

Smart Human Tricks—Saving Your Company Millions in Potential Liability with Harassment and Fraternalization Policies

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The back-story behind the attempted extortion of David Letterman features behavior of the sort that keeps legal counsel and compliance officers awake at night. Admitted extortionist, Joe Halderman, crafted a story that depicts Letterman, the Worldwide Pants, Inc. Chairman, as head of an organization with a culture that fosters workplace sexual misconduct and career advancement tied to sexual relationships.¹ Notwithstanding the veracity of Halderman's story, it presents the quintessential case of poor management behavior that puts any company at risk. The behavior of top management can foster an organizational culture acceptant of a hostile working environment, setting the stage for liability that is anything but funny. Building an effective compliance program and culture within your organization prevents your late show from developing into a veritable horror show. In light of the potential consequences, reigning in executive management may be the smartest trick of all.

Implement and Enforce an Anti-harassment Policy

The touchstone of unlawful harassment scenarios is the *quid pro quo* or "this for that" relationship where the manager provides workplace benefits in return for sexual favors. There seems to be general agreement among employment lawyers that there is little chance that Worldwide Pants will face any liability from Letterman's alleged behavior since it appears that his female employees have not actually filed sexual harassment claims.² Employees subject to this type of behavior do not file complaints for many reasons – they may have been willing participants and thus do not feel victimized by the behavior, they may believe their careers will be adversely affected by such a complaint, or they may work for a company with no or an ineffective harassment policy. Harassment can persist for a long period in work environments where the abuser is in a position of great power. The harassed employee is more likely to succumb to the manager's advances and less likely to report the harassment due to the fear of retaliation. Considering the inequities in social status, wealth, and position between the manager and the employee, denying the manager's advances may be career suicide. For the company, the possibility that a relationship will end poorly and a claim will be filed is a ticking time-bomb. It is your effort to enforce an anti-harassment program that will protect your company from liability.

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If an employee suffers a tangible employment action accompanied by harassment by a supervisor, the employer is automatically liable for the supervisor's actions unless the company has procedures to prevent and respond to complaints of harassment.³ A further incentive to maintain an effective anti-harassment policy is to avoid punitive damage liability that may add up to millions of dollars. In 1999, the United States Supreme Court decided that the purposes of Title VII are furthered by relieving employers of punitive damages liability when good faith efforts are made to implement policies that detect and deter such behavior.⁴ Therefore, it is advisable for legal counsel and compliance officers to take heed.

The Late Show with David Letterman televised examples of the type of sexually charged banter that may give rise to liability. Letterman reportedly asked employee, Stephanie Birkitt, about "such things as 'strippers' and 'the dirty little Hooters girls' and her weekend lunch at Super Duper Weenie in Connecticut. 'Do you like hot dogs, Stephanie?'"⁵ Letterman would also reportedly ask Birkitt, on-air, "to dance for him to Rod Stewart's 'Do Ya Think I'm Sexy?'"⁶ It's hard to say whether this banter is reasonably offensive within the context of a late night television comedy program; however, it is likely to be offensive in the typical workplace. Most harassment cases involve claims of hostile working environment characterized by unwelcome sexual behavior; offensive to the reasonable man or woman; severe and pervasive; and alters working conditions to create an abusive working environment. The hostile working environment claim can be asserted by an employee in a relationship with a boss or even an employee who becomes aware of a relationship between a boss and a subordinate.

The *Late Show* examples explained above are classic examples of verbal harassment. Verbal harassment includes requests for sexual favors, discussion of sexual subjects, comments about physical attributes, affectionate or demeaning nicknames, among many other examples. Harassment claims may also arise from physical and visual sources. Forms of physical harassment include unwanted touching and other sexual conduct in the workplace. Visual harassment can arise from e-mails, photos, adult materials (*e.g.*, calendars), leering, and exposing one's self.

In simple language, your company's policy should explain that the above mentioned forms of harassment will not be tolerated. Clarify with examples. Your company's policy should be provided to and signed by every employee on the first day of work. Provide the employees copies in their native language. The policy should not promise complete confidentiality because complaints must be thoroughly investigated, but the policy should state the company's commitment to prevent retaliation for good faith complaints of harassment or for participating in an investigation. Next, because employees are often apprehensive of reporting complaints to their direct supervisors, or because the supervisor is the alleged harasser, maintain an alternative reporting source, such as a high level manager, Human Resources contact and/or a hotline for employees to call and report harassment, discrimination, retaliation or other illegal activity. Information should be posted in the employee break area outlining your policy and featuring the hotline number. Management employees at all levels of the organization should receive training on the relevant law regarding harassment and their responsibilities related to enforcement of the policy. Finally, your investigation of a complaint of harassment must be thorough, objective, and conducted by or with the assistance of a human resources or compliance professional or outside counsel.

Take a Hard Line on Office Romance – Include a Non-Fraternization Policy

A worthy addition to the anti-harassment policy is to prohibit managers and supervisors from fraternizing or dating any employee. Assume for a moment that Letterman was having sexual relationships with *Late Show* staff and his belief was that the relationships were consensual. What initially may appear to be a consensual relationship can quickly be portrayed as a *quid pro quo* relationship, especially if the relationship ends badly.

