



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
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Touro Law Review

Volume 13 | Number 3

Article 8

1997

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Recommended Citation

Rogers, Alyce H. (1997) "Employer Regulation of Romantic Relationships: The Unsettled Law of New York State," *Touro Law Review*: Vol. 13: No. 3, Article 8.

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EMPLOYER REGULATION OF ROMANTIC RELATIONSHIPS: THE UNSETTLED LAW OF NEW YORK STATE

INTRODUCTION

Today, romantic liaisons in the workplace occur with great frequency.¹ The acceptance and success of women in the workplace has contributed significantly to the increase of co-worker couples.² Corporate America, however, has not entirely welcomed this contemporary development. Reflecting an attitude of disapproval, business organizations have increasingly adopted a wide range of co-worker anti-fraternization policies restricting amorous associations. In response, several states have enacted laws protecting such relationships. Additionally, more general labor laws protecting rights of employees have recently been interpreted by the courts to include such relationships.

This comment will first examine New York Labor Law Section 201-d, which has been analyzed by both the New York and federal courts as to its applicability to dating³ among co-

1. A recent survey demonstrates that approximately "80% of employees have either observed or been in a romantic relationship at their workplace." See Mary Loftus, *Frisky Business Romance in the Workplace*, PSYCHOL. TODAY, Mar. 1, 1995 at 1.

2. The workforce in America is currently 45% female. See Wendy Berner, BUS. J. PORTLAND, Feb. 21, 1997. It is predicted that by the year 2000, 60% of the American workforce will be women. See Leslie A. Yerkes, *Tips on Making a Point Like A Man*, WORKING WOMEN, March 2, 1997 at 6F.

3. Hereinafter, "dating" or "romance" refers to activities "between willing parties who consciously make the decision to act upon their attraction for one another out of their own free choice." Lisa A. Mainiero, Ph.D., OFFICE ROMANCE: LOVE, POWER & SEX IN THE WORKPLACE 35 (1989). These terms are to be distinguished from sexual harassment, which occurs when "one person engages in sexual behavior toward another but the other person is unwilling to reciprocate and work rewards are attached to the bargain." *Id.* at 34. This paper will only tangentially address sexual harassment as it will focus on consensual office dating relationships.

workers.⁴ Next, it will review the only two cases to question whether Labor Law § 201-d protects co-worker dating relationships in New York.⁵ Third, this comment will examine how jurisdictions outside of New York have regulated intra-office dating.⁶ Finally, this comment will explore both the pros and cons of employee dating, how such relationships affect both the employer and the employee and suggest how the New York State Court of Appeals would rule on this timely issue.⁷

I. NEW YORK LABOR LAW SECTION 201-D

Section 201-d of the New York Labor Law⁸ prohibits an employer from discriminating against an individual based upon participation in certain activities outside the workplace.

4. See *infra* notes 8 - 29 and accompanying text.

5. See *infra* notes 30 - 74 and accompanying text.

6. See *infra* notes 75 - 103 and accompanying text.

7. See *infra* notes 104 - 144 and accompanying text.

8. N.Y. LABOR LAW § 201-d (McKinney 1986 & Supp. 1997). This section provides, in pertinent part:

2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

a. an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal. . . ;

b. an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without the use of the employer's equipment or other property;

c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or

d. an individual's membership in a union or any exercise of rights granted under Title 29, U.S.C.A., Chapter 7 or under article fourteen of the civil service law.

N.Y. LABOR LAW § 201-d(2) (McKinney 1986 & Supp. 1997).

Specifically, protection is afforded to a person's political activities,⁹ use of consumable products,¹⁰ legal recreational activities¹¹ and union membership.¹²

Initially, Section 201-d was designed to protect smokers from employment discrimination.¹³ However, the sponsors,¹⁴ intending "to eliminate all forms of arbitrary discrimination in the workplace,"¹⁵ were unable to persuade then-Governor Mario Cuomo that the original draft would be enforceable.¹⁶ The

9. N.Y. LABOR LAW § 201-d(2)(a) (McKinney 1986 & Supp. 1997).

10. N.Y. LABOR LAW § 201-d(2)(b) (McKinney 1986 & Supp. 1997).

11. N.Y. LABOR LAW § 201-d(2)(c) (McKinney 1986 & Supp. 1997).

12. N.Y. LABOR LAW § 201-d(2)(d) (McKinney 1986 & Supp. 1997).

13. See Michael Starr, *NY Legal Activities Law Protects Employees*, N.Y. L.J. Sept. 3, 1992 at 5 (explaining "[the new Legal Activities Law] began as a bill to protect the rights of employees who smoke. . ."). See also Mem. from Walter J. Pellegrini, Governor's Office of Employee Relations, to Hon. Elizabeth D. Moore, Counsel to the Governor (July 14, 1992) (stating that the bill's genesis was as a protection for smokers). See also Letter from Andrew Mirabole, Executive Director of the American Lung Association of New York State to Governor Cuomo (July 14, 1992) (opposing S. 6935C); Letter from Mark H. Borkin, M.D., P.C., Pulmonary and Internal Medicine, to Governor Cuomo (July 15, 1992) (opposing S. 6935C); Letter from George P. Maguire, M.D., Associate Director of the Division of Pulmonary Medicine at New York Medical College to Governor Cuomo (July 16, 1992) (opposing S. 6935C); Letter from Maryann Carrigan, Chair, Legislative Affairs Committee of the American Cancer Society of New York State to Elizabeth D. Moore, Counsel to the Governor (July 16, 1992) (opposing S. 6935C) (all preceding letters and memoranda are on file at the New York State Archives).

14. The bills finally approved were, S. 6935-C, introduced by Senator James J. Lack and A. 9399-A, introduced by Assemblyman Frank J. Barbaro.

15. Governor's Veto Mem. No. 420, N.Y.S. LEGIS. ANN. (1991).

16. *Id.* The Governor had disapproved an earlier draft of the legislation as well. See Disapproval Mem. No. 15, N.Y.S. LEGIS. ANN. (1990). The 1990 version was S. 7771 (Lack) and A. 10727 (Barbaro). While describing the bill's purpose as "laudable," the Governor vetoed the legislation because "it is so broadly drawn that it has certain potential applications which are probably unintended." *Id.* See Disapproval Mem. No. 15, N.Y.S. LEGIS. ANN. (1990). In 1991, the bill was reintroduced as S. 4171-A (Lack, et. al.) and A. 8738 (Barbaro, et. al.) and was again vetoed by the Governor. Explaining that "the bill is technically flawed . . . [for failure to] define key terms, such as 'legal activities,'" the Governor disapproved the bill, concerned that it is "arguably unenforceable." Governor's Veto Mem. No. 420, N.Y.S. LEGIS. ANN. (1991) (on file at the New York State Archives).

