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Expert Analysis

Understanding and Mitigating Liability for Workplace Romances

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The recent life-imitating-art headlines featuring illicit romantic affairs involving senior corporate and governmental leaders remind us that there are legal implications to workplace romances. Once they become unpleasant or end (as some inevitably do), the former pair must continue interacting in the workplace, which may create an environment ripe for a sexual harassment claim.

To understand the legal risks associated with a soured workplace romance between a supervisor and a subordinate—that is, when the mutual attraction between two employees of different organizational statuses ends—it is important first to understand the two main forms of sexual harassment in the workplace—quid pro quo, and hostile work environment. Claims for quid pro quo harassment ("a favor for a favor") require proof that a request for sexual favors, sexual demands or conduct of a sexual nature is used either explicitly or implicitly as a basis for an employment decision.[1]

Quid pro quo harassment presumes that the harasser is in the position to actually impact the terms and conditions of someone's employment—in nearly all cases, the perpetrator is a supervisor. It also requires that the sexual conduct be unwelcome.[2] A consensual sexual relationship in the workplace simply does not qualify as sexual harassment, but, as discussed later, what constitutes "consent" is not always clear.

A hostile work environment claim depends upon proof of sexual conduct that unreasonably interferes with an employee's work performance or creates an intimidating, hostile or offensive working environment.[3] These claims can arise from peer-to-peer conduct and even conduct directed at supervisors by subordinates. Like quid pro quo harassment, to be actionable, the conduct must be unwelcome.

Strict and Personal Liability

Sexual harassment is conduct based on sex and to the extent it impacts employees in the workplace, it is a form of gender discrimination. Three statutes prohibit workplace gender discrimination in New York: Title VII of the Federal Civil Rights Act of 1964 (Title VII), the New York State Human Rights Law (New York Executive Law §296 et seq.) (SHRL) and the New York City Human Rights Law (NYC Administrative Code, § 8-101 et seq) (CHRL). Each statutory framework operates differently with respect to their targets of liability and remedies.

Title VII. Title VII, which applies to employers of 15 or more employees, imposes strict liability upon an employer for quid pro quo harassment.[4] This conclusion is predicated upon agency principles—if a supervisor acts on the employer's behalf in the scope of employment, the supervisor binds the employer.[5] For hostile work environment claims, however, Title VII offers employers the opportunity to defend against liability based upon reasonable remedial measures intended to prevent and address such misconduct in the workplace—the *Faragher-Ellerth* defenses.[6] While the corporate liability for the supervisor's quid pro quo harassment is clear, liability is not likewise personally imposed on the supervisor—there is no individual liability under Title VII.[7]

New York State Human Rights Law. The SHRL, which applies to employers of four or more employees, also imposes liability on a corporation for a supervisor's quid pro quo harassment, but the state law applies liability differently. New York state courts reject the concept of vicarious liability for sexual harassment in the workplace and instead require proof that the employer either acquiesced in the conduct or condoned it after the fact.[8] However, the New York courts have imposed strict liability upon the corporate entity for a high level executive's sexual harassment (whether quid pro quo or otherwise).[9]

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The courts have reached this conclusion based upon the capability of senior corporate officers to shield a corporation from knowledge about such activities by virtue of their position, and thus effectively deprive employees of the ability to report discriminatory conduct. As to personal liability, it will be imposed on an individual under the SHRL if the individual has a sufficient ownership interest in the entity, and he or she participated in the conduct, whether directly or by encouraging or condoning it.[10]

New York City Human Rights Law. The CHRL expressly imposes strict liability for a supervisor's sexual misconduct in the workplace if the employer knew about it and failed to correct it or should have known about it and failed to exercise reasonable diligence to prevent it. However, Code Section 8-107(13)(d) provides an employer with an opportunity to mitigate civil penalties and punitive damages for a supervisor's misconduct if the employer can demonstrate that it established and complied with policies for the prevention of the behavior, which includes procedures for reporting and investigating the complaint, and programs for educating employees about unlawful discriminatory practices and for supervising its employees, provided the employer has a record of no or few prior incidents of discriminatory conduct.

