



# DELAWARE

## EMPLOYMENT LAW LETTER

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### **OFFICE ROMANCE**

## **Not so funny business — what employers can learn from the David Letterman affairs**

by William W. Bowser

*Although the exact scope of David Letterman's "creepy and embarrassing behavior" has not yet been revealed, a supervisor having an affair with a subordinate is, unfortunately, not uncommon. There is already discussion about CBS' responsibility as an employer with respect to the affairs. The general public is likely to soon get a complete education on the legal repercussions of romantic workplace relationships. As HR professionals have known for years, office relationships left unchecked can lead to trouble — legal and otherwise. Now is a good time to review your policies and consider an antifraternalization policy if you don't already have one. Well-drafted policies and consistent practices can ensure that a failed romance ends with only a broken heart, not an empty bank account.*

### ***Workplace romance***

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 each 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 are exchanged regularly, other employees take notice and begin talking about their questionable conduct, and the office suffers decreased efficiency and productivity.

When a supervisor and subordinate have a romantic relationship, others become resentful and charges of favoritism are made. The couple may have sexual contact at work or elsewhere, sometimes with embarrassing consequences. 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 (1) attempts (unsuccessfully) to pick up their business relationship where it left off before the affair began or (2) retaliates against the subordinate.

Things get out of hand, and the subordinate files a sexual harassment claim. Sexual harassment claims can be extremely expensive, even if you prevail. They're also divisive and sabotage productivity. For an individual employee — victim or accused — a sexual harassment claim can be professional suicide. Since as many as a third of all consensual romantic relationships begin at the workplace (and often end badly), what's a beleaguered employer to do?

### ***When romance sours***

Most employees instinctively know when to draw the line on behavior that could be viewed as sexual harassment toward individuals they know only casually at work. The line gets blurry for some, however, when the questionable behavior is — at least at some point — consensual. Your obligation to stop harassment is clear. You have no responsibility to seek out a dating couple on a daily basis and inquire about the status of their relationship to determine if it's still consensual. But the minute one of them indicates he wants the contact to stop and makes that known to the company, your duty to end what has arguably become sexual harassment begins and the liability meter starts ticking.

Just because the victim consented to the same or similar conduct at one time doesn't absolve the company of liability. The troublesome aspect you may not fully realize is the fact that the relationship has evolved into sexual harassment.

Other concerns include the sexual favoritism claims that frequently follow on the heels of a workplace affair. Sexual favoritism claims represent a type of sex discrimination stemming from one employee being treated unfavorably because she isn't in a personal relationship with the supervisor. In other words, the employee who's involved with the supervisor receives favorable treatment to the detriment of other employees in the department.

### ***Adopting an antifraternization policy***

Do these claims and concerns sound familiar? If so, you may want to consider adopting an antifraternization policy.

Antifraternization policies take antinepotism rules a step further by, at their most sweeping, prohibiting any employee from dating or having a romantic relationship with another employee. More narrow versions limit fraternization within departments or when there's a direct line of report.

Antifraternization policies eliminate the most common breeding ground for sexual harassment: previous consensual conduct. They also clearly eliminate sexual favoritism or perceived favoritism. In addition, they seek to prevent any decrease in productivity and the demoralization of other employees in the work group that can be caused by office romances. Antifraternization policies have also been found to encourage early reporting of potential harassment.

If a total ban on fraternization sounds a little draconian, you're free to style an antifraternization policy that fits your company. Some employers have chosen to ban only immediate supervisor-subordinate relationships or departmental fraternization, as opposed to all intracompany relationships. The more limited policies tend to be effective in stopping sexual harassment because they focus on the situation in which most sexual harassment liability occurs.

Another type of antifraternization policy allows dating between

employees but requires one member of a couple working in the same department to request a transfer to another office or department. That's an effective policy, especially if it's aimed at supervisor-subordinate relationships, though it's probably not feasible for small employers.

Some employers have experimented with a version of a prenuptial agreement adapted for the workplace. If two employees want to establish a romantic relationship, they must inform the company and acknowledge in writing that the relationship is consensual. If the relationship ends and sexual harassment occurs, the victim must promptly notify the company. If a sexual harassment complaint is made later, failure to comply with the policy could bolster your defense. Better yet, it's likely to encourage employees to come forward sooner if a relationship turns sour, and it will sensitize you to the potential for sexual harassment claims from alleged victims.

One warning: It's possible to take antifraternization rules too far. You can't attempt to regulate an employee's love life outside the workplace. For example, courts haven't upheld blanket policies against cohabitation outside of marriage.

In Delaware, discrimination on the basis of marital status is prohibited. Although it's invoked infrequently, the statute might be triggered by an effort to inject sweeping rules of morality into the workplace — through a "no- adultery" policy, for example. Abroad antifraternization policy also might be challenged since it wouldn't prohibit married employees in different departments from socializing with each other but would prevent unmarried employees wanting to have a romantic relationship from doing so.

You should be careful when drafting policies that make either employee in a relationship change jobs. Make sure your policy doesn't require that the woman or the "lower-paid" or "lower-level" employee always be the one to transfer. You could be creating a pattern of sex discrimination if the person who has to transfer consistently turns out to be female.

### ***Bottom line***

Antifraternization policies and related rules can help ensure a

harassment- free, impartial work environment. They are an effective option not only for eliminating the potential for sexual harassment but also for increasing productivity and morale within your company.

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