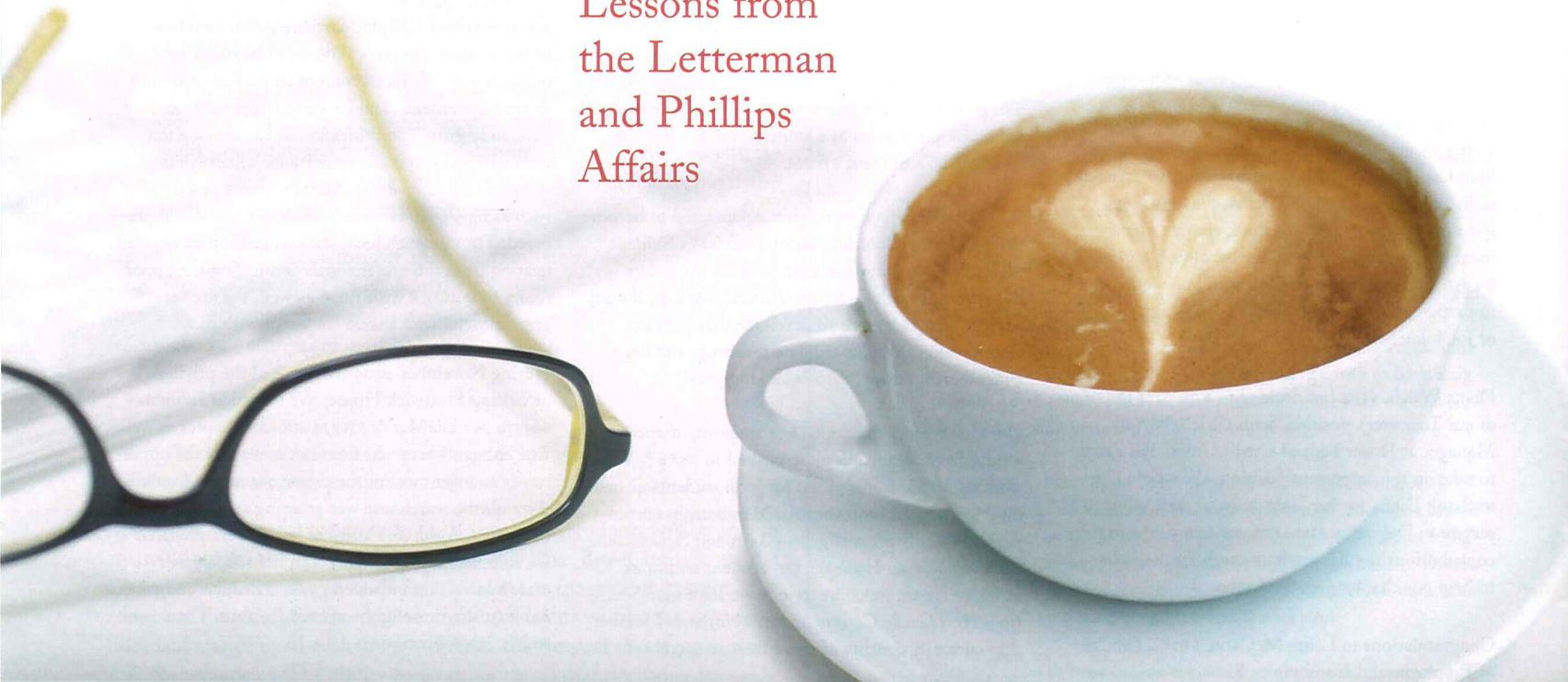


*Employers:*  
Take Care  
When *Love*  
is in the Air

By William W. Bowser  
and Adria B. Martinelli

Lessons from  
the Letterman  
and Phillips  
Affairs



**Recent** tabloid headlines on the workplace affairs of David Letterman and of former ESPN baseball analyst Steve Phillips remind us all that while workplace dalliances (particularly when they are committed by the rich and famous) make for titillating headlines, they are not uncommon. As human resources professionals have known for years, such relationships left unchecked can lead to trouble; legal and otherwise. When Cupid's bow and arrow strikes in your workplace, do you know what to do? Now is a good time to review your policies and consider an anti-fraternization policy if you don't already have one. Well-drafted policies can ensure that a failed romance ends with only a broken heart, not an empty bank account.