Code Section 8-107(13) also offered the promise by the New York City Human Rights Commission to establish model rules, policies and programs for New York City employers that, if followed, could absolve the employer of any liability for civil penalties or punitive damages. As of this date, those policies have yet to be promulgated. Finally, section 8-107(a)(6) of the CHRL holds individuals personally liable for its violation.

After It's Over

Sexual harassment must be unwelcome to be actionable. Consensual relationships are, by definition, welcome relationships. But what happens when the relationship is over? Or what happens if the subordinate claims that consent was not, in fact, freely given in the first place because it couldn't be?

Claims based upon "expired" consent are not fruitful for employees. At least one court rejected out of hand an employee's claim that a past relationship with a boss as the basis for a quid pro quo claim because the employee was unable to demonstrate her former lover demanded that she continue the relationship after it consensually ended.[11] Likewise a claim based upon "strained relations" following the termination of a consensual relationship between a supervisor and subordinate would be insufficient to create actionable sexual harassment unless the employee demonstrates that the supervisor subjected the employee to unwelcome sexual conduct following the break up. But no actionable conduct occurs simply because the supervisor and subordinate have parted ways.[12]

A consensual sexual relationship in the workplace simply does not qualify as sexual harassment, but, as discussed later, what constitutes "consent" is not always clear.

Claims based on lack of consent at the time the relationship begins are a bit harder to analyze because these claims are almost always fact specific.[13] While consent is inherently relative, a senior executive's claim of lack of consent to a relationship with an executive one rung up the corporate ladder should not be equivalent to a claim by an administrative assistant involved in a sexual relationship with a chief executive officer.

At What Cost?

The legal framework defines the risks posed by supervisor-subordinate relationships in the workplace: under all three statutory frameworks, a spurned subordinate, unhappy perhaps with the real or perceived benefits of the relationships, or falling out of like or love, might establish a colorable claim that workplace benefits were withheld or threatened to be withheld based upon commencing, continuing or ending the sexual relationship.

The available damages for these claims may include back pay, front pay, compensatory damages, attorney fees and punitive damages. In addition, corporate actors may face an uphill indemnity battle given that a claim arising from a personal relationship seems to inherently fall outside the corporate status that would otherwise entitle an officer to the benefit of indemnity.

Aside from the risk that an employer will face a sexual harassment claim, these relationships may also impact employee morale. During the relationship, other employees may claim that he or she did not receive the same benefits as the employee engaged in the sexual relationship with a supervisor—what is commonly referred to as a "paramour preference." This state of affairs is not actionable, at least not in New York, because the conduct is not based on gender; all employees—male and female—are excluded from those benefits.[14] But even if a "paramour preference" does not truly exist, these relationships may impact employee morale because employees may perceive that they are being treated unfairly, or that workplace rules are being applied unevenly, and based upon matters not legitimately related to their work performance.

Other consequences to these relationships include claims of blackmail and extortion, the disclosure of highly private information regarding corporate executives, and even the disclosure of sensitive business and, in the case of some recent headlines, national security information. Finally, conflicts arising from these relationships may divert critical corporate resources into expensive, distracting and non-business related investigations.

Managing Such Relationships

Workplace romances are a fact of American life. But given the strict liability that courts may impose on corporate employers for their supervisor's acts, employers should proactively manage these issues.

The Basics: Policies and Training. No employer today should lack a clear and effective sexual harassment prevention policy and appropriate complaint mechanism. These policies are not only relevant to the litigation of these claims (for liability

or mitigation of damages), but these policies communicate to employees that business decisions will be based on legitimate, performance-related criteria—not gender or another protected category.

Written policies should be disseminated to all new hires and should be recirculated on a regular basis to the entire work force together with a firm communication from management. If and when the New York City Human Rights Commission establishes model rules, policies and programs for New York City employers, those policies should be rigorously followed. Policies and training are investments that pay off not only in potentially mitigating legal liability or damages, but in promoting best workplace practices.