Governor had vetoed similar bills passed by the Legislature in 1990 and 1991 because he considered them too broadly constructed and lacking a clear definition of what constituted "legal activities."¹⁷

Supporting the third and final draft of the bill, Senator James Lack explained that the bill "prohibits employers from discriminating against their employees simply because the employer does not like the activities an employee engages in after work."¹⁸ Questioning whether "an employer [should] have the right to forbid a person from engaging in a legal activity, such as wearing a button for a particular candidate . . . or prohibit certain recreational activities, such as hunting or sky-diving,"¹⁹ Senator Lack emphasized that "[w]e have long since passed the days of company towns, where the company told you when to work, where to live and what to buy in their stores. This bill would ensure that employers do not tell us how to think and play on our own time."²⁰

The third version of the legislation added the word "recreational" to the prior bill's term "legal activities" (to make it

17. See Budget Report On Bills, B-201 (1992). Governor's Bill Jacket 776-77 (on file at the New York State Archives).

18. Sen. James J. Lack Mem., Ch. 776, N.Y.S. LEGIS. ANN. (1992).

19. *Id.*

20. *Id.* See also Letter from Barbara Zaron, President of The Organization of New York State Management Confidential Employees, to Governor Cuomo (July 21, 1992) (supporting S. 6935C/A. 9399A); Support Memorandum from Edward J. Cleary, President of NYS AFL-CIO (July 21, 1992); Mem. to the Governor from Raymond C. Skuse, Director of Legislation of the New York State United Teachers (June 24, 1992) (supporting S. 6935C) (all letters and memoranda above are on file at New York State archives). Surprisingly, various employers also expressed support for the bill. See, e.g., Letter from Richard L. Smith, Esq. of Bond, Schoeneck & King on behalf of their client, Miller Brewing Co., to Andrew Zambelli, Secretary to the Governor (July 14, 1992) (supporting S. 6935C); Letter from Michael A. Miles, Chairman and Chief Executive Officer of Philip Morris Companies, Inc. to Governor Cuomo (July 14, 1992) (supporting S. 6935C/A. 9399A); Letter from Scott Wexler, Executive Director of the United Restaurant, Hotel, Tavern Association to Hon. Elizabeth D. Moore, Counsel to the Governor (July 16, 1992) (supporting S. 6935C) (all preceding letters and memoranda are on file at the New York State archives).

"legal recreational activities"), enlarging the exceptions for employee actions which may affect the employer's business interests and enumerated the types of protected "recreational activities." This final version of Section 201-d became law on August 7, 1992 with the approval of the Governor,²¹ after passage by a vote of the Senate (57 to 3) and Assembly (147 to 1).²²

Since its enactment, Section 201-d has been the subject of litigation in four cases.²³ However, Section 201-d(2)(c), protecting an individual's "legal recreational activities,"²⁴ was analyzed in only two of those cases. Scrutinizing the language of this broad provision, these actions questioned whether dating among co-workers is a protected "legal recreational activity."²⁵

21. In approving the bills, the Governor explained, "I am approving these bills because they properly strike the difficult balance between the right to privacy in relation to the non-working hours activities of individuals and the right of employers to regulate behavior which has an impact on the employee's performance or on the employer's business." 1992 N.Y. Laws 2, at 2916.

22. 1992 N.Y. Laws 3, ch. 776. See Letter from Sen. James J. Lack to Hon. Elizabeth D. Moore, Counsel to the Governor (June 23, 1992)(on file at the New York State archives).

23. See *In re Matter of Civil Serv. Employees Ass'n Local 1000 v. Troy*, 223 A.D.2d 825, 636 N.Y.S.2d 455 (3d Dep't 1996); *Devine v. New York Convention Ctr. Operating Corp.*, 167 Misc. 2d 372, 639 N.Y.S.2d 904 (Sup. Ct. 1996); *Pasch v. Katz Media Corp.*, 1995 WL 469710 (S.D.N.Y. August 8, 1995); *State v. Wal-Mart Stores*, 207 A.D.2d 150, 621 N.Y.S.2d 158 (3d Dep't 1995).

24. N.Y. LABOR LAW § 201-d(2)(c) (McKinney 1986 & Supp. 1997). Section 201-d(2)(c) provides in part:

[I]t shall be unlawful for any employer . . . to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of: (c.) an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property

Id.

25. The statute defines "recreational activities" as:

[A]ny lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise,

Interestingly, these two cases reached inconsistent conclusions. The first, a state case, *State v. Wal-Mart Stores*,²⁶ held that Section 201-d does not include co-worker dating as a protected "legal recreational activity"²⁷ while the second, a federal case, *Pasch v. Katz Media Corp.*²⁸ held that a romantic relationship may in fact be a "legal recreational activity" protected under Section 201-d.²⁹

II. THE COURTS' INTERPRETATIONS OF SECTION 201-D:

A) *The New York State Courts*: *State v. Wal-Mart Stores*:

In July 1992, Laural Allen was hired to work as a cashier and customer service representative in Wal-Mart's Gloversville, New York store.³⁰ Shortly thereafter, Samuel Johnson was hired as a salesperson in the same store's sporting goods department³¹ and Allen and Johnson began dating.³² In January 1993, after learning of the relationship between Allen and Johnson, the Gloversville store manager discharged both employees pursuant to a provision in Wal-Mart's "Associate's Handbook."³³

reading and the viewing of television, movies and similar material

N.Y. LABOR LAW § 201-d(1)(b) (McKinney 1986 & 1997).

26. 1993 WL 649275 (N.Y. Sup. Ct.), *aff'd as modified*, 207 A.D.2d 150, 621 N.Y.S.2d 158 (3d Dep't 1995).

27. 207 A.D.2d at 152-53, 621 N.Y.S.2d at 159.

28. 1995 WL 469710 (S.D.N.Y. August 8, 1995).

29. *Id.* at *5.

30. 1993 WL 649275 at *1.

31. *Id.* See Jacques Steinberg, *Fraternization and Friction in Store Aisles; New York Challenges Wal-Mart Over Dismissal of Two Who Dated Against the Rules*, N.Y. TIMES, July 14, 1993, at B1, B4.

