that his or her relationship is consensual, this does not mean that it will remain consensual. One can easily imagine the scenario where an employee breaks off a relationship with a supervisor and is retaliated against as a consequence (or attempts to break off a relationship and is threatened with retaliation). Worse yet, supervisors who might have been cautious about engaging in sexually exploitative behavior might begin to feel freer to do so because they now believe that they are "protected" by the love contract (See *Williams v. Joe Lowther Insurance Agency, Inc*., 177 P.3d 1018 (Mont. 2008)).

On the other hand, the love contract would probably be assumed enforceable by at least some of the employees who sign it, and therefore chill the threat of lawsuits to a degree. Further, in certain court cases, where sexual harassment is inflicted by non-supervisory or managerial employee, the employer can provide an affirmative defense to vicarious or imputed legal liability by demonstrating that it exercised reasonable care to prevent and correct the sexually harassing behavior (and that the plaintiff employee failed to take advantage of these preventative or corrective opportunities or to avoid harm otherwise) (*Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998);*Faraghar v. City of Boca Raton,* 524 U.S. 775 (1998)). In such cases, a love contract could serve as part of the evidence that the employer attempted to prevent the harassment.

b. Love Contracts May Give Rise to Lawsuits

Nevertheless, despite the potential protective purpose of the love contract, employers should be careful not to be so draconian in their drafting of love contracts that the contracts begin to look like their own form of sex discrimination. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his/her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. § 2000e-2(a)(1)). As mentioned above, *quid pro quo* sex discrimination under Title VII arises when a

sexual relationship is entered into in exchange for a job benefit or under the threat of retaliation (*Williams v. Joe Lowther Ins. Agency, Inc.*, 341 Mont. 394; 177 P.3d 1018 (Mont. 2008); *Ocana v. Am. Furniture Co*., 135 N.M. 539; 2004 NMSC 18; 91 P.3d 58 (N.M. 2004)). Thus, a contract that requires the termination or transfer of an employee upon the breakup of a romantic relationship would very likely result in a viable discrimination claim (*Williams v. Joe Lowther Insurance Agency, Inc*., 177 P.3d 1018 (Mont. 2008)).

Likewise, a plaintiff can establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment (*Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)). In this context, sexual misconduct will be viewed as sexual harassment whether or not it is directly linked to the grant or denial of an economic quid pro quo, as long as the conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment (*Meritor Savings Bank*, 1986). Thus, a policy that requires disclosure of intimate details of a relationship could give rise to hostile work environment claims (as well as a number of other common law torts, such as intentional or negligent infliction of emotional distress).

In this way, employers must consider whether requiring workers to disclose sexual behavior might be deemed hostile or offensive. Few employers set out to "cross the line," but what the employer may view nonchalantly as work-related may be seen by the employee as an intensely private matter. And what exactly is the employee supposed to report? A relationship?A date?A kiss? What if two employees enter into a purely sexual relationship – that is, one that is not "romance" in the traditional sense but more of a "friends with benefits" relationship. This is probably the very type of relationship that the employer wants reported, as it looks so similar to sexual harassment. And yet how is it to be reported? Is the employee supposed to admit that he or she is having a sexual relationship? For many, this clearly would be uncomfortable. The employer must be careful to draft the agreement so that the information requested is not too detailed. And even then, an employee may feel violated, thereby triggering common law and statutory lawsuits.

Another issue is that employees would be required to disclose when they are involved in homosexual office relationships. While in and of itself this is not a problem, the required disclosure of such status could, in certain cases, open employers up to the threat of discrimination

lawsuits based on sexual orientation. In effect, once the disclosure is made, employers would need to be especially on guard about treatment of the employees who have just been forced to "out" themselves. For example, if the company was about to terminate the employee, its hands would now be tied – terminating the employee at this point might look suspicious. In addition, if the workplace is an environment that would be hostile to homosexuality, the forced exposure could incite discrimination. And if this discrimination case were to go to court, it might be all the more intolerable to the jury that the employees were *forced* to expose themselves. It is also important to note that although in the United States there is no federal civil rights law that prohibits workplace discrimination based on an employee's sexual orientation or preference or gender identity, many states and local entities do have such anti-discrimination laws today (Cavico, Muffler, and Mujtaba, 2012).

Therefore, although love contracts do possess some legal value, employers should be careful not to put too much reliance on them for the following reasons:

- Love contracts may be found unenforceable.
- Love contracts may increase instances of sexual harassment to the extent that workers in positions of power incorrectly view the contracts as shields against legal ramifications.
- Love contracts may give rise to lawsuits.

