

# Law Report

LEGAL NEWSLETTER

VOLUME 6, ISSUE 2

## LOVE CONTRACTS IN THE WORKPLACE

*Businesses Can Choose to Ban or Monitor  
Consensual Romantic Relations Between  
Supervisors and Subordinates*

One year ago, we published "Workplace Romances" in this newsletter (vol. 5, issue 2), detailing the boundaries of a business's ability to control consensual romantic relations between supervisors and subordinates. This article updates that earlier piece, incorporating the growing phenomenon of written "love contracts" in the workplace. Combined with a sensible published policy on the regulation of relationships between managers and junior employees, such "love agreements" establish in advance the foundation for resolving the potentially explosive conflict between a worker's right to privacy and an employer's prerogative in maintaining a productive, distraction-free work environment.

**Employer Options in Preventing Sexual Harassment Claims Arising from Consensual Relationships:** Federal and state laws protect 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.

***A business can be liable to an employee who establishes that the company condoned a sexually hostile or offensive work environment***

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. Employers are also within their rights to request two workers intent on engaging in a romance to execute a written "love contract," acknowledging the consensual nature of the relationship and their mutual obligations to refrain from recrimination and unlawful harassment, discrimination or retaliation in the event the relationship crumbles. As illustrated by the *Barbee* decision below, any business should seriously consider implementing and enforcing such policy and/or "love" agreements to head-off expensive and distracting legal actions arising from this highly volatile area.

***Federal and California courts recognize an employer may implement policies limiting dating between supervisors and their juniors***

**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

Please see "LOVE CONTRACTS," page 2

## MANDATORY SEXUAL HARASSMENT PREVENTION TRAINING

*Larger California  
Employers Must Comply  
with New Law by  
January 1, 2006*

California continues among the leaders in state regulation of the workplace. Perhaps the most significant new development in California's employment-related laws is mandatory sexual harassment training by the start of 2006 for all supervisors in companies with 50 or more employees or independent contractors. California Government Code section 12950.1. Companies must provide a minimum two hours of such training for supervisors employed as of July 1, 2005. Thus, such employers should plan and implement the initial training session for the applicable supervisors during

Please see "HARASSMENT" page 3

*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.*

TIMOTHY BOWLES, ATTORNEY AT LAW

ONE SOUTH FAIR OAKS AVE., SUITE 301, PASADENA, CA 91105 • TELEPHONE: (626) 583-6600 • FAX: (626) 583-6605  
tbowles@tbowleslaw.com • www.tbowleslaw.com

## **“LOVE CONTRACTS”**

Continued from page 1

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).”

***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***

***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 men’s 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 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.

***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 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

‘intercompany 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.

***Employers are also within their rights to request two workers intent on engaging in a romance to execute a written “love contract”***

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.

***“Love Contracts” are Further or Alternative Protection from Unwarranted Harassment Claims:*** Where a business opts to tolerate consensual supervisor-junior romantic relationships, the company can secure the participants’ written acknowledgment of the consensual nature of the relationship and of their respective post-relationship duties if and when they ever decide to call it off. At minimum, such a “love contract” between a manager and a subordinate should contain: ● a confirmation the relationship is fully consensual between the parties; ● each party’s acknowledgement of his/her obligation to comply with the company’s harassment, retaliation and discrimination policies; ● each party’s

Please see “LOVE CONTRACTS,” page 3

## “LOVE CONTRACTS”

Continued from page 2

acknowledgement that no such harassment, retaliation or discrimination has yet arisen out of the relationship; ● each party’s promise to refrain from any conduct disruptive to the workplace and its morale, including the avoidance of public displays of affection and favoritism; ● each party’s promise to immediately utilize the complaint procedures specified in such policies in the event he or she ever perceives a violation; ● and each party’s acknowledgement that a failure to promptly report an alleged violation constitutes an admission that no such improper conduct occurred.

