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What Execs Don't Get About Office Romance

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Sexual harassment — and how to deal with it — is well understood by most companies. But now new dangers are being recognized in the ways an office romance affects the people around it. “Hostile work environment” claims, and their financial costs, are just the start.

BY JOHN A. PEARCE II

SHOULD COWORKERS have sex with each other? Should employers try to stop them?

The answer to the first question is that the question isn't worth answering — because office romance is inevitable anyway. The answer to the second is more interesting. And due to recent shifts in the legal climate, for companies, it's also more scary.

There is a misunderstanding at the epicenter of the office romance debate, even as it attracts increasing scrutiny due to famous examples such as the recent episode involving CBS Corp.'s “Late Show With David Letterman” host. Contrary to some commonly misread signals, managers are not interested in stamping out employee dating. Cohesive relationships among employees, including some that become romantic, can help build esprit de corps within the work team and affinity for the company. However, sexual relationships and romances change office dynamics in potentially problematic ways, presenting legal challenges such as allegations about sexual harassment and a hostile work environment, and those challenges need to be managed skillfully.

The recent high-profile revelations about David Letterman's office romances with subordinates in his production company highlight some of the dangers involved in an office romance.



THE LEADING QUESTION

How should companies handle office romances now?

FINDINGS

- ▶ Accept first that romantic relationships are inevitable in the workplace.
- ▶ Though the individuals in the couple get most management attention, coworkers around the couple suffer, too.
- ▶ Claims of a “hostile work environment” are rising, presenting wider threats to organizations than sexual harassment litigation did.

Before addressing the challenges, though, we should recognize just how common and unstoppable office romance is. Surveys provide convincing evidence:

■ In a survey by CareerBuilder.com in 2009, 40% of respondents revealed that they have dated a coworker, with 18% indicating two or more such relationships.¹ An additional 12% are on the sidelines but eager to join the scrum.

■ Office romances extend across the age spectrum. Employees between the ages of 35 and 44 are the most likely demographic to date a coworker, with 44% acknowledging that they had done so.² In the age group of 55 and older, 34% of employees admitted to having an office relationship.

To be clear, an office romance is a relationship between two individuals employed by the same company that advances beyond the socially acceptable employer-employee association and the work-related duties that require their interaction. The relationship can be of a sexual nature where employees engage in sexual activities in and outside work, or where one employee makes sexually suggestive remarks about the other. These relationships

often involve a common grouping of situations, such as where the supervisor and subordinate engage in exclusive and frequent lunches, dinners and drinks together, or where the subordinate is extended invitations to private social events such as parties, birthdays or trips. Perhaps surprisingly, office romances can create problems for the company whether or not the couple's interpersonal relationship runs smoothly.

As an indication of the importance of office romances, the CareerBuilder.com survey found that three in 10 respondents say they married a person they dated at work. By permitting office romances, companies provide what many employees see as a prime benefit of employment with the company — an opportunity to enrich their social lives.

It's no wonder the frequency of office romances is high. In a Spherion Corp. survey, employees acknowledged the possibility that an office romance might jeopardize their job security or advancement opportunities, yet 42% of them said an open office romance is worth the risk compared with 35% who prefer to keep an office romance private in the office.³

Private or not, office romance will be with us as long as offices are.

ABOUT THE RESEARCH

This research builds on my previous work to improve corporate strategy formulation by integrating legal insights into the processes of environmental and competitive analyses and strategic choice. Because there are legal implications of every strategic move, executives rely on in-house counsel or legal consultants to ensure that their plans comply with the law and judicial interpretations. However, using attorneys as post-decision advisers can preclude executives' consideration of options that derive from the rule of law. Laws both constrain action and help to delineate options that can produce optimal outcomes for the company. Thus, legal input can improve executive decision making on important topics such as how to deal with the issues that arise from office romance.

In the course of this research, I performed quantitative and case-based research. To ground the research in the experience of many managers and their employees, I reviewed a number of large database surveys, conducted by CareerBuilder.com, Chubb, *Glamour* magazine, Lawyers.com, Society for Human Resource Management, Spherion, Steelcase and Vault.com. These findings are complemented by published survey results from the U.S. Department of Labor.

I then reviewed U.S. federal and state legislation, including Title VII of the Civil Rights Act of 1964 and publications of the Equal Employment Opportunity Commission. Next, I investigated dozens of U.S. court case renderings on sexual harassment and hostile working environments.