J. Management Implications and Recommendations - Generally

Office romance can have both positive and negative ramifications. Office romance can result in some positive consequences in the workplace by increasing workplace "engagement," that is, the desire and excitement to come to work, to care about one's company, and to work diligently. A positive effect of office romance is that it can lead to increased productivity for both participants. Furthermore, romantically involved co-workers typically spend more time at work, take fewer days off, and are less likely to be absent and to quit (Morgan, 2010). There also may be an increase in coordination, group and team work, as well as creativity and dynamism. The possibility of finding a romantic partner at work should naturally make the work environment an enjoyable, even exciting, one. The romantically involved co-workers may be more motivated to come to work, and to work. Interaction and communication at work certainly should be increased. Accordingly, some companies, such as National Public Radio, Princeton Review, Pixar, and

Southwest Airlines, allow office romance among employees (Morgan, 2010). Yet a great deal of these positive consequences potentially emanating from office romance assumes that the romantic co-workers, as well as their colleagues for that matter, will be open, mature, and professional about the relationship. One executive of a marketing company counseled that the best way to avoid problems is to have a "long corporate courtship," meaning that the co-workers should initially "keep it light" and "have fun," go to lunch and on group outings, and gradually get to know one another and thus to learn a lot about one another before they start dating. This advice, of course, is good advice for any individual contemplating a relationship. Yet a "long corporate courtship," even a "light" one, means more interpersonal relations between co-workers in the workplace, and thus perhaps more office romance (Shellenbarger, 2010, p. D1).

Yet office romance can also result in negative consequences for employers, co-workers, and the romantically involved employees. Employers, in particular, must be keenly aware of the legal and practical implications of office romance. Dating among co-workers may be disruptive to the work environment, both during the dating period but particularly during any breakup. Office romance can adversely affect the productivity of the workers romantically involved as well as the morale and productivity of their co-workers. If the dating co-workers are now having a difficult time with their romantic relationship, this "lover's quarrel" may intrude on the workplace, consequently making their co-workers feel uncomfortable and less productive. "Favoritism" can also emerge as a contentious issue as employees tend to believe that favoritism exists when there is a romantic relationship between employees, particularly a manager or a supervisor and a subordinate employee. Favoritism, or even the perception thereof, can engender dislike, disapproval, even hostility among co-workers, especially regarding the receipt of promotions or other benefits or preferential treatment. Office gossip very likely will be increased and intensified by office romance. A work deleterious work environment of disharmony, negativity, and cynicism could be spawned by an office romance. The legal and practical adverse consequences to office romance could have a "chilling effect" on dating in the workplace. Morgan (2010) indicated that in February of 2010, 75 % of U.S. workers surveyed by job search website Monster.com believed a workplace relationship could bring a conflict; and sixty-two percent said they felt office romances were a distraction from job performance.Customers of the employer could be affected in a negative manner if the romantically involved co-workers are paying too much attention to each other as opposed to serving the needs of the employer's customers. Poor

customer service will of course "translate" into fewer customers and consequently less revenue for the employer.

Promulgating policies on workplace dating is advisable. However, perhaps surprisingly, Morgan (2010, p. 75) reported on a survey conducted by the Society for Human Resource Management (SHRM) which indicated that only 13% of 600 companies surveyed had a written policy addressing office romance, and 14% stated they had an "unwritten" one. If the employer does establish a policy on office romance or dating in the workplace, the employer must ensure that all employees are aware of the policy and that the policy is consistently and fairly enforced (Davidson and Forsythe, 2011). At times these polices preclude employees dating customers, suppliers and distributors. There should be mandatory ground and/or online training to educate the employees as to the policy and to help ensure compliance. Office romance can be fit into pre-existing training that many companies have pertaining to diversity, sensitivity, and of course sexual discrimination, harassment, and a hostile work environment. Nevertheless, Davidson and Forsythe (2011) note that restrictive dating polices may not be efficacious for a small business. A restrictive dating policy "is generally not practical in small business, especially one that employs family members. If the entrepreneur is employing her spouse, it is difficult for her to say that other employees cannot start dating" (Davidson and Forsythe, 2011, p. 186). Yet they also relate that "still, situations can be strained. One entrepreneur started a business with his wife, where she was the office manager…When they had marital problems and a trial separation, they still had to work together on a daily basis" (Davidson and Forsythe, 2011, p. 186).