32. 1993 WL 649275 (N.Y. Sup.) at *1.

33. *Id.*

According to the relevant provision, "a dating relationship between a married associate and another associate other than his or her own spouse is . . . prohibited."³⁴ Allen, although living apart from her husband, was not yet divorced from him during her relationship with Johnson.³⁵

Both Allen and Johnson filed federal wrongful discharge claims against Wal-Mart in the District Court for the Northern District of New York, asking for damages of \$2 million each.³⁶ Additionally, they each filed a complaint with then New York State Attorney General, Robert Abrams.³⁷ Acting pursuant to Section 201-d(7), Abrams brought an action in the New York State Supreme Court asking for relief including reinstatement of both employees with back pay.³⁸ Furthermore, Abrams sought injunctive relief for Wal-Mart's alleged violation of Section 201-d.³⁹ Of the four claims in the amended complaint, the first cause of action charged that the firing of both Allen and Johnson constituted a wrongful discharge from employment in violation of Section 201-d(2)(c).⁴⁰ The supreme court dismissed all of the state's claims except for the first, explaining that this allegation posed a novel legal issue.⁴¹

While asserting that the question was "whether the conduct engaged in by Allen and Johnson was 'leisure time activity' as defined in Section 201-d,"⁴² the court rejected Wal-Mart's argument that Allen and Johnson were participating in a "social relationship," rather than the protected "legal recreational

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* Section 201-d(2) provides in part: "[I]t shall be unlawful to . . . discharge from employment . . . because of . . . an individual's legal recreational activities outside work hours, off the employer's premises and without use of the employer's equipment or other property. . . ." N.Y. LABOR LAW §201-d(2)(c) (McKinney 1986 & Supp. 1997).

41. 1993 WL 649275 at *2.

42. *Id.*

activity.”⁴³ Noting that the complaint failed to detail the specific activities in which Allen and Johnson engaged during their dating relationship, the court ruled that they certainly were within their rights under Section 201-d.⁴⁴ Holding that the protection of 'legal recreational activities' is not diminished by the mere fact that two employees decide to exercise their individual rights together,⁴⁵ the court declined to dismiss the first cause of action in the complaint.⁴⁶

Appealing the supreme court's decision, Wal-Mart convinced the Appellate Division for the Third Department to reverse.⁴⁷ Unpersuaded that the maintenance of a dating relationship was a "legal recreational activity," the appellate division dismissed the first cause of action.⁴⁸ Adopting a limited, strict construction approach, the Appellate Division, in a two to one decision, ruled that "dating" was clearly distinguishable from the illustrative list of activities described in Section 201-d.⁴⁹

While briefly discussing the legislative history of Section 201-d, the appellate division reasoned that the Legislature intended Section 201-d to provide protection to "certain clearly defined categories of leisure-time activities."⁵⁰ Holding that participation in an interpersonal relationship with a co-worker deviated so significantly from the examples provided in the statute, the court declined to extend protection to such an activity.⁵¹

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at *3.

47. *State v. Wal-Mart Stores*, 207 A.D.2d 150, 153, 621 N.Y.S.2d 158, 161 (3d Dep't 1995).

48. *Id.* at 151, 621 N.Y.S.2d at 159.

49. *Id.* at 151-52, 621 N.Y.S.2d at 159. The court reviewed Section 201-d(1)(b), which defines 'recreational activities' as "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material" *Id.*

50. *Id.* at 152, 621 N.Y.S.2d at 160.

51. *Id.*

Furthermore, the court relied on the "fundamental rule of construction that '[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation.'"⁵² Justifying its holding, the court reasoned that dating "bears little resemblance to 'recreational activity'"⁵³ and stated

[w]hether characterized as a relationship or an activity, an indispensable element of 'dating', in fact its *raison d'être*, is romance, either pursued or realized. For that reason, although a dating couple may go bowling and under the circumstances call that activity a 'date', when two individuals lacking amorous interest in one another go bowling or engage in any other kind of 'legal recreational activity', they are not 'dating'.⁵⁴

Dissenting, Justice Yesawich recommended that the appellate division affirm the supreme court's order.⁵⁵ Concluding that protection for dating relationships may have, in fact, been envisioned by the drafters of Section 201-d, Justice Yesawich contended that the statute's express language required a broader interpretation than the majority had allowed.⁵⁶ However, the State did not appeal, leaving the appellate division's holding as the only state court interpretation of Section 201-d to date. Interestingly, although the appellate division did not find judicial fault with Wal-Mart's anti-fraternization policy, the company has since modified the regulation to allow all dating except in cases where a direct supervisory relationship exists.⁵⁷

52. *Id.* at 151-152, 621 N.Y.S.2d at 159 (citing McKinney's Cons. Laws of N.Y. Book 1, Statutes §76, at 168; Matter of Alonzo M. v. New York City Dept. of Probation, 72 N.Y.2d 662, 665, 536 N.Y.S.2d 26, 532 N.E.2d 1254; Clemens v. Nealon, 202 A.D.2d 747, 749, 608 N.Y.S.2d 370).

53. 207 A.D.2d at 152, 621 N.Y.S.2d at 159.

54. *Id.*

55. *Id.* at 154, 621 N.Y.S.2d at 161 (Yesawich, J., dissenting).

56. *Id.* at 154, 621 N.Y.S.2d at 160 (Yesawich, J., dissenting).

57. Loftus, *supra* note 1, at 1.

B) The Federal Courts: Pasch v. Katz Media Corp.

Several months after the appellate division's *Wal-Mart* decision, a similar action addressing Section 201-d's applicability to co-worker dating relationships was brought in federal court located in New York State. Here, Judy Pasch had been employed by Katz Media's Christal Radio division for approximately nine years when she began dating and living with Mark Braunstein, a Vice President and General Sales Manager of Christal.⁵⁸ According to Pasch, management knew of this relationship and living arrangement.⁵⁹ However, on February 22, 1993, Braunstein was fired from his employment at Christal.⁶⁰ Just two days later, Christal informed Pasch that it was eliminating her position due to reorganization in her division.⁶¹ After being demoted to her original entry-level position, Pasch resigned⁶² and filed suit in federal court claiming sex discrimination under Title VII and wrongful discharge under Section 201-d.⁶³

Asserting that her "cohabitation" with Braunstein was the reason for her constructive discharge, Pasch argued that the cohabitation occurred "outside work hours, off the employer's premises and without use of the employer's equipment,"⁶⁴ and therefore should be protected by Section 201-d.⁶⁵ Moving for judgment on the pleadings, the defendants contended that "cohabitation" was not a "recreational activity" within the meaning of Section 201-d.⁶⁶ Relying on the appellate division's decision in *Wal-Mart*, the defendants argued that "because there

58. *Pasch v. Katz Media Corp.*, 1995 WL 469710, *1 (S.D.N.Y. August 8, 1995).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at *2.

