Office Romances Gone Awry

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Even if your office does not resemble the hotbed of sexual activity depicted at the advertising agency Sterling Cooper Draper Pryce on TV's Mad Men, chances are that romances are brewing. In a survey of office workers just released by CareerBuilder, almost 40% of workers admit that they have dated a co-worker. Of those, about one-third dated someone senior to them in the office hierarchy, and 16% dated their direct supervisor. Although most office romances will not lead to litigation, a recent decision by the First Circuit (which covers Massachusetts) offers a cautionary tale regarding office romances gone awry. *Gerald v. University of Puerto Rico*, — F.3d —-, 2013 WL 310396 (1st Cir. Jan. 28, 2013).

Melissa Gerald worked at the University of Puerto Rico as a research scientist and assistant professor. She reported to her department's director, Dr. Edmundo Kraiselburd. While at a conference in Cuba, Gerald and Kraiselburd engaged in a week-long sexual affair. Conflict arose when the two returned to work: he wanted to continue the affair and she wanted to end it. Although the intimate relationship ultimately ended, by all accounts, the two continued to have a close professional and personal relationship that included banter of a sexual nature. Trouble arose two years later when Kraiselburd allegedly made three unwelcomed sexual advances towards Gerald, including (1) propositioning her in a hotel parking lot in front of her young daughter; (2) grabbing her breast; and (3) asking her "What will it take for you to f–k me?" at a staff meeting in front of Gerald's colleagues. Gerald alleged that after she rebuffed Kraiselburd's advances, he took away her administrative responsibilities and decreased the amount of her monthly housing stipend.

Gerald reported these incidences, as well as the fact that Kraiselburd demoted her, to the University. It conducted an internal investigation and determined that the allegations in question either did not occur, or, that if they had occurred, they had not altered Gerald's working conditions. Thereafter, Gerald voluntarily resigned her employment and sued the University sexual harassment and retaliation.

The University primarily argued that Gerald could not establish a *prima facie* case of sexual harassment because she could not show that Kraiselburd's conduct was unwelcomed. Essentially, the University concluded that because Gerald voluntarily engaged in off-color banter of a sexual nature with Kraiselburd, she could not legitimately alleged that his conduct was unwelcomed. The First Circuit rejected this argument, stating "we fail to see how an employee telling risqué jokes means that she is amenable to being groped at work." The court similarly rejected the University's argument that the conduct, even if unwelcomed, did not negatively impact Gerald's work environment. Here, the court stated that "the fact that Gerald managed to get work done despite Kraiselburd's actions" was not fatal to her allegation that the sexual harassment sufficiently interfered with her work environment.

Take Aways

This case offers a reminder of the legal exposure companies face when employees — not to mention those in a reporting relationship — engage in an intimate relationships. Many employers do not have a policy specific to this situation. Some employers address this potential problem by prohibiting intimate relationships between those in a reporting relationship, and/or by requiring the involved employees to disclose the relationship to the company and acknowledge that they are aware of the company's sexual harassment and retaliation policies.

Regardless of how your company addresses this issue, or any potential sexual harassment concern, keep the following in mind.

- The sexual harassment laws are not meant to sanitize the workplace from any conduct of a sexual nature. The laws seek to prevent (and punish) conduct of a sexual nature that is unwelcomed, where either (1) the conduct is so severe or persistent and pervasive that it unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment; or (2) the conduct is explicitly or implicitly a term or condition of an individual's employment or is used as the basis for employment decisions. The former is referred to as hostile work environment harassment, while the latter is referred to as *quid pro quo* harassment. (*Quid pro quo* is a Latin term meaning "this for that").
- Every company in Massachusetts with 6 or more employees is required to have a sexual harassment policy. The Massachusetts Commission Against Discrimination has published a sample policy. The Commission also has published regulations to assist employers in understanding what constitutes sexual harassment, as well as to explain what employees and employers should do to prevent, stop and appropriately respond to sexual harassment.
- The *Gerald* case is a good reminder that policies regarding sexual harassment, retaliation, and conflicts of interest should be revisited regularly. The policies should be distributed at least once a year and employers should consider investing in sexual harassment training.
- For the past 25 years, Massachusetts has held employers "strictly liable" (a fancy way of saying there is no defense) if a supervisor sexually harasses a subordinate. This rule stands even when management is unaware of the conduct, and even if the employer has a policy prohibiting the conduct. For this reason alone, it is essential that employees in a supervisory role be trained to understand, recognize and respond to instances of sexual harassment.
- Retaliation is a separate and distinct claim an employee can bring if she feels the employer has taken an adverse action because she reported sexual harassment (or any type of protected activity). An employee can win a retaliation claim even if the underlying complaint (e.g. sexual harassment) is not meritorious. Indeed, plaintiffs win significantly more retaliation claims than underlying harassment or discrimination claims.