#### LETTERMAN AND PHILLIPS

For readers who may have missed this "news" last fall, Letterman confessed on live television to "creepy and embarrassing" behavior, which consisted of more than one affair with women who work for him. He was forced to reveal his indiscretions when an ex-boyfriend of one of the mistresses learned of the affairs and allegedly tried to extort money from the talk show host. Not long thereafter, Phillips, an ESPN analyst at the time and former General Manager of the New York Mets, had to come clean on his affair with a young female staffer. After he put an end to the relationship, she became so upset she wrote a letter to Phillips' wife describing the intimate details of their relationship and exhibited erratic behavior at his home, prompting his wife to call 911.

#### WORKPLACE ROMANCE

One can only hope as a HR professional that any workplace trysts in your office do not lead to national news or a Glenn Close/rabbit-on-the-stove reenactment by a scorned lover. Nevertheless, even far less dramatic escapades can lead to trouble if left unchecked.

The typical scenario unfolds like this: A supervisor begins to date a subordinate. They go out, have a good time, and continue to see each other socially. The two employees interact every day at work, and as the relationship grows, some of their romantic behavior seeps into the workplace. They are frequently together behind closed doors, e-mails or text messages are exchanged regularly, other employees take notice and begin talking about their ques-

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tionable conduct, and the office suffers decreased efficiency and productivity...at a minimum. Fellow employees often become resentful and charges of favoritism arise.

After a few months, one of the employees decides things aren't working out and breaks it off, much to the other's chagrin. The supervisor then unsuccessfully attempts to resume the business relationship where it left off before the affair or, worse, retaliates against the subordinate. The subordinate may construe even legitimate business decisions as motivated by the sexual relationship (or end thereof), and the subordinate files a sexual harassment claim.

Sexual harassment claims can be extremely expensive even if you eventually prevail. They're also divisive and they sabotage productivity. Regardless of the ultimate merits, they can bring negative publicity for the employer. For the employees involved—victim or accused—a sexual harassment claim can result in "professional suicide." Both Phillips, the ESPN analyst, and Brooke Hundley, the 22-year old production assistant, were terminated from their coveted positions at ESPN following the revelation of their affair. Since as many as a third of all consensual romantic relationships begin at the workplace and many end badly, what's a beleaguered employer to do?

## WHEN ROMANCE SOURS

Although the headline-grabbing liaisons of Letterman and Phillips were consensual, they nevertheless exposed their employers to liability for sexual harassment. What is your obligation as an employer when your employees engage in this behavior? First, the minute one of them indicates he or she wants the other to stop the contact and makes that known to the company, your duty to stop what has arguably become sexual harassment begins and the liability meter starts ticking. Your company is not absolved from liability just because the victim consented to the same or similar conduct at one time.

The other concern for you as an employer is the sexual favoritism claims that frequently accompany a workplace affair. Those claims involve a type of sex discrimination that stems from one employee being treated unfavorably because he or she isn't in a personal relationship with the supervisor. The employee who's involved with the supervisor receives favorable treatment to the detriment of other employees in the department. Although all appearances are that Letterman's relationship with his employee, Stephanie Birkett, was consensual, it has been reported in the press that some of her co-workers complained that she got the plumb assignments on "Late Night." It is certainly reasonable for co-workers to draw

the conclusion that the employee engaged in an affair with his or her supervisor to reap benefits in the workplace as a result.