Employers certainly do not want to be liable when office romances "crash and burn." Accordingly, employers have taken several proactive measures to avoid liability. One measure is called formally a "consensual relationship agreement," or more informally a "love contract" (Selvin, 2007). Such a contract is used mainly for senior executives. In a "love contract," the intimate couple can disclose their relationship, and also, most importantly for the employer, expressly state that their relationship is voluntary and consensual. The contract also typically will state that the intimate co-workers have read the company's sexual harassment policy, and that they are free to break up without any adverse impact to their jobs. The signed original "love contract" is usually filed with the company's HR department. Unrequited love is always problematic; yet whether a "love contract" is the solution is, as emphasized by the authors, still a

matter of debate.Moreover, even though the employer may have the right to establish and enforce such a no-dating policy, and concomitantly to discharge employees for violating the policy, any inconsistent and/or selective enforcement of the policy may engender discrimination lawsuits by adversely affected "protected" employees pursuant to civil rights statutes. Similarly, if an employer gets too intrusive in enforcing such a policy, for example, by monitoring and surveillance, the employer may risk, as previously underscored, a lawsuit for the intentional tort of invasion of privacy, thereby subjecting the employer to liability.

All employers should be proactive and accordingly have policies on relationships and dating among co-workers. Employers should also ensure that all the employees are aware of such policies. The policies must underscore to employees that there are appropriate legal as well as ethical standards of conduct at the workplace. The employees should also be advised that there may be career repercussions when they commence a relationship. For example, an employer can (and perhaps should) have a policy that when two employees in the same department start dating, one might need to be transferred to another department. Similarly, a policy may state that employees on the same work team cannot date and form romantic relationships. In a more extreme policy, one dating employee may have to resign or be discharged from the company. At the very least, employers should seriously consider policies that prohibit managers from dating subordinate employees. Another policy is to have managers and supervisors report dating type relationships; but not to require such reporting by lower level employees. Of course, one must define "relationship," which, as emphasized by the authors, can pose serious practical as well as legal problems. Nonetheless, such a policy typically would not require the reporting of a "mere" date. Yet Hymowitz and Lublin (2005) reported that only 12% of companies that were surveyed by the American Management Association had written guidelines on office dating. Hymowitx and Lublin (2005) also reported that most major companies do not fire employees involved in consensual affairs where neither partner directly reports to the other. It also reported that some companies, such as IBM and Xerox, have formal policies that allow relationships between employees who are not on the same management hierarchical chain.

The primary objective of such policies and measures is to shield employers from liability pursuant to sexual harassment and gender discrimination laws if the office romance later degenerates into a workplace dispute. Presumably the romance was commenced by the employees

based on their own free will without any claim of coercion or intimidation for sex, which of course is the genesis of many sexual harassment lawsuits. Employers also want to minimize morale problems at work, especially charges of favoritism, and concomitant disruption, as well as negative publicity – externally as well as internally, which can all affect the bottom-line of the business. Furthermore, an executive's failed office romance may impair the executive's ability to lead the company. Employers today are especially sensitive to office romance due to the potential of workplace sexual discrimination and sexual harassment claims, particularly since the U.S. Supreme Court has ruled that an employer may be absolutely liable for the sexual harassment of an executive, manager, or supervisor who sexually harasses a subordinate employee in the managerial hierarchical chain. Sexual harassment is premised on a workplace environment that is hostile, offensive, or abusive sexually. The legal standard for what constitutes a hostile sexual environment is a very subjective one too. Employees can sue an employer for allowing a hostile sexual environment to occur and also for not stopping the offensive sexual behavior. The problem for the employer is exacerbated when the relationship was originally consensual but now one party wants to break it off, but the other party still persists in making now unwelcome romantic advances. Furthermore, even though the federal civil rights act does not protect against discrimination based on marital status, about two dozen states and many municipalities have laws that ban discrimination on the basis of marriage. A legal problem in such a state or city might arise if a married employee who has an affair is terminated, but an unmarried employee who has an affair is not discharged. The married employee could well claim illegal discrimination based on his or her marital status. Another legal problem for employers is that employees are entitled to privacy rights – pursuant to constitutional law for government employees, but also pursuant to tort law for all employees. An employer who too intrusively investigates its employees' romantic relationships or discharges employees for such relationships may be sued for intentionally violating the employees' privacy rights.

To complicate matters further from a practical vantage point, the employee having the romantic relationship with a senior level executive may perceive that due to the relationship with the executive he or she may think he or she has, or be perceived as having, more power and influence beyond his or her official job status and authority. Employers thus want to take steps to not only avoid legal liability but also to ensure that office romances do not hinder job performance. The productivity and teamwork adversely affected may not only involve the

romantically involved employees but also their co-workers. Accusations of conflict-of-interest, whether real or perceived, have the potential to disrupt and negatively impact the workplace. Damage to the value of merit as a core principle for promotion can be another very negative consequence. Office romances can be a major distraction at work, even without charges of favoritism and conflict-of-interest.