*A “love contract” can serve as an important further protection against unwarranted sexually related claims, placing in writing the company ground rules between a supervisor and his/her junior employee before the romantic relationship has any opportunity to sour*

**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 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. Even if an employer is willing to tolerate such a romance, a “love contract” can serve as an important further protection against unwarranted sexually related claims, placing in writing the company ground rules between a supervisor and his/her junior employee before the romantic relationship has any opportunity to sour.

If you would like any further information regarding implementation of such a policy or agreements, please contact our office. ■



*“What are you—some kind of justice freak?”*

© 2005 The New Yorker Collection from cartoonbank.com. All Rights Reserved.

## “HARASSMENT”

Continued from page 1

the last half of 2005. For any person hired as or promoted to supervisor after July 1, the employer must provide training within six months of the hire or promotion. Upon any initial training, the law requires recurring training of each supervisor every other year. As the training must include information and practical guidance on the applicable federal and state statutory laws and case decisions, it should be conducted by a qualified legal professional.

**Nature of the Required Training:** New Government Code section 12950.1 specifies the required training is “at least two hours of classroom or other effective interactive training and education regarding sexual harassment . . . The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of

harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”

**Definition of “Supervisor”**

**Under the Law:** FEHA defines “supervisor” as any individual entrusted with authority and independent judgment: (i) “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees”; (ii) to direct employees or to adjust their grievances; or (iii) to effectively recommend any action in (i) or (ii) above. Government Code section 12926(r). Thus, administrative assistants, with the ability to make recommendations to their managers, must receive such training.

**By January 1, 2006, Employers of 50 or more must provide a minimum two hours of sexual harassment training for supervisors**

**Employers Covered by the New Law:** For this new training requirement only, FEHA curiously defines “employer” means any person “regularly employing 50

Please see “HARASSMENT” page 4

# TIMOTHY BOWLES

ATTORNEY AT LAW

ONE SOUTH FAIR OAKS AVE., SUITE 301  
PASADENA, CA 91105

Prsrt. Std  
U.S. Postage  
**PAID**  
Glendale, CA  
Permit No. 61

ADDRESS SERVICE REQUESTED

## IN THIS ISSUE

*Love Contracts in  
the Workplace*

*Sexual Harassment  
Prevention Training*

### “HARASSMENT”

Continued from page 3

or more persons or regularly receiving the services of 50 or more persons providing services pursuant to a contract.” Government Code section 12950.1(c). Thus, as currently written, the law directs that an employer with fewer than 50 employees but with more than 50 independent contractors providing its services (for example, a general building contractor regularly hiring 50 or more independently licensed subcontractors) would still have to provide the required harassment training for its employed supervisors.

**Consequences for Non-Compliance:** The new law does not provide any particular penalty for non-compliance. If the California Fair Employment and Housing Commission finds an

employer in violation, it is required to “issue an order requiring the employer to comply with these requirements.” Government Code sub section 12950.1(e).

***A California  
“employer” under  
this new law means  
any person regularly  
employing 50 or  
more persons or  
regularly hiring 50 or  
more independent  
contractors***

FEHA makes it unlawful for any employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment for occurring.” Government Code sub section 12940(j), (k). However, while failure to provide the harassment training required by

Government Code sub section 12950.1 could contribute to a finding that the employer failed to take all reasonable steps necessary to prevent FEHA discrimination or harassment, such failure “shall not in and of itself result in the liability of any employer ... [for] sexual harassment.” Government Code section sub 12950.1(d). On the other hand, an employer’s provision of such training does not insulate that employer from sexual harassment liability. *Id.*

Nevertheless, it would be foolish for an employer to ignore these training requirements on the assumption there are no immediate consequences for a violation. The new law also specifies that the required training and education “is intended to establish a *minimum threshold* and should not discourage or relieve any employer from

providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.” Government Code sub section 12950.1(f) (emphasis supplied). Thus, an employer’s program to ensure that its supervisors receive appreciably more training than this new statutory minimum is the best policy to reduce to near zero the potential for allegations the company failed to take its expected steps to prevent workplace discrimination and harassment.

If you would like any further information regarding our ongoing provision of the training required by this new California law, please contact our office. ■