## ADOPTING AN ANTI-FRATERNIZATION POLICY

The best preventative measure for these types of claims is to adopt an anti-fraternization policy, if you don't already have one. Most agree that it is unrealistic to prohibit any dating among employees, although some employers choose to adopt a total ban. Generally, these types of policies don't stop the relationships, they simply drive them underground where you cannot address any liability problems until it's too late. Moreover, a policy this broad could be determined to be in violation of Delaware's law against discrimination based on marital status since it wouldn't prohibit married employees who work for the same company in different departments from socializing with each other, but it would prevent unmarried employees who want to have a romantic relationship from doing so.

For these reasons, a policy that addresses the issue only when the relationship is between a supervisor and subordinate is recommended. Such policies tend to be effective in stopping sexual harassment because they focus on the situation in which most sexual harassment liability occurs. These policies either ban roman-

tic relationships when one party reports to another altogether, or they require disclosure of such relationship and the transfer of one party to another office or department. The latter is an effective policy if the employer is large enough that it is feasible. Make sure your policy doesn't always require that the woman or the "lower-paid" or "lower-level" employee be the one to transfer. You could be creating a pattern of sex discrimination if the person who has to transfer always turns out to be female.

#### BOTTOM LINE

Steve Phillips and David Letterman have shown us that smart, successful people do not always behave that way when it comes to workplace romances. No workplace is immune from this behavior, and an anti-fraternization policy may not necessarily prevent it from occurring. However, putting your employees on clear and unequivocal notice of your position will put the company in a good position when defending any future harassment claim and will provide support for any disciplinary action you may choose to take against the alleged harasser. By adopting and enforcing a limited anti-fraternization policy, you will be doing everything you can as an employer to limit the impact of any office-romance-gone-bad, and with any luck avoid being the next story on "Entertainment Tonight." ■

#### ABOUT THE AUTHORS



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William Bowser has represented both private and public employers in a full range of labor and employment matters for over 25 years and is ranked as a top employment lawyer in Delaware by Chambers USA and The Best Lawyers in America. He defends employers in employment-discrimination, constitutional, and whistleblower lawsuits in state and federal courts. He represents employers before PERB and the

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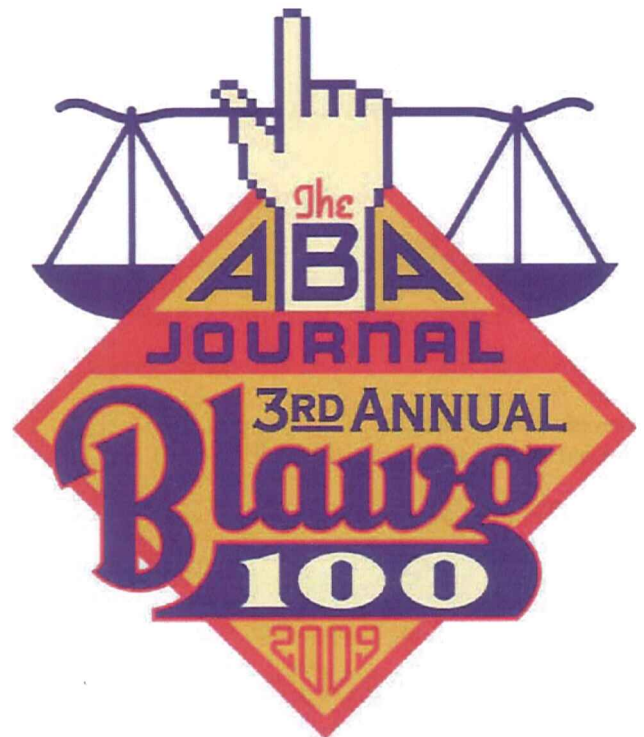
Adria Martinelli

Adria Martinelli has practiced employment law in Delaware since joining Young Conaway in 2001 as a senior associate in the Employment Law Section. Prior to joining Young Conaway, she was an associate in the Washington, D.C. office of the national firm of Seyfarth Shaw.

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