65. *Id.*

66. *Id.*

is no relevant distinction between 'dating' and maintaining a personal relationship through cohabitation *Wal-Mart* compels dismissal. . . ."67

While recognizing the influence of state courts on matters of state law brought within a federal court sitting in diversity, the district court explained, "although the activity involved in *Wal-Mart* and [*Pasch*] are similar, this Court reaches a different conclusion regarding the statutory protection afforded by [Section] 201-d."⁶⁸ Explaining that the federal courts' authority to bind the lower state courts within their geographic jurisdiction is limited by "persuasive evidence that the highest state court would reach a different conclusion,"⁶⁹ the court considered whether the Court of Appeals of New York would reach a different conclusion than the appellate division in *Wal-Mart*.

Carefully scrutinizing the legislative history and statutory purpose of Section 201-d to resolve the statute's ambiguity, Judge Robert Patterson Jr. was influenced by the section's repeated vetoes before its ultimate enactment.⁷⁰ Finding that the successive amendments to the bill limited the unprotected behavior to only that which directly threatens the employer's proprietary interests, Judge Patterson concluded that the legislative intent of Section 201-d's scope of protection was to include any social activities, romantic or otherwise, "so long as the activity occurs outside work hours, off of the employer's premises and without use of the employer's equipment or other property; and does not create a material conflict of interest related to the employer's trade secrets, proprietary information, or other proprietary or business interest."⁷¹ Characterizing the defendant's position as "indefensible"⁷² the Southern District denied Katz Media's motion for judgment on the pleadings.

67. *Id.* at *3.

68. *Id.*

69. *Id.* (citing *Kuwait Airways v. Ogden Allied Aviation Services*, 726 F. Supp 1389, 1395 (E.D.N.Y. 1989) (quoting *Entron, Inc. v. Affiliated FM Ins. Co.*, 749 F.2d 127, 132 (2d Cir. 1984)).

70. 1995 WL 469710 at *4-*5.

71. *Id.* at *5.

72. *Id.* at *6.

While the *Pasch* case was proceeding to trial, it was dismissed by stipulation of the parties.

The *Pasch* holding effectively prohibits employers from proscribing intra-office dating. However, because the state authority, in *Wal-Mart*, held that the maintenance of a social relationship was outside the scope of Section 201-d's protection, and the federal authority held that such a relationship is protected, the Section 201-d plaintiff is essentially afforded the opportunity to "forum shop"⁷³ so as to obtain a favorable verdict.

As a result of these two cases, it appears that New York's Labor Law allows an employer to regulate the off-duty social activities of an employee so long as the activity tends to "create a material conflict of interest related to the employer's trade secrets, proprietary information, or other proprietary or business interest."⁷⁴ Additionally, corporate policies restricting intra-office dating should survive scrutiny under the existing case law so long as such policies are sufficiently narrowly drawn to regulate conduct relating specifically to an employee's actual on-the-job performance, or that is actually detrimental to the company, in contrast to activities which an employer merely considers objectionable.

III. JURISDICTIONS OTHER THAN NEW YORK STATE

Currently, thirty states and the District of Columbia have adopted laws protecting employees' privacy outside the

73. "'Forum shopping' occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict." BLACK'S LAW DICTIONARY 655 (6th ed. 1990). Naturally, a plaintiff must bring either a diversity claim exceeding \$75,000 against the defendant or raise a federal question to establish federal subject matter jurisdiction.

74. *Pasch*, 1995 WL 46910 at *5.

workplace.⁷⁵ While most of these laws protect both job applicants and employees from discrimination based on off-duty tobacco use, several states extend that protection to off-duty consumption of any lawful product including food and alcohol.⁷⁶ Three states, Colorado, North Dakota and, as we have seen, New York, have enacted statutes with general provisions protecting almost all non-work related activities.⁷⁷

75. The states, including the District of Columbia, that have enacted statutes that prohibit discrimination based on off-duty conduct are: ARIZ. REV. STAT. ANN. §36-601.02(F); COLO. REV. STAT. §24-34-402.5; CONN. GEN. STAT. §§31-40S, 31-51U; D.C. CODE ANN. §6-913.3; ILL. ANN. STAT. CH. 820, para. 55/5; IND. CODE §22-5-4-1; KY. §344.040; LA. REV. STAT. 23:966; ME. REV. STAT. ANN. tit. 26, §597; MINN. STAT. ANN. §181.938; MISS. CODE ANN. §71-7-33; MO. REV. STAT. §290.145; MONT. CODE ANN. 39-2-313; NEV. REV. STAT. §613.333; N.H. REV. STAT. ANN. §275:37-a; N.J. STAT. ANN. §34:6B-1; N.M. STAT. ANN. §50-11-3; N.Y. LABOR LAW §201-d; N.C. GEN. STAT. §95-28.2(b); N.D. CENT. CODE §§14-02.4-01, 14-02.4-03; OKLA. STAT, tit. 40 §500; OR. REV. STAT. §659.380(1); R.I. GEN. STAT. §23-20.7.1-1; S.C. CODE ANN. §41-1-85; S.D. CODIFIED LAWS ANN. §60-4-11; TENN. CODE ANN. §50-1-304(d); VA. CODE ANN. §15.1-29.18; W.VA. CODE §21-3-19; WIS. STAT. ANN. §111.31; WYO. STAT. §27-9-105(A)(IV). See Jack A. Raisner & Wayne N. Outten, *The Emerging Law of Off-Duty Conduct Protection*, EMPLOYMENT LAW STRATEGIST at 3, Apr. 1995.

76. Protection of the use, before and after work, of lawful consumer products has been extended to employees and/or job applicants by eight states: Illinois, Minnesota, Missouri, Montana, Nevada, North Carolina, Tennessee and Wisconsin.