Finally, I conducted a comprehensive review of corporate best practices pertaining to the development of a business policy designed to prevent inappropriate workplace behavior associated with the negative repercussions of office romance. I synthesized the key lessons of success and generalized them into a set of findings that can be used by executives to better design and implement a policy that optimizes a company's chances of avoiding legal entanglements while allowing its employees to enjoy social interaction.

The New Management Challenges of Office Romance

Difficulties stemming from office romances can arise for the company in three main ways.

The first one isn't new: Some employees object to being pursued romantically on the job, at some times and by some people. A survey by Vault.com reveals that 38% of employees report that they have received unwanted sexual advances from their coworkers.⁴ A joint survey by *Glamour* magazine and Lawyers.com found that 47% of employees regard being asked on a date by their supervisor as uncomfortable attention, and 36% stated that being complimented on their body or physique by their supervisor of the opposite sex is inappropriate.⁵

And it's not just the boss-and-direct-subordinate pairing that causes problems. The CareerBuilder.com survey found that 22% of employees admitted dating a married coworker, and 27% said they had dated someone with a higher position in the organization than their own.

The second difficulty in office romance gets less attention: While office romances are stimulating, ex-

citing and energizing for the couple involved, their noninvolved coworkers see these dalliances as destructive for everyone else. A 2008 workplace survey by Steelcase Inc. found that 85% of respondents believe that office romance is a workplace distraction.⁶

Of course, some romances are sweet and foster good feelings and well wishes. Some resemble live soap operas imbued with the likelihood of drama. However, everyone knows the key governing fact: Most office romances end, some with lingering awkwardness and animus.

When one member of the couple wishes that the romance could continue and the other does not, the “dangerous liaison” syndrome is likely to disrupt the workplace. Patterns of distrust emerge. Sides are taken. Reputations are damaged. The possibilities of retaliation and retribution lurk in every assignment and evaluation. In fact, the survey published by Lawyers.com found that the fear of reprisal after a romance ends affects 67% of employees.

The third cause for managerial concern is the freshest, and is increasingly posing legal trouble for businesses. Difficulties for the company arise because many romances, certainly those involving a supervisor and a subordinate, can create resentment among other “third party” subordinates who second-guess the fairness of evaluations and rewards. If favoritism is detected or even suspected, motivation is undermined. The disruption in the workplace deteriorates toward a productivity death spiral — or, equally devastating, a hostile work environment lawsuit. According to U.S. Equal Employment Opportunity Commission regulations, an employer may be liable for a hostile work environment claim when there is unlawful sex discrimination against third-party employees who were qualified for but denied an employment opportunity or benefit, because it was given to an employee who was engaged in a romantic relationship with a supervisor.

Claims of sexual harassment and hostile work environment are traumatic for the individuals directly involved, their coworkers and for the company as a whole in terms of workplace disruption, threats to morale and company culture, and reputational damage. Performance losses result from absenteeism, low productivity and employee turnover.

Additionally, the legal ramifications are likely to bring unwanted attention on management prac-

tices and individuals’ behavior and motivation. The legal proceedings that are likely to result are time-consuming, contentious and costly, regardless of the outcome. Although the vast majority of sexual harassment complaints are believed to be concluded through negotiated settlements that are acceptable to the victims, other charges are pursued by the plaintiff through litigation.

A Growing Problem

The evidence of the widespread nature of sexual harassment and hostile work environment problems in the workplace is compelling:

- The U. S. Department of Labor reports that 71% of working women cope with some form of sexual harassment during their careers.⁷
- A poll of the largest U.S. service and industrial companies finds that 66% of women vice presidents report that they personally have been sexually harassed.⁸
- According to a Chubb Corp. survey of the presidents of privately held companies, 22% report having employees file sexual harassment or hostile work environment complaints with the EEOC or a state agency.⁹
- The most recent available statistics show that in 2008, 13,867 cases alleging sexual harassment and hostile work environment were filed with the EEOC — the highest level in six years.¹⁰
- The direct monetary benefits paid by companies to settle sexual harassment and hostile work environment claims through the EEOC have averaged \$47.8 million annually for the past 12 years. That doesn’t sound like much, given the prevalence of the problem. Unfortunately, the bulk of financial costs don’t show up in EEOC outcomes. The largest monetary payments — which are in addition to these amounts — are determined separately through litigation or through arbitration that is commonly advocated by employers to reduce the corporate costs of litigation and to minimize public disclosures.

The recent high-profile revelations about David Letterman’s office romances with subordinates in his production company highlight some of the dangers involved in an office romance. On October 1, 2009, Letterman mixed jokes and confessions during his nightly monologue in revealing on his TV program that he had had sexual relationships

with multiple members of his 70-person staff.

