

## The Perils of Office Romance

By Elaine Herskowitz

Office romance is on the rise. A 2006 survey by CareerBuilder.com found that about half of the workers polled have dated a co-worker and 21 percent have dated their boss. While the percentage who have dated a co-worker was similar to the previous year, those who admitted to having dated their boss increased from 14 percent. A similar survey by Vault.com in 2006 found that 15 percent of respondents admitted to dating a boss or superior and 21 percent have dated a subordinate, up slightly from the previous year.

Attitudes about relationships with supervisors are shifting as well. A Workplace Romance Survey by the Society for Human Resource Management and CareerJournal.com found a decline in the percentage of employees who object to romance between a supervisor and subordinate, from 70 percent in 2001 to 60 percent five years later. In contrast, the percentage of HR professionals who believe such romance does not or should not occur between supervisors and subordinates increased from 64 percent to 80 percent.

Most organizations do not have policies addressing workplace romance, according to the SHRM/CareerJournal.com survey. While employers may want to avoid interfering in employees' private lives, ignoring relationships between supervisors and subordinates is particularly risky. Such relationships not only can affect office morale and productivity, but also can lead to claims of favoritism, discrimination, sexual harassment and retaliation.

Possible claims arising from romantic or sexual relationships between supervisors and subordinates include:

- A subordinate may claim he or she consented to sexual behavior with a supervisor because of threats of adverse consequences if the subordinate refused.
- Third parties may challenge preferential treatment by a supervisor toward a sexual partner.
- If a romantic relationship between a supervisor and subordinate sours, the subordinate may claim the supervisor subsequently used his or her delegated authority to lash back or try to coerce the subordinate into resuming the relationship.
- If an employee complained to management about adverse treatment by his or her supervisor following the break-up of their relationship, a subsequent adverse job action could be challenged as retaliation.

## **Unwelcome but Voluntary Relationships**

A sexual-harassment claim might arise from a sexual relationship between a supervisor and subordinate if the subordinate asserts he or she was coerced into the relationship by threats of job consequences. In a 1986 Supreme Court case addressing sexual harassment, *Meritor Savings Bank vs. Vinson*, the court made clear that the voluntariness of sexual conduct -- in the sense that the complainant was not forced to participate against her will -- is not a defense to a sexual-harassment claim. The correct inquiry is whether the complainant indicated the alleged sexual advances were unwelcome.

Note, however, that as a result of the Supreme Court's decisions in *Faragher vs. City of Boca Raton* and *Burlington Industries vs. Ellerth*, an employer may be able to avoid or limit liability where a supervisor's harassment does not cause tangible job consequences. To establish an affirmative defense, the employer must prove it exercised reasonable care to prevent and correct such harassment and the employee unreasonably failed to report the misconduct or otherwise avoid the harm.

## **Favoritism**

Numerous courts have held that an isolated instance of favoritism by a supervisor toward an individual with whom he or she is engaged in a consensual sexual relationship does not violate Title VII of the Civil Rights Act. This is because other workers -- both male and female -- are equally disadvantaged. While this sort of conduct breeds resentment and clearly is inappropriate, it is not sex discrimination.

However, a supervisor cannot explicitly or implicitly demand that an employee engage in sex as a condition for job benefits or advancement. The Equal Employment Opportunity Commission has stated that Title VII is violated in these circumstances, regardless of whether the employee agreed to the unwelcome demands and therefore obtained job benefits or rejected the demands and therefore suffered adverse job consequences.

Furthermore, if there is widespread favoritism toward employees of one sex who are engaged in consensual sexual relationships with one or more supervisors in a workplace, then other workers may be able to establish an unlawful hostile work environment. This would be the case regardless of whether the claimants were targets of unwelcome sexual conduct.

## **Soured Relationships**

Courts have struggled with the question of whether punitive action by a supervisor due to a failed romance with a subordinate violates Title VII. Some courts have held that adverse treatment due to a failed consensual sexual

relationship does not violate Title VII because such treatment is based on personal animosity rather than gender.

On the other hand, courts uniformly have held that a supervisor's demand for resumption of a sexual relationship along with the threat of job consequences if the employee does not comply violates Title VII. This is because gender is the basis for job benefits. Furthermore, a violation would be found if a supervisor, following the ending of a relationship with a subordinate, lashes back by subjecting the subordinate to unwelcome sexual or gender-based behavior in the workplace. This would be the case regardless of the supervisor's personal motivation.

### **Retaliation**

Title VII prohibits retaliation against an individual because he or she has opposed a practice made unlawful by the statute or because he or she has participated in formal EEO proceedings. In some cases, employees who have failed to establish sex discrimination or harassment arising from a consensual relationship with a supervisor have been able to establish retaliation for complaining about the alleged violation.

To establish retaliation based on opposition to discrimination, a claimant need not prove the conduct complained of amounted to a Title VII violation. It is enough that the employee had a reasonable, good-faith belief that a violation occurred and acted upon it. The protection is even greater, according to the EEOC, when a claimant participates in formal EEO proceedings. In those situations, the individual is protected regardless of whether the allegations were reasonable or made in good faith. Thus, even if an employee is unable to prove that adverse treatment stemming from a consensual relationship with a supervisor amounted to unlawful harassment, he or she may be able to establish that a complaint about the mistreatment led to retaliation.

### **Policies and Procedures**

An organization that ignores consensual sexual relationships between supervisors and subordinates does so at its peril. These relationships can have ripple effects on other employees in the workplace, cause disgruntlement and negatively affect productivity. Furthermore, they may expose the organization to lawsuits.

Even if it is not feasible to ban workplace romance, an employer can adopt certain restrictions and take steps to address the risk of sexual harassment. The following are some suggestions:

- Periodically redistribute and vigorously enforce the organization's anti-harassment policy. The policy should spell out what is inappropriate

workplace behavior and include information about employees' protection against retaliation.

- Provide anti-harassment training to all employees. Such training should include a discussion about the pitfalls of workplace romance.
- Require disclosure to higher management when a supervisor or manager dates a subordinate and then separate the individuals in their work interactions. When such a relationship is disclosed, management should first seek to determine whether the relationship truly is consensual, in light of the power imbalance. If the subordinate indicates the relationship is not consensual, the matter should swiftly be investigated and addressed in accordance with the employer's sexual harassment policy. Even if the relationship truly is consensual, management should work out a change so the subordinate no longer reports to the supervisor.

By taking these steps, employers can manage the growing risk of liability arising from office romances.

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