77. See COLO. REV. STAT. §24-34-402.5 (Supp. 1995) (providing "[i]t shall be a discriminatory or unfair practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours. . . ."); N.D. CENT. CODE §14-02.403 (1991 & Supp. 1995) (providing "[i]t is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to [otherwise discriminate with respect to] participation in lawful activity off the employer's premises during nonworking hours. . . ."); N.Y. LABOR LAW §201-d (McKinney 1986 & Supp. 1997) (providing "it shall be unlawful for any employer . . . to refuse to hire. . . or to discharge. . . or to otherwise discriminate against an individual. . . because of . . . an individual's legal recreational activities outside work hours, off the employer's premises and without the use of the employer's equipment or other property. . . .").

In one sense, both the New York and North Dakota statutes are broader than the Colorado statute in that these states protect both job applicants and employees whereas Colorado's protection extends only to employees. Although the Colorado, New York and North Dakota's statutes are virtually identical in language and purpose, the issue of co-worker dating has been raised under only the New York and Colorado versions.⁷⁸

Distinguishable from the Colorado and North Dakota provisions, the New York statute includes the word "recreational" in describing the protected legal activities. This one word difference has created an ambiguity with respect to co-worker dating that is avoided by the Colorado and North Dakota versions. Clearly, by granting protection to employees based on their "lawful activit[ies]," both the Colorado and North Dakota statutes would include those employees involved in office romances. Dating a co-worker is a legal activity and is therefore protected under the Colorado and North Dakota provisions.

This comparison of the New York provision with the Colorado and North Dakota statutes highlights the trouble with the New York statute. The apparent ambiguity of the phrase "legal recreational activity" has been left unresolved by the courts; the only two cases brought under Section 201-d reached opposite conclusions.⁷⁹ The Colorado and North Dakota provisions, although similar to New York's version, offer little guidance in determining whether intra-office dating is a protected activity because the drafters of those statutes used broader language, which certainly includes a dating relationship as a protected "legal activity."

Interestingly, actions addressing the issue of co-worker dating have arisen in states without off-duty employee conduct statutes.

78. See *State v. Wal-Mart Stores*, 1993 WL 649275 (N.Y. Sup. 1993), *rev'd*, 207 A.D.2d 150, 621 N.Y.S.2d 158 (3d Dep't 1995); *Pasch v. Katz Media Corp.*, 1995 WL 469710 (S.D.N.Y. Aug. 8, 1995); *Galieti v. State Farm Mut. Auto. Ins. Co.*, 840 F. Supp 104 (D. Colo. 1993) (concerning a terminated plaintiff-employee's allegation that his termination, due to his continued social interaction with a subordinate female co-worker, was an unlawful prohibition of a legal activity).

79. See *supra* notes 30 - 74 and accompanying text.

For example, in *Crosier v. United Parcel Service, Inc.*,⁸⁰ the California Court of Appeals upheld the discharge of a manager for dating a non-management employee in violation of the company's no-fraternization policy.⁸¹ In this case, the terminated employee was dating and living with a non-management employee, in violation of the company's "unwritten rule proscribing social relationships between management and non-management employees."⁸² After evaluating the purpose of the rule, which was "to avoid misunderstandings, complaints of favoritism and possible claims of sexual harassment,"⁸³ the court ruled that the company's policy was acceptable, and the termination was lawful.⁸⁴

Likewise, in *Rogers v. International Business Machines Corp.*,⁸⁵ the United States District Court for the Western District of Pennsylvania granted summary judgment to the employer, dismissing the employee's wrongful termination claim arising from a personal relationship with another employee. In this case, the plaintiff maintained a close personal relationship with subordinate employee.⁸⁶ While the employer did not have a policy proscribing such behavior, the employer argued that the relationship at hand negatively affected the duties of the plaintiff's employment.⁸⁷ After an initial investigation revealed that the plaintiff's job performance was unacceptable, the employer discharged him.⁸⁸ Arguing that the employer's stated reason for termination was pretextual, and that the true reason for his dismissal was the relationship, the plaintiff was unable to prove this to the court. Therefore, the court determined that the employer's action did not violate public policy nor did the

80. 150 Cal. App. 3d 1132, 98 Cal. Rptr. 361 (1983).

81. *Id.* at 1141, 198 Cal. Rptr. at 367.

82. *Id.* at 1135, 198 Cal. Rptr. at 362.

83. *Id.*

84. *Id.* at 1140, 198 Cal. Rptr. at 366-67.

85. 500 F. Supp. 867 (W.D. Pa. 1980).

86. *Id.* at 868.

87. *Id.*

88. *Id.*

employer violate an implied covenant to discharge only for good cause.

As explained earlier, several states have enacted statutes protecting an employees off-duty conduct only with respect to tobacco use. Therefore, those statutes clearly do not extend to co-worker dating as a protected off-duty activity. For example, Oregon's statute explicitly prohibits an employer from proscribing the use of tobacco during nonworking hours.⁸⁹ Therefore, in *Patton v. J.C. Penny Co.*,⁹⁰ the plaintiff relied on the common law tort theory of intentional infliction of emotional distress and wrongful discharge under the employment at will doctrine in his complaint against his employer for discharging him for socializing with a co-worker.⁹¹ Here, the plaintiff was informed by his supervisor to end the romantic relationship with a female co-worker and warned that refusal to do so may lead to his termination.⁹² Taking the position that he was not dating the woman at work, but rather on his own time, the plaintiff decided he would continue to see her.⁹³ The employer had no explicit personnel guidelines prohibiting socializing among its employees. However, shortly after the warning, the plaintiff was terminated due to his refusal to end the relationship.⁹⁴ The Oregon Supreme Court rejected the emotional distress count, holding that the employer's conduct did not rise to the level of outrageous to be actionable.⁹⁵ As for the wrongful discharge claim, the court held that the employer had the right to fire the employee at will and had warned the employee of the impending action.⁹⁶

Closely related to the protection afforded to intra-office dating (or lack thereof) is the extent of protection afforded to married

89. OR. REV. STAT. §659.380 (Supp. 1994).

90. 719 P.2d 854 (Or. 1986).

91. *Id.* at 855.

92. *Id.* at 856

93. *Id.*

94. *Id.*

95. *Id.* at 858.

96. *Id.* at 857

employees.⁹⁷ Naturally, an integral step to marriage is dating. Therefore, it is important to examine state statutes related to discrimination in workplace on the basis of marital status.