Letterman's impetus for divulging his secret was that Robert J. Halderman had been arrested earlier in the day for trying to extort the late-night comedian. Halderman gave Letterman a package of materials about the affairs that "contained clear, explicit and actual threats that [were designed to] ... destroy the reputation of Mr. Letterman and to submit him and his family to humiliation and ridicule." Unless Letterman agreed to a payment of \$2 million, Halderman threatened to make the information public. Letterman informed authorities about the threats, and Halderman was arrested. Letterman admitted his actions to preempt the disclosures by the press.¹¹

Questions surfaced immediately. Letterman appears to be an extortion target — but is he also guilty of victimizing his employees through criminal sexual harassment? Will any of his sexual partners decide to pursue legal action? Will they charge that they felt coerced into affairs with Letterman, even if the liaisons appeared to be consensual at the time?

Equally critical, there are questions concerning the impact that Letterman's behavior had on the workplace for all of his employees. Will other employees back their media interview claims with formal charges that their knowledge of Letterman's sexual relationships created a hostile work environment that was biased against them or in which it was difficult to work? Will coworkers bring formal charges that because of Letterman's office romances he showed favoritism toward his sexual partners, providing them with opportunities that nonromantically involved coworkers were unjustly denied?

The Special Dangers of a Hostile Work Environment

Media visibility, arbitrated decisions and courtroom judgments have alerted managers to the dangers of a "hostile work environment," which is the legal term that describes a pattern of offensive, hostile, abusive conduct or a favoritism atmosphere caused by management or coworkers.¹²

While sexual harassment complaints are most likely to center on two people, hostile work environment claims arise from the damage to the employment experiences of many more — 486 employees in the case of Mitsubishi Corp., which agreed to pay \$34 million to settle an EEOC suit on

behalf of employees who were groped and subjected to lewd jokes while on the job.¹³

Managers and the legal system share a concern for hostile work environments that are sufficiently severe or pervasive that they interfere with employees' work performance. The situations of concern are serious. Sexual flirtation, innuendo or vulgar language that is trivial, or merely annoying, does not establish a hostile environment.

There is evidence that the emergence of a hostile work environment is directly related to a company's tolerance of office romances involving superiors and their subordinates. Although the law does not forbid a coworker's romantic involvement with a supervisor, managers need to be concerned that the work environment will become fouled by a supervisor's actual or perceived sexual favoritism or preferential treatment of his or her paramour. Such behavior could lead other employees to believe that favorable treatment may be obtained from the supervisor in exchange for a romantic or sexual relationship. Unequal treatment of employees, combined with sexually explicit behaviors, creates an illegal hostile environment and raises legal and business problems.

Despite the jeopardy involved, the CareerBuilder.com survey found that among workers who have dated a coworker, a third admit that they have dated someone with a higher position in their company. Of those, 42% said that they have dated their boss.

An affair between the supervisor and subordinate, manifested by sexual horseplay in the office or preferential treatment of the subordinate that prevents coworkers from being evaluated on grounds other than their sexuality, makes an office romance likely to raise objections and provide circumstances that are legally actionable.

A hostile environment can come in uglier forms. An example is quid pro quo harassment in which a supervisor uses an employee's response to a sexually charged overture in the workplace as the basis for employment decisions affecting the employee, thereby attempting to force the subordinate to tolerate or participate in the sexual conduct.

Courts have determined the existence of a hostile work environment by evaluating such factors as the frequency of the offending conduct, its severity, whether it is physically threatening or humiliating

or an utterance and whether it unreasonably interferes with an employee's work performance. The effect of the company's sexual culture on the employee's psychological well-being is also relevant in determining whether an employee found the environment abusive.

The courts and arbitrators consider whether the alleged harasser was a coworker or a supervisor, whether other employees joined in perpetrating the harassment and whether the harassment was directed at more than one individual. In this assessment, no single factor is required or determinative. Thus, the general work atmosphere for employees other than the plaintiff is relevant to determining if a hostile work environment exists.

What Managers Need to Know About Hostile Work Environment Law

The origin of hostile work environment law is found in Title VII of the Civil Rights Act of 1964, which makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." The Equal Employment Opportunity Commission regulations expand Title VII to protect against unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (See "About the Research," p. 38.) Further, EEOC regulations provide that "where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination *against other persons* who were qualified for but denied that employment opportunity." (Emphasis mine.)

Within the framework of a hostile work environment, a third party, commonly a coworker of the subordinate involved in an office romance, sues the employer. Third parties may pursue litigation for hostile work environment by arguing that they were harmed by the favoritism of the supervisor toward the subordinate paramour.

