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Law Report

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WORKPLACE ROMANCES

Businesses Can Control Consensual Romantic Relations Between Supervisors and Subordinates

Federal and state law protects workers from sexual harassment in the workplace. Thus, a business can be liable to an employee who establishes that the company condoned a sexually hostile or offensive work environment or who establishes that a supervisor utilized job security or advancement as leverage to obtain sexual favors from that employee.

Such consequences can make employers understandably nervous about dating between employees. A company's executives may consider they cannot "regulate" intimate, off-hours activities by consenting adults. Yet, a consensual relationship between a supervisor and a subordinate that blossoms in the spring might sour by summer, resulting in the subordinate's allegations that the business should be responsible for the supervisor's supposedly "hostile," "offensive" or otherwise unlawful actions.

Fortunately, there are several appeals decisions, in both the federal and California court systems, that provide guidelines for an employer's internal policy limiting dating between supervisors and their juniors. Any business should seriously consider implementing and enforcing such policy to head-off expensive and distracting legal actions arising from this highly volatile area.

Romance Blossoms Between Sales Manager and His Subordinate: A recent helpful decision is *Barbee v. Household Automotive Finance Co.* (2003) 113 California Appellate Reports, Fourth Series (Cal.App.4th) 525, 6 California Reporter Third Series (Cal.Rptr.3d) 406. Robert Barbee

was the national sales manager for HAFC. He began dating salesperson Melanie Tomita in October 2000. A few months later, CEO John Vella warned Barbee that "intercompany dating was a bad idea."

Employer HAFC had an internal policy which stated: "Situations of relationships between employees may... cause a conflict of interest. If a consensual intimate relationship between a supervisor and any employee within that supervisor's direct or indirect area of responsibility is desired, it is the supervisor's responsibility to bring this to management's attention for appropriate action (i.e., possible reassignment to avoid a conflict of interest)."

Company Terminates the Manager to Avoid Potential Sexual Harassment Claim: National sales manager Barbee met with CEO Vella and human resources director Pat Boney in March 2001. Barbee confirmed that he was in a romantic relationship with salesperson Tomita. Vella and Boney gave Barbee a choice of (a) ending the relationship; or (b) resigning company employment along with Tomita. A few days later, Barbee told senior management that he and Tomita had decided to stay with the company, implying they would end their relationship. However, when Vella and Boney later confirmed that Barbee and Tomita had recently spent a weekend attending the NCAA mens basketball Final Four, HAFC terminated Barbee.

Barbee then sued HAFC for invasion of privacy, alleging the company was prohibited by the California Constitution from terminating him. Article I, Section 1 of

that constitution permits an individual to sue and collect if he or she can show "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy violation." *Barbee v. HAFC*, 113 Cal.App.4th at 530.

The trial judge summarily dismissed Barbee's claim, finding he had failed to present evidence of HAFC's liability for privacy invasion. The Court of Appeal affirmed that decision.

Manager Had a Constitutionally Protected Right to Pursue the Romantic Relationship: First, citing the recent U.S. Supreme Court decision in *Lawrence v. Texas* (2003) 539 United States Reports (U.S.) 558 (finding a statute prohibiting sodomy between persons of the same sex was unconstitutional), the Court of Appeal observed that "[i]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of [constitutionally protected] liberty... Moreover, this protection extends to intimate choices by unmarried as well as married persons." Thus, the court concluded that Barbee "may have a [constitutionally] protected interest in pursuing an intimate or sexual relationship." *Barbee v. HAFC*, 113 Cal.App.4th at 531.

Company Had Corresponding Right to Terminate Manager Who Chose the Relationship over His Job: However, the Court of Appeal found that Barbee could not collect against HAFC since he had no reasonable Please see "WORKPLACE ROMANCES," page 2

THE IMPORTANCE OF WRITTEN EMPLOYEE POLICIES AND AGREEMENTS

Why Would Any Business Need Standardized Employment Policies and Forms?

On the notion that *an ounce of prevention is worth a pound of cure*, we are encouraging our clients to become well educated and to implement forms and policies that will greatly improve a company's legal protection in employment screening, hiring, training, terminations, and other related issues.