Consider this, do the employees in these relationships get hired, promoted, escape discipline, receive preferential work schedules, or better pay during their relationship with this manager? Further, do the employees get passed over for promotions, become subject to disciplinary actions, lose their preferential work schedules and pay, or are terminated after relationships with this manager? This type of sexual favoritism raises serious concerns in the workplace. The Equal Employment Opportunity Commission's (EEOC) guidance on the issue tells us that isolated instances of sexual favoritism "to a 'paramour' (a spouse or a friend) may be unfair, but it does not support a claim for discrimination against women or men, since both are disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man nor, conversely, was she treated less favorably because she was a woman."⁷ Letterman's admitted extortionist tells a story that alleges a pattern of sexual favoritism that goes beyond isolated instances. The EEOC's guidance reveals that this can establish a hostile work environment:

If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the favors. In these circumstances, a message is implicitly conveyed that the manager views women as "sexual playthings," thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is "sufficiently severe or pervasive 'to alter the conditions of [their] employment and create an abusive working environment.'"⁸

The best course of action for your company is to stop office romance before it starts by adding a non-fraternization policy to your anti-harassment effort. Your policy should be clear that the company strictly prohibits managers and supervisors from fraternizing with or becoming romantically or sexually involved with any non-management employee in his or her chain of command. You may even consider expanding the policy to prohibit all employees, managerial and non-managerial from becoming involved with other employees when the company believes such relationships may create a conflict of interest, cause disruption, create a negative or unprofessional work environment, or present concerns regarding supervision, safety, security, or morale.

Demand full disclosure. Require employees involved with supervisors or fellow employees to immediately and fully disclose the circumstances of the relationship to the Human Resources Department. You need to be able to quickly determine whether the relationship violates your policy. Stipulate the company may take action necessary to correct violations of the policy—transfer employees to other work groups, terminate one or both of the employees involved and disciplinary action, up to and including termination for failure to disclose the relationship.

Monitoring the Workplace

Monitor the workplace for changes in the environment that may indicate risky behavior. Warning signals include the forming of cliques, particular patterns of turnover, failure to enforce the policy, a blurring of work and social relationships, and the use of e-mail and the internet. Managers must be cognizant that they are never relieved of their management duties, especially when socializing with subordinates outside of work. Management employees must understand that their behavior could give rise to company liability twenty-four hours a day, seven days a week, and three hundred and sixty-five days a year. Most importantly, rumors of office romance or sexual relationships in the workplace should never be ignored and must be immediately investigated.

Love Contracts

"Love contracts," also known as "Consensual Relationship Agreements" are an option in companies where the culture is such that it is commonplace for employees to become romantically involved. Often relationships among co-workers can be productive and lead to marriage and other long-term familial bonds. "Love contracts" are written acknowledgments between the parties that the relationship arose from and continues to be based on mutual consent—the parties agree that either can terminate the relationship without adverse consequence. Furthermore, they agree that the relationship is not business-related and that it poses no threat to the company's anti-harassment policy. Other "love contract" provisions to consider are ones that require reporting when the relationship ceases to be consensual, remind supervisory employees of the potential for personal liability, curb workplace contact/displays of affection, admonish that problems within the relationship that affect work may lead to termination or transfer of either or both employees, and release the company from claims arising from the relationship.

Although such an agreement reflects the couple's intentions, it is an untested method for shielding the company from harassment suit liability. The love contract may or may not reduce the chances of employees successfully suing for harassment if the relationship ends poorly. At this point, the law has revealed no suitable substitute to a strict non-fraternization policy.

Conclusion

It is unlikely that office romance at your organization will become as publicly embarrassing as the alleged behavior at the Ed Sullivan Theatre, it might be just as, if not, more costly. Unfortunately, no policy is iron-clad. You must be ever vigilant about rooting out and preventing risky behavior. Confront the behavior of executive

management and make the leadership team accountable for compliance with and enforcement of your anti-harassment policies. The future security of your organization may very well rely upon a corporate culture that embraces anti-harassment and non-fraternization policies.

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¹ Mark Seal, *Big Trouble at 11:35*, VANITY FAIR, April 2010, <http://vanityfair.com/hollywood/features/2010/04/letterman-201004>.

² Nora Tooher, *Letterman scandal a lesson in risks of office liaisons*, MINNESOTA LAWYER (Oct. 19, 2009), <http://find.galegroup.com/gtx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T003&prodId=AONE&docId=A210065618&source=gale&srcprod=AONE&userGroupName=apollo&version=1.0>.

³ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–808 (1998).

⁴ *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545–546 (1999).

⁵ Seal, *supra* note 1.

⁶ *Id.*

⁷ The U.S. Equal Employment Opportunity Commission, *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism*, <http://www.eeoc.gov/policy/docs/sexualfavor.html> (last visited March 14, 2010).

⁸ *Id.*