

# Non-Fraternization Policies Pose Difficult Issues But May Be Useful When Limited and Enforced Fairly

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Modern circumstances have combined to make the workplace a likely place for romance to develop between co-workers. Employees are working longer hours. Women have joined the workforce in increasing numbers. Colleagues tend to share similar views and goals and become friends. Group projects and work-related social functions increase interaction between co-workers.

A 2005 Office Romance Survey by Vault, Inc. found that 58 percent of the employees surveyed had been involved in an office romance, 38 percent knew of an office romance currently taking place between two co-workers at their company, 22 percent met their spouse or long-term significant other on the job, and 23 percent had engaged in sex at the workplace. See Vault, Inc. 2005 Office Romance Survey at [www.thevault.com/nr/newsmain.jsp?nr\\_page=3&cb\\_id=420&article\\_id=23513899](http://www.thevault.com/nr/newsmain.jsp?nr_page=3&cb_id=420&article_id=23513899).

A similar survey of employees by CareerBuilder.com in 2005 found that 56 percent of those surveyed had dated a co-worker and 31 percent had engaged in an office romance more than twice. See CareerBuilder.com 2005 Office Romance Survey at [www.careerbuilder.com/share/aboutus/press\\_releasesdetail.aspx?id=pr160&sd=2/7/2005&ed=12/31/2005](http://www.careerbuilder.com/share/aboutus/press_releasesdetail.aspx?id=pr160&sd=2/7/2005&ed=12/31/2005). Of the respondents to this survey who had dated a co-worker, 22 percent began dating after collaborating on projects, 15 percent became romantically involved with a co-worker while working late, and 13 percent cited a "happy hour" with co-workers as the starting point for an office romance.

## Why Workplace Romances Are Troublesome

Workplace romances can have a negative effect on employee morale and job performance and pose a risk of claims for sexual harassment or discrimination. Certain types of office romances are most troublesome.

### Adulterous Affairs

These are among the most awkward situations, and, when they involve co-workers who are not in the same department or in a super-

visor/subordinate relationship, most managers and human resource professionals shy away from attempting to "regulate morality" in a delicate situation that is more personal than professional. However, adulterous affairs between co-workers affect spouses outside the workforce who may intrude upon and disrupt the workplace when the affair is discovered. Moreover, like other office romances, the break-up of an adulterous affair may have a negative "spillover" effect at the workplace due to arguments or other emotional behavior between the former lovers.

### On-Site Sexual Activity

Workplace romances can be a problem when inappropriate sexual behavior occurs at the workplace. Office trysts and even public displays of affection at the workplace can distract and disturb other employees. Overt sexual behavior that other employees find irritating and unprofessional should not be tolerated by management.

### Intra-Departmental Romances

A romance between co-workers in the same department or work group may decrease their focus and attention to their work and the needs of their other co-workers. Arguments and other emotional behavior between co-workers engaged in a romance can disrupt the department's or work group's performance or productivity, especially after a break-up of the relationship when their assignment to the same department or work group keeps them in constant contact with each other.

### Supervisor/Subordinate Relationships

This type of workplace romance poses the greatest difficulty for employers. The 2005 Vault, Inc. survey found that 19 percent of the employees surveyed had dated a subordinate, and 14 percent had dated a boss or superior. A supervisor/subordinate relationship can create uneasiness, jealousy and suspicions of favoritism among other employees in the subordinate's work group who wonder how the relationship will affect their opportunities for advancement. The work group's morale and job performance may suffer when other employees perceive, rightly or wrongly, that the supervisor's "paramour" enjoys better job

assignments, overtime or pay increases. The same notions apply to a relationship between a subordinate and an indirect supervisor who is in the subordinate's "chain of command" and can affect the terms, conditions or responsibilities of the subordinate's employment.