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Conflict of Interest Policies. A conflict of interest policy provides a sensible adjunct to a sexual harassment policy. In addition to addressing other ethical issues in the workplace, the policy might advise supervisors that relationships with their direct subordinates, if not disclosed, may result in termination of employment. While some employers have banned supervisor-subordinate relationships completely, such a ban would appear to invite a discriminatory application of these policies because it is clear these relationships will happen. Instead, a better approach would be to require prompt disclosure of the relationship, which would allow the employer to take appropriate steps, such as changing a reporting relationship, or taking other steps to mitigate potential liability.

Love Contracts. Yet another approach is to set the ground rules for these relationships in writing. These agreements, sometimes referred to as "love contracts," serve a number of beneficial purposes. First, contracts formally require the full disclosure of the relationship so that the employer can make an informed decision regarding reporting relationships or take other steps to address any conflict the relationship poses.

Second, the contract, which typically asks the employee to acknowledge the employee's consent is freely given, as well as outline the issues that may arise in the future, provides an excellent defense to later claims that the subordinate did not truly consent to the relationship. It is also good practice to advise the subordinate to seek legal counsel before signing it. Typically a love contract will make reference to an employer's harassment policy and complaint mechanism—indeed, the most effective contracts will require both the supervisor and subordinate to certify that they have read the policy and will comply with it.

Finally, to avoid the potential embarrassment and disclosure of private information in the course of any court proceeding, employers should consider adding an arbitration provision to the love contract, to make it clear that any claim arising from the relationship (or even more broadly, arising from employment generally) will be subject to private arbitration.

Conclusion

Employers must be certain their sexual harassment prevention policies are not only adequate, but communicated on a regular basis to their employees. Employers should also consider implementing conflicts of interest policies and formal devices, such as love contracts, to be sure of full disclosure at the outset of the relationship so that the employer may mitigate exposure. Doing nothing about workplace romance between a supervisor and subordinate is neither a prudent nor a viable option.

1. *Father Belle Community Ctr v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996).
2. *Zutrau v. Ice Sys.*, 33 Misc. 3d 1215A, 941 N.Y.S.2d 542 (N.Y. Sup. Ct. 2009).
3. *Father Belle*, 221 A.D.2d at 50, 642 N.Y.S.2d at 744. The New York City Human Rights Law standard only requires proof of unequal conduct based upon gender. *Williams v. New York City Housing Authority*, 61 A.D.3d 66, 872 N.Y.S.2d 27, 31 (1st Dept. 2009).
4. 42 U.S.C. S §2000e et seq.; *Karibian v. Columbia University,* 14 F.3d 773, 777 (2d Cir. 1994).
5. *Karibian*, 14 F.3d at 777-78.
6. It is possible the U.S. Supreme Court may modify these defenses after the Nov. 26, 2012 oral argument in the *Vance v. Ball State University* case (Sup. Ct., Index No. 11566).
7. *Guerra v. Jones*, 421 Fed. Appx. 15, 17 (2d Cir. 2011).
8. *Father Belle*, 221 A.d.2d at 53, 642 N.Y.S.2d at 746.
9. *Father Belle*, 221 A.D.2d at 54, 642 N.Y.S.2d at 746-47.
10. *Patrowich v. Chemical Bank*, 63 N.Y.2d 541,542, 483 N.Y.S.2d 659. 66-61 (1984); *Pepler v. Coyne*, 33 A.D.3d 434, 435, 822 N.Y.S.2d 516, 517 (1st Dept. 2006).
11. *Zutrau*, 33 Misc.3d 1215A, 941 N.Y.S.2d 542.
12. *Mauro v. Orville*, 259 A.D.2d 89, 92-93, 697 N.Y.S.2d 704, 708 (3d Dept. 1999). See *Mandel v. Rofe*, 2012 U.S. Dist. LEXIS 103692 at *5 (S.D.N.Y. 2012) (even if consent was freely given at the outset of the relationship, a claim for quid pro quo harassment may be based upon implicit threat against employee for withdrawing that consent and failing to continue the relationship).
13. *Karibian*, 14 F.3d at 779.
14. *Fattoruso v. Hilston Grand Vacations*, 2012 U.S. Dist. Lexis 80807 at *13-14 (S.D.N.Y.), citing *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307-8 (2d Cir. 1986).