Several states have enacted statutes which explicitly proscribe discrimination based on marital status.⁹⁸ While these statutes vary in language and scope, they generally have adopted one of two approaches to discrimination based on marital status. One approach dictates that "marital status discrimination covers distinctions made based on the identity and occupation of an individual's spouse, as well as the actual state of being married, single, divorced or widowed."⁹⁹ In contrast, other states have enacted more narrow statutes, which provide protection from

97. This paper addresses private, not public employers; therefore, it will not examine the Constitution's guarantee against governmental interference with an individual's fundamental rights. However, the United States Supreme Court has interpreted "fundamental right" to include the right to marry. See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

98. About twenty states and the District of Columbia provide protection against discrimination on the basis of marriage. See ALASKA STAT. § 18.80.220 (1991); CAL. GOV'T CODE § 12940 (1992); CONN. GEN. STAT. § 46A-60 (1992); DEL. CODE ANN. tit. 19, § 711 (1985); D.C. CODE ANN. § 1-2512 (1987); FLA. STAT. ANN. § 760.10 (1986); HAW. REV. STAT. § 378-2 (1991); ILL. REV. STAT. ch. 68, at 1-102(1989); MD. ANN. CODE ART. 49B, § 16 (1991); MICH. COMP. LAWS ANN. § 37.2202 (1992); MINN. STAT. ANN. § 363.03 (1991); MONT. CODE ANN. § 49-2-303 (1991); NEB. REV. STAT. § 48-1104 (1988); N.H. REV. STAT. ANN. § 354-A:8 (1991); N.J. REV. STAT. § 10:5-12 (1992); N.Y. EXEC. LAW § 296 (1982); N.D. CENT. CODE § 14-02.4-03 (1991); OR. REV. STAT. § 659.030 (1991); VA. CODE ANN. § 2.1-716 (1992); WASH. REV. CODE § 49.60.180 (1990); WIS. STAT. § 111.311 (1988). See Michaels & Thornburg, *Although Employer's Restrictions on Relationships Between Employees Can Give Rise to Claims, Some Restraints on Office Romances May Withstand Challenge*, NAT'L L.J. Apr. 1, 1996 at B5.

99. *Id.* For example, Montana, Washington, Minnesota and Hawaii have adopted this broad approach to marital status discrimination by prohibiting an employer from promulgating "any rule, such as a no-spouse or anti-nepotism policy, that makes a distinction based on whether an employee is married, even to a co-employee or supervisor, unless they can show an overriding business necessity." *Id.*

discrimination based only on the status of being married, single, divorced or widowed.¹⁰⁰

Recognizing the importance of protecting employees from discrimination based on marriage, approximately twenty states have enacted statutes prohibiting such discrimination.¹⁰¹ In contrast, only two states have statutes broad enough to include dating as a protected activity.¹⁰² This sharp difference is surprising because the natural progression of a dating relationship is, in many cases, marriage. In other words, in contemporary America, marriage would not occur at all unless the participants first dated one another. Therefore, in a state such as New York, where the scope of the off-duty conduct statute has not been settled by the courts, there is an apparent inconsistency of the Legislature's intent. On the one hand, the Legislature explicitly affords protection to marriage under the Executive Law,¹⁰³ while, on the other, it does not include specific language protecting intra-office dating under the Labor Law.

IV. EMPLOYER RESTRICTIONS ON CO-WORKER RELATIONSHIPS AND THE POLICY CONSIDERATIONS OF INTRA-OFFICE DATING:

100. *Id.* The states adopting this second approach include: Michigan, New Jersey, New York and West Virginia.

101. *See supra* note 98.

102. *See* COLO. REV. STAT. § 24-34-402.5(Supp. 1995); N.D. CENT. CODE § 14-02.403(1991 & Supp. 1996). While New York has a broad statute, the issue of whether intra-office dating is within the scope of the statute's protection remains to be seen. *See supra* notes 104 - 144 and accompanying text.

103. New York Executive Law §296 provides, in part,
It shall be an unlawful discriminatory practice: (a) For an employer or licensing agent, because of the . . . marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . .
N.Y. EXEC. LAW § 296 (McKinney 1986 and Supp. 1997).

The corporate culture¹⁰⁴ of the workplace generally reflects the type of policy that the company promulgates. According to a study conducted by Margaret Kent and Robert Feinschreiber, authors of *Love At Work: Using Your Job to Find a Mate*, some companies impose no restrictions whatsoever, whereas other companies have anti-nepotism rules which prohibit the "hiring of an employee's immediate family, in-laws, first cousins, and even second cousins."¹⁰⁵ The study found that rules proscribing dating and marriage are more likely to be present in certain industries than others. For example, it is more common for older corporations to place restrictions on personal freedoms than for younger businesses.¹⁰⁶

Additionally, the size of the organization contributes to the existence of such a policy. The study found that larger corporate entities are more likely to adopt more restrictive regulations in contrast with smaller businesses which generally have less burdensome rules.¹⁰⁷ Furthermore, "[c]reative businesses, where individuals are hired for [their] talent, are more likely to allow relationships between employees, but this flexibility is lacking where the work is routine."¹⁰⁸

Recognizing that employers have legitimate business concerns regarding their employees dating one another, courts have articulated various problems which may arise from such unions.¹⁰⁹ However, office relationships may also positively

104. The corporate culture is "the sum total of the attitudes, beliefs, values, philosophies, norms, and standards of behavior that evolve for those who work in a corporation." Mainiero, *supra* note 3 at 106. A corporate culture may be described as traditional, action-oriented, creative, innovative, reactive or conservative. *Id.*

105. Margaret Kent & Robert Feinschreiber, *LOVE AT WORK: USING YOUR JOB TO FIND A MATE* 170 (1988).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See, e.g., Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 615 (11th Cir. 1995) (conflicts of interest, favoritism, likelihood of sexual harassment); *Parson v. County of Del Norte*, 728 F.2d 1234, 1237 (9th Cir.), *cert. denied*, 469 U.S. 846 (1984) (conflicts of interest and favoritism); *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd.*, 51

affect the organization. Several case studies conducted by Lisa Mainiero, Ph.D., reveal that, in general, employees involved in an intra-office dating relationship had increased productivity and efficiency.¹¹⁰ One employee interviewed explained, "I wanted to show Rod how competent I was at my job,...[s]o I did extra homework just to impress him."¹¹¹ Another stated, "[w]hen I was first interested in Gene, I became overly work-oriented....I wanted to be around him, and he often worked late. I would join him and do extra work on my own."¹¹²

On the other hand, office romances have also decreased the efficiency and productivity of amorously involved employees. In what Dr. Mainiero refers to as the "honeymoon" period,¹¹³ the involved employees have difficulty concentrating on their work and thus significantly diminish their productivity. She points out, however, that this period is rather short in duration and after this time, the couple usually experiences a renewed interest in their work obligations.¹¹⁴

A) Benefits of Office Romance:

An office romance can stimulate workplace morale. It can be very exciting to watch two people fall in love at work, and as such, the participants and their colleagues feel "more energized, excited and stimulated."¹¹⁵ Watching a romance develop can significantly improve the workplace environment.¹¹⁶ According to a survey¹¹⁷ conducted by Dr. Mainiero, "34 percent of

N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980) (conflicts of interest and favoritism).