Moreover, if a supervisor pressures or coerces a subordinate into having or continuing a relationship, it can result in a "quid pro quo" sexual harassment claim by the subordinate, and, if it is also alleged that granting sexual favors is a condition for promotion, it can result in a sexual discrimination claim by the subordinate's co-workers. See EEOC's "Policy Guidance on Employer Liability under Title VII for Sexual Favoritism" (EEOC Policy Guidance) at [www.eeoc.gov/policy/docs/sexualfavor.html](http://www.eeoc.gov/policy/docs/sexualfavor.html), citing Section 1604.11(l) of the EEOC's Guidelines on Sexual Harassment at 29 C.F.R. Section 1604.11, and *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199-1201 (D. Del. 1983). Even a consensual supervisor/subordinate relationship carries a risk that the break-up of the relationship will prompt the subordinate to claim the relationship was not consensual, but was sexual harassment. In addition, if the subordinate is later discharged, he or she might claim retaliation.

The EEOC Policy Guidance illustrates another possible risk of consensual supervisor/subordinate relationships. It notes that Title VII does not prohibit isolated instances of preferential treatment based on a consensual romantic relationship, since both men and women are disadvantaged by such a relationship for reasons other than their gender. *Id.*, citing *Benzie v. Illinois Dept. of Mental Health*, 810 F.2d 146, 148 (7th Cir.), cert. denied, 107 S.Ct. 3231 (1987), *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 180 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986), *Miller v. Aluminum Co. of America*, 679 F. Supp. 495, 501-02 (W.D. Pa.), aff'd, 856 F.2d 184 (3d Cir. 1988), and *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), cert. denied, 108 S.Ct. 89 (1987). However, the EEOC Policy Guidance states:

If favoritism based on the granting of sexual favors is widespread in a work-

place, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed 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 conditions of [their] employment and create an abusive working environment.'" Managers who engage in widespread sexual favoritism may also communicate 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. This can form the basis of 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. *Id.*, citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)), *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986), and *Miller v. Aluminum Co. of America*, 679 F. Supp. 495, 501-02 (W.D. Pa.), *aff'd*, 856 F.2d 184 (3d Cir. 1988).

The EEOC Policy Guidance was the focus of the California Supreme Court's recent decision in *Miller v. Dept. of Corrections*, 2005 Cal. LEXIS 7606 (July 18, 2005), where a supervisor was involved in consensual sexual relationships with several of his subordinates, and the plaintiffs were other subordinates in the supervisor's work group who were not among his paramours. The plaintiffs asserted sexual discrimination and harassment claims against the supervisor and the employer under California's equal opportunity law because the subordinates having sex with the supervisor received special treatment such as unfair promotions over the plaintiffs, scheduling and training preference, reduced accountability, and general favoritism. The *Miller* court noted that discrimination was not present since the supervisor's consensual sexual relationships with subordinates had a negative impact on both women and men regardless of their gender. However, the court allowed the plaintiffs to go to trial on their sexual harassment claim against the defendants.

Relying on the above-quoted portion of the EEOC Policy Guidance, the *Miller* court held that the plaintiffs could establish a claim of sexual harassment under California's equal opportunity law by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter working conditions and create a hostile work environment. The court also concluded that widespread sexual favoritism could amount to "quid pro quo" sexual harassment if the favoritism created a reasonable belief that managers would only promote employees who engaged in sexual liaisons with their supervisors. Liability in the *Miller* case was not based on the co-worker romance itself, which was viewed as impacting both women and men equally, but instead was based on the effect the co-worker romance had on the workplace.

### Non-Fraternization Policies May Be Useful But Are Not Popular

Most employers' experiences with workplace romances will not be like the *Miller* case, where a supervisor's involvement in sexual relationships with a "harem" of subordinates made the employer especially vulnerable to sexual harassment claims. However, office romances of all types, whether coerced or consensual (and whether heterosexual or homosexual), have the potential to disrupt workplace harmony, decrease employee morale and job performance, and cause sexual harassment claims.

It is important for employers to have a sexual harassment policy, enforce it consistently, promptly investigate each complaint of harassment, and take corrective action when necessary. It is also essential for employers to educate and train employees about the laws regarding sexual harassment in the workplace, and what constitutes sexual harassment, to deter such conduct.