We have developed – and periodically revised to match the changing law – a "soup-to-nuts" employee handbook and a package of the following basic hire-to-fire forms and policies. The forms and policies include:

- employment application and form job description (including releases that acknowledge an employer's use of pre-employment

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The Law Offices of Timothy Bowles work primarily in employment and health care fraud law; mediation; arbitration; and civil litigation. While published articles convey the firm's views on topics it has found concern many of its clients, the articles are not intended and should not be considered legal advice. Such professional advice requires full disclosure to an attorney of a client's circumstances and that attorney's opportunity to analyze those circumstances against applicable law.

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expectation of privacy under the circumstances of his particular case. The court acknowledged California and federal case decisions "have approved of restrictions on intimate relationships between employees of an organization or entity where such relationships presented potential conflicts of interest within the organization." Prior judicial recognition of an employer's right to regulate this area "strongly suggests that a supervisor has no reasonable expectation of privacy in pursuing an intimate relationship with a subordinate." Moreover, "managerial-subordinate relationships present issues of potential sexual harassment." *Barbee v. HAFC*, 113 Cal.App.4th at 532.

The Court of Appeal also noted that HAFC "had an express policy requiring that any supervisor who wanted to maintain an intimate relationship with a subordinate bring the matter to the attention of management to allow management the opportunity to take appropriate action to avoid the potential conflict of interest. Further, Vella expressly told Barbee that 'inter-company dating was a bad idea.'

Thus, Barbee had 'advance notice' that HAFC believed his conducting an intimate relationship with a subordinate would present a potential conflict of interest. This notice further diminished any expectation of privacy Barbee otherwise may have had in pursuing an intimate relationship with Tomita." *Barbee v. HAFC*, 113 Cal.App.4th at 533.

Accordingly, the Court of Appeal resolved that Barbee had no reasonable expectation of privacy in pursuing his intimate relationship with Tomita and thus had no claim against HAFC. *Barbee v. HAFC*, 113 Cal.App.4th at 533.

Conclusion: The California Supreme Court will soon consider another side to company regulation of romantic relationships. In *Mackey v. Department of Corrections* (2003) 105 Cal.App.4th 945, 130 Cal.Rptr.2d 57, the Court of Appeal found an employer was not liable for sexual harassment of female employees for allegedly condoning a supervisor's string of sexual relationships with – and resulting favoritism toward – other female workers. The Supreme Court has accepted that case for review. If that court reverses the Court of Appeal, it could increase

markedly employer responsibility for monitoring and controlling such relationships in the workplace. We will keep you informed on the outcome of the *Mackey* case.

In any event, the *Barbee* case clearly permits employers to make certain romantic relationships between employees a company issue, with employer ability to terminate supervisors – and other workers – who violate policies prohibiting such dating. It is well within a business's prerogative to issue and enforce a balanced, written policy regulating dating between workers where such practices may create instability, distraction, and upset within the group. The Court of Appeal obviously found HAFC's policy a good example of the balance required. The policy does not absolutely prohibit romantic relations between supervisors and subordinates. Rather, contemplating that the individuals involved will seek to continue a relationship, it directs a supervisor to provide senior management with advance notice and thus accord management the opportunity to move applicable personnel into unrelated divisions before a problem arises. ■

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tests, notwithstanding the Americans with Disabilities Act and California's constitutional privacy protections);

● pre-employment procedures policy (properly positioning the above tests as aimed at job-related qualities rather than physical or mental disabilities);

● employment agreement (including confidentiality/non-disclosure of company trade secrets and mandatory mediation in the event and/or arbitration in the event of a dispute); and

● termination policy, checklist and standard release (to be applied with troublesome employees for greater protection against later, frivolous suits).

The handbook is normally available on hardcopy and on disk for a \$300 service fee. The forms/policies are available for a \$150 service fee. However, to assist businesses in getting started, we are offering a discounted price of \$400 for both if ordered and paid for prior to June 30, 2004. We look forward to hearing from you soon! ■