110. Mainiero, *supra* note 3 at 37.

111. *Id.*

112. *Id.*

113. *Id.* at 37-38. It is at this point that the couple starts to realize that their attraction is shared and begin a dating relationship. *Id.* at 38.

114. *Id.*

115. *Id.*

116. *Id.* at 52.

117. The survey sample consisted of 100 respondents from a variety of occupations, including sales, data processing, law, medicine, education,

executive women recognized that romance [does in fact] energize workplace morale."¹¹⁸ Furthermore, a study "conducted by Carolyn Anderson and Philip Hunsaker, of the University of San Diego, reported in *Personnel* magazine in February 1985, found that 'the development of a romance may make work more enjoyable and can reduce stress and anxieties.'"¹¹⁹ Colleagues, as well as the participants, benefit from the pleasant atmosphere created by the romantic liaison.

Another benefit of an office romance is that the involved persons tend to become more highly motivated regarding their work obligations.¹²⁰ According to G. Oliver Koppell, who succeeded Robert Abrams as New York's Attorney General, research has shown that workplace romances "may not necessarily be detrimental,"¹²¹ and opined that "office romance[s] and dating can have a positive effect on worker performance and that in most cases, workers go about their work with little noticeable change."¹²² Illustrating this point, an employee interviewed in Dr. Mainiero's survey explained, "[o]ne of the major benefits of my romance with Stanley was that I put more energy into my work than ever before."¹²³ Agreeing, another employee stated, "[w]hen I was dating my husband in the office, I was concerned . . . that others would view [the relationship] negatively . . . so I made sure that my work was outstanding. I worked extra hard because I wanted to be certain that no one was saying anything [about us]."¹²⁴

media, fashion, electrical, manufacturing, banking and insurance. *Id.* at 278, app. D.

118. *Id.* at 52.

119. *Id.*

120. *Id.* at 55. According to the author's survey, productivity increased in about one-third of the cases studied. *Id.*

121. Randall Samborn, *Love Becomes a Labor Law Issue Wal-Mart Firings Raise Issue of Privacy*, 94 NT'L L.J. Feb. 14, 1994 at 1 (referring to research conducted by James Dillard, a professor of communication arts at the University of Wisconsin).

122. *Id.*

123. Mainiero, *supra* note 3, at 56.

124. *Id.*

Closely related, another benefit is that an office romance can encourage creativity and innovation. An accountant with a national firm explained, "[w]e spent all our time thinking up new ways to get the work done faster, so we could have more play time together after five. We found a creative way around the messiness of the audit without compromise."¹²⁵ Furthermore, psychologists have concluded "that a creative synergy emerges between two people who are attracted to each other. That synergy can lead to innovation, brainstorming, and the courage to apply new, risky approaches to old problems."¹²⁶

Moreover, an office romance can soften work-related personality conflicts. In another survey, Dr. Mainiero found that forty-one percent of women agreed that romance made the participants "easier to get along with."¹²⁷ Echoing this sentiment, a survey respondent explained, "I used to have to work with this real bitchy coworker. But now that she's dating, her whole demeanor has improved. Our office is much better off. . . . We dread a breakup!"¹²⁸

Additional important benefits resulting from an office romance are improved "teamwork, communication and cooperation."¹²⁹ Specifically, when the participating couple work in different departments of the same organization, their dating relationship provides an alternate channel for communication.¹³⁰ In the 1985 survey conducted by Carolyn Anderson and Philip Hunsaker, published in *Personnel* magazine,¹³¹ the results demonstrated that twenty-one percent of those surveyed said that the relationship had a positive impact on the organization in that the relationship increased coordination in the workgroup, lowered

125. *Id.* at 59.

126. *Id.*

127. *Id.* at 62.

128. *Id.*

129. *Id.* at 64.

130. *Id.* According to the author's survey, 27 percent of the respondents expressed the view that an office romance actually improved "communication, teamwork, and cooperation" among departments. *Id.* at 65.

131. C. Anderson & P. Hunsaker, *Why There's Romancing at the Office and Why It's Everyone's Problem*, PERSONNEL, Feb. 1985 at 57-63.

interdepartmental tensions and improved work flow.¹³² Illustrating this point, one respondent stated, "[n]ow that my boss is involved with a man in one of our customer service departments, we no longer have to wait for quick response. She tells him directly about a customer problem that has surfaced and it gets his immediate attention."¹³³

Another benefit to employee dating is that an office romance may attract and help maintain the workforce. "Romance in corporations may be used as a recruitment and retention device to stabilize the workforce of certain firms. . . . Dual career marriages often mean that when one spouse needs to find a new job," both spouses must relocate.¹³⁴ Some corporate executives deliberately employ the spouse of a valuable employee so as to retain that employee. For example, Cable News Network (CNN) has employed several husband/wife teams. "According to Steve Haworth, Director of Public Relations at CNN in Atlanta, '[t]here are no formal policies to employ or not to employ a spouse, but, occasionally, we have offered employment to a spouse as part of attracting an employee to come or stay here.'"¹³⁵

B) Drawbacks of Office Romance:

Most significantly, an office romance may cause work performance to decline. The passion of a romance may distract the couple from their work obligations and interfere with the couple's concentration on the job. Closely related, an office romance may threaten career advancement.¹³⁶ In addition to a decline in work performance, management may look unfavorably toward an employee who dates a co-worker because management

132. *Id.*

133. *Id.*

134. Mainiero, *supra* note 3, at 72.

135. *Id.*

136. *Id.* at 77. According to the author, in a "survey of executive women, 63% of those surveyed felt that careers could be compromised by an office romance" and more than half decided that this was a risk too serious to take. *Id.* at 77.

may conclude that such action illustrates poor judgment, an inability to control one's emotions, or an unwillingness to obey company policy regarding dating. These considerations may lead management to defer or postpone advancement for that employee within the organization.