In addition to an effective sexual harassment policy and education and training for employees, non-fraternization policies can help employers avoid sexual harassment claims. Non-fraternization policies also may help employers avoid the potential disruption and decrease of workplace harmony, employee morale and job performance that can result from office romances of all types.

However, non-fraternization policies are not popular with employees. Three-fourths of the employees who participated in the 2005 CareerBuilder.com survey believe they should be able to date anyone they wish at work, and most of those who had dated a co-worker believed their office romance did not impact their employment situation or their job performance. Interestingly, 8 percent of the respondents to that survey who had dated a co-worker said their office romance

helped them to progress in their careers.

In addition, many employers feel that non-fraternization policies are not useful or are reluctant to enforce them if they exist. In a survey of human resources professionals and executives conducted by CareerJournal.com and the Society for Human Resource Management in 2002, 75 percent of the HR professionals and 59 percent of the executives said that their companies did not have policies prohibiting workplace affairs. See 2002 CareerJournal.com and SHRM joint poll at [www.careerjournal.com/myc/officelife/20020205-capell-3.html](http://www.careerjournal.com/myc/officelife/20020205-capell-3.html). In a 2003 survey of managers and executives by the American Management Association, 84 percent of those surveyed said that their companies had no written policies on workplace or employee dating, and, of those companies where such policies existed, most applied only to dating between supervisors and subordinates and only 11 percent prohibited any co-workers from dating. See 2003 AMA Workplace Dating Survey: [www.amanet.org/press/amanews/workplace\\_dating.htm](http://www.amanet.org/press/amanews/workplace_dating.htm). Two-thirds of the managers and executives who responded to the 2003 AMA survey said it was okay for co-workers of equal status to date, and 30 percent said they had dated someone from work. Among the respondents to the 2005 Vault, Inc. survey who were acting in a management capacity, 59 percent said they would interfere in an office romance only if work were being compromised and 13 percent said they would do nothing about it.

This attitude exists because there are risks and difficulties associated with non-fraternization policies, especially broad policies that prohibit intimate relationships between any employees regardless of their work relationship or lack thereof. A broad non-fraternization policy may offend some employees who believe it invades their privacy rights and attempts to impose morals on them outside the workplace without truly advancing the company's legitimate business interests. Significant employee opposition to a non-fraternization policy can decrease employee morale and loyalty without sufficient benefit to the company. Non-fraternization policies often provide that violators may be separated by transfer or reassignment or disciplined in some other fashion, and employees subjected to these consequences may become disruptive or leave.

Further, employees who are demoted or terminated after violating a non-fraternization policy may challenge their demotion or termination in court. Such claims burden employers with litigation, though employers have been successful in reported court decisions involving limited non-fraternization policies.

For example, in *Barbee v. Household*

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**Automotive Finance**, 113 Cal. App. 4th 525, 6 Cal. Rptr. 3d 406 (2003), the employer's non-fraternization policy required that any supervisor desiring to have an intimate relationship with any employee within that supervisor's direct or indirect area of responsibility must bring the issue to management's attention for appropriate action to avoid a conflict of interest. The plaintiff, a manager, began dating a subordinate and was instructed by management that the relationship created a conflict of interest and would have to be ended or one of them would have to resign. After the plaintiff chose not to end the relationship or resign, he was fired.

The plaintiff in **Barbee** sued the employer for invasion of privacy and wrongful termination in violation of public policy based on a California statute that prohibited employers from taking any adverse employment actions against an employee for any lawful conduct occurring during nonworking hours away from the employer's premises. Several states have similar protection for "off-duty conduct" as a result of efforts by the tobacco lobby to prevent employers from discriminating against employees who smoke.

The **Barbee** court held that the plaintiff had no reasonable expectation of privacy and found, to the contrary, that employers have legitimate interests in avoiding conflicts of interest, reducing the appearance of favoritism, and preventing potential sexual harassment claims that can result from supervisor/subordinate relationships. The court held further that California's statute prohibiting adverse employment actions based on an employee's lawful "off-duty conduct" did not set forth any independent public policy that provided employees with new substantive rights, but instead simply established a procedure by which the state labor commissioner could assert previously recognized substantive rights on behalf of employees.