Yet it is difficult to have an effective total ban on dating since human nature and sexual attraction may overcome any employer policy. People will still get romantically involved at the workplace regardless of any policy. People meet other people most frequently at work. Total prohibitions of relationships may drive them "underground." "Turning a blind eye," moreover, means that the employer has lost an opportunity to provide guidelines and to counsel the dating couple. Of course, dating employees may attempt to keep their relationship secret; yet secrecy can be difficult to achieve in certain workplaces, particularly where the corporate culture is one of openness and informality and where the employees work long hours together. Employees who date and form relationships, whether secretly or openly, should be very scrupulous about keeping their romantic relationship out of the office. Shellenbarger (2010, p. D1) also noted the efforts that dating co-workers go to in order to prevent "fallout" from their office romance. For example, some dating co-workers asked to be assigned to different departments, teams, or projects. Some couples inform their co-workers, including new employees, they are dating. One couple related that they also told newly hired employees that if they felt uncomfortable about their dating they should inform a manager. Avoid calling one's co-worker whom one is dating, "Honey," one employee in a work relationship prudently advised. Furthermore, one couple warned that dating co-workers better get used to "kidding" from co-workers, reported Shellenbarger (2010, p. D1). So what are the choices for a company or organization when confronting office romance today: ban it totally, prohibit relationships between managers and supervisors and subordinate employees only, permit it pursuant to a "love contract," or freely allow it or for that matter encourage it? These are all very difficult questions that the employer must answer in today's workplace. The authors trust that they have provided some valuable legal and practical guidance for employers as they seek to promulgate and enforce legal, ethical, and efficacious office romance policies.

K. Summary and Conclusion

Certain individuals believe it is morally right and proper to date and to engage in romantic relationships in the workplace. On the other hand, romance in the workplace can result in legal liability, decreased morale, and reduced productivity; and of course in the long-run these negative consequences will adversely affect the business or organization.Fairness, equity, and moral issues are also of great concern to the employer. Employers have a right as well as a duty to maximize value for the shareholders, serve their customers, and maintain the morale and productivity of the workforce. It is vital for employers to protect these business interests. Many companies and organizations believe that dating between co-workers is "bad for business," and thus these companies promulgate and enforce non-fraternization policies. For the employer, therefore, a determination of its self-interest could indicate that the discharge of the romantically involved co-workers, especially a manager and a subordinate employee, is the "right thing" to do due in order to lower the risks of legal liability as well as to eliminate any perceived "paramour preference" and concomitant lessening of morale and decreased productivity.

Certain concluding points are very clear: drawing the line between personal and business affairs is never easy; employer scrutiny of office romance surely will increase; consequently, employers not only will have to get involved with workplace romances, but they also will have to manage office romances, very carefully too. Employers may choose to "look the other way" when employees date, but that "head in the sand" approach is short-sighted and very risky. Employers must always keep in mind that office romances can "crash and burn," and consequently be prepared to act accordingly to contain the damage to the firm and its stakeholders. Therefore, based on the legal and management analysis conducted herein, the authors would advise that employers should have clear , careful, and practical policies to govern office romantic relationships.

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Appendix I - Questions for Discussion:

1. Discuss the legal ramifications arising from office romance, for example, contract, employment at will, tort of negligence, tort of invasion of privacy, sexual harassment, discrimination?
2. What would be a legally AND a morally appropriate office dating policy? Why?
3. Based on legal, ethical, and practical considerations, do you believe that an employer, especially one with younger employees, should take a "more neutral stance on office romance"? Why or why not?
4. Do you agree that "office romance is coming out of the closet"? Why or why not?
5. Is trying to "stamp out office romance...like standing in front of a speeding train"? Why or why not?
6. Is "frowning upon" certain office romances a viable policy for a company – legally, morally, and practically? Why or why not?
7. Discuss the legal, moral, and practical issues involved in office romance.
8. Specifically, what office romance policies do you believe are the most efficacious – legally, morally, and practically? Why?
9. In the Boeing-Stonecipher case, was the CEO treated in a moral manner? Why or why not?
10. Did the Boeing-Stonecipher whistleblower act in a moral manner? Why or why not?
11. Does the Southwest Airlines' office romance policy pass the test of Value Driven Management? Why or why not?

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