When a supervisor or any organizational superior and a subordinate are engaged in a romantic relationship, coworkers may claim that the involved person-in-power favors that subordinate. The EEOC regulations define favoritism as a situation "where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors."

There are three categories of favoritism. The first involves isolated instances of favoritism toward a paramour. An isolated instance of preferential treatment based on consensual romantic relationships does not violate Title VII. Thus, for example, a female employee who is denied an employment benefit because it is awarded by her supervisor to her coworker who is his paramour would not have a viable Title VII claim based on this single, isolated instance of sexual favoritism. Such favoritism is not illegal, because an allegation claiming the existence of a hostile work environment should prove a pattern of repeated, routine or generalized level of harassing behavior by a supervisor, manager or employer.

The courts have judged a host of actions as being an insufficient basis for finding a company guilty of fostering a hostile work environment: a male supervisor looking down the low-cut blouse of a female employee, following her movements as she leaves the premises, blowing her kisses across the office, attending a private birthday lunch with her, having clandestine meetings in and out of the office with her, telling her during a company Christmas party that she is beautiful, giving her the largest year-end bonus and giving her a Christmas gift.¹⁴ The principal shortcoming of these charges is that they were one-time events that did not prove a pattern of repeated, routine or generalized level of harassing behavior by the supervisor.

The second category of illegal favoritism that can result in a claim of hostile work environment is based on incidents of coerced sexual conduct. It occurs when an employee is coerced into submitting to unwelcome sexual advances in return for a job benefit. When this occurs, coworkers who were qualified for but denied the benefit could believe that sexual favors were generally a condition for receiving the benefit. Such an implied requirement would be evidence of favoritism in support of a legal claim that the coworkers, as well as the targeted employee, were

victims of a hostile work environment.

In one case, for example, the court considered evidence of telephone calls made by a supervisor to proposition several female subordinates at their homes, descriptions of the supervisor's sexual encounters with subordinate female employees and the supervisor's engagements in suggestive behavior at work. The court found that the supervisor demonstrated a "total inability to separate his work life from 'personal' matters."¹⁵

This evidence, supplemented by confirmation of other harassing behaviors, led the court to side with the plaintiff, who was a coworker of a woman who was having an affair with their supervisor. The court found that when sexual favors play a role in determining individual rewards, including promotion and irrespective of qualifications, the supervisor is guilty of harassing the subordinate and creating a hostile environment for the subordinate and the subordinate's coworkers. The court ruled that the plaintiff's Title VII rights were violated because granting sexual favors was a condition for a promotion. The court also noted that even when an affair between supervisor and subordinate is consensual, the law has been broken if sexual favors play a role in the rewards process.

The third category of favoritism occurs when decisions based on sexual favors are widespread in a workplace. Offended employees can establish a hostile environment claim in violation of Title VII. The claim may be established regardless of whether any objectionable conduct is directed at them personally and regardless of whether those who were granted favorable treatment willingly provided the sexual favors.

An example of a hostile work environment caused by this form of favoritism involved a female employee who filed a claim against the Securities and Exchange Commission after five years of employment. The court concluded that evidence presented at trial established that "conduct of a sexual nature was so pervasive" at the department that it created "a hostile or offensive work environment," which affected employees who found the conduct offensive and repugnant.¹⁶ The court found that the employee was forced to work in an environment in which managers harassed her and other female employees by "bestowing preferential treatment

upon those who submitted to their sexual advances." This preferential treatment undermined the motivation and performance of the employees who did not submit to the sexual overtures and deprived them of promotions and other benefits.

Tactics to Prevent a Hostile Work Environment (and the Damages It Brings)

Managers can take proactive steps to protect their businesses from hostile environment claims and the associated consequences of lawsuits, large monetary jury awards, public embarrassment and damage to employee morale and productivity. By developing a policy that declares the expectations of management, employers can help shield their company from legal liability by preventing or reducing unacceptable incidents of supervisor behavior that can create a hostile work environment. By enforcing the policy as necessary, employers can respond promptly and confidently to claims of sexual harassment or hostile work environment that stem from an office romance.

The elements of a policy to eliminate the downside consequences of office romance are similar to those needed to prevent sexual harassment in the workplace, since the problems have important commonalities. Both represent violations of Title VII of the Civil Rights Act and Equal Employment Opportunity Commission regulations. Both involve intense interpersonal dynamics. Both damage the involved employees' work performance or the productivity of their coworkers. Both can result in legal action by employees to hold the employer culpable unless executives of the company can prove that they took two steps:

- They took strong action to prevent office romance from degenerating into favoritism, sexual harassment or a hostile work environment, and
- If problems arose, the company activated a response plan to halt the suspected violation immediately, investigate the circumstances in a thorough and unbiased manner, penalize guilty perpetrators according to preestablished guidelines and take action to close the gap in the company's prevention plan.