### Limited Non-Fraternization Policies are Preferred

The **Barbee** decision affirms that employers can enforce reasonable non-fraternization policies intended to avoid conflicts of interest, reduce the appearance of favoritism, or prevent sexual harassment claims. Because of the risks and difficulties associated with broad non-fraternization policies, some employers prefer to use limited policies that only prohibit intimate relationships between employees in the same department, employees in a supervisor/subordinate relationship, and employees in positions where one of them may affect the terms, conditions or responsibilities of the other's employment (i.e., where one employee is in the other employee's "chain of

command"). Some employers extend the scope of their non-fraternization policies to intimate relationships between a company employee and an employee of one of the company's customers, suppliers or competitors, to help avoid third-party sexual harassment claims and damage to customer and supplier relationships or protect the security of the company's confidential information.

Limited policies also appear to have the greatest support among HR professionals and executives. In the 2002 survey of HR professionals and executives by CareerJournal.com and SHRM, three-fourths of the HR professionals and 59 percent of the executives said their companies lack policies prohibiting workplace affairs, but more than half of them said their companies discourage workplace romances, mostly due to the potential for sexual harassment claims. In the same survey, two-thirds of the HR professionals and executives who responded said they disapproved of workplace romances between supervisors and subordinates, 31 percent of the HR professionals and 49 percent of the executives disapproved of intradepartmental romances, and half of them said workplace romances result in complaints of favoritism.

### Marriage and Cohabitation

A difficult issue for employers considering implementation of a non-fraternization policy is how they should treat workplace romances that develop into marriage or cohabitation. The issue of marriage or cohabitation between co-workers may be more appropriately addressed in an anti-nepotism policy, but there is still some wisdom in limiting the policy to a prohibition against such employees working in the same department or being in a supervisor/subordinate relationship.

Employers in states with statutes prohibiting discrimination on the basis of a person's marital status must be cautious when enforcing a non-fraternization policy or anti-nepotism policy against co-workers who are married or cohabitating, though courts in different states have reached opposite conclusions regarding these statutes.

For example, in **River Bend Community Unit School District No. 2 v. Illinois Human Rights Commission**, 232 Ill. App. 3d 838, 597 N.E.2d 842, app. denied, 147 Ill. 2d 637, 606 N.E.2d 1235 (1992), the Illinois Court of Appeals held that Illinois' statute prohibiting discrimination on the basis of a person's marital status prevented a school district from enforcing its policy prohibiting a spouse from directly supervising his or her spouse, finding that the policy imposed an undue burden on marriage. In contrast, the Michigan Supreme Court reached the opposite

conclusion in **Whirlpool Corp. v. Michigan Civil Rights Commission**, 425 Mich. 527, 390 N.W.2d 625 (1986), holding that Michigan's statute prohibiting discrimination on the basis of a person's marital status did not prevent an employer from enforcing an anti-nepotism policy to keep spouses from working with each other in the same plant.

In **Minnesota Dept. of Human Rights v. Porter Farms**, 382 N.W.2d 543 (Minn. Ct. App. 1986), the Minnesota Court of Appeals held that Minnesota's statute prohibiting discrimination on the basis of a person's marital status applied to prohibit discrimination against an employee on the basis of his cohabitation with a woman. The court held that the statute protected the employee from discrimination on the basis of his decision not to be married, just as it would protect him from discrimination on the basis of his decision to be married. However, the Illinois Court of Appeals came to a different conclusion in **Mister v. A.R.K. Partnership**, 197 Ill. App. 3d 105, 553 N.E.2d 1152 (1990), holding that Illinois' statute prohibiting discrimination on the basis of a person's marital status did not protect unmarried cohabitating couples from discrimination.