Office romances may also ruin professional relationships.¹³⁷ Such romances often terminate unpleasantly, creating an uncomfortable workplace situation for the former couple and others. The most significant difficulty of a terminated office romance is that the participants may be professionally compelled to continue to see one another on a daily basis. The parties are thus constantly reminded of the failed relationship, which in turn may affect their work product and ability to concentrate at the office. Other co-workers may also feel uncomfortable with the demise of the amorous interaction and feel obliged to side with one or the other of the former couple, which may result in a diminution of efficient operations in the workplace.

Another drawback of co-worker dating concerns the competition and conflict that may arise from an office romance. For example, colleagues may gossip and complain to one member of the couple about the other. This internecine conflict is likely to result in a slackening of workplace productivity. Moreover, there is also the possibility that the participants in a romantic relationship may find themselves competing for advancement within the organization. Additionally, one partner may advance at a faster pace than the other, causing envy, tension and anxiety between the couple, resulting in diminished productivity.

Still another significant drawback of co-worker dating is the enhanced opportunity for professional conflicts of interest. "Pillow talk," where the disclosure of certain business information might be detrimental to the organization, is another reason that management generally disfavors such relationships. This is especially troublesome for partners involved in an interdepartmental relationship, where one partner may be privy to

137. *Id.* at 81.

confidential information not normally accessible to the other partner.¹³⁸

Attorneys must be particularly cautious when participating in a dating relationship with an office colleague. Although states have different rules concerning lawyers ethics, most have provisions similar to those of the American Bar Association's Model Code of Professional Responsibility. Particularly relevant is Canon 9, entitled "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," endorsing the concept that an appearance of impropriety decreases public confidence and respect for the legal profession and the entire system of justice.¹³⁹ Within an office, attorneys involved in a dating relationship may allow that relationship to cloud and distort their professional judgment. The strong emotions involved in an intimate relationship may interfere with the detached professionalism expected of lawyers. However, because Canon Nine discourages the mere appearance of professional impropriety, no actual impropriety need be shown.¹⁴⁰

A serious problem which may stem from a intra-office romantic relationship is the potential of employer liability for sexual harassment. For example, a once mutually-consensual dating relationship may conclude when one partner no longer wishes to continue the relationship. Hoping to rekindle the romance, the abandoned member may voice overt expressions of affection toward the former paramour. Unwelcoming these advances, the recipient of the now undesired attention may file "hostile work environment" sexual harassment charges.¹⁴¹ Due

138. *Id.* at 99.

139. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (1995).

140. For a discussion of ethical considerations of dating within the legal profession, see Nicole A. Bartow, *Dating Among the Profession: Ethical Guidance in the Area of Personal Dating Conflicts of Interest*, 34 SANTA CLARA L. REV. 1157 (1994).

141. A "hostile work environment" may be found where "jokes, suggestive remarks, physical interference with movement (such as blocking one's path), pictures, cartoons or sexually derogatory comments alter the circumstances of the workplace." Mark. I. Schickman, *Sexual Harassment: The Employer's Role in Prevention*, 13 COMPLEAT LAW 1 at 24 (1996). While a single incident

to the Equal Employment Opportunity Commission's requirement that an employer "take reasonable steps to prevent harassment before it occurs,"¹⁴² employers may find themselves in the difficult position of monitoring their dating employees and determining whether both parties voluntarily consent to participate in the relationship, so as to avoid liability.

Finally, participants in an office romance may lose the respect of peers and management. Victimized by "water-cooler" rumor-mongering and gossip, the participants in a romantic liaison may lose status and credibility within the organization. As a result, the amorous couple may succumb to self-doubt and lost objectivity, leading to decreased productivity and reduced performance of work obligations.

CONCLUSION

Jurisdictions vary greatly with respect to legislation concerning an employee's protected off-duty conduct. New York, for example, has not yet settled this thorny issue, therefore, employers and employees alike should familiarize themselves with the law of their state in order to best protect their respective rights.

Although the New York State Court of Appeals has not yet spoken on this issue, when it arises, the state's high court is most likely to agree with the Second Circuit's *Pasch* holding. Currently, the opinions from the court of appeals tend to be liberal, securing and protecting individual freedoms.¹⁴³ Restricting the right of co-workers to interact socially would severely interfere with the exercise of one's most fundamental natural human needs. The court probably would be loath to regulate human behavior in such a significant and restrictive manner.

or "stray comment" may be sufficiently severe as to alter the working conditions, usually a repeated course of conduct is required. *Id.*

142. *Id.* at 26.

143. See generally, Symposium, *State Constitutional Jurisprudence: Decision Making at the New York Court of Appeals*, 13 *TOURO L. REV.* 3, 3-58 (1996).

Additionally, as the *Pasch* court explained, the extensive legislative history of Section 201-d demonstrates the Legislature's desire to enact a statute protecting a broad range of activities. Had the Legislature meant to provide an exhaustive list of protected activities, the language of the statute would make such an intent explicit. Therefore, as Judge Patterson stated, such a narrow interpretation is "indefensible."¹⁴⁴

Until the New York State high court rules on this issue, employers should exercise caution when implementing a prohibition or restriction on co-worker dating. In order to determine the most rational restriction on co-worker relationships, employers should explore the various degrees of implementable dating policies available to them. For example, anti-fraternization policies might include an outright prohibition of romantic relationships between employees, a requirement that such relationships be reported to management, or a prohibition of such relationships only when management perceives an actual conflict of interest.

Additionally, after a policy has been established, it should be publicized in employees handbooks, company manuals, bulletin boards and should be mentioned at orientation seminars and repeated at personnel meetings. Once a socially restrictive policy is implemented, it must then be consistently applied to all employees.

Anti-dating policies may be more successfully enforced and result in reduced risk of litigation if employers promulgate the least restrictive policy on employees' privacy that is nonetheless sufficient to accomplish company goals.

*Alyce H. Rogers**

144. *Pasch v. Katz Media Corp.*, 1995 WL 469710, *6 (S.D.N.Y. August 8, 1995).

* The author would like to express her warmest gratitude to Professor Daniel Subotnik of Touro Law Center for his invaluable guidance and support in writing this article.