Prevention is the best tool for minimizing the exposure of the company to lawsuits stemming from

office romances and associated sexual harassment or hostile work environment claims. To prevent problems from occurring, an employer should educate employees on the company policy concerning office romance. That official notification can supplement the company's total and unqualified opposition to sexual harassment in the workplace, explaining its illegality, specifying appropriate sanctions for breaching of the policies and identifying the company's plan to sensitize all supervisory and nonsupervisory employees on the issues.

The cornerstone of an employer's efforts to prevent favoritism, sexual harassment and hostile work environments is a policy statement. That written and widely circulated document puts all employees on notice that the employer actively seeks to identify and eliminate all problems stemming from sexual dynamics. A carefully formulated and implemented policy to prevent favoritism, sexual harassment or a hostile work environment provides a useful defense against claims for liability and punitive damages if violations occur. Conversely, the absence of a policy makes it difficult for an employer to prove that it exercised reasonable care to prevent or correct the problem.

Yet, many companies do not have a formal written policy on office romance. A survey by the Society for Human Resource Management of 617 companies on workplace romance found that 72% of the respondents did not have a written policy, 13% had a policy and 14% said they had an unwritten, but well understood, norm in their workplace.¹⁷ These figures may provide a clue as to why EEOC statistics on sexual harassment claims continue to increase.

To reduce the possibility of illegal employee behavior and associated company liability, employers should have a policy against favoritism, sexual harassment and hostile work environments. The policy should include an effective complaint procedure, a distribution plan, education for all employees and a system for timely investigations and corrective action. The policy statement should be clear, emphatic, easily understood, free of confusing legal terms and provide examples of conduct targeted for immediate dismissal.

A policy on office romance needs to specify prohibitions, enforcement and penalties. The main prohibition to be determined for managers pertains

to dating between employees. A blanket prohibition against any employee dating any other employee is rare. Wal-Mart Stores Inc. has one, but they are difficult to enforce and unpopular among employees.

A policy that forbids dating between employees at different levels of the organization is more palatable among employees but often fails to address most troublesome relationships. However, a policy that explicitly forbids dating between a supervisor and a person under his or her direct chain of command directly addresses the most dangerous pairing of employees. Their power imbalance creates the opportunity for the supervisor to impose his or her will over the subordinate, to be vindictive or to show favoritism. A ban that proactively attempts to prevent these self-evident hazards is an intuitively appealing centerpiece of an office romance policy. Once set, a policy limiting office romance needs to be monitored vigilantly and the penalties consistently applied.

The importance of expressing concern for fairness is suggested by the findings of the survey by Lawyers.com, which reveals that 26% of workers claim that they have experienced sexual harassment at work. Only 52% of these workers had taken action, such as reporting the behavior, confronting the harasser or quitting their job. The respondents' most common reason for not acting was their sense that nothing would happen even if they complained (22%).

Incentive for Proactive Attention

When an employee complains to management about a negative consequence of an office romance — alleged favoritism, sexual harassment or a hostile work environment — the employer is obligated to investigate the allegation. If the claim has merit, an employer has established an affirmative defense by exercising reasonable care in advance of and in response to the claim. Different strategies exist to handle claims, and the employer has latitude in deciding how to respond. However, the courts look for evidence of the employer's zeal in investigating and resolving claims in judging the company's determination to address the current situation and to prevent any future violations.

The psychic, temporal and financial costs of romantically and sexually precipitated problems in the workplace can combine to cripple productivity and endanger employee relations. The dollar cost

of defending against a claim of office favoritism, sexual harassment or hostile work environment can start at \$250,000.¹⁸ During resulting litigation, company records come into play. In addition, personal intrusions, including computer work files, e-mails and even personal e-mails from home accounts of all involved parties become relevant and discoverable. Unfortunately, data from the SHRM survey suggest that such events are likely, since an average of 4% of the employees involved in a failed office romance file a formal complaint.

Executives can construct safeguards by educating their employees about a policy of the company that is designed to prevent office romances from becoming a disruptive force. Then, if trouble strikes, executives can activate a formal response plan to deal quickly and fairly with any violation of the policy, to close the gap in the company's prevention plan and to restore a productive work environment that is respectful of all employees.

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