### Enforcement Must Be Fair, Consistent and Gender-Neutral

When enforcing non-fraternization policies, employers must take care to ensure that enforcement is fair, consistent and gender-neutral. Employers should be diligent in their investigations of reported violations and document their investigations to show they were done in an unbiased and non-discriminatory manner. For established violations, employers should be careful to determine that any corrective action taken is necessary and appropriate under the circumstances, and consistent with any prior violations of a similar nature. Because workplace romances come in so many different varieties, with different degrees of risk to workplace harmony and different risks of liability, employers who use non-fraternization policies should consider adopting multiple options for enforcement, including encouragement of self-reporting and requiring counseling, transfer, reassignment or other discipline for violators, with termination as a last resort.

Most importantly, employers should not ignore reported violations of non-fraternization policies, or tolerate "repeat offenders." Such conduct could be argued to be evidence that an employer knew of prior instances of sexual harassment or discrimination and did little or nothing about them.

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Two court decisions from different jurisdictions, but involving the same employer, illustrate the value of fair and consistent enforcement of non-fraternization policies when addressing violations of varying seriousness.

In *Shumway v. United Parcel Service*, 118 F.3d 60 (2d Cir. 1997), the employer learned that a female supervisor had been dating an hourly employee in violation of the company's non-fraternization policy, when the hourly employee reported to a manager that the supervisor was upset over the break-up of their relationship and was disturbing him at his home. When confronted by the manager, the supervisor was warned that her conduct violated the company's policy. She lied to the manager about the extent of her relationship with the hourly employee, and the company discharged her on the manager's recommendation. She sued her employer for sexual discrimination under Title VII, claiming that the employer had not terminated male supervisory employees who had also violated the non-fraternization policy.

The court in *Shumway* found that the plaintiff was not similarly situated to the male supervisors she compared herself with because none of those supervisors had dated a subordinate for as long as she had, none of them were warned about the company's non-fraternization policy to the extent she was, none of the male supervisors had harassed their subordinate paramours after the relationship ended as she had, and none of them had lied about the relationship when confronted by management as she had. In addition, the court noted that the employer had terminated some of the male supervisors who violated the non-fraternization policy. The court also found that the man-

ager who recommended the plaintiff's discharge had been very consistent in treating male supervisors who violated the policy in the same way he treated the plaintiff. As a result of these findings, the *Shumway* court dismissed the plaintiff's claims.

In a case where the same employer's enforcement of the company's non-fraternization policy was less consistent, the Ohio Court of Appeals reached a different conclusion. In *Russell v. United Parcel Service*, 110 Ohio App. 3d 95, 673 N.E.2d 659 (1996), a female supervisor asserted a claim against her employer for sexual discrimination in violation of Ohio's equal opportunity law after she was terminated for violating the company's non-fraternization policy even though her male subordinate paramour had resigned. The plaintiff presented evidence that male supervisors who had violated the policy were allowed to remain in their jobs when their female subordinate paramours resigned. The Ohio Court of Appeals reversed the trial court's grant of summary judgment against the plaintiff and held that she could proceed to trial on her claim that the company might have used the non-fraternization policy as a pretext for gender-based discrimination.

### Conclusion

Non-fraternization policies can help employers avoid the potential disruption and decrease of workplace harmony, employee morale and job performance that can result from workplace romances. Non-fraternization policies also can help employers avoid claims of sexual harassment and discrimination, but cannot be a substitute for

an effective sexual harassment policy and education and training for employees.

Employers who wish to implement a non-fraternization policy may want to consider a limited policy with multiple enforcement options, and should seek legal counsel in drafting it to minimize the impact on employees' privacy rights while protecting the company's legitimate business interests. Broad non-fraternization policies may be viewed as an attempt to impose morals on employees outside the workplace without truly advancing the company's interests, and, on the practical side, may face significant opposition from workers and decrease employee morale and loyalty without sufficient benefit to the company.

Finally, employers should be diligent in responding to and investigating reported violations of non-fraternization policies, and make sure that enforcement is fair, consistent and gender-neutral. ■

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